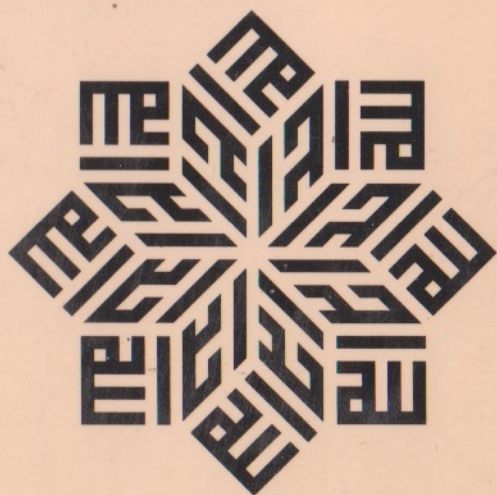


# Sharia

in  
Contemporary Society

The Dynamics of Change in the Islamic Law



Dr. Fathi Osman

SHARIA  
IN  
CONTEMPORARY  
SOCIETY

*THE DYNAMICS OF CHANGE  
IN  
THE ISLAMIC LAW*

*DR. FATHI OSMAN*



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## PUBLISHER'S NOTE

All Arabic words and phrases are put in Italics.

All Quranic references are also put in italics with chapter and verse numbers. The Quranic references are numerous and the word Quran is not repeated after every verse.

Index includes the name of people, places and key subjects.

Bibliography includes books that a reader may find useful in his/her further studies.

## ACKNOWLEDGEMENT

The help and support of my wife Aida has been always essential in all my works including this work since our marriage. My daughter Ghada has had her valuable contribution in editing and proof reading the text. Dr. Aslam Abdullah, the Editor-in-Chief of *The Minaret* and of the Multimedia Vera International has kindly supervised the technical aspects of the production. He also prepared the index. I acknowledge the whole-hearted help that I have got from all of them, which has been essential – materially and morally– for this work to be available for the readers.

Fathi Osman

## DEDICATION TO THE MEMORY OF

- Shaykh Muhammad Abduh (d. 1905): Egyptian pioneer of the Modern Islamic thinking and the practice of *ijtihad* to assure the dynamism of *Sharia* and its response to the change in human societies. His reformist vision and views spread over the Muslim world from Indonesia to Grand Maghrib. In his steps followed modern Egyptian jurists, especially those who have taught *Sharia* at the school of law, including Abdul Wahab Khallaf (d. 1956) and Muhammad Mustafa Shalabi.

- Muhammad Iqbal (d. 1938): the pioneer of modern Islamic thinking in the Indian-Pakistan-Bangladesh subcontinent, whose vision of the change and views about the Islamic dynamism to cope with it in his work *The Reconstruction of Religious Thought* in Islam have been an eye-opener for the Muslims every where to get out of their stagnated and static thought.

- Abdul Razzaq al-Sanhuri (d. 1971): the distinguished jurist, professor and judge, who had his great contribution to the codes of civil law in Egypt, Iraq, Syria, Libya and Kuwait. In spite of his distinction in the Western schools of law, his strong relation with *Sharia* could be traced as early as 1926 in his doctorate thesis in France on the Caliphate (*Le Califat*), and continued in his voluminous works on: *The Contract in Islamic Jurisprudence* and *The Sources of the "Right" in Islamic Jurisprudence*. He stressed the professional role of the Muslim jurists and their human genius in formulating the Islamic jurisprudence, which may be called sometimes *Sharia* and may be understood mistakenly as divine in its totality. His influence and attitude towards *Sharia* have been extensively and significantly obvious in the Egyptian school of law, even among the non-Muslims in the legal profession.

To all these pioneers who contributed to the shaping of my mind with an enormous number of others, I dedicate my modest effort in the same direction.

# FOREWORD

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**D**URING THE LAST DECADE, WE SAW A PLETHORA of writings and discussions about the *sharia*, usually translated as Islamic law. Unfortunately, a good part of this was the production of zealots for or against Islam.

Lack of objectivity leads to confusion. In the past, some of the writers have tried to handle the subject without investing the time and energy needed to assume a position of intellectual authority.

This book is a landmark on the road towards clear understanding of Islam, the foundation upon which its legal system is built.

The author employed his study of common law and Islamic jurisprudence together with his qualifications as an eminent historian to explain the subject.

The book sets the distinction between the *Sharia* and the *Fiqh*, while the first refers to the Word of God pointing to the direction, setting the attitudes and forming the basic general

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rules, the later is the effort of human beings to interpret His Words in search of happiness in this life and in the hereafter. The interpretations are influenced by the dynamics of time and age.

The author explores the intrinsic dynamism embedded in the system offering a continuous, progressive and multidimensional growing corpus of legality that is conducive of liberty and progress.

The English literature badly needed such a book and no one is more capable and suitable to fill this need more than Professor Mohammed Fathi Osman.

Maher Hathout, M.D.  
President  
Multimedia Vera International  
Los Angeles

# PREFACE

---

**T**HE PACE OF THE CONTEMPORARY MUSLIM masses in establishing Islamic states which observe Islamic moral values and enforce Islamic law has accelerated at a remarkable rate since the establishment of the Islamic Republic of Iran. The establishment of this Republic, regardless of its shortcomings and its weaknesses, crowned the successful Islamic revolution in Iran. Other Muslim countries, which were able to recently reach recognized independence from colonial rule, some of which were then able to overthrow their autocratic monarchies, have found themselves in confrontation later with the military dictatorship that sometimes followed.

Meanwhile, national secular quasi-democracies have failed; accentuating the underlying need for radical change. The collapse of communism in Eastern Europe has shattered the illusion of the communist dream, and a return to Islam has gained momentum among the masses promising a radical change for the better.

In the West, the superpowers have a background of traditional fears of religion in general and of Islam in particular, and being always thoughtful of their interests in Muslim countries and the contemporary world, which they have succeeded in maintaining until now through false democracies, autocratic monarchies, military dictatorships or even leftist and assumed Marxist rulers; they have become worried about the massive pull toward the Islamic state and the establishment of Islamic law. The West has deployed all its powers to resist, directly or indirectly, any momentum toward the establishment of the Islamic state and law in Muslim countries, whether such development has arisen by revolution as in the case of Iran, or has potentially come peacefully and democratically, as in the case of Tunisia and Algeria. Although hopes for a smooth transition were aborted by the oppressive autocratic and military regimes in both countries respectively.

Misunderstanding and mistrust have intensified on both Islamic and anti-Islamic sides, and it has become necessary to clarify the truth about the Islamic state and the Islamic law to all parties concerned and to the whole world. Muslims will never abandon their faith in Islamic law and state as long as they remain faithful to Islam itself, and it is better for them to know precisely what they believe in and are striving for.

At the same time, the whole world, including the West, needs to recognize the rights of Muslim peoples to choose their way of life including their state and their law, and to know what such a choice really means for Muslims themselves and for the whole world. Both parties, in responding to recent developments, need to try as hard as possible to rid themselves of inherited bitterness and lack of knowledge about each other, since both attitudes may be due to subliminal prejudices.

Some extreme expression of the views of one party toward the other may represent only a very small minority on either side, and any misunderstanding may be a result of failures in communication and lack of unbiased information on both sides.

It is essential in our contemporary globalism to clarify how a law which was revealed by God fourteen centuries ago can apply to the present world, whose circumstances differ qualitatively from the circumstances of even one century earlier, not to speak of fourteen centuries.

Islamic law is often presented as if it were a closed system including every detail needed by any society at any time or in any place, when in fact it is not a closed system at all, nor does it include details which are limitless in nature. Islamic law presents general principles such as the commanding of justice in all its dimensions and the forbidding of injustice in all its forms including aggression, exploitation and fraud. Human rights are the cornerstone in the society and laws of Islam.

What is discouraged or forbidden, on the one hand, is clearly stated, and what is encouraged or required, on the other, is delineated as well, but these strong recommendations and absolutes are limited in number. Moreover, between the two areas of the proscribed and the prescribed is a limitless area of what is simply allowed: in this area of the allowed, which encompasses the vast majority of juristic situations encountered, it has been left to the human mind, guided by the general principles of *sharia* and its goals, to decide on a given case according to changing circumstances. The essence and very nature of *sharia* would benefit humanity as a whole morally and materially, and would respond to continually emerging human needs.

In any dealing with *sharia*, we must draw a clear line between the enormous body of juristic efforts historically exerted over decisions in the realm of the allowed. These efforts are by nature human and changeable, and the smaller body of laws of the revealed texts in the Quran and the Prophet's traditions (*sunna*), which are divine and permanent.

It is no less essential to clarify the main features of the contemporary world and its societies, cultures and civilization, in which the Islamic state and Islamic laws are supposed to function. In evaluating these contemporary world circumstances, we should make a distinction between their roots in the past and their developments in the present which may represent an entire change and between the essential and the non-essential in their features and products, so that we may not judge or oppose them unfairly.

Removing the ambiguities and misconceptions about the Islamic state and *sharia* on one side, and the contemporary world and its civilization on the other, would help to show how the Islamic state and Islamic laws would function in a contemporary society and the contemporary world, and how an Islamic state and the contemporary civilization would interact and contribute to each other. This is a goal that cannot be achieved by one person or one attempt. However, such an attempt may be considered sufficiently successful if it merely persuades those who are concerned with the present and the future of this planet and this universe to engage in a serious discussion about how we can accommodate divine guidance in the contemporary world and how we can moralize the contemporary world civilization to liberate itself from its built-in self-destructive tendencies of one sidedness and short sightedness so that all humanity can survive and enjoy happiness.

This is the main goal of Islamic law, since the goal of the divine message in all its stages has always been to secure dignity, in all its dimensions, for all the children of Adam whatever their race, language and culture, gender, faith and any other differences may be:

*We have conferred dignity on all children of Adam; have borne them over land and sea; and provided for them sustenance of good things of life; and favored them by far, above many of Our creation.*

(17:70)

According to the divine message, human differences are meant to encourage getting together and complementing one another, not to build up barriers and develop prejudices:

*O human beings We have created you all out of a male and a female, and have made you into [various] peoples and tribes so that you might come to know well [and cooperate with] one another surely, the noblest of you in the sight of God is most conscious of Him; Behold God is All-knowing, All-aware.*

(49:13)

The plural pronoun for the speaker "We" which a non-Muslim reader may not be familiar with when God is the speaker, is used in Arabic to express supremacy and glory but by no means plurality. It has been used for a similar purpose also by Arab monarchs in different times, even after Islam.

The verses emphasize the guidance of the Creator of the diverse children of Adam about their natural relations with one another and their rights and responsibilities as human beings in this life. This is the corner stone of the divine message that

Islam and its law represents the last stage of God's message to humanity according to the Muslim belief, and this is what this simple effort tries to clarify.

# THE MESSAGE

## A CHANGE TO BETTER

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**M**USLIMS COEXIST WITH NON-MUSLIMS IN THE world. Islamists (Islamic ideologists or activists) are often mistakenly thought to present Islam as a theological message which aims to convert non-Muslims to Islam, and thus sensitivity and sometimes tensions arise between Muslims and non-Muslims. The Islamists themselves may contribute to the confusion through their approach and tone in presenting Islam and in dealing with other religions and their followers. The eternal message of Islam to the world is a call for social change, not theological conversion. Islam in the original Arabic means “submission to God”:

*Indeed, everyone who submits one's whole being unto God (aslamu wajhahu lil -lah) and is a doer of good withal shall have his/her reward with his/her Lord; and all such should have no fear, and neither should they grieve.*

(2:112)



Submission to God as the essence of religion is something that can be felt by any human being, and the only judge for it is the All-Knowing God. Muslims believe that the message of Islam as taught and practiced by Prophet Muhammad has its characteristics and merits which can be presented to others, and they welcome any fair and constructive argument. Muslims also believe that the main goal for an Islamic movement is to further the cause of social change, the advantages of which will be shared by all people, Muslims as well as non-Muslims.

Conversion addresses individuals, concentrates on theological beliefs and accordingly represents mainly an intellectual effort, the aim of which is that certain individuals may embrace Islam. Social change addresses the masses and accordingly represents a dynamic plan for continuous progress. A message of social change is directed to all, whether or not they are interested in conversion, and calls for a better society and a better world.

Muslims can serve their faith by serving the people through the social change which they seek. It may happen – as it has happened in history – that whenever a genuine social change takes place, some of the beneficiaries embrace Islam by their own choice and free will. However, this is not the main goal of the Muslims who sincerely call and work merely for a better society or world where justice, peace, morality and kindness dominate.

The Quran emphasizes that human dignity is a status given by God to every human being without exception. A human being has the right and duty to fulfill his/her physical, intellectual and moral needs and aspirations in order to reach the universal and comprehensive potential of human dignity:

*I have conferred dignity on the children of Adam, carried them over land and sea, provided for them sustenance out of the good things of life, and favored them over most of my creation.*

(17:70)

The Quran presents the essence of Islam as a moral and social change rather than as a restricted theology:

*God commands justice, doing what is best, and generosity toward one's kinsfolk; and He forbids all that is shameful, all that runs counter to reason (and common sense), as well as aggression....*

(16:90)

*...[The prophet] who enjoins upon them the doing of what is right and good and forbids them the doing of what is wrong and evil, and makes lawful to them the good things of life and forbids them the bad things, and lifts from them their burdens and the shackles that were upon them.*

(7:157)

According to classical jurists, the goals of Islamic law (*sharia*) are to secure and develop the human essentials in these different areas: *life* (in all its dimensions), *family and children* (to ensure the continuation of life), the *mind, moral values, religious freedom*; and *the rights of ownership* whether private or public (16:90).

The Quran teaches Muslims to struggle against oppression and to secure freedom of belief for every person in order to keep the way open between the human heart and mind on one side, and God on the other, without any human hindrance (see 2:193, 8:39).

Such a message of social change requires *a social movement, not theological preaching*. Although faith in God deepens and strengthens the commitment for social change. It is not a prerequisite for the Islamic message of social change. Islam defines the goals of social change in general terms such as justice, doing what is best in the society, caring about the family, and enjoining what is right while forbidding what is wrong. Muslims can address the whole world on the basis of these common grounds and on the universality of their message.

An Islamic movement for social change for the better must fulfill certain requirements in order to succeed. **Conceptual depth** must be articulated with reference to the basic message and its goals. **Breadth** of the movement must be achieved by addressing the masses and caring about their needs and sufferings, while **length** and continuation should be achieved through efficient organization which protects the movement from being a temporary convulsion. Indeed, the early Islamic movement endured over a long period of time across a vast expanse of land, thus creating a civilization, but the resulting Islamic civilization could not have been created in a vacuum, isolated from available sources of civilizational experiences.

The European Renaissance occurred when Islamic civilization made the heritage of ancient civilizations, along with its Muslim contribution, available to Christian Europe through peaceful contacts in Muslim Spain and Sicily and through the hostile contacts of the Crusaders. Earlier, isolation had led Christian Europe to the Dark Ages.

The Islamic movement for social change requires the *collective efforts of a group*, while conversion may be achieved merely by a gifted preacher. The Quran indicates that a group is required for social change:

*and there should grow out of you a group (of people), who invite unto all that is good and enjoin the doing of what is right and forbid the doing of what is wrong, and it is they who shall attain success [and happiness].*

(3:104)

Such a group should know and apply the social laws which can lead to the change of a dominant authority or of a political power. These social laws are no less in control than the natural laws which lead to the sequences of day and night and life and death. No miraculous victory can be expected, but intelligent and capable planning which takes advantage of all human and material resources is essential:

*And make ready against them (those who obstruct the change by force) whatever force you are able to muster ... but if they incline to peace, incline to it as well and place your trust in God.*

(8:60-61)

*...and had God so willed, He could indeed defeat them (those who use force against you), but (He wills you to struggle so as) to test you (all) through (your dealing with) one another.*

(47:4)

What was practiced by the Prophet and his Companions in the earliest Islamic movement for social change coped with the historical circumstances in tribal Arabian society and later in other medieval societies. These practices should enlighten Muslims in any time and place, but no practice should be isolated from its social context. One should realize that the past cannot be blindly repeated in our contemporary world. A mere

search for martyrdom without considering the gains is suicidal for individuals and lethal for the movement: “*and let not your own hands throw you into self-destruction*” ( 2:195), “*and do not kill yourselves*”(4:21).

Islamic movements for social change should fulfill certain requirements: moral commitment, ideological knowledge, education of the masses, mobilization, recruitment and organization of potential workers; an organizational framework is necessary for carrying out the struggle for social change. However, it may not be necessary that a movement for social change strictly follow a prescribed sequence step by step. Ideological learning and educating the masses may be simultaneous. Recruitment may precede mobilization in certain cases, as the Prophet recruited committed and effective elements from Medina before mobilizing the masses there. Change starts in hearts and minds: “*...verily, God does not change a people’s condition unless they initiate changing themselves (from inside)....*” (13:11).

Shaking long-lasting injustice or stagnation can mean an inevitable conflict:

*...and if God had not enabled people to struggle for defending themselves against one another, mischief would surely overwhelm the earth....*

(2:251)

Wherever democracy is absent or distorted, an Islamic movement has to struggle for a genuine democracy to secure the basic rights and freedoms of belief, expression and assembly. In a democracy, the vehicles used for a social change for the better include the media, lobbying, political parties and elections. Persistence and continuation of the movement should be maintained since social change cannot be achieved quickly:

*if you are hurt by an adversity, a similar one has hurt (the other) people as well; for it is by turns that apportion unto people such times [of ups and downs].*

(3:140)

*Had there been (prospect) of immediate gain and an easy journey, they would certainly have followed you (O Prophet), but the distance (of the struggle) was too great for them.*

(9:42)

The mobilization, recruitment, organization and struggle should include both men and women (*The Quran*, 3:195, 9:71). Alliances and fronts may be formed to bring together all forces that share certain common grounds and are committed to the struggle, since the movement for social change addresses, mobilizes and benefits the masses, regardless of their ethnic or doctrinal differences.

The Prophet once referred with praise to a tribal alliance which aimed to support the victims of injustice caused by an individual or clan, which came as a result of meetings before his prophethood. The Prophet said that if he had been invited to such an alliance against injustice after his prophethood, he would have agreed to join it.

The Quran significantly refers to the continuation of the movement through successive generations:

*And those who come after them (the early generation of believers) pray: our Lord, forgive us all shortcomings and those of our brethren who preceded us in faith as well, and let not our hearts have any bitter feelings against (any of) those who have attained to faith.*

(59:10)

The Quran, the traditions of the Prophet (*Sunna*) and his life (*Sira*), provide the essential guidance for an Islamic movement for social change which benefits the whole of mankind through all times and places : *And I have merely sent you (O Prophet) as a mercy for all humanity (21:107).*

However, a contemporary Islamic movement for social change can make use of all human experience and findings of sociology, political science and history as long as they do not contradict Islamic guidance. The Prophet advised Muslims to search for wisdom wherever they could find it.

The contemporary world needs Islam. However, the message of Islam must be introduced in a comprehensible way and in the universal way which our time requires:

*And I have never sent forth a conveyer of the message otherwise than (with a message presented) in his own people's tongue, so that he could make (the message) clear to them.*

(14:4)

*Invite (all mankind) to your Lord's path with wisdom and impressive exhortation, and argue with them in the most effective and impressive manner.*

(16:125)

# HUMAN RIGHTS

## INSEPARABLE FROM FAITH IN ONE GOD

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**A**CCORDING TO THE QURAN, THE *DIGNITY* OF THE children of Adam is a divine bestowal which is to be secured by all means, including the law and the state authorities, and is to be defended by all forces:

*We have conferred dignity on the children of Adam, and have borne them over land and sea, and provided for them sustenance out of the good things of life, and favored them far above most of our Creations.*

(17:70)

As a demonstration of this privileged position, God ordered the angels to prostrate themselves before Adam, the first human being. What mainly distinguishes humans from other creatures is their intellect, and their free will to choose between doing good and doing evil.



To fulfill the human potential, all obstacles and pressures must be removed, and all means should be secured to maintain and develop our humanity. The dignity bestowed on humans in the Quran must be defended. It is the individual, social and universal responsibility of Muslims to guard human rights because oppression is an obstruction of God's will in His creation:

*As for that (happy) life in the life to come, We grant it (only) to those who do not seek to exalt themselves on earth, nor yet to spread malevolence: for the future belongs to the God-conscious.*

(28:83)

It is the individual, social and universal responsibility of Muslims, according to their faith, to protect the human merits and virtues of all the children of Adam, regardless of their differences. Defending the human rights of *any* human being is a religious duty for a Muslim, since he/she believes that any oppression is an obstruction of God's will and plan in His creation. Besides, a Muslim believes that God has created all mankind equal as human beings, and no one can claim superiority in this respect, whatever his/her ethnicity, family, wealth or gender may be. The Quran teaches:

*O humanity! Be conscious of your Lord, who has created you out of one living entity, and out of it created its mate, and out of the two spread abroad a multitude of men and women. And remain conscious of God, in whose name you demand [your rights] from one another (and before Him you will be accountable), and of these ties of kinship. Verily, God is ever watchful over you.*

(4:1)

*O humanity! Behold, we have created you all out of a male and a female, and have created you into nations and tribes, so that you might come to know one another. Verily, the noblest of you in the sight of God is the one who is most deeply conscious of Him. Behold, God is All-Knowing, All-Aware.*

(49:13)

The only One who is above all humans is their Creator and Lord: “*and there is nothing that could be compared with Him*” (112:4).

At the inception of the belief in one God is the belief in the maintenance of human rights and the equality of all human beings, since those who believe in the one God believe that all human beings are created by the one Creator. Any discrimination against an individual or group about basic rights as members of humanity is a challenge to the faith, since for any human to claim superiority according to origin or power is contradictory to the belief in the One Ultimate Supreme Being:

*... the All-Highest, who creates [everything], and thereupon forms in accordance with what it is meant to be.*

(87:1-2)

*He cannot be called to account for whatever He does, whereas they will be called to account.*

(21:23)

A tyrant against human rights is against the One Ultimate Supreme Being as well:

*Behold, Pharaoh exalted himself in the land, and divided its people into castes. One group of them*

*he deemed utterly low; he would slaughter their sons and spare [only] their women, for behold, he was one of those who spread malevolence [on earth].*

(28:4)

In the same chapter, the Quran states that those who will attain to happiness in the life to come – as has been mentioned before – are

*those who don't seek to exalt themselves on earth, nor yet to spread malevolence; for the future belongs to the God-conscious.*

(28:83)

Thus, the Quran repeatedly emphasizes human rights and justice, as well as condemning injustice, aggression and oppression. It highlights the message of the Prophet Muhammad which

*...enjoins upon them the doing of what is right and forbids the doing of what is wrong, and makes lawful to them the good things of life and forbids the bad things, and lifts from them their burdens and the shackles that were upon them....*

(7:157)

Justice can be concisely and precisely defined as the maintenance of human rights and equality:

*Behold, God enjoins justice, and [going beyond justice to] the doing of what is magnanimous and kind, and giving to one's kinsfolk; and He forbids all that is shameful and all that runs counter to reason [and morality], as well as transgression; He exhorts you [repeatedly] so that you might bear [all this] in mind.*

(3:195)

Any discrimination between men and women in rights or responsibilities is forbidden according to divine justice, the same as any other discrimination:

*And their Lord does answer them: I shall not lose sight of the labor of any of you who labors [in My way], be it man or woman....*

(3:195)

*And [as for] the believers, both men and women – they are close unto one another [and form together one body], they [all] enjoin the doing of what is right and forbid the doing of what is wrong, and keep up their prayers, and render the purifying [social] dues, and pay heed unto God and the conveyer of His Message.*

(9:71)

Divine justice can never be for Muslims only: it secures the rights of all human beings regardless of belief. It especially secures the rights of belief and of practicing one's belief: “no coercion should be in matters of faith” (2:256).

Defending all houses of worship is legitimate and urged:

*...for if God had not enabled people to defend themselves against one another, [all] monasteries and churches and synagogues and mosques in [all of] which God's name is abundantly exalted – would surely have been destroyed (ere now), and God will most certainly support one who supports His cause....*

(22:40)

Muslims are taught by the Quran to build their relations with others on kindness; the minimum obligation which should be strictly observed is justice (60:8). Muslims should always

have in mind that no hostility stays permanently, and that if they follow God's guidance their behavior may turn an enemy into a close friend:

*Yet God may develop affection between you and those of them you felt were enemies, for God is All Powerful, Much Forgiving and Most Gracious.*

(60:7)

*But good and evil cannot be equal; repel [therefore, evil] with what is better; and so between yourself and one with whom there was enmity [it may then become] as though he/she had [always] been a close friend. Yet [to achieve] this is not given to any but those who are patient and enjoy self-control; it is not given to any but those endowed with the greatest good fortune.*

(41:34-35)

Islam secures even the human rights of those who may violate the human rights of others, since two wrongs do not make a right. Although a violation should be stopped instantly, the rights of the violator as a human being should be secured. Islamic law aims to fight the crime in its origin, not just to inflict punishment. Islamic penal law is enforced in order to prevent the sources of violation and transgression. It is required that every possible effort be made to educate and rehabilitate an offender, not to destroy him/her. Moreover, the Prophet states that a mistaken decision in acquitting a guilty person is better than a mistaken decision of punishing an innocent one. (From an authentic tradition of the Prophet compiled by Ibn Ali Shayba, al-Tirmidhi, al-Hakim and al-Bayhaqi in *al-Sunan* on the authority of Aisha, wife of the Prophet).

Islamic civil and commercial law prohibits illegitimate and exploitative gains while protecting principle which has been earned legitimately and legally before usurious additions :

*...and give up all outstanding gains from usury...for if you do it not, then know that you are at war with God and the Conveyer of His Message. But if you repent, you shall be entitled to your principals. You will do no wrong and neither will you be wronged.*

(2:278-279)

The Islamic law of war requires an open declaration of the start of military operations and limits fighting to the combatants only. As soon as the aggression itself is stopped and the aggressor submits to justice, justice should be maintained in relation to both parties equally:

*...but then, if one of the two [groups] goes on aggressing against the other, fight against the aggressors until they revert to God's commandment; and if they revert, make peace between them (both parties) with justice, and deal equitably [with them], for verily, God loves those who act equitably.*

(49:9)

Any of the enemy's army who asks for protection or shelter should be granted it, and may be returned to his camp if he so requests:

*And if any of those who ascribe divinity to aught beside God seeks your protection, grant him protection, so that he might [be able to] hear the word of God [from you]; and thereupon convey him to a place where he can feel secure....*

(9:6)

The wounded and deserters from the enemy's army should not be attacked, but should be cared for until they are cured or repatriated.

Human rights according to the divine message were considered by the Muslim jurists to be the "very goal of *sharia*", which they condensed in the securing and developing of the human personality in five main areas: life, family, mind, faith, and property. The human rights covered by these five areas include the collective rights of groups and peoples as well as the rights of individuals, and political and social rights have their place side by side.

A collective effort to defend the "powerless and the oppressed" against a powerful oppressor is an essential Islamic obligation. Every right is considered a responsibility and an obligation: in addition to human rights being considered a collective responsibility of the *umma* and the authorities, every holder of a right must also struggle for him/her self to obtain, maintain and enjoy this right.

An accurate balance has to be maintained between basic spiritual and moral development and education on one side, and the protection of values by the law and the state on the other. A balance should also be maintained between rights and duties:

*Indeed, [even after time] did We sent forth the Conveyers of Our Messages with all evidence of the truth; and through them We bestowed revelation from on high, and a balance [where with to weigh right and wrong], so that men behave with equity; and We bestowed from on high [the ability to make use of] iron, in which there is awesome power as well as [other] benefits for man; and [all this was given] so that God might mark out those*

*who would stand up for Him and the Conveyer of His Message, even though He [Himself] is beyond the reach of human perception. Verily, God is Powerful, Almighty.*

(57:25)

Being based on faith in God, the Islamic perspective on human rights is comprehensive and deep. When a Muslim fighter was asked by the Sassanian leader Rustum about the cause that he was fighting for, he simply answered, “God has sent us to transport human beings from the worship of one another to the worshipping of One God, from a narrow life to a wide world, and from beliefs connected with injustice to the justice of Islam.” (al-Tabari, in his reports about the battle of al-Qadisiyya in 17 AH/ 637 CE)

This was the message of Islam for the early Muslims: a universal liberation and establishment of justice and maintenance of human rights. We have thus to maintain, develop and spread such an understanding of the divine message in our times.



# SHARIA AND SOCIAL CHANGE

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**S**HARIA REFERS TO THE LAW OF GOD AS REVEALED BY Him to mankind through His Prophet and Conveyer of His Message Muhammad, to be observed in every time and place as soon as any individual or group becomes Muslim. The divine sources of *sharia* are the Quran and the words and deeds of the Prophet (*sunna*). This concept of *sharia* may become clearer through the following highlights:

- The Quran and *sunna* do not represent only legal commandments or prohibitions. Most of their contents are devoted – as in most other religions – to teaching the faith (belief in the oneness of God, His Prophets and revealed books, Judgement Day, and the life to come) as well as teaching ethics and their implications in human behavior under various circumstances. Glimpses of the perfect creation and function of the universe are presented in the Quran and *sunna*, not as dry scientific statements, but in an impressive style that aims to

guide mankind to the Almighty Creator. Significant characteristics of the Prophets and their practices in preaching their divine message are represented as ethical guidance.

- The implementation of *sharia* is a manifestation of one's obedience to God. It has its roots deep in the conscience of the faithful individual and the faithful society, and this foundation renders it a body of law efficient to implement. *Sharia* guards the moral values and ethics which are taught by Islam and it, in turn, is guarded by faith and morality. Morality is thus the basis as well as the outcome of a genuine implementation of *sharia*.

- Legal rules in the Quran and *sunna* are limited in number, although they cover extensive areas of life. Many of these rules offer general principles and guidelines. Justice is ordained for essentially all human activities: in the family, in business, in the whole society, between the rulers and the ruled, and in all universal relations in general. In the field of transactions, for example, the Quran and *sunna* emphasize the essential requirement of mutual consent for any contract and the prohibition of exploitation, fraud and usury. In addition, some principles about different kinds of evidence for settling disputes are mentioned. Some details are reported in the *sunna* about agricultural and commercial dealings which were common in Arabia at the time of the Prophet, and a few penalties are indicated for certain crimes.

The door is kept open to introducing more laws for other transactions and offenses which may emerge in different times and places. It is considered that new laws should be developed according to a human intellectual approach which is guided by the general principles of the Quran and *sunna* and which stringently avoid contradicting any text in the revealed sources.

The jurists developed a marvellous intellectual methodology, which includes analogy and generally allowed benefits to produce new rules in *sharia* to respond to changing circumstances. By observing the general principles of Quran and *sunna* and by applying suitable methods for developing new detailed rules to cope with changes and needs in different times and places, successive generations of jurists formulated copious detailed rules in varying fields.

In this way, the *sharia* allows human intelligence to interact with the divine sources on one side and the changing realities of the human existence on the other. Muslims are instructed to use their minds in order to understand the *sharia* in its revealed sources utilizing a systematic and synthetic approach which deals with the *sharia* and all the acknowledged texts as a whole, under the assumption that, up to a certain point, all are related. In addition, Muslims are required to respond intellectually, according to general Islamic principles, to the continuously changing circumstances and emerging needs and problems of different individuals and societies.

The *Sharia* does not represent a kind of dictionary or mathematical table which encompasses all information related to a certain subject. The mind is a gift of God to the human being, and He would not render it ineffective by His other gift, that is the divine law. Besides, *sharia* has to be carried out within the range of human ability: “*God does not burden any human being with more than one is well able to bear...*” (2:286), “*...God does not want to impose any hardship on you, but wants to make you pure....*”(5:6).

*...but if one is driven by necessity to do what is forbidden –either coveting it nor exceeding one’s immediate need – no offense shall be upon him/her....*  
(2:173)

*...and He has so clearly spelled out to you what He has prohibited unless you are compelled....*

(6:119)

- Any obligation according to the *sharia* should be based only on an authentic divine text, the outcome of which is definitely clear. The authenticity of the Quranic text is accepted by consensus among Muslims even if differences may arise about the interpretation of a certain part of it.

Traditionists (*muhadithin*) had their techniques in examining what was reported after the Prophet. For reaching a final conclusion from different texts, jurists developed certain methods. Historical and logical methods have been applied to distinguish between what was abrogated in the days of the Prophet and what is permanently effective, what may be a rule for a specific case and what is a general principle. When a tradition of the Prophet obviously denotes a revelation from God, it represents a permanent principle or a legal obligation that ought to be followed by every Muslim as long as it is possible for him/her in any time or place. However, a tradition may also represent a personal habit or a social custom, such as traditions which refer to the food and dress of the Prophet. Or it may obviously reveal the personal discretion of the Prophet, as in some cases of military decisions.

The Prophet himself sometimes indicated that he was speaking or acting according to his personal knowledge or thinking. Any deed of the Prophet (practical tradition or *sunna*) denotes merely that it is allowed to be done by any Muslim, unless a saying of the Prophet (oral tradition or *sunna*) indicates that such a deed is encouraged or ordered. A thorough examination of the text, and its context and the circumstances in which it emerged is necessary to determine the nature of the

statement given by the tradition. Judicial guidelines have been elaborated in this field. Deeds which are supported or rejected by *sharia* do not stand at the same level.

• What is accepted and what is rejected by the *sharia* do not have the same legal status. *Sharia* may order or only recommend on one side, or prohibit or simply discourage on the other. Between the two sides, *there is a spacious middle area of permission and allowance*, in which the human intellect has to practice its changeable discretion. For example, it is recommended for a man to be dressed as beautifully as he can in the mosque, but anyone who does not observe this recommendation does not jeopardize the validity and acceptability of his prayers so long as they are performed properly and his duty is fulfilled. Similarly, going to the mosque after eating garlic is discouraged, as those who pray beside someone who has eaten garlic will suffer from his/her bad breath, but doing what is discouraged does not affect whether or not one's duty in performing the prayers is fulfilled. Also, what is allowed or permitted cannot be considered an obligation, and what is permitted may not be necessarily the ideal or the preferable behavior. Divorce, for example, is permitted, but the Prophet considered it the most hated by God among all that is permitted. However, one may not prohibit, according to his/her personal wishes or on the grounds of caution and piety, what is permitted by God, because to do so is no less condemnable than the opposite case of permitting what is prohibited:

*O you who have attained to faith, do not deprive yourself of the good things of life which God has made lawful to you, but do not transgress the bounds of what is right....*

(5:87)

*Say: Have you ever considered all the means of sustenance which God has bestowed upon you and which thereupon divide into things forbidden and things lawful. Has God given you leave (to do this) or do you perchance attribute your guesswork to God?*

(10:59)

*Do not utter falsehoods by letting your tongues determine (at your own discretion) this is lawful and this is forbidden, thus attributing your own lying inventions to God....*

(16:116)

- Any detailed rule which is not indicated in the Quran and *sunna* and occurs as an application of the general principles or as a result of an intellectual approach of a jurist or a ruler is a guiding precedent, but it does not represent a part of the permanent mandatory *sharia*. Any Muslim individual or society may accept a rule thus derived as long as it is found to be reasonable and beneficial. This represents a practice of *ijtihad* and may in principle be replaced by another similarly derived ruling. Nevertheless, a rule based on *ijtihad* should be respected and obeyed when it is adopted by the legitimate authorities of an Islamic state to which, according to the Quran, obedience is a duty (4:59). It enjoys its mandatory power as long as it is applied by the authorities, but this enforcement at a certain time and in a certain place should be distinguished from the obligation toward a divine ordainment with its permanence and universality which characterize the revealed rules.

One should always keep in mind that what is represented as *sharia* in the voluminous jurisprudential works and the accu-

mulated Muslim practice of the rulers and the ruled, is a combination of what may be an obvious and definite outcome from a divine source, and what may be an intellectual outcome of a juristic method of inference. These two distinctive kinds of rules in juristic works may be mixed and confused both in the minds of some concerned non-Muslims and those of some enthusiastic Muslim activists.

- The *Sharia*, as a law based on faith and included in the divine sources, maintains its effectiveness and efficiency in application through its reliance on the deep moral roots dug in the conscience of the faithful, be they rulers or ruled. It is not something which may be imposed by force from above; it should come as a result of faith and public acceptance.

An assumed application of *sharia* by a despotic regime or a police state undermines the foundations of faith and betrays the whole *raison d'etre* of the *sharia*. The fundamental principle of Islam is that “*There should be no coercion in matters of faith; distinct is the right way from the way of error (for the human mind)....*” (2:256).

Once the Prophet had to settle a dispute about property and addressed both the parties in the case saying: “I am just a human being, and I rule according to what appears to me as true from what I hear. A party may be more expressive in presenting his case. Anyone to whom I give something according to what I hear, which does not actually belong to him/her, will be merely holding a firebrand.” Both men in the dispute shed tears and each tried to allow the other a full hand over the property (an authentic tradition of the Prophet reported by Malik, al-Bukhari, Muslim, Ibn Hanbal, Abu Dawood, al-Tirmidhi, al-Nasai and Ibn Majah).

Moreover, *sharia* determines what is just and instructs the authorities of the state in the application of justice, but the ethics of Islam urge people to surpass the level of justice in their human relations and achieve a higher more preferable level of forgiveness (*afw*), favor (*fadl*), kindness and generosity, and performing in the most excellent ways (*ihsan*):

*...and to forgo what is due to you is more in accord with consciousness of God, and forget not that you are to act with grace towards one another; verily God sees all that you do.*

(2:237)

*...(the God-conscious and pious) who restrain their anger and pardon their fellow men because God loves the doers of good.*

(3:134)

*God enjoins justice, and the doing of the best...*

(16:90)

*...but let them pardon and forbear, do you not desire that God should forgive you (as soon as you forgive others).*

(34:22)

*But since good and evil cannot be equal, repel evil with something that is better, and thus one who is hostile to you may then become as if he had always been to you a close true friend.*

(41:34)

*But an attempt at requiting a wrongdoing should be proportionate to it; hence whoever forgives and reconciliates his/her reward rests with God; for, verily, He does not love wrongdoers.*

(42:40)



among contemporary Muslims suffer and thus a lack of distinction, about what the law as revealed in the Quran and *sunna* and human interpretation or inference. Consequently, errors and mistaken judgments may be given for financial and commercial activities, in banking, insurance, mortgages, for example. A lack of precise knowledge of such contemporary activities in their totality and specifics, of the existing circumstances among Muslims, especially Muslim minorities, and of the *sharia* itself contribute to the confusion. In this way, Muslims deprive themselves of some of the benefits of the existing economical, cultural, intellectual and legal experiences of the contemporary world.

- Islam provides basic principles and laws, but it does not reject other practices which do not contradict these principles and laws. A clear distinction must also be made between the application of the *sharia* in a Muslim country and society, and its application among a Muslim community which lives as a minority in a non-Muslim country. The difference relates to the nature of the *sharia* rule itself, and it can be carried out by individuals and small groups, whether it needs a relatively large and cohesive community, or it requires a majority of people and the authority of a state.

Such a differentiation is essential for the application of *sharia* because its rules cover all fields of human activity. In any case, Muslims in any time and place should keep in mind the general principle of *sharia*: “God does not burden any human being with more than he[*she*] is well able to bear...” (*The Quran*, 2:286), “...God does not want to impose any hardship on you....” (5:6).

Moreover, *sharia* determines what is just so far as to instruct the authorities of the state in the application of justice, but the ethics of Islam urge people to surpass the level of justice in their human relations and achieve a higher more preferable level of forgiveness (*afw*), favor (*fadl*), kindness and generosity, and performing in the most excellent ways (*ihsan*):

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(42:40)

The concept of *sharia* among contemporary Muslims suffers from confusion, and thus a lack of distinction, about what is a permanent divine law as revealed in the Quran and *sunna* and what is a human interpretation or inference. Consequently, some hasty and mistaken judgments may be given for financial and commercial activities, in banking, insurance, mortgages, for example. A lack of precise knowledge of such contemporary activities in their totality and specifics, of the existing circumstances among Muslims, especially Muslim minorities, and of the *sharia* itself contribute to the confusion. In this way, Muslims deprive themselves of some of the benefits of the existing economical, cultural, intellectual and legal experiences of the contemporary world.

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The *Sharia* if understood and explained properly would provide deep moral and spiritual roots for the respect of human rights among Muslims, and in their relations with others. The laws of the *sharia*, enforced by the ruling authorities but based at the same time on faith and morals, would enjoy a unique effectiveness and efficiency among the rulers and the ruled. Values such as justice, kindness, altruism, unity and peacefulness would interact with legal rules. The moral and material development which might be maintained among the Muslims, and in the whole world, would have an enormous effect on the implementation of any law in general and the law of God in particular.

The *Sharia* is not a magic button which automatically provides every material and moral benefit just by being pressed. It represents only a part of Islam which is principally a faith and which combines moral education and social reform with the application of law. Even in the legal field, human rights should be preserved and maintained as a basis for the genuine application of rules concerning transactions, penalties, political and administrative systems and international relations. Islam as a whole rejects any narrow or partial conception; it actually mobilizes believers to work hard, persistently and productively, so as to fulfill the responsibility of human and material development in this world, which has been entrusted by God to human beings.

The Quran and *sunna* do not represent inclusive dictionaries, encyclopedias or mathematical tables, but are, rather, dynamic guides for the continuous development of human efforts in moral and material arenas of life. Islam does not seek to turn people either into angels or machines, nor does it allow them to live merely at the biological level of animals. It inspires

and guides the harmonious development of individual and collective human energy: spiritually, intellectually, physically, individually and collectively. The *Sharia* cannot be restricted to penal rules only, and such a way of thinking about *sharia* or presenting it, is a complete distortion. The fixed penalties which are indicated in the Quran and *sunna* for certain crimes are very few and have their strict individual and social requirements, while all other offenses and their punishments are left to the discretion of the authorities in the Islamic state.

Penal rules cannot be applied separately from other parts of the *sharia*, especially the rules which secure the fulfillment of human needs: whether moral or material. The right to work under humane conditions and for a just payment are protected by the *sharia*. Social security for the elderly, disabled, ill and unemployed should be provided by the state through *zakat* revenues and other possible resources. According to the Prophet's traditions, the state must provide assistance for marriage, housing and transportation. The Prophet said: "I have the ultimate responsibility for every Muslim, whether male or female. Possessions that are left by anyone who dies are for his/her inheritors, while obligations and needy children and family members are my responsibility and the concerned party should come to me and I shall take care of him/her" (tradition reported by al-Bukhari, Muslim, Ibn Hanbal, al-nasai, al-Tirmidhi and Ibn Majah).

A tradition reported by Ibn Hanbal states that the Islamic state is responsible for fulfilling the needs for public officials: housing, transportation, marriage and personal assistance in housework and other essential needs. Education represents both a right and a duty of the individual according to the *sharia* (An authentic tradition of the Prophet reported by Ibn Abdel

Basr and al-Bayhaqi in *Shu'ab al Iman*), and the state is responsible for educating its children and developing the knowledge of its adults as well. (Ibn Hazm, *al Ihkam fi Usul al-Ahkam*, Vol V, Ch. 31.) Ethical values should be nurtured and maintained by the family, the school, the mosque and all mass media and the society as a whole.

Maintaining such a moral and material standard for the society is an essential prerequisite for the infliction of penalties on offenders, and it is a foundation of *sharia* which cannot be ignored. The fixed penalties (*hudud*) especially those stated for theft and adultery, may seem too severe, but they cannot actually be inflicted in most cases because of the social and legal conditions which are required by the Quran and *sunna* for their infliction. In order to carry out the penalty for theft, the stolen matter must possess certain characteristics such as value and a clear sign of ownership made by the owner to secure it (Quran 2:282). The legal evidence which is required for proving adultery is almost impossible to obtain, except in case of a confession made without any pressure and without any mental or psychological deficiency. al-Nasai reported that the Prophet rejected the practice of any physical pressure on a defendant so that he might confess. (See also Abu Yusuf's *al-Kharaj*.) In general, according to the Quran and *sunna*, any physical or moral pressure on a defendant or witness invalidates his/her statement.

A judge should not push a defendant to confess; on the contrary, every defendant should be informed precisely of his/her rights as well as of the legal definition of the offense. Clarification should be made to remove any possible misunderstanding or confusion about related forms of behavior which may be distinctive legally from the specific offense under

question and may be assigned a lesser punishment. If any social or legal requirement is missing or if any suspicion may arise about the alleged commitment of the offense, the fixed penalty cannot be inflicted. In such a case, either the defendant is acquitted without any punishment, or a lighter discretionary penalty is inflicted if the judge is convinced that some offense has been committed even though the fixed penalty for it cannot be legally defined. The Prophet stated clearly that the mistake of acquitting a guilty man is better than that of condemning an innocent man (an authentic tradition reported by Ibn Abi Shayba, al-Tirmidhi, al-Hakim and al-Bayhaqi in *al-Sunan*).

The social and legal requirements for the fixed penalties do not represent modernized sophisticated apologetics: they are presented clearly in the Quran and *sunna*, the early judiciary practices under the Caliphs, and the classical juristic heritage. In this light, the few fixed penalties in *sharia* – especially those for theft and adultery – can be considered as primarily preventive or deterrent.

Some different points of view may develop among Muslims about the application of *sharia* in contemporary societies in areas such as acceptable dress for Muslim women, the proper education of children, legal ways of saving, borrowing or investing money, and intellectual and practical relations with people of different religions or ideologies. Such differences should be taken as something normal and inevitable in the practice of *ijtihad* and the application of *sharia*. They do not indicate any intention to deviate from *sharia* or deform its rules. Once a Muslim scholar rightly said: “I consider my view as the right one which may be proven wrong, while other views are for me the wrong ones which may be proven right.”

# SHARIA IN BRIEF

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**S**HARIA REFERS TO THE BODY OF LAWS OF ISLAM IN all fields, whether they are related to worshipping God (*ibadat*) or to dealings with people (*muamalat*). The divine sources of the *sharia* are the Quran and the *sunna* of the Prophet. However, the divine source must be understood, interpreted and implemented by the human mind.

- The laws of the Quran and *sunna* are either general principles of justice, or particular rules about certain essential family relations, civil and commercial dealings, or criminal offenses. The last are limited in number and must be understood and implemented within the whole structure of *sharia*, especially the principles which secure human rights including social justice and public education.

- In addition to the laws determined by the Quran and *sunna*, *sharia* can adjust to new circumstances through *ijtihad*, in which we use human intelligence in providing new laws to meet emerging needs based on the general objectives of *sharia*



(e.g. securing justice in all its dimensions, forbidding exploitation, fraud etc.).

- Muslim jurists have used their human intellect in understanding the divine laws in the Quran and *sunna*, as well as the practice of *ijtihad*. They have introduced new rules based on general Islamic principles to respond to changing circumstances, and have used several intellectual methods such as analogy, preferences in case of possible alternates, analogies, consideration of the allowed general benefit and so on.

- Juristic heritage includes what is related directly to the divine sources with necessary human interpretation, and what represents a human effort to respond to the emerging changes and needs guided by the general principles of *sharia*. In this way, the Islamic juristic heritage encompasses within the same framework both what is divine and permanent and what is human and changeable. Some have suggested that the term *sharia* be used for the laws of the Quran and *sunna* only, while the legal heritage may be called jurisprudence (*fiqh*). The confusion is not caused by the terms but by the meanings and connotations given to them. Whether the legal heritage of Islam is considered law or jurisprudence or both, the concrete fact is that it includes both what is divine and permanent and also what is human and changeable together in one place.

It is the responsibility of Muslims, and especially that of their leaders, jurists and thinkers, to make the clear distinction between both, and observe the permanent divine laws, while carrying on the practice of *ijtihad* in order to develop specific detailed rules to suit the contemporary circumstances of a given time and place and respond to emerging needs.

- According to Islam, laws enforced by state authorities should be preceded by and combined with a comprehensive

development of material and human resources and by securing social justice and public education. Caliph Umar, for example, did not enforce the fixed penalty of theft in a case when he realized that the essential needs of life had not been secured for the defendant by those who were responsible for him. In fact, the Caliph suspended the penalty for theft during years of famine, since all the people were under the pressure of necessity at the time.

# PERMANENT PRINCIPLES OF JUSTICE

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**M**USLIMS BELIEVE THAT ISLAM IS THE FINAL message of God and that its law suits every time and place. Non-Muslims, however, repeatedly question how laws which appeared fourteen centuries ago can apply to contemporary society, since in their view, laws reflect changing social needs, concepts and concerns. Unfortunately, either Muslims have been unable to present the case of Islamic law clearly and convincingly, or non-Muslims have not understood the merits of *sharia* and how it works. In any case, the burden of proof is on Muslims to explain the dynamism of Islamic law *vis a vis* human change clearly and concisely.

They should not feel upset or offended by continuous arguments and objections. Most arguments generally refer to a common idea of law and its function, and most have been influenced by modern developments in Judaism with regard to the Jewish law as indicated in the *Torah*, or by the separation of church and state in modern Christian thought.

The human mind has even recognized a kind of super-law which supersedes time and place and may be considered as a permanent and comprehensive source of justice which fills the gaps and complements the limitation of particular laws in given times and places. Through such a legal explanation, Greek philosophy and Roman jurisprudence recognized as permanent super-law what they called “natural law.” In England, the Court of Chancery developed the “Principles of Equity.” Likewise, in the eighteenth century Jean J. Rousseau (d. 1778) and John Lock (d. 1704) introduced their ideas known as *the social contract* to support the people and their common will over the rulers and their decisions.

According to Islam, God guides human beings to *super-principles of permanent justice* through human reason which is guided by divine message:

*And We have shown him/her [the human being] the two paths [of good and evil].*

(9:103)

*...there [on earth] shall most certainly come unto you guidance from Me; and one who follows My guidance will not go astray, neither will he [she] be unhappy. But one who shall turn away from remembering Me (and My guidance) shall suffer a hard life (sterile and spiritually narrow).*

(20:123-124)

*And set your face steadfastly toward the faith (in the One God), turning away from all that is false, in accordance with the human nature created by God, since such a nature cannot be changed; and this is the genuine faith, even if most people may not know.*

(30:30)

To emphasize the connection between human common sense and divine guidance, the Quran calls the good and the evil “the acceptable and the rejected,” (*maruf and munkar*) as if they are both recognized by common sense. As an example the Quran reads:

*...the Prophet who enjoins upon them the doing of what is right (as known by human reason and common sense) and forbids them the doing of what is wrong (as it runs counter to human reason and common sense), and makes lawful to them the good things of life and forbids them the bad things, and lifts from them their burdens and the shackles that had been upon them.*

(7:157)

*...and He (God) forbids all that is shameful and all that runs counter to reason and common sense....*

(16:90)

Thomas Aquinas, the thirteenth century Christian theologian, might have been influenced by such interaction of human recognition and divine inspiration in Islam, as he identified “the natural law” with “the law of God,” or that part of the eternal law of God, or the reason of divine wisdom, which is knowable by humans through their power of reason. These permanent principles of justice represent the cornerstone of *sharia*, which should not be overshadowed by small details incorporated into the Islamic legal heritage throughout the centuries by rulers and jurists.

*Sharia*, then, in its divine sources, the Quran and the *sunna*, presents mainly general principles. Some basic civil and penal rules are indicated to underline their importance and to show

how more can be developed to respond to social needs. Rules forbidding the exploitation of human beings through usury, fraud and unfair transactions, and rules forbidding transgression against the human body, dignity, or property are clearly stated, and these represent the essence of *sharia* as revealed by God in the Quran and *sunna*. The full development of *sharia*, however, comes in works of *fiqh*, or jurisprudence, which are not restricted to the limited revealed laws. Successive generations of Muslim jurists have added new laws, applying the techniques of interpretation and inference to what is already revealed in divine source. Examples of these techniques are analogy (*qiyas*), preference in case of alternate analogies (*istih-san*), consideration of an allowed general benefit (*maslaha*), and the general principle that everything is initially permitted until it is forbidden by the Quran or *sunna* (*ibaha asliyya* or *istishab al ahal*), the burden of evidence being on the one who claims the prohibition. Such human techniques and their outcomes are not part of the permanent divine law, since they merely represent human intellectual efforts, and since the results may change according to the change of cultural and social circumstances in different times and places.

Legal changes resulting from changed circumstances cannot be practiced arbitrarily nor can they cause a suspension or violation of *sharia*. God, who has “... *perfected your religion for you and has completed His gift to you....*” (Quran 5:3) has allowed the necessary mechanism for the change of law from within, to cope with the changing human circumstances and emerging needs, while revealing general principles to suit all times and places and provide a deep and wide basis of justice on which particular laws can be developed to cope with particular circumstances.

These general principles represent a permanent and rich source which cannot be ignored.

*God commands justice and kindness and caring for (one's) relatives; while He forbids all that is shameful and all that runs counter to reason (or common sense) and transgression.*

(16:9)

*...But what is with God is better and more enduring for those who believe and those whose (affairs are conducted through mutual) consultation among themselves.*

(42:38)

*We have conferred dignity on the Children of Adam and transported them around on land and sea and provided for them sustenance out of the good things of life and favored them far above most of Our creations.*

(17:57)

*...and We have made you into nations and tribes so that you may come to know one another, verily, the noblest one in the sight of God is the one who is the most conscious of Him.*

(19: 13)

*No coercion is allowed in matters of faith [2:256]. ...and no one who writes a document or is a witness must suffer harm (because of what, either may state)....*

(2:282)

*[the Prophet] who enjoins upon them the doing of what is right and forbids the doing of what is wrong and makes lawful to them the good things of life and forbids to them the bad things and lifts from them their burdens and the shackles that were upon them.*

(9:67)

*Do not devour one another's possessions wrongfully, and in case of trade it has to be [conducted] by mutual agreement, and do not destroy yourselves....*

(4:29)

*God does not like any evil to be voiced openly....*

(4:148)

*Those who love to spread evil among those who believe, grievous suffering awaits them in this world and in the life to come....*

(24:19)

*...and do not spy upon one another....*

(49:12)

*...one who does evil is requited for it.*

(4:123)

*...and whatever (wrong) any human being commits rests upon himself alone; and no bearer of burdens bears another's burden.*

(6:164)

The *sunna* also provides general rules of justice. For instance the Prophet said:

“No harm is allowed to be caused by anyone, whether inadvertently or deliberately, initially or retributively” (an authentic tradition reported by Ibn Hanbal, Ibn Majah) and “Deeds are judged according to intentions” (an authentic tradition reported by al-Bukhari and Muslim). According to the Prophet’s tradition, education is an obligation upon every individual (an authentic tradition reported by Ibn Abd al Basr and al-Bayhaqi in *Shuab al Iman*) and the authorities must provide the necessary means to fulfill the obligation (Ibn Hazm, *Al Ihkam* Vol. V, Ch 31.). Another tradition states that Muslim



authorities are responsible for helping any family whose supporters have left it without resources or with crippling debts (an authentic tradition reported by al-Bukhari, Muslim, Ibn Hanbal, al-Nasai, al-Tirmidhi, Ibn Majah).

These general principles of justice provide the society with a permanent, deep and wide source for different laws which are capable of responding to changing needs and circumstances. Particular rules in the Quran and *sunna* are limited in number and they deal only with basic civil and penal cases to deter the violation of essential human rights.

Muslim jurists who have analyzed the rules of *sharia* in the Quran and *sunna* have realized that all of these divinely revealed rules aim to secure and develop, physically and morally, the human individual and society in the areas of human life, family and children, the intellect, freedom and sanctity of faith, as well as property. Whenever changing circumstances may affect particular rules or raise needs for additional ones, the general goals of Islamic law stay permanently and guide the legal change. The Quran repeatedly stresses how *sharia* aims to remove hardships and pressures from human life:

*...God wills that you shall have ease and does not will you to suffer hardship....*

(2:185)

*God does not want to impose hardship on you.*

(5:7, also 22:78)

*Sharia* emphasizes the fundamental principle that everyone is responsible only within the limits of his/her own ability. God requires the believer to carry out what is possible, and He forgives what is beyond individual and societal abilities

development of material and human resources and by securing social justice and public education. Caliph Umar, for example, did not enforce the fixed penalty of theft in a case when he realized that the essential needs of life had not been secured for the defendant by those who were responsible for him. In fact, the Caliph suspended the penalty for theft during years of famine, since all the people were under the pressure of necessity at the time.

# PERMANENT PRINCIPLES OF JUSTICE

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**M**USLIMS BELIEVE THAT ISLAM IS THE FINAL message of God and that its law suits every time and place. Non-Muslims, however, repeatedly question how laws which appeared fourteen centuries ago can apply to contemporary society, since in their view, laws reflect changing social needs, concepts and concerns. Unfortunately, either Muslims have been unable to present the case of Islamic law clearly and convincingly, or non-Muslims have not understood the merits of *sharia* and how it works. In any case, the burden of proof is on Muslims to explain the dynamism of Islamic law *vis a vis* human change clearly and concisely.

They should not feel upset or offended by continuous arguments and objections. Most arguments generally refer to a common idea of law and its function, and most have been influenced by modern developments in Judaism with regard to the Jewish law as indicated in the *Torah*, or by the separation of church and state in modern Christian thought.

The human mind has even recognized a kind of super-law which supersedes time and place and may be considered as a permanent and comprehensive source of justice which fills the gaps and complements the limitation of particular laws in given times and places. Through such a legal explanation, Greek philosophy and Roman jurisprudence recognized as permanent super-law what they called “natural law.” In England, the Court of Chancery developed the “Principles of Equity.” Likewise, in the eighteenth century Jean J. Rousseau (d. 1778) and John Lock (d. 1704) introduced their ideas known as *the social contract* to support the people and their common will over the rulers and their decisions.

According to Islam, God guides human beings to *super-principles of permanent justice* through human reason which is guided by divine message:

*And We have shown him/her [the human being] the two paths [of good and evil].*

(9:103)

*...there [on earth] shall most certainly come unto you guidance from Me; and one who follows My guidance will not go astray, neither will he [she] be unhappy. But one who shall turn away from remembering Me (and My guidance) shall suffer a hard life (sterile and spiritually narrow).*

(20:123-124)

*And set your face steadfastly toward the faith (in the One God), turning away from all that is false, in accordance with the human nature created by God, since such a nature cannot be changed; and this is the genuine faith, even if most people may not know.*

(30:30)

To emphasize the connection between human common sense and divine guidance, the Quran calls the good and the evil “the acceptable and the rejected,” (*maruf and munkar*) as if they are both recognized by common sense. As an example the Quran reads:

*...the Prophet who enjoins upon them the doing of what is right (as known by human reason and common sense) and forbids them the doing of what is wrong (as it runs counter to human reason and common sense), and makes lawful to them the good things of life and forbids them the bad things, and lifts from them their burdens and the shackles that had been upon them.*

(7:157)

*...and He (God) forbids all that is shameful and all that runs counter to reason and common sense....*

(16:90)

Thomas Aquinas, the thirteenth century Christian theologian, might have been influenced by such interaction of human recognition and divine inspiration in Islam, as he identified “the natural law” with “the law of God,” or that part of the eternal law of God, or the reason of divine wisdom, which is knowable by humans through their power of reason. These permanent principles of justice represent the cornerstone of *sharia*, which should not be overshadowed by small details incorporated into the Islamic legal heritage throughout the centuries by rulers and jurists.

*Sharia*, then, in its divine sources, the Quran and the *sunna*, presents mainly general principles. Some basic civil and penal rules are indicated to underline their importance and to show

how more can be developed to respond to social needs. Rules forbidding the exploitation of human beings through usury, fraud and unfair transactions, and rules forbidding transgression against the human body, dignity, or property are clearly stated, and these represent the essence of *sharia* as revealed by God in the Quran and *sunna*. The full development of *sharia*, however, comes in works of *fiqh*, or jurisprudence, which are not restricted to the limited revealed laws. Successive generations of Muslim jurists have added new laws, applying the techniques of interpretation and inference to what is already revealed in divine source. Examples of these techniques are analogy (*qiyas*), preference in case of alternate analogies (*istih-san*), consideration of an allowed general benefit (*maslaha*), and the general principle that everything is initially permitted until it is forbidden by the Quran or *sunna* (*ibaha asliyya* or *istishab al ahal*), the burden of evidence being on the one who claims the prohibition. Such human techniques and their outcomes are not part of the permanent divine law, since they merely represent human intellectual efforts, and since the results may change according to the change of cultural and social circumstances in different times and places.

Legal changes resulting from changed circumstances cannot be practiced arbitrarily nor can they cause a suspension or violation of *sharia*. God, who has “... *perfected your religion for you and has completed His gift to you...*” (Quran 5:3) has allowed the necessary mechanism for the change of law from within, to cope with the changing human circumstances and emerging needs, while revealing general principles to suit all times and places and provide a deep and wide basis of justice on which particular laws can be developed to cope with particular circumstances.

These general principles represent a permanent and rich source which cannot be ignored.

*God commands justice and kindness and caring for (one's) relatives; while He forbids all that is shameful and all that runs counter to reason (or common sense) and transgression.*

(16:9)

*...But what is with God is better and more enduring for those who believe and those whose (affairs are conducted through mutual) consultation among themselves.*

(42:38)

*We have conferred dignity on the Children of Adam and transported them around on land and sea and provided for them sustenance out of the good things of life and favored them far above most of Our creations.*

(17:57)

*...and We have made you into nations and tribes so that you may come to know one another, verily, the noblest one in the sight of God is the one who is the most conscious of Him.*

(19: 13)

*No coercion is allowed in matters of faith [2:256]. ...and no one who writes a document or is a witness must suffer harm (because of what, either may state)....*

(2:282)

*[the Prophet] who enjoins upon them the doing of what is right and forbids the doing of what is wrong and makes lawful to them the good things of life and forbids to them the bad things and lifts from them their burdens and the shackles that were upon them.*

(9:67)

*Do not devour one another's possessions wrongfully, and in case of trade it has to be [conducted] by mutual agreement, and do not destroy yourselves....*

(4:29)

*God does not like any evil to be voiced openly....*

(4:148)

*Those who love to spread evil among those who believe, grievous suffering awaits them in this world and in the life to come....*

(24:19)

*...and do not spy upon one another....*

(49:12)

*...one who does evil is requited for it.*

(4:123)

*...and whatever (wrong) any human being commits rests upon himself alone; and no bearer of burdens bears another's burden.*

(6:164)

The *sunna* also provides general rules of justice. For instance the Prophet said:

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Muslim jurists who have analyzed the rules of *sharia* in the Quran and *sunna* have realized that all of these divinely revealed rules aim to secure and develop, physically and morally, the human individual and society in the areas of human life, family and children, the intellect, freedom and sanctity of faith, as well as property. Whenever changing circumstances may affect particular rules or raise needs for additional ones, the general goals of Islamic law stay permanently and guide the legal change. The Quran repeatedly stresses how *sharia* aims to remove hardships and pressures from human life:

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*God does not want to impose hardship on you.*

(5:7, also 22:78)

*Sharia* emphasizes the fundamental principle that everyone is responsible only within the limits of his/her own ability. God requires the believer to carry out what is possible, and He forgives what is beyond individual and societal abilities

...but if one is driven by necessity – neither coveting it nor exceeding the immediate need, he will have no offense held against him....

(2:173)

...As for one who is driven [to what is forbidden] by hunger without any deliberate intention to sin behold: God is much-forgiving, the most Merciful....

(5:3)

And He [God] so clearly spelled out to you what he has forbidden to you (from) unless you are compelled (to do so).

(6:119)

Accordingly, jurists have formulated a general rule that when a real hardship may be felt in carrying out a certain law, flexibility must be used in implementing that law in order to remove hardship and put the person at ease (*al-mashaqqa tajlib al-taysir*).

Cases of necessity and pressure are not restricted only to individuals, but also include communities and societies. A collective unavailability of something forbidden by *sharia* may lead to making it temporarily tolerable and forgivable (*umum al-balwa*). Such a valuable juristic rule was derived directly from the Quran and *sunna*, as the above-mentioned texts illustrate. The Prophet taught the Muslims that they must follow in the right direction and must be as close as possible to the teachings of God (*saddidu wa qaribu*) (an authentic tradition reported by al-Bukhari, Muslim, Ibn Hanbal and al-Tabrani in *Al Kabir*), since a perfect and complete abiding by all the rules of *sharia* may not be easy or possible for a certain individual or community in a certain time or place.

In this light, the enormous freedom which has been left for the human intellect to devise new laws (a mechanism technically called “the practice of *ijtihad*”) assures the capacity of *sharia* to meet emerging circumstances and needs. Among the many methods of *ijtihad* are some above-mentioned ones whose names reveal clearly their relations to the conceptual and practical circumstances, especially preference (*istihsan*), consideration of an allowed general benefit (*maslaha*), and the initial permissibility of everything until it is proven forbidden by the divine sources. Moreover, the general goals of *sharia* provide a wide base for producing new laws to cope with continuous change following broad principles and main directions.

Many of the enormous details in juristic books are a product of *ijtihad*. The Caliph Umar was a pioneer in making Islamic law cope with changing circumstances. Under his authority as caliph, he enforced laws he thought best suited the Muslim society in his time. In one well known case, Umar considered the pronouncement of three divorces at once as three separate ones, thus preventing the ex-husband from restoring the marriage with his ex-wife after she married a new husband and got divorced. This verdict differs from the guidance of *sharia*, which requires three separate pronouncements of divorce and other means as well to emphasize that the undesirable decision of divorce should be taken seriously and slowly.

In other cases, the Caliph restricted the marriage of Muslim men with non-Muslim women and stopped the payment of any revenue of *zakat* (social welfare dues) to those whose hearts were to be won over. Some may agree with the Caliph’s views and others may not, but everyone admires his courageous initiatives in responding to emerging circumstances and practicing *ijtihad*.

Two hundred years after the Caliph Umar, Imam Shafii (d. 819) changed many of his own views and even rewrote his own books after he moved from Abbasid Iraq to Fatimid Egypt. Consequently, he had within his juristic approaches what was described as “old” and “new,” and his works had versions related to Baghdad and others related to Egypt. While some of his followers restricted themselves to the new versions and views, assuming that they had abrogated the older ones according to a statement of Imam Shafii which his disciple Buwaayti reported, others chose the older or considered both as equal options.

Imam Shafii might have changed his thinking in Egypt as a result of new evidence or of a different interpretation, as well as a result of different features and needs in the new social environment. Ibn al-Qayyim (d. 1351) stated in his valuable work *I'lam al-Muwaqqin* that the change in rules by time is merely because of the change of time and circumstances, and not necessarily because of a change of evidence and arguments. (Ibn al-Qayyim, *I'lam al Muwaqqin*, Vol III, Ch. I).

It may be helpful in the field of juristic studies to follow a certain topic or point historically, vertically, through successive generations of the same school or of different schools, or followed geographically – horizontally – through various regions and environments in the same school or in different schools. By examining the contributions of Abu Hanifa (d. 767) and those who followed, such as Ibn al Humam (d. 1456) and Ibn Abidin (d.1836), or by examining the juristic Hanafi heritage in Syria, Egypt, Iraq, India and Central Asia, one can realize how the Muslim jurists even within one school coped with changing circumstances in different times and places. The same result can be reached by examining the contributions through successive

generations of Maliki jurists from Malik (d. 795) to Sahnun(d. 854), Ibn al-Arabi (d. 1147), al-Qurtubi (d. 1272), al-Shatibi (d. 1388), until we reach later ones such as Shaykh Bakhit in Egypt, or by examining the Maliki contributions in Hejaz, Egypt, North Africa (Maghrib) and Southern Spain (Andulus).

In the Hanafi and the Maliki school juristic opinions (*fatwas*) which differed from previous ones on the grounds of either common necessities (*umum al balwa*) or emerging ones (*nawazil*) present examples of the flexibility of *sharia* and its dynamism in facing human change.

Contemporary Islamic jurisprudence must follow the same dynamic mechanism to respond to present needs and to expose how faulty the assumption is that *sharia* was developed in previous centuries and has become now merely a closed book and a permanent code of laws of which nothing can be revised or changed.

# DYNAMICS OF SHARIA

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**A**WARE OF THE FACT THAT MUSLIM JUDGES WOULD confront cases not directly related to a Quranic text or the *sunna* (the Prophet Muhammad's words and deeds), Prophet Muhammad asked Muadh ibn Jabal, who was going to be a judge in Yemen, how he would tackle such cases. Muadh answered that he would do his best in using his human intellect and common sense. The Prophet was pleased. He asked God to guide the future judge to the right way in his future rulings. The word which Muadh used in his reply to the Prophet became a classical term for the intellectual response to emerging needs which is used in addition to the Quran and *sunna* in the formulation of Islamic law: the term is *ijtihad*.

Even understanding and interpretation of the texts of the Quran and *sunna* themselves require a human effort or *ijtihad*. One must know the totality of the texts themselves, their historical background, the nature of the issues treated in them, and the circumstances of the times and places. *Ijtihad* is essen-

tial in responding to emerging problems and coping with changing circumstances with reference to these divine sources. The divine and final message revealed fourteen centuries ago allows within itself spacious room for coping with change, as change is fundamental in human nature and is always noticeable in the individual and collective intellectual and social developments of human beings.

Al-Shihristani, the prominent author of a comprehensive work on the religious beliefs of his time (d. 1153), stated clearly that the Quran and *sunna* have a limited number of texts which cannot cover the unlimited number of continuously emerging events except through the intellectual dynamics of *ijtihad*; and this fact was repeatedly emphasized by other Islamic authorities such as Ibn Khaldun (d. 1405) (al-Shihristani, *al Milal wa il Nihal*, Vol. I, Chapter on differences in legal details [*al-furu*]; see also Ibn Khaldun, *al-Muqaddima*, Chapter on the Science of Fiqh). The general principles of the Quran and *sunna* and the goals of *sharia* as developed by prominent jurists like al-Shatibi (d. 1388), (Al-Shatibi, *al-Muwafaqat*, Vol. II), represent an invaluable guide to the practice of *ijtihad*.

One must remember that in order for the practice of *ijtihad* to provide suitable legal rules in response to social changes, the human intellect must play a major role. The human intellect is crucial in comprehending the general principles and the goals of *sharia* as represented in the Quran and *sunna*, as well as in understanding the existing social circumstances and needs which brings the necessity of *ijtihad*.

Examples of the general and permanent principles of *sharia* have been mentioned in a previous chapter. Some are mentioned here again to bring them to mind now:

*God does not burden any human being with more than he(/she) is well able to bear*  
(2:286)

*And He has laid no hardship on you in religion.*  
(22:78)

*...And let not your own hands throw you in destruction...*  
(2:195)

*There should be no coercion in matters of faith.*  
(2:256)

*God will not take you to task for oaths which you may have uttered without thought, but will take you to task (only) for what your hearts have conceived (in earnest).*  
(2:225)

*But if you repent and give back what you get (by exploitation and injustice,) you are entitled to your principal; you will do no wrong, and neither will you be wronged.*  
(2:279)

*And neither one who writes nor the witness must suffer harm.*  
(2:282)

*Do not devour one another's possessions unjustly, and (be aware that) legitimate gain should be only through business based on mutual consent among you, and do not destroy one another.*  
(4:29)

*God commands justice, and doing the best (and the kindest) and giving (one's dues) to near relatives, while He forbids all that is shameful and all that runs counter to reason (common sense and good taste), as well as (any form) of oppression.*  
(16:90)



The traditions of the Prophet are a treasure trove of general principles of justice such as “Actions are but by intention,” (an authentic tradition reported by al-Bukhari and Muslim).

“That which I have forbidden you to do: you should avoid; what I have ordered you to do: do as much of it as you can.” (This authentic tradition was reported by al-Bukhari, Muslim and ibn Hanbal.)

“Verily, God has prescribed proficiency and magnanimity in all ideas” (an authentic tradition reported by Muslim, Ibn Hanbal, Abu Dawood, al-Tirmidhi, al-Nasai and Ibn Majah.)

“There should be no harm caused by someone to another neither initially nor retributively” (an authentic tradition reported by Ibn Hanbal and Ibn Majah);

“My followers have been exempted from any responsibility for their mistakes, (their) forgetfulness and for what they may do under duress” (an authentic tradition reported by al-Tabrani in his work *al-kabir*.)

Another significant *hadith* was reported by al-Daraqutni and others:

God has ordained obligations: do not neglect them; and He has set boundaries: do not trespass them; He has prohibited certain things: do not violate these prohibitions. He might not mention it out of compassion for you, not forgetfulness: do not seek after it.

The goals of *sharia*, as established by our jurists, provide a solid basis for, and a well-constructed presentation of, human rights. Islamic law aims to secure and develop: life in all its dimensions (physical, intellectual, psychological and spiritual), the family and children as a continuation of human life, the

human mind, freedom of belief and expression of one's beliefs, and private and public ownership. *Sharia* secures human needs, whether they are essentials or refinements. Priorities can be arranged according to the goals of particular deeds and to the levels of requirement that the deeds are related to. In addition, there is the known differentiation in the force of what Islam may require or forbid. Whether a deed is an obligation or recommendation on one side, or a prohibition or discouragement on the other, is something that is clearly established in *sharia*, provided that the relevant text is authentic and its meaning is obvious or can be supported according to the technical ways known to specialists.

When some Muslims seem reluctant to accept change as something fundamental in human nature, or when they seem reluctant to use the dynamics of *ijtihad* to cope with change, they may be pushing people to argue about the binding of the *sharia* or the binding of the Prophet's traditions or other essentials, in order to secure for themselves the necessary flexibility which they have been denied within the system. In their mistaken rigidity about *sharia*, these Muslims may unconsciously provide the grounds for those who may say that the Quran, the traditions, and the *Sharia* are wholly or partly inapplicable to our time. Technological progress has made the whole world smaller and closer through mass communication and mass production. Accordingly, multinational and international activities have become dominant, and the circulation of commodities, currencies and credit has become universal, huge and transient. Some may see and say that Muslims cannot be isolated from such contemporary globalization to live on their own and by laws which are different from the universal legal development, coping with the continuously emerging realities.

Muslims have to show that *sharia* can cope with change through *ijtihad* and that it is still relevant in contemporary daily life. Muslims cannot isolate themselves from the dynamism of the whole world if they want to be successful participants and contribute to progress. They feel increasingly uncomfortable with past judgments made to cope with the then-existing circumstances, when transportation and communication facilities were limited. The degree of international contact and the spread of intellectual and social change which occurred in the past cannot be compared with that of the increasingly accelerated pace and scope of the contemporary world.

It is thus essential to draw a line between the permanent, divine guidance in the Quran and *sunna* and the human contributions which have been the product of a given time and place and represent merely a heritage, even if that heritage was guided in general by the Quran and *sunna*. With regard to the *sunna*, we should realize that Prophet Muhammad was a human being who received the divine revelation, no more and no less: *Say (O Prophet): I am only a human being like yourselves, but I have received revelation (from God).... (18:110).*

A denial of Muhammad's humanity is no less serious and no less heretical than a denial of his prophethood. In the fundamentals of jurisprudence, it is a well known fact that the practice of the Prophet might or might not represent a binding revelation. Among such practices of the Prophet that could not be considered as binding for all, one may mention what might be restricted to himself personally (like some of his practices in marriage or fasting) or what might be related to his human nature and habits or what was done through his human discretion as a leader of the community on the grounds of *ijtihad*.

The practical *sunna* cannot be considered as an obligation for Muslims in general, unless we find some indication or support for this, but instead they mean that, with a few named exceptions, such practices are permitted. Sayings addressed by the Prophet to his followers may have been intended to be taken as orders, recommendations or mere guidance, or as prohibition, discouragement or mere permission. An arrangement of priorities can be made according to the place of any instruction of the Prophet through the above mentioned goals of *sharia* and through the various levels of Islamic rules as they deal with essentials, needs, or refinements. In the science of *hadith*, traditions which were widely circulated (*mutawatir*) or well known (*mashhur*) or singly reported cannot be taken equally, especially in certain matters. Much confusion about the authentic *sunna* arises when all traditions are given the same bindingness.

It is essential to secure such an intelligent and knowledgeable differentiation between what is divine and permanent and what is human and temporary, between what represents an obligation or a prohibition and what represents an encouragement or a discouragement, between what is strong and what is weak, in the form and content of different texts, in order to provide cogency to our contemporary Islamic jurisprudence. This should go hand in hand with the accurate evaluation of the reporters of *sunna* and their conceivable interpretation. The contemporary responsibility of Muslim thinkers and jurists is two-fold: how to deal with the past, and how to cope with the present and plan for the future. Both are logically and practically connected, and both require the serious application of the divine gift of human intelligence.

God's messages taught His divine guidance and this should interact with human intelligence, "the Book and the wisdom" (2:129, 151, 231, 3:48, 81, 164, 4:54, 113, 5:110, 62:2) :

*And whoever is granted wisdom has indeed been granted wealth abundant; but none bears this in mind save those who are endowed with genuine thinking [2:269].*

# PRIORITIES IN SHARIA

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**I**N UNDERSTANDING AND IMPLEMENTING ISLAMIC LAW it is essential to look at it, and at Islam as a whole, as a dynamic process, not as a static entity. The Quran was revealed over a period of 23 years, spreading the message of Islam according to a certain plan which dealt with circumstances that existed and developed in Makka and Medina during that time.

The response of Muslims to aggression provides an example of how events in the early history of Islam were dealt with in an emerging dynamic system of law. At first, in spite of the severe attacks on Islam and on the Prophet Muhammad and in spite of the torture which many believers suffered in Makka, Muslims stood firmly, but they were not allowed to defend themselves or their beliefs by using force. Then, after receiving the divine command to emigrate to Medina, the Muslims studied the surroundings, geographically and demographically, and changed their strategy. Muslims, wherever they lived in Arabia, were mobilized and ordered to gather in Medina.

*And as for those who have come to believe without having moved (to Medina), you are not responsible for defending them until they move (to it) ...*

(8:72)

With this strategy, Muslims were able to pressure the belligerent tribe of Quraysh and defend themselves against its attacks, even when Quraysh mobilized a tribal alliance to besiege Medina. Later, when Muslims felt strong enough morally and physically to go to Makka for a peaceful visit to the Kaba, (the House of God) established by Ibrahim (Abraham), but finding their attempted visit obstructed by the leaders of Quraysh, they relied on another strategy: negotiation.

Negotiations between the Muslims and their enemies led to the agreement of Hudaibiya, which enabled the Muslims to extend their activities all over the Arabian peninsula, and although they had to return without visiting the Kaba that year, according to the agreement, they were able to visit it the following year. Shortly afterwards, they entered Makka victoriously, after having been forced to fight because of their enemies' violation of the agreement.

Such a dynamic course of events cannot be looked at horizontally, ignoring how planned strategy interacted with changing circumstances. Also, an event can neither be studied in isolation, nor be viewed at the same level as other events. Individually or grouped, events cannot be taken out of their context in order to be repeated by Muslims in different circumstances, as time and place have determined certain interactions in the past which may not fit a later situation and may not necessarily produce the previous successes.

Nevertheless, the moral lessons of the past about persistence, firmness, and patience in adversity apply to any time and place. What may differ according to changing circumstances is the planning of an ideological or practical strategy. Determining priorities comes at the head of such planning.

The Quran shapes the Muslim's mind to consider the priorities in its teachings, and to avoid seeing them in a vacuum, or in a one-dimensional way. Some examples can be given in the following verses:

*True piety does not consist in turning your faces toward the east or the west: but the truly pious is the one who believes in God and the last day and the angels and revelation and prophets, and spends what he/she may own - however much he/she may cherish it - upon his/her near of kin, and the orphans and the needy and the wayfarer and those who ask for help, and for freeing human beings from bondage; and the one who keeps up the prayers and renders the purifying dues for those who are in need; and (the truly pious are) those who keep their promises whenever they promise, and are patient in misfortune and hardship and in time of peril: it is they who have proved themselves true, and it is they who are really conscious of God.*

(2:177)

*Do you, perchance, regard the (mere) giving of water to pilgrims and the tending of the inviolable House of Worship as being equal to (the works of) one who believes in God and the Last Day and strives hard in God's cause. They are not equal in the sight of God ....*

(9:19)



*Such of the believers as remain passive – other than the disabled – cannot be deemed equal to those who strive hard in God’s cause with their possessions and their lives....*

(4:95)

*Not equal are those of you who spent and fought (in God’s cause) before the victory (of entering Makka), and others: (the former) are of a higher rank than those who may spend and fight (only) after it....*

(57:10)

Moreover, God’s rewards for good deeds have their grades, since good deeds cannot themselves be equal just because they are all good. There are *the foremost who will be drawn close unto God in gardens of bliss....*(56:10-11), beside “*those at the right*” or “*who have attained to what is right*” (56:8).

*Some (of the believers) stick to the minimum (of the required deeds of goodness), while others – by God’s leave – are foremost in deeds of goodness: (and) this, indeed, is a merit most high.*

(35:32)

Looking to the development of *sharia* as the Islamic system or as the organized way of life in various areas, it is clear that the legislative process started in Medina, when an Islamic state with all its requirements – including land, people, sovereignty and authority – was established. Not all prohibitions were decided at once, but they were distributed over the nearly ten years that the Prophet was in Medina. The *sharia* should not be understood as split parts, with every part equal to the other in

importance regardless of different circumstances. On the contrary, priorities for implementing *sharia* should be set by any modern Islamic movement or state, considering the particular circumstances of a given time and place.

Steps in implementing *sharia* ought not to be considered horizontally as equal bits, but should be considered as parts of a dynamic development. Some may believe that all rules of *sharia* are equally required at once without delay or differentiation, while others may think that the historical development of presenting the message of Islam to the Arabian society by the Prophet (*dawa*) or implementing its laws should be repeated literally, whatever the difference in contemporary circumstances may be.

Agricultural or industrial societies may now need a process in *dawa* or sets of legislation which is different from what was followed in the Arabian tribal society during the Prophet's lifetime. Islamists should develop their own plans which deal with the realities they face today, such as automation and computerization, mass economics (mass production, mass distribution) and globalization. Such planning allows for a variety of possible outcomes according to different ideas and circumstances of particular situations, whereas imitating a pattern derived from medieval practices or judicial traditions may produce a mere illusion.

The moral essence and the legal principles of Islam based on its values are universal and permanent, but the detailed specifics worked out by human intellect (*ijtihad*) have to account for the huge qualitative changes in the contemporary world. Since Islam is the last and final of God's messages revealed to humanity, and since no other prophets are expected to "make lawful to you some of what was previously for-

*bidden to you,*” as Jesus did in relation to the Laws of Moses (3:50), Islamic *sharia* is planned to enable Muslims to cope with changing circumstances from within.

One of the basic mechanisms of *sharia* in this respect is to set priorities and goals, and use appropriate methods to achieve them. Until the battle of Uhud, drinking alcohol was not yet forbidden by God, and the prohibition of usury came late in the life of the Prophet. Each of these legal rules had to come after a certain educational and legislative process to reach the required goal. It is essential to thoroughly study the methodology and dynamics of this process in order to apply the principles and rules of *sharia* to our contemporary circumstances, and not to simply repeat the implementation of a certain rule, even if the existing circumstances would abort it from the very beginning or kill in the process any constructive results expected from it.

Our previous jurists were aware of the concept of priorities in *sharia*. What was required was graded into mandatory and recommended, and what was forbidden was graded into prohibited and discouraged. Between the “required” and the “forbidden,” the jurists pointed to a wide and spacious area of what is permitted. Any permitted deed or thing can be moved to the side of the “required” or the side of the “forbidden,” according to developing circumstances. Smoking may be a good example in this respect.

The jurists graded the entire body of the teachings of Islam, whether they be moral values or legal rules, and whether they be about what is required, permitted or forbidden, into three levels: the essentials: “darurat,” the needs: “hajat,” and the refinements: “tahsinat.” For example, one may ignore some refinements of washing (*ghusl* or *wudu'*) although washing is

considered in itself an obligation, if the water to be used is desperately needed for drinking. The goals of *sharia* were ascertained by the jurists to be securing and developing humanity: life, family and children, the mind, spirituality and property.

Bearing these goals in mind one can see why a prayer which maintains and develops human spirituality can be interrupted to save a human life which is at risk. Jurists stated that a public need has a priority over an individual essential. If a prohibition is an essential for an individual or a society, it may be allowed. One may eat pork or drink alcohol if he/she would otherwise die from starvation or thirst in a desert and this is the only food or drink that is available.

A society may be likewise exempted from certain prohibitions to overcome certain pressures. For example, in a case of famine, the punishment for stealing was suspended by Caliph Umar. At the same time, forbidding evil has priority over bringing out good, and consequently Islamic authorities may not allow gambling or prostitution to encourage tourism or increase the national income and the revenues of taxes. Unless the priorities of *sharia* are set out and arranged according to existing circumstances, *sharia* as a means to achieve justice will not be appreciated by Muslims or others.

How can a legal system developed over centuries of continuous practice of *ijtihad* by the rulers and jurists be implemented at one stroke in the present? How can the rules reached by one of the methods of *ijtihad* in a medieval society apply to a modern society? It is essential to understand the dynamism of *sharia* in its historical development and to benefit from our judicial heritage. This is not accomplished simply by repeating the legal formulated details which jurists worked out by *ijtihad*; it is accomplished, rather, by following the dynamic process in

which they engaged again and again over the centuries. In this way, Muslims in different contemporary societies can apply *sharia* to their needs and prove the value of Islamic justice in all its dimensions – social, political, administrative, legislative, judicial, national and international. Priorities must be set according to *sharia* and organized according to the circumstances of a particular society, so as to present divine guidance to contemporary beneficiaries in a sensible and practical way. Repetition of vague rhetorics and generalization leads inevitably to failure in both the conception and the implementation of *sharia*.

Disputes and troubles about women's code of dress in Iran, or among the women personnel of the international agencies that work among the refugees of Afghanistan, or about political alliances in Malaysia, or about allowing the production and distribution of liquor in certain Muslim countries, or about allowing interest, banking, insurance and mortgage in many countries – all such disputes and troubles not only show a weakness in understanding contemporary problems and responding to them according to the principles of *sharia* and methods of *ijtihad*, but also expose our failure in establishing priorities for a productive Islamic reform in contemporary Muslim societies.

# POLITICS AND STATE

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**T**O SAY THAT ISLAM DEALS ONLY WITH THE SPIRITUAL life and has no relation to state and society, is as far from reality as saying that Islam provides a comprehensive and detailed social, economical and political system.

The law of Islam, *sharia*, in its two divine sources the Quran and the *sunna*, is permanent but its direct legal rules are limited. On the other hand, the intellectual derivatives as represented in the jurisprudence works, and the accumulated practices of Muslim societies and governments as represented in the historical works, are both dynamic and extensive. Both human and divine efforts are at work in *sharia*, and failure to understand the dynamics of this mixture leads to confusion, not only in the view of some non-Muslim observers and scholars, but also in the view of some enthusiastic Islamists. Islam in its revealed sources provides limited legal texts in various fields. Many of the texts offer general principles and guidelines, espe-

cially in the political field. In the field of transactions, for example, there are general principles of mutual consent and the abolition of exploitation, in addition to limited details about some agricultural and commercial dealings known in Arabia at the time of the Prophet. In addition, a few penalties are indicated for certain crimes. The door is kept open for introducing new laws for all other transactions and offenses which may emerge in different times and places, according to a human intellectual approach, guided by the general principles of the Quran and *sunna*. These are perfectly formulated and presented in the divine sources in a general way to fit the changing circumstances and impose such principles as the observance of justice and consent and the avoidance of harm and aggression. Following such general principles and applying analogy to some other detailed rules, jurists over the centuries have built up a legal system and produced a huge heritage which covers various fields and provides much detail.

Now that the central dynamics of *sharia* have been again reviewed, with an eye to politics in general, we turn to what could be called the making of politics per se. To begin with, the Quran and *sunna* introduce certain principles which deal with counsel (*shura*), justice, and legitimate struggle against aggression (*jihad*). However, until our modern times, these Islamic political rules were not treated in the majority of juristic works at the same length as the rules of worship such as prayers, fasting, pilgrimage, required social welfare payments (*zakat*), the rules of family matters, transactions and penalties. Since divine revelation that deals with politics is so limited, any approach in this field has had to rely basically on human thinking, and thus we may find this approach to be nearer to philosophy than to law.

Nevertheless, a few juristic works tried to work out certain regulations for the Islamic state based on the general principles of the Quran and *sunna*, in addition to the accumulated historical practice of successive Muslim rulers. It may be significant that these works were called rules for the rulers (*al-Ahkam al-Sultaniyya*), as they related more to the practice or art of ruling than to Islamic public law or the rules of *sharia* in the relationship of the state to its people. Later a few juristic works dealt with “the practice of political authority according to the principles of *sharia*” (*al-siyasa al-sharia*). The name which was given to the subject and to the titles of the works on it indicates that such a practice should be inspired and guided by the general principles of *sharia*; although it has, at the same time, its own dynamic character, which may make it nearer to being parallel to *sharia* or complementing it, than to being a formal part of it.

The Quran considers *shura* as one of the main pillars of the Muslim society, thereby recognizing the role of the people in making the policy and/or decision. In fact, in the Quran *shura* is connected with obedience to God, keeping up prayers and spending money for social needs (42:38).

*Shura* is worthless unless it involves active participation by citizens in policy and/or decision-making. This shows clearly the importance of human initiative and contribution to a Muslim society as accorded by the teachings of the Quran. However, *shura* did not get the attention it deserved either in juristic works or in the practice of rulers after the early decades of the Islamic state. Enjoining what is right and good and forbidding what is wrong and evil (*al-amr bil-maruf wa al-nahy an al-munkar*) is a human right and duty for individuals, groups, the government and the society as a whole, according



to Islam. Offering any advice (*nasihah*) to the rulers or to the ruled and even within the family itself, in private or in public, (Quran 2:233, 31:17) encourages the individual and the society to speak their views, whether positive or negative. This establishes and develops in every individual a sense of responsibility towards God, towards other individuals and the society as a whole, and even towards the universal Muslim body (*umma*) and the whole world.

However, the public practice of *shura* ought to be distinctive from individual advice. It should be an obligation for the rulers and the ruled, not a mere right or option. It should be practiced during daily life openly and normally through an open expression of views; there should be no need for underground opposition or extremist and violent attempts for change.

Therefore, Islamic morality does not leave the people helpless in their political life, however at the same time Islam as a religion is not expected to provide a political system in detail, as some wishful thinkers among contemporary Islamists believe and propagate. The place of politics in Islam may be in fact somewhere between two extreme views: the one of Ali Abd el-Raziq, the Egyptian Azharite, who wrote *Islam and the Fundamentals of Government (al-Islam wa Usul al-Hukm)*, and the other of Abul Ala al-Mawdudi, the founder of al-Jama'a al-Islamia in the Indian sub-continent, and Sayyid Qutb, the Egyptian writer who was associated with the Muslim Brotherhood in Egypt during the last years of his life until he was executed by Jamal Abdel Nasser.

This exaggeration on both sides emerged as a result of the impact of the West on contemporary political thought among Muslims: either in the form of following the ideas of national-

ism and separation of church and state as in the West, or as a challenge to Western thought by the attitude favoring a restoration of the Islamic state. The impact of the West on the advocates of a national secular state is obvious to those familiar with traditional Muslim countries and can be easily recognized from their recent histories, while such an impact on Islamic thinking may need some discussion.

The Western colonization of Muslim lands in the eighteenth century led to the development of secular laws and to the restriction of Islamic law to family affairs in these lands. Then, in the struggle for independence, Islamic '*jihad*' was combined with modern nationalism in nurturing the feelings of the masses. However, as soon as independence was achieved, most of the Muslim states (we may say all of them with very few exceptions in the Arabian peninsula) adopted constitutions or actual governments of the national secular type, under which secular laws have continued to be issued and under which, as in colonial days, Islamic law pertains to a limited sphere of activity in the society.

Over time, frustration developed over the national secular leadership, and feelings of rejection began to stir for what some Islamic thinkers and activists might term the "cultural invasion" of Western secular law into the society. Islamic movements developed in several countries soon after the announcement of formal political independence (e.g. the Muslim Brotherhood in Egypt in 1928 after formal independence was declared in 1922), and their voice became heard inside and outside their countries between the two World Wars, especially around the end of the Second World War in 1945. The Islamists called for the application of *sharia* or the Islamization of the state and expressed their hope for unity among the Muslim

people. Their proposals for the form of government to be instituted ranged from a revival of the caliphate to the adoption of a sort of commonwealth as suggested by the late Algerian Muslim thinker Malik ben Nabi.

In spite of the Islamists' rejection of a Western style national secular state, they have been influenced sometimes indirectly and unconsciously by Western ideologies. During the nineteenth century, Jamal al-Din al-Afghani (d. 1897) and Muhammad Abduh (d. 1905) seemed sometimes inclined to wish for a "just despot," an idea which probably reflected that of the 'enlightened despot' in Europe before. Facing the extremes of democracy – political disputes and conflicts that may lead to political vacuums or paralyses, permissive liberalism, unhealthy individualism, opportunism, passiveness, or materialism – on the European side, and the extremes of Marxism, with all its totalitarian, atheistic and oppressive evils on the other side, Muslim movements have tried to work out Islamic economic and political systems between the two extremes, relying on relevant Islamic teachings such as *shura* and earning money (*kasb*) and spending it on private and public needs (*infaq*). However, *shura* has still been dealt with vaguely in these approaches, and the modern Islamic state has not been given a clear democratic character.

In the past, Islamic economy has been more inclined to be controlled and directed, and the importance of free enterprise has not been strongly emphasized. The historical practices of the early Caliphate, as well as any later practice chosen selectively or arbitrarily, have been used in the formulation of the desired ideology. Even the term "ideology" has been transliterated in Arabic to describe the Islamic formula, although the root of the word, 'idea', deals with a product of the human

mind, which undermines the essential merit of a system based on the permanent general guidance of God, the Lawgiver. Sometimes the word “theory” has been used, even by al-Mawdudi himself, although it also is related to human thinking. This unconscious adoption of certain terms may reveal the impact of Western political culture on contemporary Islamists themselves.

In addition to making use of Western political thought in the formulation of an Islamic “ideology,” Islamic activists have made use of Western organizational experience in the construction and function of Islamic parties and associations, in such aspects as their internal mechanism and public activities. Constituent assemblies and executive boards have been organized, and the relations between these bodies, and between the center and the branches have been codified in the regulations of the party or the association according to the Western model.

Further proof of the adoption of western models can be seen in the fact that many organizations use publications, including journals, brochures and booklets, to address the public about the movements’ principles, views and activities. Some Islamic organizations, functioning openly or underground, have organized their members into small units (cells) following the communist organizational pattern. Demonstrations and other means of public pressure which are common in Western democracies are sometimes implemented by Islamic organizations, and some of these organization have been known to practice violent actions along the Marxist model.

Mistrust and fear of theocratic authority has built up in the Western mentality over the centuries since the Renaissance and the Enlightenment. Although a few Western scholars of Islamic Studies such as Thomas Arnold (who pointed out in his *The*

*Caliphate* that the Caliphate was different from the Church and that Muslim jurists (*ulama* or *fuqaha*) were different from the Christian – especially the Catholic clergy) exist, their works have not been widely read or appreciated.

The fact that the Islamic legal heritage developed through human intellectual efforts, including the relevant contribution of non-Muslims, has not been sufficiently obvious even among many Muslims who have found it easy to challenge the well-developed Western systems by Islamic assumptions which claim political and economic projection. Dealing with the traditions of the Prophet himself and with juristic history alone, Schacht's approach in his *Origins of Mohammedan Jurisprudence* and in other works have provoked Muslims and caused them to resent and resist, rather than to be convinced to take a historical approach to the body of laws built up over the centuries and to understand it in the light of socio-cultural developments, since these laws were mostly derived through the practice of *ijtihad*.

The late Muslim scholar, Fazl ur Rahman criticized Schacht (Schacht, Joseph, *the Origins of Mohammedan Jurisprudence*, Oxford) and tried to achieve the same goal on different grounds, but his approach in *The Historical Methodology* did not seem more acceptable for many Muslims (Fazl ur Rahman, *The Historical Methodology in the Study of Islam*).

Some Marxists have been recently trying to review and reformulate their theses about religion and its historical and contemporary role, dealing specifically with Christianity and Islam, so that they may not lose the religious masses in Christian or Muslim societies. This development has not yet been successfully mainstreamed in Marxist thought, however, and the political collapse of communist states has paralyzed

contemporary Marxist thinking. Nevertheless, such a change in the basic tenet of Marxism is significant, as it highlights the need for reviewing socio-cultural theses and assumptions, especially those given in a generalized form, however deeply rooted and widely accepted they may seem.

It can be seen from the above mentioned examples that it is not just the West which suffers from ungrounded fears about Muslims, Muslims too, have suffered from their paranoiac complex, even after decades of independence and development. Their convulsive reaction might have been understandable during the colonial era for the protection of their cultural identity, but it now represents a paralyzing obstacle for their cultural and material development.

Free cultural exchange which is based on conviction is distinct from the imposition of any culture or the abolition of another by force. Indeed, intercultural relations have never stopped since the dawn of history, especially during the period of the flourishing Islamic civilization itself, which assimilated Greek, Persian, Indian and other heritages into its own, producing a centrally Muslim civilization with its own distinctive character. The Prophet of Islam taught his followers that any true believer should search for wisdom, and wherever he finds it, he/she should hold it (a well-accepted tradition reported by al-Tirmidhi).

Muslims have nothing to offer contemporary civilization if they keep themselves isolated from it. Due to amazing technological advances in the field of communications, the present civilization is actually global and may not be properly called "Western" except for its historical origin. Today, Japan, India, China, South Korea, and Taiwan are as much a part of the present civilization as Britain, France, Germany, Russia, other

developed European countries and the United States. Democracy in its concepts and institutions has no better alternative, in spite of the existing drawbacks which have been noticed and made known by westerners themselves who have enjoyed the blessings of democracy in criticizing its mechanism and practicalities. The teachings of the Quran and *sunna* allow ample room for human intellectual activities through *ijtihad*, which may find in democracy and its institutions a useful organizational experience. If Muslim and Western thinkers can clarify that democracy does not necessarily and inevitably imply secularism, Islamic political culture may flourish again in the contemporary world, and the cultural and social gap between the West and the Muslim world may be narrowed, although it will not be fully bridged. Deadly conflict can be replaced by healthy competition or vivid challenge.

There are Christian democrats and Christian socialists among the political parties in Western Europe. Among Islamists, even al-Mawdudi has described the Islamic political system as “theo-democratic” and later in his life, after a period of reluctance, he accepted elections as the best available means for the expression of the people’s wishes. For the sake of accuracy and good faith, it should be emphasized by thinkers and politicians that secularism, which has been advocated by the West in modern times, after long, fierce religious wars in Europe, does not mean, in its correct definition, a hostility to religion itself or atheism.

A healthy development in Islamic political thought would observe the divine teachings and allow Muslims to receive fresh ideas and experiences from the West (or elsewhere), while holding on to what has proven to be beneficial in the Muslim heritage without complexes or sensitivities. Initiating a cultural

change to cope with changing circumstances is not always easy, especially when the culture has a religious base, but it is essential.

Muslim jurists in classical times showed intelligence and wisdom in perceiving the changes of their times and responding to them. The Maliki school had a long experience in dealing with emergent problems (*nawazil*) in different times and places. The Hanafi school dealt with dominant and unavoidable issues in public practices, which were not recommended by Islam (*umum al-balwa*). In the political field, Ibn Taymiyya (d. 1328), realizing that the time of one ideal ruler such as the early caliphs had passed and might not shortly return, suggested in his book, *al-Siyasa al-Sharia*, that an Islamic state could have a ruling team in which required merits are distributed among its member. Now we realize clearly that a modern state (as all modern bodies) should be run by efficient institutions, not merely by capable leaders (Ibn Taymiyya, Taqiyy ul Din Ahmad, *al-Siyasa al-Sharia*).

Having more than one Islamic state with more than one ruler (*imam*) was accepted by several of the Muslim theologians who dealt with the imamate in lands originally part of the Caliphate (e.g. al-Baghdadi, author of *Usul al-Din* (d. 1028) and Abdel Malek al-Juwayni, author of *Ghiyath al-Umam* (d.1085). These lands, partitioned after the Caliphate ended, re-emerged, under these theological influences as Islamic states and even in some cases as new Islamic caliphates.

Imam al-Juwayni, suggested that if it became impossible at any time to know about the Islamic law of transactions, one basic principle at least should be observed: that any contract is to be by the free consent of every party involved. If contemporary Muslim jurists carried out the heavy intellectual responsi-



bility of making the distinction between what is a permanent divine teaching and what is a human practice of *ijtihad*, and if they followed their prominent predecessors in pointing out the priorities and offering their legal contributions according to the present socio-cultural circumstances, Islamic political thinking would suffer no more from stagnancy or fossilization.

The late Shaykh Abd el-Wahab Khallaf, a distinguished contemporary jurist who lectured for many years at the School of Law in Cairo University and can be considered a pioneer of modern Islamic legal thinking, clearly pointed out that the practice of political authority according to Islamic principles (*al-Siyasa al-Sharia*) can make use of any experience which is not against the principles of Islamic law in general and which fulfills the public needs and interests, even if no evidence can be provided from the Quran and *sunna* to support this experience specifically (Khaled, Abd ul Wahab, *al Siyasa al Sharia*). The precedent of Caliph Umar in establishing several institutions that were influenced by non-Muslim administration, land-taxation and military organization supports this practice. If such concepts could become clear to contemporary Muslims, channels between Islamic culture and the contemporary world would be strong, and mutual approaches on both sides would enrich human knowledge and support universal cooperation. Meanwhile, non-Muslim scholars and all advocates of the modern secular state are invited to investigate thoroughly what the Islamic concept of a state really means, instead of being trapped or misled by prejudice. A constructive discussion by all parties would lead to a clear Muslim vision of the required Islamic state in its nature, structure and function.

*Give this glad tiding of happiness to those of My worshippers who listen (closely) to all that is said and follow the best of it, (for) it is they whom God has graced with His guidance and it is they who are truly endowed with insight and constantly use their intellect.*

(39:17-18)

# SHURA AND DEMOCRACY

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**A**ND THOSE WHO RESPOND (TO THE CALL OF) THEIR Lord, and keep up their prayer, and whose rule (in all matters of common concern) is consultation among themselves, and who spend (on common needs) out of what We provide for them.

(42:380)

No Muslim would question the obligation of *shura* in Islamic society. The argument in several Muslim countries is, rather, about the relation between the Islamic principle of *shura* and democracy. Since democracy as practiced in the West is secular, some Islamists distance themselves from democracy to such an extent that they have begun to raise a slogan: “*Shura*, not Democracy!” When *shura* and democracy are seen as contradictory to each other, a political confrontation between the Islamists who believe in such a contradiction and the democrats who believe that there is no contradiction seems inevitable.

The confusion has come from the apparent difference in nature between an Islamic state which enforces *sharia* as divine law and a democratic state which represents the people and legislates what they want. However, recognition of *sharia* does not necessarily eliminate the role of human opinion, nor does the establishment of a democracy entail the complete elimination of rigidity or restriction.

First of all, in the judicial system of Islam, when no text of direct and specific relevance can be found in the Quran or the *sunna* to address a particular judicial question at hand, a procedure called *ijtihad* is authorized. In order for the Islamic state to respond to its own emerging needs, *ijtihad* allows for both the rendering of an understanding of the divine text according to established linguistic and juristic rules, and the inferring of a judicial conclusion from general principles of *sharia*, analogy, or other recognized intellectual means. Ever since the early days of Islam, the Prophet himself authorized governors, military leaders and judges to practice *ijtihad*.

Al-Qurtubi, the prominent commentator on the Quran, stated in his *tafsir* (commentary) on verse 3:159 of the Quran that the Prophet's practice of *shura* with his companions was to consult them in matters of common interest (*masalih*) but not in laws which were revealed. However, after the death of the Prophet, the companions had to practice *shura* even in the field of law. Al-Shihristani states in "*Al-Milal waal-Nihal*" his well known book on the faiths and cults:

“We certainly know that events cannot be counted or limited; also we know definitely that the revealed texts did not cover in detail or with direct relevance all events from the time of revelation onwards. In every place texts have been limited, while the events are not limited, and thus (the

events) should not be controlled by what is limited. The practice of *ijtihad* should be definitely able to face the continuously emerging events.” (Vol I, Chapter on Muslim’s differences about legal rules *al-Furu*).

Sometimes it is forgotten or overlooked that *ijtihad* is a technical judicial function of a certain number of jurists and judges, which is far from legislation that is mainly divine. In fact, *ijtihad* was also practiced by Muslim rulers who could enforce it through governing. *Ijtihad* can be legislative, and by such *ijtihad* the institution of the Caliphate itself was established and the laws of land taxation (*kharaj*) were decided. As long as there is room for the practice of *ijtihad* in *sharia*, there is room for legislation. Inferences made from the Quran and *sunna* to cope with continuously emerging needs should be decided collectively, and one view has to prevail over others. This a mere legislative function, whatever the name given to it may be.

The term “legislation” may be accepted and justified by some, while others who prefer to keep the word for the revealed laws only may have some reservations about it. However, the legitimacy of the function itself in an Islamic state is beyond any argument. Ibn Taymiyya and Ibn al-Qayyim convincingly explained how the practice of authority according to *ijtihad* (*al-siyasa*) cannot be separated from *sharia* and is actually a part of it (Ibn Taymiyya, *al-Siyasal-Sharia*; Ibn al-Qayyim, *Ilam al Muwaqqin*, vol. IV, also: *al Turuq al Hukmiyya*).

In addition to the legislative function, the *shura* body has to carry out other responsibilities of a modern parliament, such as determining the budget and checking governmental and administrative functions directly or through other authorized persons

and bodies like ombudsmen, special bodies concerned with public accountancy or with inquiries about administrative practices, individually authorized investigators and prosecutors, and/or special courts for ministerial offenses and abuses of power. Al-Qurtubi quotes a juristic statement (see his commentary on verse 3:159) which indicates that a ruler's practice of *shura* is a duty that can be carried out with scholars (*ulama*) in the fields of religion and *sharia*, with army leaders in the area of military affairs, with leading persons in general in cases of public interest, and with top administrators when the common good and the development of the country are discussed. *Shura* should cover the political, administrative and social responsibilities of the government. In a modern state, *shura* may be practiced either directly by the main *shura* body or indirectly through specific bodies which focus on certain fields and are provided with experts under the supervision of the main *shura* body.

Democracy, as it has been practiced in the West, does not exclude in principle or in practice certain norms which should not be challenged. For example, many supporters of democracy believe that democracy should not allow its own abolition. Following this principle they hold that a communist party by its very nature, ends and means would inevitably conflict with the *raison d'être*, structure and function of a democratic state, and therefore it should not be legitimized. Moreover, a democratic constitution may indicate permanent fundamentals which it considers unchangeable, on the grounds that they secure social stability and moral ideals. Many philosophical and legal arguments have been made to assume an abstract source of super and permanent legitimacy which is superior to the momentary desires of the ruler and the ruled. This source may

be “natural law,” the “social contract,” the “individualist“ or the “socialist” doctrine, “social solidarity” or any other concept which sets restrictions on the state’s authority. It is admitted now by many political thinkers that ideology (or ideal directives of justice, as some prefer to call it) should be considered superior to any authority including the constitutional and legislative powers themselves.

No one argues that democracy in its conceptual and practical dimensions does not mean authority of the people, by the people, for the people. However, this does not necessarily mean that a democratic government must be atheistic or even secular. If the majority of the people believe that the establishment of an Islamic state and the enforcement of *sharia* represent a religious obligation, their practice of democracy will be directed to the extensive fields of *ijtihad* without the violation of any divine text. As previously stated by al-Shihristani and Ibn Khaldun (al-Shihristani, *ibid*; Ibn Khaldun, Abd ul Rahman, *al-Muqaddima*, Chapter on *Ilm al Fiqh*), the number of revealed laws is limited, and thus the laws which can be formulated by the practice of *ijtihad* to cope with countless emerging needs should be unlimited. Therefore, neither human thinking nor legislative function (under any name) can be stopped because of this limited number of revealed laws. At the same time divine laws cannot be ignored just because they are limited in number. The human mind and divine guidance are both God’s blessings, and they ought to interact with each other, not contradict one another. However, if the majority of any Muslim people expresses through legal and free voting, that they do not want to be bound anymore *sharia*, how could *sharia* be imposed on them by force, when Islam emphatically states that there is no coercion in matters of faith? (The Quran 2:256, also 6:66,107, 10:108, 11:12, 42:256, 50:43, 88:21-22)

The relationship between the permanent and the changeable has been observed in Islam since the Prophet allowed rulers, military leaders and judges to practice *ijtihad* for a specific case as long as they could not find a revealed text with direct relevance to that case. The practice of *ijtihad* in running the governmental, administrative, and judiciary affairs was called *siyasa* and was considered as a necessary complement to the revealed *sharia*. *Siyasa*, or the legislative function as it may be called now, has to be guided by the general goals of *sharia* known as *maqasid* – on which the distinguished jurist al-Shatibi elaborated (al-Shatibi, *al-Muwafaqat*, Vol. II). The *maqasid* can be derived from the teachings of the Quran and *sunna*.

The difficulty in thinking about the role of democracy in an Islamic state arises from the concrete fact that to date no serious practical approach in this field has ever been made. The separation between democracy as a modern approach towards the maintenance of public authority and human rights and religion in general in the West or wherever democracy was followed in other countries, has led some Islamists to think that an incorporation of the democratic mechanism in the Islamic state would be impossible.

This way of thinking has probably been nurtured by a belief that when basic ideological differences exist between two systems, the only solution is that one should prevail while the other should be completely excluded. However, while Islam emphasizes its own authentic merits, it has always incorporated in its structure human experiences which do not contradict any of its teachings and prove to be useful. As has been stressed before, the Quran teaches:



*Give this glad tidings to (those of) My worshippers who listen (closely) to all that is said and follow the best of it; it is they whom God has graced with His guidance and it is they who are (truly) endowed with and constantly use their intellect.*

(61:17-18)

The Prophet emphasized that a believer is the most deserving of wisdom wherever he finds it (a well-accepted tradition reported by al-Tirmidhi). Such a marvelous synthesis between divine revelation and human creativity was evident in the long golden age of Islamic civilization.

An issue that may be raised here is that in a democratic state all citizens – Muslims and non-Muslims – should be equal and share authority and many may think that this would not be the case in an Islamic state. However, Islamic principles emphasize the equality of human beings at both the moral and legal levels. (See for example the Quran 17:70) What is required from a non-Muslim citizen in an Islamic state is to accept the authority of the state and the supremacy of its law, whatever his/her belief about the divine source of Islam may be. The goals and objectives of *sharia* and its emphasis on human rights for all human beings would make its principles acceptable for all people if these principles are preserved, interpreted and implemented properly.

In an Islamic state, non-Muslim citizens should enjoy equality with Muslims in rights and duties. In the twelfth century the prominent jurist al-Mawardi stated that a *dhimmi* a non-Muslim subject of the Islamic state – could be appointed to a position as high as that of a minister with executive powers (*wazir tanfidh*), a position similar to that of a secretary in a

special field like public health, education or labor in the United States. Moreover, the codification of Islamic law, in which many rules based on *ijtihad* would be incorporated, would make it both possible and acceptable to have a non-Muslim serving as a judge, especially when he/she sits with other members to give collective rulings.

There are precedents for the above examples in history. Several Coptic professors of civil law in Egypt learned *sharia* well and referred to its rules with admiration. Shafiq Shihata, a Christian, wrote his doctorate thesis on the general theory of obligations in *sharia*. The prominent Egyptian lawyer and politician Makram Ubayd knew the Quran by heart and used its verses capably in court. The Syrian Christian lawyer Faris al-Khuri was widely knowledgeable in *sharia*.

A non-Muslim can also be a soldier or an officer in the army to defend his/her country even if he/she does not believe in Islam. There is historical evidence as reported by al-Baladhuri and al-Tabari about certain events in the days of Caliphs Abu Bakr and Umar. Al-Baladhuri in his *Futuh al Buldan* reports on the agreements with al-Jarajima, a Christian group in Lebanon, and al-Samira or Samavitans, a Jewish sect in Palestine, and the Muslim's withdrawal from Hims; also al-Tabari in his *Tarikh* reports that in the conquest of Iran non-Muslims carried out military duties and were consequently exempted from the payment of poll tax. It has been legitimately concluded that a non-Muslim citizen of the Islamic state (a *dhimmi* in the classical juristic terminology) has to pay poll tax (*jizya*) only when he is exempted from military service. This is supported by a judgment that a *dhimmi* who cannot fight – a child, a woman, an elderly or disabled person – should not pay a poll tax according to several early traditions and to many

later jurists. In fact, Caliph Umar ibn al-Khattab allowed the Christian tribe of Taghleb in northern Mesopotamia to pay some other dues for social welfare since they felt offended to pay *jizya*. (See the reports about Muslim treatment of the Christian tribe Taghleb in: Abu Yusuf, *al-Kharaj*; al-Baladhuri, *Futuh al Buldan*.)

Are contemporary Muslims as enthusiastic as Caliph Umar to gain the hearts of non-Muslim citizens, and to prevent any disloyalty to the Islamic state and any discomfort about Islam? Would they seriously do their best to nurture among the non-Muslim citizens a sincere understanding of the merits of the Islamic state that are best proved by securing justice and human rights in all dimensions, and thus a genuine loyalty in their hearts and minds which would naturally develop? Can they be inspired by the Caliph's precedents to distinguish between the permanent fundamentals of the divine law and the changeable ways of interpretation and implementation which have to be affected inevitably by changing human circumstances?

Some may argue that in a democracy, decisions reached by the people or their representatives should be carried out whether these decisions are right or wrong, whether they accord with the *sharia* or contradict it, and whether or not they are supported by the government and its leader (whom some people prefer to call the *imam*, adhering to the classical title). If the majority of people are Muslims, their representatives must know their obligation towards the *sharia*. When the majority of the people freely elect to establish an Islamic state, then the constitution must declare the absolute supremacy of permanent principles of *sharia* as indicated in the Quran and *sunna*. Democracy practiced in an Islamic state is directed by

Islamic teachings and laws. However, as it has been repeatedly stressed, there is a spacious room for legislative power because of the *sharia*'s allowance of *ijtihad*. If any difference arises between the government (led by the head of state) and the *shura* body which practices legislation, one cannot suppose that the government or its leader is always right. The *shura* body will naturally include various experts. However, the *shura* assembly or its specialist committee can always arrange special sessions to hear governmental representatives, other experts or even concerned persons from the public, as world parliaments practice when such sessions are needed.

In addition to these allowances, the head of the state or the executive branch can have the right to veto a decision of the *shura* body with or without conditions, but when a decision is approved for the second time with a certain majority, it should be enforced. Technical differences can be solved in joint meetings of the experts from the executive and legislative branches.

In cases of legal differences about the *sharia*, a supreme court can make a ruling regarding whether a certain law complies with or violates any permanent divine guidance. When the representatives of the people are found wrong in their assessment of the public interest, they have to bear the consequences before the people in ensuing elections. It goes without saying that they are responsible for any felony or abuse of power.

In this way, all the state branches, and all the people behind them, can be involved in the political process. Instead of being trapped into a passive obedience to a ruler, an attitude which destroys the potential for developing alternatives and which nurtures autocracy or dictatorship on one side and indifference or bitterness on the other, these people would be involved in developing their country. The prominent jurist Ibn al Arabi as

quoted by al-Qurtubi intelligently pointed out that *shura* maintains public unity and warms relations among the people, allows chances for developing and judging intellectual potential, and ultimately leads to fruitful decisions. *Shura* benefits the best of the present capabilities, while it develops potential for future ones.

*Shura* was practiced by the Prophet himself in the battles (*ghazawat*) of Badr, Uhud, and al-Khandaq, and during the conflict of al-Hudaybiya, as well as on many other occasions as recorded by many historians. Ibn Kathir indicates (Ibn Kathir, *Tafsir*, Vol. I, Commentary on the verse 3:159) that the Quran directed the Prophet to practice *shura* in areas not dealt with directly or in detail by revelation, an example that stresses how *shura* is strictly required for a Muslim society and state.

Decisions reached by *shura* were carried out during the life of the Prophet and in the appointments of the earliest four caliphs (*al-Rashidin*) and the caliphs themselves employed *shura* in making their own decisions. When Umar sought to levy *kharaj* on conquered land and to keep it from distribution as booty (*ghanima*), he did not impose his opinion, but rather he continued to present his argument to different people and chose arbitrators from the *muhajirin* of Makka and the *ansar* of Medina to discuss the matter, until he gained support for his opinion and it prevailed. (Abu Yusuf, *al-Kharaj*)

According to the texts and contexts of the Quran, *sunna* and historical precedents, *shura* means an actual participation in the policy and/or decision-making process, not a superficial or ceremonial procedure. The juristic term for those eligible to participate in *shura*, “eligible for binding and dissolution,” (*ahl al-hal wal-aqd*)” is significant. It underlines the decisiveness and effectiveness of *shura*. Involving people in policy and/or

decision-making is obligatory for the head of the state and the government whether it is binding or dissolving rules or laws. Al-Qurtubi agrees with Ibn Attiyya (another commentator on the Quran) in his statement “*Shura* is one of the fundamentals and obligations of *sharia*, and a ruler who does not practice it should be deposed; no difference is to be found among jurists about that” (al-Qurtubi, *Tafsir*, Commentary on the verse 3:159).

Some opponents of democracy among the Islamists may say that a majority may not always be right according to the Quran. The possibility of making mistakes is inevitable for both a majority and a minority, but would be less with a majority. The Quran seeks more to emphasize human limitations than to blame majority decisions. The possibility of human error simply draws attention to the need to rely on divine guidance, which is the basis of the Islamic state, and to reduce human error to the minimum through the participation of the people and their representatives and through a process of decision-making reached by the majority. The Quranic condemnation of the majority attitude in certain cases should not be considered separately from the Quranic condemnation of the unreasonable imitation of others, whether such an imitation comes consciously or unconsciously:

*But they say: ‘Behold, we found our forefathers agreed on what to believe, and verily, it is in their footsteps that we find our guidance.’ And thus it is: whenever We sent before your time a warner to any community, those of its people who had lost themselves entirely in the pursuit of pleasures would always say: ‘Behold, we found our forefathers agreed on what to believe, and, verily, it is but in*

*their footsteps that we follow. (Whereupon a Prophet would) Say: 'Why? Even though I bring you a guidance better than that which your forefathers believed in....?' (43:22-24)*

*And they will say: 'O our Lord, Behold, we paid heed unto our leaders and our great men, and it is they who led us astray from the right path.'" (33:67)*

In an Islamic society and state, the majority would be guided by the divine teachings in conducting constructive discussions and would be arguing in the best way conceptually and ethically.

Another argument may claim that democracy would lead to increasing differences and splits which would undermine Islamic unity. On the contrary, the practice of autocrats and dictators who do not allow open discussion on differences always leads to the aggravation of these differences, and the development of rigidity, stubbornness, bitterness and extremism. Political parties, whether Islamic or not, can be accepted in an Islamic state, as long as they abide by the state's directives and laws and respect the authorities chosen by the majority of the whole people. (These authorities should not advocate imposing or work to impose their views by violence.) Islamic ethics and procedures should be applied to any political difference whether it emerges between individuals or between parties:

*... and if you are at variance over any matter, refer it unto God and the Conveyer of His Message if you (truly) believe in God and the Last Day: this is the best for you (and your relationship) and the best for good understanding (of all angles of the problem). (4:59)*

Ibn al-Arabi was deeply aware of human nature when he stated that *shura*, despite the fact that it extends possibilities of differences, actually maintains the unity of the people and warms their relations (al-Qurtubi in his commentary on the verse 3:159). People can talk to each other about their differences, and they can settle their differences legitimately and efficiently through a majority decision after a reasonable discussion.

The observance of *shura* in a Muslim state has wider and deeper dimensions than an abstract philosophy or imposed order. *Shura* is a religious duty, and in an autocratic or authoritarian regime the Muslim rulers and the ruled may find themselves close to worshipping another god, for it is only God who rules without need for advice or control:

*He cannot be called to account for whatever He does, whereas they will be called to account.... they speak not until He has spoken unto them, and whenever they act they act at His behest.*

(21:23, 27)

Thus, observing *shura* maintains the true faith in the one God (*tawheed*). Islam establishes and nurtures *shura* in the daily life of the individual and society. Even a decision about weaning an infant should be taken by both parents and based on *shura*: “*And if both parents decide by mutual consent and counsel on weaning there is no blame on them,*” as both have mutual responsibilities in the family and towards the children:

*No human being shall be burdened with more than he is well able to bear, neither shall a mother be made to suffer because of the child nor because of his child he who has begotten it.*

(2:233)



Finally, the Prophet emphasized that it is a religious obligation to introduce one's different view or opinion to any concerned party among the rulers and the ruled as well (an authentic tradition by Muslim, Ibn Hanbal, Abu Dawood, al-Tirmidhi and al-Nasai). Removing the illusionary contradiction between *shura* and democracy, as well as preventing the groundless confrontation between the supporters of each, may be a step in the right direction for the establishment of an Islamic state, for the reasonable presentation of Islam in any case, and probably for the establishment of a genuine state in some cases.

# VOTING

## HOW TO DETERMINE THE PUBLIC WILL

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**O** YOU WHO HAVE ATTAINED TO FAITH! PAY HEED unto God, and pay heed unto the Messenger and unto those from among you who have been entrusted with authority by you; and if you are at variance (or dispute, conflict) over any matter, refer it unto God and the Conveyer of His Message .... (4:59).

Islamists sometimes suggest that the historical precedent of *baiy'a*, which was used in choosing the early four caliphs, should be followed in the choosing of the head of a modern Islamic state, to whom is given the classical title of *imam* to emphasize his leadership and the pledge of obedience by the Muslim people. In fact, the opinions of certain individuals, however influential or representative they may be, or the opinions of any limited selected group cannot replace the need for a free public election or referendum. This fact may not be clear to Westerners or to some Muslims as well, since it is often thought that a limited number of Muslims chose each of the

first four caliphs (*al-Rashidin*). Several jurists have ruled that an *imam* can be appointed by a limited group of individuals who are eligible for binding and dissolving (*ahl al-aqd wa al-hal*). However, defining those who are eligible for binding and dissolving represents a practical problem in a contemporary society. It is therefore essential to ensure that *baiy'a* not be used as a tactic to avoid the expression of the public will through an election.

The shortcomings of a voting system are often emphasized to support *baiy'a* as a decision of a selected group or even of one person. Historical precedents and juristic statements should be analyzed to determine the proper requirements for the appointment of a head of an Islamic state. Any Muslim who is enthusiastic about the creation of an Islamic state should have no ambiguity or vagueness about such an essential issue. Much confusion exists concerning how modern elections can be considered legitimate in the light of what has been stated in the Islamic historical and juristic heritage about *baiy'a*.

It is well known, for example, that *baiy'a* was used, or abused, in the early days of the military regime in Egypt in 1952 to legitimize the power of the president of the revolutionary council without facing the risks of public elections after the overthrow of the monarchy and the banning of political parties. The minister of *awqaf* who graduated from the College of Arabic Language at Al-Azhar University attended public meetings in several provinces where he read a statement of *baiy'a* for General Muhammad Najib, the president of the revolution's consulate at that time, and the audience repeated the statement after him. However, even such a superficial and ceremonial procedure was not performed when General Najib was deposed and Gamal Abdel Nasser replaced him.

When the caliphs held their positions as a result of a free public selection, the agreement drawn between the ruler and the ruled was given the term of *baiy'a*. That contract was a concrete historical fact, not a mere hypothesis like the social contract of Locke and Rousseau. The Arabic root of *baiy'a* means “selling, or making a transaction.” The term has been used in the Quran for the promise given to the Prophet from early Muslims to obey God and His Messenger (e.g. 48:10, 28, 60:12).

The *baiy'a* statement was pronounced while the believer put his hand on the hand of the Prophet and gave a pledge of obedience. According to Ibn Khaldun, this putting of their hands together was similar to the actions of a buyer and a seller when a transaction was completed (Ibn Khaldun, *al-Muqaddima*, ch. on *baiy'a*). Just as the seller has an obligation to provide satisfactory goods to the buyers for the price paid by them, the ruler is obligated to secure justice in all its dimensions when enforcing Islamic law, and to ensure public satisfaction in return for the pledge of the people to obey and support him. The Hanbali jurist Abu Ya'la made it clear that *baiy'a* is a mutual pledge of the ruler and the people as indicated above (Abu Yala, *al-Mutamad fi' Usul al Din*). In addition, such a contract of appointing the *imam* represents, as jurists have explained, a combination of the right of God *haqq Allah* and a human right. According to the jurists, the right of God can be what we now call a public right, while a human right is mainly private. The appointment of the leadership of an Islamic state is entrusted to the whole people, but the leader-elect is an individual who can accept the responsibility or reject it. Such a public position does not put the person above the law, which should be enforced on all the citizens equally.

Now comes the essential question: who would actually be responsible for choosing the leader of an Islamic state? Should all adults be eligible, or should they be represented by a smaller group? And in the case of representation, how would representatives be chosen? How can we set an appropriate size and determine adequate requirements for this body?

According to juristic heritage, those who qualified to choose the *imam* and make the contract of *baiy'a* with him were called, as mentioned above, “the eligible for binding and dissolving (*ahl al-aqd wa al-hal*) or the eligible for choosing the *imam* (*ahl al-ikhtiyar*).” The suggestion of such a body may call to mind the idea of the electoral college in the United States, but such a body was never delineated or listed practically by any Muslim administration in history, although the qualifications for eligibility were stated by jurists.

Such a formal procedure was not necessary in the days of the early Caliphate because the Muslim population was limited, and the prominent Companions were well known. Furthermore, in a tribal society like Arabia the influential clans and their leaders could be identified without difficulty. Thus, from the time of the Ummayyad dynasty onwards, the Islamic state (or the several Islamic states in later times) came under the authority of monarchic dynasties or military leaders, and because their rule was authoritarian even at times autocratic, administrative procedures for establishing the presence of *ahl al aqd wa al-hal* were never developed.

Jurists legitimized the existing status quo of rulership in Muslim countries so as to legalize the decisions of rulers, as well as administrators and judges who were appointed by those rulers. The jurists, who considered the contract of *baiy'a* effective with any number of *ahl al-aqd* assumed that such a num-

ber, however limited it may be, should represent the whole of those who were qualified for that responsibility and that their choice of a person for the position should be followed by the agreement of the masses, whose consent and support were essential to the practice of authority and the enforcement of law and order. The requirements suggested by the jurists for *ahl al-aqd* or *ahl al-ikhtiyar* and for the candidate for the leadership of the Islamic state seemed satisfactory to them for securing a good choice and preventing a misplacement of authority or abuse of power, but this proved to be theoretical in many cases. Nevertheless, it seemed difficult for Sunni jurists to admit that the teachings of Islam were not being observed among the ruling circles in the Muslim states, since doing so would have the logical and legal consequence of considering such authorities illegitimate. Yet, some jurists such as the Hanbali Abu Yala adhered to the ideal and stated that the majority, the *jumhur* of *ahl al-aqd*, should participate in the *baiy'a* of the *imam*. It should always be kept in mind that the Islamic political experience, whether historical or juristic, was merely a practice of *ijtihad* in given circumstances and like any human attempt might have its shortcomings.

One modern Egyptian jurist and historian, Muhammad al-Khudari, rightly argued that the glorious Islamic institution of the caliphate which was based on *shura* actually lacked a concrete assignment of those eligible to choose the caliph (i.e. the voters), and this gap led the Muslims to ceaseless conflicts and bloodshed. He believed that the precedent of Caliph Umar in nominating a certain *shura* body for choosing his successor and in defining the voting procedure for that body was unique in the history of Islam, since it was neither repeated and developed in the later political practices nor seriously considered in

the juristic heritage. However, each member of this *shura* body chosen by Umar was himself a candidate for the caliphate, and thus the group were the only voters for one among themselves.

It appears that most of the early Muslim people in Medina personally knew of one another; they especially knew about the prominent Companions of the Prophet. By the time the caliphate came to be extended to new lands, and Muslim societies with the potential for leadership became far flung, the authoritarian and autocratic rulers of the era were not concerned about an electoral body or an elected caliph.

The essence of *baiy'a* is free public consent. Therefore, those who make this contract on behalf of the people should be their trusted and followed representatives rather than their oppressors and intimidators. The best available way to reach this goal in a contemporary Muslim society is the public vote. Historical sources report that each of the early four caliphs, after receiving the *baiy'a* of the *ahl al-aqd* went to a public meeting in the mosque to receive the *baiy'a* of the masses (*al-jumhur, al-'amma*).

In Muslim countries, expanding urbanization and industrialization have led to a continuous movement from rural to urban areas and from one urban area to another. There is thus no place in such a continuously changing society for such static institutions as tribes or clans or for hereditary privileges. Modern societies may have other entities such as political parties, trade unions or local voluntary organizations for social services but the membership and the leadership of these are always changing. Abu Yala rejected the idea that the members of the body of *ahl al - aqd* or *ahl al-ikhtiyar* could be appointed by an *imam* to choose that *imam's* successor (Abu Yala, *ibid; al-ahkam al-Sultaniyya*). Instead, this body, being an elec-

toral college, should merely be the representatives of the people: the *ahl al-'aqd* would nominate a candidate for the *imamate* who meets all the requirements, but he cannot be an *imam* unless he gets the approval of the people. A considerable majority of these representatives should be present for the nomination of the candidate.

The modern Egyptian reformer Muhammad Abduh indicated that *ahl al-aqd* may consist of the tops of the ruling hierarchy (*al-umara*); the rulers (*al-hukkam*) in general, a term which may include others of lower ranks in the center, regional rulers and administrative chiefs, as well as the judiciary; the scholars (*ulama*); the military leaders; and “all other chiefs and leaders whom the people would ask for help and support in what they need and in anything of public interest” (Muhammad Abduh, Rashid Rida, *Tafsir al-Manar*, commentary on the verse 3:159). Later, Hasan al-Banna, the founder of the Muslim Brotherhood in Egypt, pointed out that the qualities of *ahl al-aqd* apply to three groups: jurists capable of *ijtihād*, experienced people in public affairs, and those “who enjoy a kind of leadership among the people as heads of families and tribes or heads of groups” (Hasan al Banna, *Mushkilatuna fi daw al Nizam al Islami*). Expressions such as “experienced people in public affairs” and “heads of groups” still require a clear delineation.

In fact, the best way to select representatives who would nominate a candidate to lead an Islamic state is a public election. A suitable number of seats may be allocated to the representatives of trade unions or similar professional organizations who should also be elected, while other seats should be filled by public voting. This electoral body may be the legislature itself or a separate body. This method of selection does not rule



out, from an Islamic point of view, the possibility of direct nomination of a candidate by political parties (or organizations) themselves or by a certain number of eligible voters, nor does it rule out any other nominating procedure preliminary to action by the *ahl al-aqd*. Social and political experts can decide what may be the best for a certain people in their circumstances. The supreme court may be involved in the nomination process to assure that a candidate for the legislature or the presidency or any public position filled by election fulfills the legal requirements for that position, and in addition it may adjudicate any serious complaint about the elections for high political positions. It may also make inquiries and decisions about cases of a later loss of any of the legal requirements for these positions and report this to the legislature. A particular quorum or majority may be required for a candidate's nomination by the concerned body, if the nomination is not allowed to be made by an individual decision.

In short, no modern electoral experience which may be beneficial for the nomination or election of the head of a modern Islamic state should be ignored. The *baiy'a* of the early caliphs was practiced according to *ijtihad*, and each one of the first four caliphs was chosen in a way different from the other. The essential content of the whole practice is the free expression of public will, which should not be restricted to only previous particular practices of *ijtihad* which reflected the existing circumstances in a certain time and place.

Considering that *baiy'a* is a legal contract between the ruler and the people, in which public consent and support is crucial, it should be practiced by the masses (*al-jumhur al-'amma*) whose will is indispensable for the legitimate occupation of the position of Islamic head of state, and it cannot be merely

demonstrative or ceremonial. The traditional form of *baiy'a* might have been a historical convenience in given circumstances, but it should not remain as the permanent and single form. Contemporary Muslims should adhere to the permanent and essential content, not to the changeable form:

*... one who breaks his/her pledge, breaks it only to one's own hurt, whereas one who remains true to what he/she has pledged unto God, on him/her will He bestow a reward supreme.*

(48:10)

# FREEDOM OF EXPRESSION

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**T**HE MAIN GOAL OF GOD'S MESSAGE TO humankind is the attainment of justice in all of its fairness. This justice, the foundation of Islam, cannot be achieved unless human rights are secured for every individual and group in a Muslim state. The members of such a state must be free to choose just rulers, to observe these rules as they practice their authority, and to stand firm against any injustice from them. Primary among human rights are the rights to believe, to express one's beliefs, and to assemble to defend one's group's beliefs.

The rights of expression and information cannot be separated from freedom of thinking and believing. Intellectual and linguistic capabilities characterize human beings, and thus the right to form and express opinions represents an essential manifestation of human merits and of God's gifts. The right to inform and to be informed should therefore be secured by all who are respectful of humanity or grateful to God. Indeed, if

one is allowed to think and believe but not to communicate with others or exchange views, one's freedom of thought and belief is actually restricted. The human being is a social creature, and therefore genuine intellectual activity in which a thinker considers more than one perspective on an idea and learns the strengths and weaknesses of it when debated, cannot be practiced individually or in isolation. Moreover, the basic condition for freedom of expression and information is that it extends to different viewpoints; otherwise expression is merely an imposition of ideas and exercise in brain-washing.

Many national and international documents on human rights acknowledge the fact that freedom of thought and freedom of expression are intertwined. The Universal Declaration of Human Rights which was issued by the General Assembly of the United Nations in December 1948 has dealt with both in two successive articles (18, 19).

Freedom of thought and belief is repeatedly emphasized in the Quran:

*There shall be no coercion in matters of faith.*

(2:256)

*And had your Lord so willed, all those who live on earth would have attained to faith - all of them, do you then think that you could compel people to believe.*

(10:99)

*Said (Noah): O my people - what do you think? If (it be true that) I am taking my stand on a clear evidence from my Lord ... to which you have remained blind, can we force it on you even though it is hateful to you.*

(11:28)

*And so (O Prophet) exhort them; your task is only to exhort; you cannot compel.*

(88:21-22)

As long as freedom of expression and information is maintained, different views can be expressed and must be respected:

*Call you (all humanity) unto your Lord's path with wisdom and goodly exhortation, and argue with them in the most kindly (and convincing) manner.*

(16:25)

The Quran repeatedly reports the arguments of atheists and polytheists and replies to them objectively in order to teach Muslims how freedom of expression and information should be maintained to make such a dialogue fruitful. Freedom of expression and information is a basic human right, and it is a duty of everyone according to Islam. Islam condemns spreading lies and false information as well as passiveness and reluctance when the truth should be spoken: “*And do not overlay the truth with falsehood, and do not knowingly suppress the truth*” (2:42).

A believer who is conscious of God should always maintain and defend truth and justice:

*O you who have attained to faith! Be ever steadfast in upholding equity, bearing witness to the truth, for the sake of God, even though it be against your own selves or your parents and kinsfolk....*

(4:135)

*... Be ever steadfast in your devotion to God, bearing witness to the truth in all equity, and never let hatred lead you into the sins of deviation from justice ....*

(5:8)

Providing false information about an event which one has witnessed (22:30, 25:4, 72, 58:2), as well as refraining from

providing the facts which one knows (2:146, 283, 3:71, 167) are both considered grave sins which should be avoided and prevented by every possible means.

The teachings of the divine message should be revealed to the public and not concealed, even when the message criticizes or condemns an influential party or authority (2:159). It is significant that the Arabic word *kafir* and its origin *kafara* mean originally “to conceal, or to hide.” (See the word in a lengthy Arabic dictionary such as *Lisan al-Arab*; and see the Quranic verses 6:35, 37:14, and 31:32.)

The vice of hypocrisy (*nifaq*) is not less condemned in the Quran than *kufr*:

*They (the hypocrites) are the real enemies ..., how perverted are their minds.*

(63:4)

*Behold, together with those who deny the truth, God will gather in hell the hypocrites ....*

(4:140)

*Verily the hypocrites shall be in the lowest depth of hell ....*

(4:145)

Likewise, one who is reluctant to provide the facts is actually concealing the truth and such a person is described as “evil at heart” in the Quran (2:283) and as “a muted devil” in the tradition of the Prophet. Providing the known facts and cooperating constructively so that truth may prevail are fundamental parts of the Islamic obligation of enjoining the doing of what is right and forbidding the doing of what is wrong (3:110).

One who provides false information or is reluctant to provide the right information becomes a participant in the prevalence of falsehood and evil. Every believer is a witness and protector of the truth during his/her whole life:

“... so that you may bear witness to the truth before all humanity ...” (2:143 ) God Himself is the “Ultimate Truth” according to the Quran (22:6, 24:25), and it is incumbent upon every believer to support the truth in all forms so that it will always prevail.

Muslims are addressed as a community to work together in their efforts for progress. The right of assembly is thus essential to secure correctional efforts against any powerful supporter of deviation from truth and righteousness:

*And the believers, both men and women, are responsible for (and the supporters of) one another; they all enjoin the doing of what is right and forbid the doing of what is wrong.*

(9:71)

*And that there should arise among you a band of people who invite unto all that is good and enjoin the doing of what is right and forbid the doing of what is wrong.*

(3:104)

*But help one another in furthering virtue and God-consciousness, and not in furthering evil and enmity.*

(5:2)

*And enjoin upon one another the keeping to truth ... and enjoin upon one another patience (and firmness) in adversity.*

(103:3)

Freedom of expression and information, which constitutes both a right and a duty for every believer, as previously mentioned, should be established and maintained by all Muslims – men and women, rulers and ruled. The Quran orders those who have been entrusted with authority “*to deliver all that you have been entrusted with unto those who are entitled thereto, and whenever you rule between people rule with justice*” (4:58-59).

The rulers are responsible for securing the doing of what is good and preventing the doing of what is evil (22:41). Their responsibility is not limited only to allowing the people to express themselves as individuals or groups, but they are also obligated to develop a sound public opinion by providing correct information to the people. The authorities cannot maintain their credibility among the people if they expose only what supports their position while concealing what may arouse criticism of their rule. If individuals can be blamed for not revealing the truth, then rulers must receive greater blame for that same evil since they have been entrusted with authority by the people for the public benefit; moreover, they have the sources of information and the authority and capability to obtain information. How can Muslim rulers discharge their responsibility of forbidding what is wrong unless they themselves provide a model by courageously airing their faults?

*Do you bid other people to be pious , while you forget your own selves, and yet you recited the divine writ; will you not then use your reason?*

(2:44)

Rulers may not, by concealing or manipulating information the sources of which they may monopolize, use their authority



to conceal facts which may hurt them personally or damage their authority. Their responsibility is to maintain freedom of information, allow its flow, and tolerate any individual effort to obtain essential information from governmental sources within reasonable limits of state security, which themselves ought to be delineated by the people. Rulers have the obligation to display all the facts and release all the required evidence about an issue either at their own initiative or in response to a request, even if their interests suffer:

*...if they but refer – any matter pertaining to peace or war - unto the Conveyer of the (divine) Message and unto those from among them who have been entrusted with authority, such of those who are engaged in investigating the matter would indeed know it (directly and properly).*

(4:83)

Therefore, according to Islamic teachings, just as the Muslim people may not be passive subjects, the Muslim rulers do not enjoy absolute powers. To use political terminology, Islam establishes an institutional and constitutional authority, not a personalized one. This set of restrictions on Muslim rulers is similar to that which Rousseau has elaborated on: in any society past the primitive level, the ruler's authority and the citizens' rights and liberties may not conflict with each other. The citizens' rights are opposed by the ruler's authority only in a society which is deprived as a whole of participation in the practice of political power; in such a society only the rulers enjoy absolute authority.

The Islamic state is an institutional and constitutional one because the divine law, *sharia*, defines the rights and obliga-

tions of the ruled and the rulers. The Islamic rulership by the contract of the caliphate or the *imamate* is a legal and historical fact. The Quran stresses that absolute sovereignty and authority belong only to God and that anyone who is entrusted with authority from among the believers by them should be obeyed as long as such a person maintains divine justice and public consent. The Muslim people are not always expected to be obedient, as cases of variance and even clashes of views between rulers and ruled are possible. Such differences should not be settled by suppression, but through a constitutional political and judicial process, according to the Quran and *sunna* (3:159).

The principle that the rulers should not use their authority to conceal facts from public control or from judicial inquiry is reminiscent of the classical legal principle of habeas corpus, regarded as “the great writ of liberty” when it was formalized in the Habeas Corpus Act of 1679 in England. Under this law, any authority who detains any person for any reason is forced to bring the detained person to a judge to explain what has led to the detention, and to report procedures followed in effecting the detention. The judge, in addition to deciding what allegations are to be brought against the person being detained, must also ascertain that any harm which has befallen him/her – including death – has not been caused by the concerned authority. No abuse of power on the side of the authorities should be tolerated, and all relevant evidence should be introduced.

The responsibility of the authorities to provide relevant documents in general, with certain specified and conditional exceptions, has also been stated recently by certain legislations in the United States, Canada and a few other countries (see for example James Michael, *The Politics of Secrecy*). Such a guar-

antee of freedom of information is required in principle by Islam and should be formulated in detail and sanctioned. Facts must be displayed by anyone who holds them, and Islamic authorities have greater responsibility than ordinary individuals in this respect, *to bear witness to the truth for the sake of God, even though it be against their own selves* (4:135).

At the same time, Islam cannot ignore a reality accepted by contemporary legislation: that in some cases freedom of expression and information may be restricted temporarily or partially to maintain other human rights or public interests. For example, privacy and justifiable security requirements, especially in time of war, have to be considered. According to Islamic legal principles, a line should be drawn, in practicing the right of expressing one's views, between criticizing an ordinary man and criticizing one who occupies a public office, especially a high office. Freedom of expression has a broader range in the latter case than in the former, especially with regard to public activities and to behavior in personal life that may affect the practice of public authority. The ethical values and legal principles of Islam which secure privacy and forbid spying or any violation of personal rights should be observed. A groundless allegation cannot be tolerated:

*...if any iniquitous person comes to you with a tale, use your discernment lest you hurt people unwittingly, and afterward be filled with remorse for what you have done."*

(100 :6)

*God does not like any evil to be mentioned openly, unless it be by him/her who has been wronged*

....

(4:149)

*yet indeed as for any who defend themselves after having been wronged - no blame whatsoever attaches to them; blame attaches but to those who oppress (other) people and behave outrageously on earth, offending against all right ... but withal, if one is patient in adversity and forgives - this is indeed something to set one's heart upon.*

(42:41-43)

In *sharia*, calumny, libel and slander or any other offense of that kind are forbidden and punishable. However, the right of self-defense may justify some permissiveness in this respect:

In any expression of thoughts or feelings by words, drawings, music, performance or otherwise, one should observe the values of Islam and present them. A speech, writing, work of art or any other human expression cannot by any means persuade a deviation from Islamic values or a perpetration of what is prohibited. Any discussion which may arise about the beliefs and the laws of Islam should observe objectivity and avoid illegitimate offense, agitation and provocation. Arguing with non-believers, which the Quran cautions against, would necessarily draw them to defend their beliefs which are rejected by Islam or to give their opinions about what they are invited to follow. Maintaining the human rights of expression and wisdom in presentation and argument are essential for such a dialogue, which must be conducted within methodological and ethical guidelines on both sides in order to make it fruitful. Those who are born Muslim should not be deprived of the right to a similar discussion of their faith within the same lines.

Rights of expression and information should be protected by all authorities: legislative, executive and judiciary, internal and universal. A specific Islamic court for human rights should be established in every Muslim country and on a global level, and the special court of the glorious historical precedent which was concerned specifically with cases of injustice committed by one who occupied public positions or were politically or socially influential should be revived. Disputes with rulers should be settled according to the superior legal sources: the Quran and *sunna* (4:59). Any violation of human rights from rulers or from any group of the ruled (*baghy*) should be stopped (49:9). Islamic judicial protection of human rights must be more comprehensive and effective than any in the contemporary world. It must show concern for any moral harm which is caused by the authorities to individuals, groups or the whole society, as well as for material transgression: “... *and who can be a better lawgiver than God?*” (5:50).

# WESTERN MISAPPREHENSIONS

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**I**F THE FOREGOING ARE THE CONCEPTS AND PRINCIPLES of the *sharia* and the Islamic state which enforces it and if they represent and secure justice in all its dimensions and are dynamic in responding to emerging needs and coping with human change, why do we find many Muslims and non-Muslims along with Westerners worried about any movement or state which may commit itself to Islam and Islamic law? Whenever any individual or group from an Arab or Muslim country is accused of an act of violence, especially if the group's name contains *jihad*, Western media automatically accuse and attack Islam. Not a single sensible and conscientious human being accepts terrorism, and no one can tolerate the horror of a hijacked aircraft or a senseless bombing. All humanity ought to co-operate to defend itself against any form of spreading terror and horror among the elderly, women, children and all innocent people who do not initiate fighting and cannot defend themselves. However, fighting a disease – or an epidemic –

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requires accuracy in tracing the symptoms and analyzing the possible causes, because a correct diagnosis is the prerequisite of a cure.

Sometime ago, a university in Israel organized a conference on "Islam and Terrorism," and published a selection of the papers. One scholar rhetorically asked why Islam alone, and not other religions, was associated with terrorism. His answer was that since Islam is both a faith and a political system, and it contains *jihad* in its teachings, it is legitimate to discuss its relation to terrorism. He ignored the historical relationship between Christianity and the Crusades, the wars between European kings and the Popes, the bloodshed between Catholics and Protestants, and the colonial aggression which claimed Christianization as its main purpose and which was supported, as well as blessed, by missionary organizations. Although the ethnic and social reasons for the differences between the Catholics and Protestants in Northern Ireland are obvious, the religious factor cannot be ignored, and several leaders of the loyal Unionists who support the political union with Britain are Protestant clergy. The terrorist actions of the IRA in Ulster enjoy understanding, sympathy and sometimes material support from many people in different corners of the world, including the United States. Liberation theology is dominant in the social and political struggle of Latin America, and many of the Catholic clergy support the militants by word and actions, which include the use of weapons.

As for Judaism, the scriptures and Jewish history record successive military conflicts. If Zionism has its roots in Judaism itself, as most Zionists believe, modern militancy -- or even terrorism -- has been added to the historical precedents.

A struggle for justice by force that is legitimized by a reli-

gion when all other peaceful ways are blocked is understandable and justifiable for those who think deeply and fairly. When a high-ranking figure in the Vatican said that he could not imagine Jesus with a gun, many others responded that Jesus could also not be imagined standing passive towards social and political oppression. He could not stand by while the House of God was turned into a den of thieves:

*And (he) cast out all of them that sold and bought in the temple, and overthrew the tables of the money-changers....*

(Matt.21:12-13)

However, a line should be drawn between the legitimate use of any principle and the abuse of any principle, and a just cause may be stained by the malpractice of those who claim to fight for it. Such abuse is human and universal, and if we trace the human experience in the past and the present, abuses cannot be limited only to Arabs or Muslims.

Terrorism, in fact, has become a universal phenomenon. Historians, social scientists, lawyers, criminologists, administrators and politicians are showing an increasing awareness of the need for a more multi-disciplinary approach towards “the growing international incidence of acts of terrorism perpetrated by extremist groups of almost every ideological hue and in every continent,” as Yonah Alexander, David Carlton, and Paul Wilkinson have stated in *Terrorism: Theory and Practice*.

What should be delineated is what the word “terrorism” actually means.

According to *Encyclopedia Britannica*, terrorism is the systematic use of terror, or unpredictable violence, against governments, peoples or individuals, to attain a political objective. Terrorism has been used by political organizations with both



rightist and leftist objectives, by nationalistic and ethnic groups, by revolutionaries and by armies and secret police of governments themselves.

Terrorism, then, can be connected with human nature itself, not with a special group or belief.

Governmental terrorism practiced by state agents should be labeled as terrorism, whatever the excuses may be. A government cannot use public revenues provided by the people to defend their rights and maintain justice in order to violate those rights and undermine justice, particularly as state terrorism is likely to be on a larger scale than individual terrorism. Encyclopedia Britannica indicates:

Terrorism was adopted as virtually a state policy, though an unacknowledged one, by such totalitarian regimes as those of Nazi Germany and the Soviet Union under Stalin. In these states: arrest, imprisonment, torture and execution were applied without legal guidance or restraints to create a climate of fear and to encourage adherence to the national ideology and the declared economic, social and political goals of the state.

Such policies of spreading fear in the hearts and minds of a whole people were and are also adopted by many oppressive regimes in Latin America, the Arab World, Indonesia, the Philippines under Marcos, and other countries.

The same source continues: "Terrorism has been practiced throughout history and throughout the world." Examples were mentioned by the ancient Greek historian Xenophon (C. 430-C. 349 BC) in dealing with enemy populations. The Spanish Inquisition used arbitrary arrest, torture and execution to pun-

ish what it viewed as religious heresy.

The use of terror was openly advocated by Robespierre as a means of encouraging revolutionary virtue during the French Revolution, leading to the period of his political dominance that was called the Reign of Terror (1793-4).

After the U.S. Civil War (1861-5), defiant Southerners formed the Ku Klux Klan, a terrorist organization to intimidate supporters of the Reconstruction.

In the latter half of the nineteenth century, terrorism was adopted by the adherents of anarchism in Western Europe, Russia and the U.S. They believed that the best way to accelerate revolutionary political and social change was to assassinate persons in positions of power.

The twentieth century witnessed great changes in the use and practice of terrorism. Terrorism became the hallmark of a number of political movements stretching from the extreme right to the extreme left of the political spectrum. Terrorism has most commonly become identified, however, with individuals or groups attempting to destabilize or overthrow existing political institutions. It has been used by one or both sides in the anti-colonial conflicts between Ireland and the United Kingdom, Algeria and France, Vietnam and France, followed by the U.S.A. Later, terrorism has erupted in disputes between different national groups over possession of a contested homeland (e.g. Palestinians and Israel), in conflicts with religious tokens, even if religion may not be the only factor (e.g. Catholics and Protestants in Northern Ireland), and in internal conflicts between revolutionary forces and established governments (e.g. Malaysia, Indonesia, the Philippines, Iran, Nicaragua, El Salvador and other countries in Central and South America).

This may show how widely terrorism ranges throughout the contemporary world. Several factors have contributed to it, most of all, the social and political oppression which is often connected with state terrorism. Arabs and Muslims are no exception in this regard, however strictly Islam tries to control them. In *Islam in Modern History* (New York 1957, p.163) , Wilfred Cantwell Smith was fair enough to clarify the general climate of suppression and frustration under which Arabs and Muslims work:

The society has deteriorated to a point where violence is almost inevitable...It is the expression of the hatred, frustration, vanity and destructive frenzy of a people who for long have been the prey of poverty, impotence and fear.

Several names such as the Red Brigades in Italy, the Baeder-Meinhof in West Germany, ETA (the Basques) in Spain, Direct Action in France, the Red Army in Japan, have been connected with violence all over the world, in addition to violent actions practiced under nationalist or ethnic labels by the Armenians, the Tamil in Sri Lanka, the Sikhs in India, and others elsewhere. Under the significant title “Keeping Count of Terror,” the special correspondent of *The Economist* reported in the issue of 26 July, 1986:

Three months after the bombing of Libya, the temptation is to call it a success. Was it? The Middle East is not anyway the worst part of the world for the Americans. The number of Latin American-related acts of terrorism in which Americans have been killed over the past five years is on average 40 per cent higher than the number of Middle East-related

acts. In 1985, there were some 86 terrorist acts in Latin America involving US citizens compared to 16 similar incidents in the Middle East. Contrary to popular American belief: relatively little Middle East terrorism is directed against Americans. Terrorism in Europe, according to American statistics, accounted for a fifth of all terrorist deaths last year. Europe's own groups (IRA, ETA, etc.), being credited with the highest scores, killed 118 people. Middle Easterners working in Western Europe killed 65. State-terrorism represents a formidable brand of terrorism which should be considered seriously whether it is conducted against internal or external enemies.

The correspondent further explained that in 1957 France forced a plane, in which leaders of the Algerian Liberation Front were flying from Morocco to Tunisia, to land in France, and the leaders were arrested. In 1986 the U.S. forced an Egyptian airplane going to Tunisia with some Palestinians on board to land in Sicily. More recently the US allocated \$100million openly to support the Contras who aimed to overthrow the government in Nicaragua. Israel practices state terrorism regularly by bombing the Palestinian refugee camps in Lebanon, and occasionally kidnapping any citizen from any country to be tried and punished by Israeli courts for alleged harm against Israelis or Jews in general. The white minority government of South Africa has been carrying out formidable state terrorism against the majority, including the torture of detainees. State terrorism is practiced under totalitarian and despotic regimes in many countries of the Third World, and it was practiced for a long time in the communist block.

A modern arsenal of oppressive equipment developed and supported by a state to maintain and extend its power, forces dissidents to the use of violence to attract public and international attention to their grievances. As constitutional jurists and political scientists have observed, advanced technology provides the modern state with accurate spying devices and crowd-dispersing equipment, which undermine the rights of expression and assembly, even if such rights are acknowledged in the first place. The oppressive measures of the state and its forces, supported sometimes by legal provisions, develop bitter feelings of helplessness and frustration among the public. Labor unions, political parties, the parliament and the mass media may be directed and controlled by small groups, if not by state agents openly, and this does not allow a great number of ordinary citizens any channel for the expression of views and demands.

The courts should represent an essential safeguard for the public, but the costs of litigation are often high for the average citizen, and impossible for the poor. Until some effective way can be found for the ordinary citizen to voice complaints, which will be received positively and responded to justly by the state, individuals and groups will be tempted to look for other dissidents to make grievances known through extraordinary actions.

According to *Encyclopedia Britannica* Technological advances such as automatic weapons and compact, electrically detonated explosives, gave terrorists a new mobility - and lethality... Terrorism's public impact has been greatly magnified by the use of modern communications media." However, even those who may be sympathetic to the cause of any terrorist group "may be alienated by an indiscriminate use of terrorism" as the same source states.

There are other factors which may have contributed to the violent attitude of younger generations. Psychological factors such as deterioration in family and school discipline for the youth, in addition to a social and economic deprivation may lead a young man or woman to take revenge for such negligence without regard for others. Some television programs, as proved by recent research, may also encourage violence and guide viewers to some of its practices and techniques. Certain games reflect and encourage violent attitudes. The remarkable increase of crimes against the elderly, women and children, of masochistic and sadistic practices, of suicide, even among children, of the use of drugs, and of sexual assaults connected with violence and murder all indicate that television cannot be separated from the general psychopathic phenomena. One can see from books such as Erich Fromms' *The Anatomy of Human Destructiveness* how widely and deeply the roots of aggression and violence are spreading in contemporary society.

Like any other community, Arab and Muslim groups include some psychopathic and violent elements. Nonetheless, many Western politicians and mass media professionals remember scattered incidents of violence attributed to Arabs or Muslims, while completely failing to recall the Muslim world's long history of peaceful and legitimate political activity, including patient negotiations in the United Nations and other international organizations.

Moorehead Kennedy was in the foreign service of the United States for twenty-one years, and was in the American Embassy in Tehran when he, with fifty-two other American officials, was seized as a hostage for 444 days. He told the London-based *The Times* on 20 January, 1986, how his cap-

tivity led him to an enlightenment about the suffering of those who are labeled terrorists

I was suddenly free from having to think like a foreign service officer, free from state department smugness and assumptions, attitudes I had been part of. I went through a form of mental hygiene. I began to see more clearly that if we are to confront terrorism, we have to change our old-fashioned assumptions.

Moorehead believed that the crisis held important lessons for Americans, but that they didn't learn from it. "The whole thing was treated by the American people as an aberration and the Iranians were dismissed as mad...." He wrote.

The only way out of this is for us to start listening to the Middle East. We have to reconsider our attitudes of superiority. We think and act as if we are God's chosen instrument. We have been brought up to assume that the rest of the world thinks, or should think, as we do.... I am not condoning or caving in to terrorism, but we must know the other side. Terrorism challenges our thinking, not our military might. When talking of the Iranians he said, These people both admire and envy us. "We like the Americans, but we hate the U.S.," they said. We have disappointed them. In the Middle East and elsewhere, people take the Declaration of Independence more seriously than we do. We have talked of freedom and human rights, but our conduct in the world has caused disillusionment and bitterness and made us hypocrites. As a victim of terrorism I abominate it, but it holds up a mirror to us. As I say: we should start listening.

When Moorehead Kennedy came home to a hero's welcome after his release, he turned down a good position and resigned from the foreign service, since he believed that "you can't be part of an organization and go around criticizing it in public." Now he devotes himself to spreading the lessons of the "American's traumatic experience with the Iranian revolution."

What Kennedy says about his experience makes him a controversial figure among the Americans who hear his lectures on terrorism and see him on television. Through the Council of International Understanding, which he has established in New York, he lectures and writes tirelessly on terrorism and its challenges to the American mind: "I talk to parents and church groups and schools, wherever people are committed to serious listening and discussion," he said.

Similarly, the Italian actress Sandra Milo witnessed a moment of truth and enlightenment during the attack on Rome's airport, in which she and her daughter miraculously escaped death. In an interview which was published on 31 December 1985, she stressed that a miserable life leads one to plant misery in others' lives, and she gave as an example the situation of Napoli and southern Italy.

As Moorehead Kennedy said, some "make efforts not to hear," and instead blame others' beliefs. In fact, Islam teaches its believers how to cure egoism and remove hostility and aggression, through both faith and ethics on one side and the law and the state on the other. Justice should be maintained in all fields: social and economic, political and legal, internal and universal.

The protection of human life, body, dignity, family, mind, freedom of belief, and rights of private and public property rep-



resent the main goals of the *sharia*. The divine teachings indicate how grave the taking of human life is:

*If anyone slays a human being – unless it be (in punishment) for murder or for spreading mischief on earth, it shall be as though such a person had slain the whole of humanity; whereas, if anyone saves a life, it shall be as though he had saved all the lives of the whole of humanity.*

(5:32)

Those who spread mischief and destruction are condemned severely, regardless of what their arguments may be:

*There is one whose speech may please you greatly in this world, and (he/she) cites God as witness to what is in his/(her) heart, and is moreover exceedingly skillful in argument. But when this person turns back, his/her aim everywhere is to spread mischief through the earth and destroy crops and progeny, and God loves not mischief. And whenever one says to this person: fear God, false personal pride (and arrogance) drives him/her into evil; wherefore hell will be the allotted portion of such a person - and how vile a resting place.*

(2:204-6)

*It is but a just recompense for those who make war on God and His Messenger and endeavor to spread mischief on earth, that they are punished by death...; such is their ignominy in this world, but in the life to come (yet more) awesome suffering awaits them.*

(5:33)

Universal cooperation is required to fight terrorism and terrorists by securing justice in the first place. Sincere efforts for social and political reconciliation need to follow, and coordinated universal measures, preventive and defensive, may be the last resort, as the Quran counsels in the case of a clash between two groups:

*... make peace between them; but then, if one of the two (groups) practices aggression towards the other, fight against the one that practices aggression until it reverts to God's commandment; and if they revert, make peace between them with justice.*

(49:9)

The Quran teaches that the party which initiates aggression should be treated in the end with justice, as soon as it reverts to God's commandments, because only justice can halt the vicious circle of reciprocal violence. *Jihad* is allowed for Muslims only to repel those who initiate an attack: "*And fight in God's cause against those who are waging war against you, and do not transgress limits, for God loves not transgressors*" (2:190).

The common translation of *jihad* as "holy war" is misleading, since Islam has never justified a war to impose its faith on others by force. *Jihad* aims only to prevent intimidation (2:193), not to spread it. All races are equal members of humanity, and good relations and cooperation have to be developed in the whole world, whatever the racial and ethnic differences may be (49:12). Justice and fairness should dominate the relationship between Muslims and believers of other faiths (60:8). No group should suffer for an individual offense, and no collective accusations or punishments are accepted by

Islamic justice, since every individual has to be accountable only for his/her own deeds and should never bear another's burden (53:38-9).

In the case of an undesirable but legitimate defensive war which might be imposed on Muslims as a response to aggression, this war should be declared openly (8:58) and conducted against the combatants only. Therefore, the women and the children, the elderly, the clergy and the monks, as well as the peasants and all who have not been involved in fighting the Muslims directly, must not be hurt by them. A distinction should be drawn between a legitimate struggle on one side and common criminality on the other, even if drawing such a line may be sometimes difficult.

All houses of worship must be defended, whatever the belief of the worshippers may be:

*For had God not enabled people to defend themselves against one another, (all) monasteries and churches, synagogues and mosques, in which God's name is abundantly extolled, would surely have been destroyed. And God will most certainly support one who supports His cause.*

(22:40)

Even the life of plants and animals should be preserved except in a pressing need. Martyrdom is quite distinct from meaningless and fruitless suicide: "*and let not your own hands throw you unto destruction, and persevere in doing good*" (2:195).

The goal of a legitimate war is to prevent mischief and aggression (2:251), and to replace them with righteousness and justice (22:41). Facts about any matter of war or peace should

be discussed honestly between the people and the authorities who are responsible for providing accurate information to the public through the available media:

*And if any matter pertaining to (public) safety or fear comes within their knowledge, they spread it abroad – whereas, if they would but refer it unto the Conveyer of the (divine) Message and unto those from among the believers who have been entrusted with authority, such of them who investigate should indeed know (directly the truth of) the matter.*

(4:83)

Can Muslims expect from others more fairness in dealing with Islam and more seriousness in discussing the wide-spread epidemic of terrorism instead of the chronic prejudices that they often face? Can we hope to eliminate indifference to state terrorism, and to social and political injustice in the whole world? If so, there may be more progress in securing peace and fighting terrorism, rather than blaming Islam and Muslims for something that they have never initiated, and that their faith and majorities have never supported.

# CONTEMPORARY CIVILIZATION

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**I**T MAY BE OBVIOUS NOW THAT ISLAMIC LAW OR *SHARIA*, through the spacious room allowed for human intellectual efforts to cope with change (*ijtihad*), can benefit from any contemporary experience, especially that of the developed Western countries in their political, administrative and economical systems. An essential question may be raised by some Islamists: how can Muslims rely on the products of a civilization that has denied God and has opposed or ignored any collective practice of religion from the society as a whole? Modern Muslim thinkers, such as Jamal ud Din al-Afghani, Muhammad Iqbal, Abul Hasan Ali Nadwi, Hasan al-Banna, Abul Ala al-Mawdudi, Muhammad Asad, Malik ibn Nabi, Sayyid Qutb and others, in their efforts to build up self-confidence and mobilize the Muslims against Western colonization, imperialism and neo-imperialism, have sharpened the contrast between Islamic values and Western values and practices. Their works have provided ammunition for Islamists to attack, some-

times indiscriminately, the West and all that may be related to it, including modernity itself. It may be the time now to discuss with some seriousness both the Western attitude toward religion and the anti-modernity attitude of some Islamists, and to trace the origin and development of each.

In the beginning of the eighteenth century, when the Europeans colonized Muslim lands, the people experienced shocking material and moral changes and found themselves in a puzzling dilemma. On the one hand, the humiliation of invasion and suppression created strong feelings of anger and resentment. On the other hand, the inhabitants of the Muslim lands were dazzled by modern European civilization with its advanced technology and organization, a sentiment that had not been strongly felt during previous confrontations with the west. There is a great difference, for example, between the impression which the Crusaders left on the Muslim knight Usama ibn Munqidh (d. 1188), as recorded in his memoirs *Al-I'tibar*, and that which the French invaders of Egypt left on Muslim scholar and historian al-Jabarti (d. 1825), as reported in his *Aja'ib al-Athar*.

Usama witnessed the European Crusaders who appeared strange to him in their way of life. He might have found them militarily strong and victorious but he did not feel for a second that they were the representatives of a civilization superior, or even equal to his, in military or civil life. For al-Jabarti, on the other hand, the impact of the French invaders was tremendous. Not only did they have superior military technology but also better organization and administration.

Colonialism left Muslims with mixed feelings of hatred and admiration. Muslim reaction to colonial occupation varied. Some Muslims believed that they should swallow the bitterness

of colonialism and adopt a positive attitude for the sake of progress. This attitude was emphasized by successive generations of Muslim thinkers and writers such as Shaykh Rifa'a al-Tahtawi (d. 1873), Shaykh Muhammad Abduh (d. 1905), Qasim Amin (d. 1908), Lufti al-Sayyid (d. 1963) and Taha Husayn (d. 1974) in Egypt, Medhat Pasha (d. 1883) in the Ottoman Sultanate, Khayr ul-Din Pasha (d. 1879) in Tunisia and Sayyid Ahmad Khan (d.1889) in India.

However, between the two world wars in the twentieth century, hostility towards European civilization began to grow among Muslims. Shocked by the impact of the so-called modernization on their social traditions and cultural identity and provoked by certain missionary activities and liberal opinions about religion, those who were committed to Islam struggled enthusiastically to defend their faith and way of life. Al-Azhar University in Cairo established a post-graduate diploma in preaching (*dawa*) and published a monthly journal to defend the faith and the Islamic identity against the threatening Westernization. Some collective activities began to be organized among Muslims, spurred on by their knowledge of the pioneering efforts of Jamal al-Din al-Afghani (d. 1897), Muhammad Abduh (d. 1905) and Abd al-Rahman al-Kawakibi (d. 1902). In Egypt, the Association of Muslim Youth was established, followed in 1928 by the appearance of the Muslim Brotherhood.

Muslim preachers, thinkers and activists began their efforts by emphasizing that all the merits of European progress could be supported by the teachings of Islam. But later such apologetics were followed by a critical approach towards European civilization, whether in its ancient roots or in its modern products, which aimed to undermine its credibility among Muslims.

In spite of the benefits of the application of Greek logic to Arabic linguistics and Islamic theology and jurisprudence, the classical argument of some Islamic scholars such as Ibn Hazm and Ibn Taymiyya against it, as well as the argument of al-Ghazali against Greek philosophy in general, were revived to prove that any foreign epistemological approach could damage genuine Islamic knowledge. Some supporters of such an attitude went further to restrict the genuine Islamic civilization that truly represented the teachings of Islam to the period of the early four caliphs (al-Rashidin).

As more information about the political and economic problems of the West became available, especially after the worldwide depression of the 1930's and the attacks of fascism and communism against democracy, the Islamists thought that attacking European civilization might be the most effective way to defend Islam and to nurture self-confidence.

As soon as the Second World War came to an end, national frustration fuelled by external Western pressures and internal Westernized leaders increased the hostility of Muslims against the West. This provided a suitable climate for the Islamists to carry on their campaign against Western civilization on cultural and ideological grounds. The intellectual and psychological roots of the West that did not care about religion or were hostile to it were used to support moderate criticism (e.g., views of Muhammad Iqbal, Muhammad Asad, Abul Hasan Ali Nadwi, Malik Ibn Nabi) or absolute rejection (e.g., al-Mawdudi, Sayyid Qutb). Western historians themselves did not conceal such roots. Robin W. Winks wrote, in *Western Civilization*, (Prentice-Hall, New Jersey, 1979, pp. 176-178) that “the Renaissance was a time when people were rethinking their old assumptions. It heralded the Reformation, and both must be



seen as a continuum." He explained that during that time some people wished to return to antiquity, and to the values they associated with Greek and Roman civilization; others consciously attempted to promote new, experimental and somewhat unusual ideas. Still others held even more strongly to the firm beliefs of the Middle Ages. "In this contention of idea against idea," wrote Winks.

People experienced a liberation that stimulated innovation in many aspects of life. Particularly important was the literary movement labeled "humanism," to which Petrarch contributed so much in Renaissance Italy. The humanists emphasized the importance of humanity as opposed to the significance of systems. Many of the humanists were lay writers, not members of the clergy, who wanted to turn back to the ancients - especially to Plato, Homer, Cicero and Horace - for inspiration. These ancient writers were thought of as men of reason, secular men who did not quarrel over petty matters of church doctrine....

Winks explained that "Renaissance thought also promoted science, not only in the practical sense of new discoveries and experiments or in terms of pure theory, but in finding ways for reconciling God and human."

Winks points out that it was Aquinas's (d. 1274) feat to show that faith and reason need not be at war and that faith was under no challenge from reason. Aquinas made it possible for people to hold to the truth of the church while attacking specific clergy members. Not only was reason acceptable to the Church, but the Church was acceptable to reason. Those who

followed Machiavelli (d. 1527) cast such reconciliations aside, and freed politics from theology or moral teachings. But there were some people who longed for the world of Platonic idealism. Others wanted to give the Church first place in their lives.

In such an environment, European civilization was born. As it developed, religion became less important. Winks (pp. 228-9) explains that the Enlightenment, which is said to run from 1687, the date that Newton's work was published, to the outbreak of the French Revolution in 1789, was seen an age of light, of special wisdom about human nature.

There was no longer any need for a God as the Creator of all things; Universal gravitation provided the First Cause. There no longer was either need or justification for miracles, for all so-called miracles should be capable of scientific explanation. The universe was governed by precise mechanical laws that were capable of mathematical proof; this universe could run for eternity without the intervention of God. The world was a machine.

Those holding this view did not believe that God was without purpose, however, because while science can explain the operations of the machine, even this compromise had lost its attraction for evidence for a Creator of Divine Intelligence, and that accident and chance had created the universe, even though it might operate laws that would ensure for all time and that could be mathematically investigated. The individual became all important. Evil arose not from Original Sin but from bad institutions. Rational individuals should be capable of reforming their institutions to the point that the environment reinforced the good in people.

All social institutions should be remodeled in the light of Reason. History studied closely would reveal the mistakes of

the past and guide the society of the future. Nature and Reason would unlock the meaning of all experience...Nothing could stop the advance of knowledge.

A revolutionary practice was inspired by rebellious thought, and vice versa. Robert Anchor in *The Modern Western Experience* (Prentice Hall, N.J., 1978, pp. 65-67) pointed out that when the 1848 revolutions failed to achieve "the victory of liberalism, democracy and social justice.... Gone was the high-minded romantic and idealistic utopianism that had come in the wake of the triple revolution." However, "gone too was the die-hard based on a hopelessly obsolete alliance between throne and altar and a policy of modernization." A new mood which was described as a blend of disillusionment with the old and fascination with the new; a distrust of intellectual speculation and infatuation with hard facts; an indifference towards the past and a boldly optimistic attitude toward the future now settled over Europe and the West.

The new mood manifested itself in Karl Marx's tough-minded revolutionary theories, which claimed to be more realistic than the "utopian" socialism of the first half of the century, which Marx scorned. Liberals themselves, originally dedicated to the ideals of liberty, equality and fraternity, now concerned themselves more with material well-being and with strengthening the political and social position of the middle classes. The new mood pervaded Victorian England: proud, prosperous and practical. This new mood was manifested in positivist philosophy, Darwinian science, the enthusiastic acceptance of industrial civilization, and the rise of the social levels and school of naturalism.

During the 1850s and 60s nationalism pervaded all spheres of life in the Western world because all pre-industrial intellec-

tual, moral and social models, whether conservative, liberal or radical were now obsolete. In order to survive at all, these movements had to adapt to the new urban and industrial setting, to the now indisputable dominance of the middle classes and growing importance of the factory proletariat, and to the reality of emerging mass society. Even the critics of materialism, to be effective, had to learn to speak its language and appreciate its importance. What occurred during the age of materialism and under its aegis was the transition of those Western countries where age old tradition in turn marked the secularization of western culture and laid the foundations of contemporary history.

In such a psychological and intellectual climate arose the modern European civilization. Through the development of education and information, the advocates of Islam became aware of the philosophical basis of modern civilization that averts religion and restricts objective knowledge to the sensory. Since religious faith is based on the belief in the existence of that which is beyond the reach of human perception (e.g., Quran 2:3), the modern epistemological approach has been labeled as material, and thus anti-religion or even atheistic. Many Islamists have come to believe that the evils of modern civilization cannot be described merely by certain emerging ideas or practices, for, they believe, these evils lie deep within the very nucleus and basis of that civilization.

According to these Islamists, Muslims should make use of Western technological achievements, but they should reject Western values and ideas. As technology relies on science, we should be very cautious about any anti-religious orientation of science which may infiltrate the Western approaches. Muslims should stay close to the concrete facts and abide by them with-

in the general Islamic scope of God as the Almighty Sovereign and the Creator of the universe. Some Islamists have recently emphasized the great need for an Islamic approach to the physical and biological sciences themselves. In the fields of social sciences and humanities, Western methods and data should be scrutinized and restated according to Islamic criteria and principles.

The suspicious attitude of Islamists towards modern civilization in the early decades of the twentieth century can be understood and justified. However, continued adherence to such a standpoint should be revised as Western civilization has become global, spreading over the whole world with its various denominations, cultures, social structures and political systems. The technological revolution in the fields of transportation and mass communication has spread Western civilization everywhere, and thus maintaining cultural isolation has become impossible. The countries of Europe and North America are now no more representative of this civilization than Japan or even Taiwan, China and South Korea. One can assume that the present global civilization has been separated from the cultural atmosphere which witnessed its beginnings. The technological aspects of contemporary civilization – neutral in their origins and nature – are becoming dominant, and thus the contemporary civilization has been unanimously accepted by liberals and conservatives, atheists and religious people.

Is this global civilization unable to survive or to fit in a religious society, just because it originated in a climate which did not like religion? In the past, some of the components of the Byzantine and Sassanian civilizations continued under the Islamic Caliphate. Would such a survival of two worldviews be thought impossible now, when human contacts and cultural

exchanges have become so rapid and widespread? The Islamists need to reconsider the relationship between culture and civilization as anthropologists and social scientists have been doing, in the light of the present circumstances in which civilization has become unprecedentedly universal and dynamic.

The assumption that modern civilization must be accepted as a whole, forcing us to take both what we may like and what we may not, is an exaggerated determinism. Islamists have to realize that there is a place for cultural and ideological differences within this global and dynamic civilization itself, and therefore any rigid rejection of it would be against the interests of Muslims in their practical life. Besides, even in its origins and early stages, contemporary civilization has not always advocated an individual or a narrow national utilitarianism. Social values such as respect for others' rights and views, organization, cooperation, observance of one's duties (especially those related to work and country) and endurance in fulfilling them, and loyalty in human relations to others or to social and political institutions have flourished in Western societies.

On several occasions, these societies have shown their support for international cooperation, and they present from time to time strong voices and movements devoted to universal welfare. With burgeoning knowledge and an increasing conception of relativity, probability and abstraction, science has become less arrogant. Empiricism in the field of concrete matters has led to a vast space related to the nature of energy.

Well-known scientists and artists in various fields have in large numbers increasingly emphasized their faith in a Creator. Increasing disasters of unemployment, economic hardships, pollution and environmental deterioration, drought and

famine, emerging unknown diseases, in addition to looming nuclear holocaust and self-destruction have shaken the previous certitude about the future according to the doctrine of permanent and continuous progress, which was “the most original aspect of the Enlightenment, since taken for granted,” as John Bowle stated in his *History of Europe* (Book Club Association, London, 1980, p. 473). Under such pressures, societies that seemed most steeped in individualism and materialism have shown an increasingly positive attitude toward religion as they become aware of the growing spiritual emptiness in contemporary civilization.

The Islamists should realize that they cannot create a contemporary Islamic civilization in a vacuum. They have no choice but to be a living part of contemporary civilization if they want to suggest another direction. Without a positive approach and active participation, it is impossible to graft Islamic values onto the present civilization.

A “decline of the West,” which the German philosopher Oswald Spengler (d. 1936) foresaw, may not necessarily lead, as Arnold Toynbee (d. 1975) strongly argued, to the fall of contemporary civilization, a civilization that is no longer limited to the West but has become global. However, such criticism by leading thinkers proves a healthiness and a liveliness, in addition to proving the worth of the argument. Building a contemporary Islamic civilization in the individual or collective imagination will not establish it in reality.

Our Muslim ancestors were more aware of the succession of civilizations than we are today. They adopted what was useful in the achievements of existing civilizations in science, mathematics, philosophy and humanities, as well as in state organization and administration. The intellectual heritage of Greeks,

Persians and Indians was translated and systems of administrative organization (*dawawin*), land-taxation (*kharaj*), customs (*ushur*), police and prisons were introduced.

We should think seriously and concretely about the Islamic civilization which we believe in and look for. Adhering only and always to the rejection of others' achievements is a very poor means of confirming one's identity. The Prophet of Islam emphatically taught self-confidence and human universality in such inspiring and well-accepted traditions as that reported by al-Tirmidhi: "The believer should search always for wisdom, wherever he/she may find it: he/she is the most deserving of it."



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SHARIA  
IN  
CONTEMPORARY  
SOCIETY

*THE DYNAMICS OF CHANGE  
IN  
THE ISLAMIC LAW*

*DR. FATHI OSMAN*



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## PUBLISHER'S NOTE

All Arabic words and phrases are put in Italics.

All Quranic references are also put in italics with chapter and verse numbers. The Quranic references are numerous and the word Quran is not repeated after every verse.

Index includes the name of people, places and key subjects.

Bibliography includes books that a reader may find useful in his/her further studies.

## ACKNOWLEDGEMENT

The help and support of my wife Aida has been always essential in all my works including this work since our marriage. My daughter Ghada has had her valuable contribution in editing and proof reading the text. Dr. Aslam Abdullah, the Editor-in-Chief of *The Minaret* and of the Multimedia Vera International has kindly supervised the technical aspects of the production. He also prepared the index. I acknowledge the whole-hearted help that I have got from all of them, which has been essential – materially and morally– for this work to be available for the readers.

Fathi Osman



## DEDICATION TO THE MEMORY OF

- Shaykh Muhammad Abduh (d. 1905): Egyptian pioneer of the Modern Islamic thinking and the practice of *ijtihad* to assure the dynamism of *Sharia* and its response to the change in human societies. His reformist vision and views spread over the Muslim world from Indonesia to Grand Maghrib. In his steps followed modern Egyptian jurists, especially those who have taught *Sharia* at the school of law, including Abdul Wahab Khallaf (d. 1956) and Muhammad Mustafa Shalabi.

- Muhammad Iqbal (d. 1938): the pioneer of modern Islamic thinking in the Indian-Pakistan-Bangladesh subcontinent, whose vision of the change and views about the Islamic dynamism to cope with it in his work *The Reconstruction of Religious Thought* in Islam have been an eye-opener for the Muslims every where to get out of their stagnated and static thought.

- Abdul Razzaq al-Sanhuri (d. 1971): the distinguished jurist, professor and judge, who had his great contribution to the codes of civil law in Egypt, Iraq, Syria, Libya and Kuwait. In spite of his distinction in the Western schools of law, his strong relation with *Sharia* could be traced as early as 1926 in his doctorate thesis in France on the Caliphate (*Le Califat*), and continued in his voluminous works on: *The Contract in Islamic Jurisprudence* and *The Sources of the "Right" in Islamic Jurisprudence*. He stressed the professional role of the Muslim jurists and their human genius in formulating the Islamic jurisprudence, which may be called sometimes *Sharia* and may be understood mistakenly as divine in its totality. His influence and attitude towards *Sharia* have been extensively and significantly obvious in the Egyptian school of law, even among the non-Muslims in the legal profession.

To all these pioneers who contributed to the shaping of my mind with an enormous number of others, I dedicate my modest effort in the same direction.

# FOREWORD

---

**D**URING THE LAST DECADE, WE SAW A PLETHORA of writings and discussions about the *sharia*, usually translated as Islamic law. Unfortunately, a good part of this was the production of zealots for or against Islam.

Lack of objectivity leads to confusion. In the past, some of the writers have tried to handle the subject without investing the time and energy needed to assume a position of intellectual authority.

This book is a landmark on the road towards clear understanding of Islam, the foundation upon which its legal system is built.

The author employed his study of common law and Islamic jurisprudence together with his qualifications as an eminent historian to explain the subject.

The book sets the distinction between the *Sharia* and the *Fiqh*, while the first refers to the Word of God pointing to the direction, setting the attitudes and forming the basic general

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rules, the later is the effort of human beings to interpret His Words in search of happiness in this life and in the hereafter. The interpretations are influenced by the dynamics of time and age.

The author explores the intrinsic dynamism embedded in the system offering a continuous, progressive and multidimensional growing corpus of legality that is conducive of liberty and progress.

The English literature badly needed such a book and no one is more capable and suitable to fill this need more than Professor Mohammed Fathi Osman.

Maher Hathout, M.D.  
President  
Multimedia Vera International  
Los Angeles

# PREFACE

---

**T**HE PACE OF THE CONTEMPORARY MUSLIM masses in establishing Islamic states which observe Islamic moral values and enforce Islamic law has accelerated at a remarkable rate since the establishment of the Islamic Republic of Iran. The establishment of this Republic, regardless of its shortcomings and its weaknesses, crowned the successful Islamic revolution in Iran. Other Muslim countries, which were able to recently reach recognized independence from colonial rule, some of which were then able to overthrow their autocratic monarchies, have found themselves in confrontation later with the military dictatorship that sometimes followed.

Meanwhile, national secular quasi-democracies have failed; accentuating the underlying need for radical change. The collapse of communism in Eastern Europe has shattered the illusion of the communist dream, and a return to Islam has gained momentum among the masses promising a radical change for the better.

In the West, the superpowers have a background of traditional fears of religion in general and of Islam in particular, and being always thoughtful of their interests in Muslim countries and the contemporary world, which they have succeeded in maintaining until now through false democracies, autocratic monarchies, military dictatorships or even leftist and assumed Marxist rulers; they have become worried about the massive pull toward the Islamic state and the establishment of Islamic law. The West has deployed all its powers to resist, directly or indirectly, any momentum toward the establishment of the Islamic state and law in Muslim countries, whether such development has arisen by revolution as in the case of Iran, or has potentially come peacefully and democratically, as in the case of Tunisia and Algeria. Although hopes for a smooth transition were aborted by the oppressive autocratic and military regimes in both countries respectively.

Misunderstanding and mistrust have intensified on both Islamic and anti-Islamic sides, and it has become necessary to clarify the truth about the Islamic state and the Islamic law to all parties concerned and to the whole world. Muslims will never abandon their faith in Islamic law and state as long as they remain faithful to Islam itself, and it is better for them to know precisely what they believe in and are striving for.

At the same time, the whole world, including the West, needs to recognize the rights of Muslim peoples to choose their way of life including their state and their law, and to know what such a choice really means for Muslims themselves and for the whole world. Both parties, in responding to recent developments, need to try as hard as possible to rid themselves of inherited bitterness and lack of knowledge about each other, since both attitudes may be due to subliminal prejudices.

Some extreme expression of the views of one party toward the other may represent only a very small minority on either side, and any misunderstanding may be a result of failures in communication and lack of unbiased information on both sides.

It is essential in our contemporary globalism to clarify how a law which was revealed by God fourteen centuries ago can apply to the present world, whose circumstances differ qualitatively from the circumstances of even one century earlier, not to speak of fourteen centuries.

Islamic law is often presented as if it were a closed system including every detail needed by any society at any time or in any place, when in fact it is not a closed system at all, nor does it include details which are limitless in nature. Islamic law presents general principles such as the commanding of justice in all its dimensions and the forbidding of injustice in all its forms including aggression, exploitation and fraud. Human rights are the cornerstone in the society and laws of Islam.

What is discouraged or forbidden, on the one hand, is clearly stated, and what is encouraged or required, on the other, is delineated as well, but these strong recommendations and absolutes are limited in number. Moreover, between the two areas of the proscribed and the prescribed is a limitless area of what is simply allowed: in this area of the allowed, which encompasses the vast majority of juristic situations encountered, it has been left to the human mind, guided by the general principles of *sharia* and its goals, to decide on a given case according to changing circumstances. The essence and very nature of *sharia* would benefit humanity as a whole morally and materially, and would respond to continually emerging human needs.

In any dealing with *sharia*, we must draw a clear line between the enormous body of juristic efforts historically exerted over decisions in the realm of the allowed. These efforts are by nature human and changeable, and the smaller body of laws of the revealed texts in the Quran and the Prophet's traditions (*sunna*), which are divine and permanent.

It is no less essential to clarify the main features of the contemporary world and its societies, cultures and civilization, in which the Islamic state and Islamic laws are supposed to function. In evaluating these contemporary world circumstances, we should make a distinction between their roots in the past and their developments in the present which may represent an entire change and between the essential and the non-essential in their features and products, so that we may not judge or oppose them unfairly.

Removing the ambiguities and misconceptions about the Islamic state and *sharia* on one side, and the contemporary world and its civilization on the other, would help to show how the Islamic state and Islamic laws would function in a contemporary society and the contemporary world, and how an Islamic state and the contemporary civilization would interact and contribute to each other. This is a goal that cannot be achieved by one person or one attempt. However, such an attempt may be considered sufficiently successful if it merely persuades those who are concerned with the present and the future of this planet and this universe to engage in a serious discussion about how we can accommodate divine guidance in the contemporary world and how we can moralize the contemporary world civilization to liberate itself from its built-in self-destructive tendencies of one sidedness and short sightedness so that all humanity can survive and enjoy happiness.

This is the main goal of Islamic law, since the goal of the divine message in all its stages has always been to secure dignity, in all its dimensions, for all the children of Adam whatever their race, language and culture, gender, faith and any other differences may be:

*We have conferred dignity on all children of Adam; have borne them over land and sea; and provided for them sustenance of good things of life; and favored them by far, above many of Our creation.*

(17:70)

According to the divine message, human differences are meant to encourage getting together and complementing one another, not to build up barriers and develop prejudices:

*O human beings We have created you all out of a male and a female, and have made you into [various] peoples and tribes so that you might come to know well [and cooperate with] one another surely, the noblest of you in the sight of God is most conscious of Him; Behold God is All-knowing, All-aware.*

(49:13)

The plural pronoun for the speaker "We" which a non-Muslim reader may not be familiar with when God is the speaker, is used in Arabic to express supremacy and glory but by no means plurality. It has been used for a similar purpose also by Arab monarchs in different times, even after Islam.

The verses emphasize the guidance of the Creator of the diverse children of Adam about their natural relations with one another and their rights and responsibilities as human beings in this life. This is the corner stone of the divine message that



Islam and its law represents the last stage of God's message to humanity according to the Muslim belief, and this is what this simple effort tries to clarify.

# THE MESSAGE

## A CHANGE TO BETTER

---

**M**USLIMS COEXIST WITH NON-MUSLIMS IN THE world. Islamists (Islamic ideologists or activists) are often mistakenly thought to present Islam as a theological message which aims to convert non-Muslims to Islam, and thus sensitivity and sometimes tensions arise between Muslims and non-Muslims. The Islamists themselves may contribute to the confusion through their approach and tone in presenting Islam and in dealing with other religions and their followers. The eternal message of Islam to the world is a call for social change, not theological conversion. Islam in the original Arabic means “submission to God”:

*Indeed, everyone who submits one's whole being unto God (aslamu wajhahu lil -lah) and is a doer of good withal shall have his/her reward with his/her Lord; and all such should have no fear, and neither should they grieve.*

(2:112)

Submission to God as the essence of religion is something that can be felt by any human being, and the only judge for it is the All-Knowing God. Muslims believe that the message of Islam as taught and practiced by Prophet Muhammad has its characteristics and merits which can be presented to others, and they welcome any fair and constructive argument. Muslims also believe that the main goal for an Islamic movement is to further the cause of social change, the advantages of which will be shared by all people, Muslims as well as non-Muslims.

Conversion addresses individuals, concentrates on theological beliefs and accordingly represents mainly an intellectual effort, the aim of which is that certain individuals may embrace Islam. Social change addresses the masses and accordingly represents a dynamic plan for continuous progress. A message of social change is directed to all, whether or not they are interested in conversion, and calls for a better society and a better world.

Muslims can serve their faith by serving the people through the social change which they seek. It may happen – as it has happened in history – that whenever a genuine social change takes place, some of the beneficiaries embrace Islam by their own choice and free will. However, this is not the main goal of the Muslims who sincerely call and work merely for a better society or world where justice, peace, morality and kindness dominate.

The Quran emphasizes that human dignity is a status given by God to every human being without exception. A human being has the right and duty to fulfill his/her physical, intellectual and moral needs and aspirations in order to reach the universal and comprehensive potential of human dignity:

*I have conferred dignity on the children of Adam, carried them over land and sea, provided for them sustenance out of the good things of life, and favored them over most of my creation.*

(17:70)

The Quran presents the essence of Islam as a moral and social change rather than as a restricted theology:

*God commands justice, doing what is best, and generosity toward one's kinsfolk; and He forbids all that is shameful, all that runs counter to reason (and common sense), as well as aggression....*

(16:90)

*...[The prophet] who enjoins upon them the doing of what is right and good and forbids them the doing of what is wrong and evil, and makes lawful to them the good things of life and forbids them the bad things, and lifts from them their burdens and the shackles that were upon them.*

(7:157)

According to classical jurists, the goals of Islamic law (*sharia*) are to secure and develop the human essentials in these different areas: *life* (in all its dimensions), *family and children* (to ensure the continuation of life), the *mind, moral values, religious freedom*; and *the rights of ownership* whether private or public (16:90).

The Quran teaches Muslims to struggle against oppression and to secure freedom of belief for every person in order to keep the way open between the human heart and mind on one side, and God on the other, without any human hindrance (see 2:193, 8:39).

Such a message of social change requires *a social movement, not theological preaching*. Although faith in God deepens and strengthens the commitment for social change. It is not a prerequisite for the Islamic message of social change. Islam defines the goals of social change in general terms such as justice, doing what is best in the society, caring about the family, and enjoining what is right while forbidding what is wrong. Muslims can address the whole world on the basis of these common grounds and on the universality of their message.

An Islamic movement for social change for the better must fulfill certain requirements in order to succeed. **Conceptual depth** must be articulated with reference to the basic message and its goals. **Breadth** of the movement must be achieved by addressing the masses and caring about their needs and sufferings, while **length** and continuation should be achieved through efficient organization which protects the movement from being a temporary convulsion. Indeed, the early Islamic movement endured over a long period of time across a vast expanse of land, thus creating a civilization, but the resulting Islamic civilization could not have been created in a vacuum, isolated from available sources of civilizational experiences.

The European Renaissance occurred when Islamic civilization made the heritage of ancient civilizations, along with its Muslim contribution, available to Christian Europe through peaceful contacts in Muslim Spain and Sicily and through the hostile contacts of the Crusaders. Earlier, isolation had led Christian Europe to the Dark Ages.

The Islamic movement for social change requires the *collective efforts of a group*, while conversion may be achieved merely by a gifted preacher. The Quran indicates that a group is required for social change:

*and there should grow out of you a group (of people), who invite unto all that is good and enjoin the doing of what is right and forbid the doing of what is wrong, and it is they who shall attain success [and happiness].*

(3:104)

Such a group should know and apply the social laws which can lead to the change of a dominant authority or of a political power. These social laws are no less in control than the natural laws which lead to the sequences of day and night and life and death. No miraculous victory can be expected, but intelligent and capable planning which takes advantage of all human and material resources is essential:

*And make ready against them (those who obstruct the change by force) whatever force you are able to muster ... but if they incline to peace, incline to it as well and place your trust in God.*

(8:60-61)

*...and had God so willed, He could indeed defeat them (those who use force against you), but (He wills you to struggle so as) to test you (all) through (your dealing with) one another.*

(47:4)

What was practiced by the Prophet and his Companions in the earliest Islamic movement for social change coped with the historical circumstances in tribal Arabian society and later in other medieval societies. These practices should enlighten Muslims in any time and place, but no practice should be isolated from its social context. One should realize that the past cannot be blindly repeated in our contemporary world. A mere

search for martyrdom without considering the gains is suicidal for individuals and lethal for the movement: “*and let not your own hands throw you into self-destruction*” ( 2:195), “*and do not kill yourselves*”(4:21).

Islamic movements for social change should fulfill certain requirements: moral commitment, ideological knowledge, education of the masses, mobilization, recruitment and organization of potential workers; an organizational framework is necessary for carrying out the struggle for social change. However, it may not be necessary that a movement for social change strictly follow a prescribed sequence step by step. Ideological learning and educating the masses may be simultaneous. Recruitment may precede mobilization in certain cases, as the Prophet recruited committed and effective elements from Medina before mobilizing the masses there. Change starts in hearts and minds: “*...verily, God does not change a people’s condition unless they initiate changing themselves (from inside)....*” (13:11).

Shaking long-lasting injustice or stagnation can mean an inevitable conflict:

*...and if God had not enabled people to struggle for defending themselves against one another, mischief would surely overwhelm the earth....*

(2:251)

Wherever democracy is absent or distorted, an Islamic movement has to struggle for a genuine democracy to secure the basic rights and freedoms of belief, expression and assembly. In a democracy, the vehicles used for a social change for the better include the media, lobbying, political parties and elections. Persistence and continuation of the movement should be maintained since social change cannot be achieved quickly:

*if you are hurt by an adversity, a similar one has hurt (the other) people as well; for it is by turns that apportion unto people such times [of ups and downs].*

(3:140)

*Had there been (prospect) of immediate gain and an easy journey, they would certainly have followed you (O Prophet), but the distance (of the struggle) was too great for them.*

(9:42)

The mobilization, recruitment, organization and struggle should include both men and women (*The Quran*, 3:195, 9:71). Alliances and fronts may be formed to bring together all forces that share certain common grounds and are committed to the struggle, since the movement for social change addresses, mobilizes and benefits the masses, regardless of their ethnic or doctrinal differences.

The Prophet once referred with praise to a tribal alliance which aimed to support the victims of injustice caused by an individual or clan, which came as a result of meetings before his prophethood. The Prophet said that if he had been invited to such an alliance against injustice after his prophethood, he would have agreed to join it.

The Quran significantly refers to the continuation of the movement through successive generations:

*And those who come after them (the early generation of believers) pray: our Lord, forgive us all shortcomings and those of our brethren who preceded us in faith as well, and let not our hearts have any bitter feelings against (any of) those who have attained to faith.*

(59:10)



The Quran, the traditions of the Prophet (*Sunna*) and his life (*Sira*), provide the essential guidance for an Islamic movement for social change which benefits the whole of mankind through all times and places : *And I have merely sent you (O Prophet) as a mercy for all humanity (21:107).*

However, a contemporary Islamic movement for social change can make use of all human experience and findings of sociology, political science and history as long as they do not contradict Islamic guidance. The Prophet advised Muslims to search for wisdom wherever they could find it.

The contemporary world needs Islam. However, the message of Islam must be introduced in a comprehensible way and in the universal way which our time requires:

*And I have never sent forth a conveyor of the message otherwise than (with a message presented) in his own people's tongue, so that he could make (the message) clear to them.*

(14:4)

*Invite (all mankind) to your Lord's path with wisdom and impressive exhortation, and argue with them in the most effective and impressive manner.*

(16:125)

# HUMAN RIGHTS

## INSEPARABLE FROM FAITH IN ONE GOD

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**A**CCORDING TO THE QURAN, THE *DIGNITY* OF THE children of Adam is a divine bestowal which is to be secured by all means, including the law and the state authorities, and is to be defended by all forces:

*We have conferred dignity on the children of Adam, and have borne them over land and sea, and provided for them sustenance out of the good things of life, and favored them far above most of our Creations.*

(17:70)

As a demonstration of this privileged position, God ordered the angels to prostrate themselves before Adam, the first human being. What mainly distinguishes humans from other creatures is their intellect, and their free will to choose between doing good and doing evil.

To fulfill the human potential, all obstacles and pressures must be removed, and all means should be secured to maintain and develop our humanity. The dignity bestowed on humans in the Quran must be defended. It is the individual, social and universal responsibility of Muslims to guard human rights because oppression is an obstruction of God's will in His creation:

*As for that (happy) life in the life to come, We grant it (only) to those who do not seek to exalt themselves on earth, nor yet to spread malevolence: for the future belongs to the God-conscious.*

(28:83)

It is the individual, social and universal responsibility of Muslims, according to their faith, to protect the human merits and virtues of all the children of Adam, regardless of their differences. Defending the human rights of *any* human being is a religious duty for a Muslim, since he/she believes that any oppression is an obstruction of God's will and plan in His creation. Besides, a Muslim believes that God has created all mankind equal as human beings, and no one can claim superiority in this respect, whatever his/her ethnicity, family, wealth or gender may be. The Quran teaches:

*O humanity! Be conscious of your Lord, who has created you out of one living entity, and out of it created its mate, and out of the two spread abroad a multitude of men and women. And remain conscious of God, in whose name you demand [your rights] from one another (and before Him you will be accountable), and of these ties of kinship. Verily, God is ever watchful over you.*

(4:1)

*O humanity! Behold, we have created you all out of a male and a female, and have created you into nations and tribes, so that you might come to know one another. Verily, the noblest of you in the sight of God is the one who is most deeply conscious of Him. Behold, God is All-Knowing, All-Aware.*

(49:13)

The only One who is above all humans is their Creator and Lord: “*and there is nothing that could be compared with Him*” (112:4).

At the inception of the belief in one God is the belief in the maintenance of human rights and the equality of all human beings, since those who believe in the one God believe that all human beings are created by the one Creator. Any discrimination against an individual or group about basic rights as members of humanity is a challenge to the faith, since for any human to claim superiority according to origin or power is contradictory to the belief in the One Ultimate Supreme Being:

*... the All-Highest, who creates [everything], and thereupon forms in accordance with what it is meant to be.*

(87:1-2)

*He cannot be called to account for whatever He does, whereas they will be called to account.*

(21:23)

A tyrant against human rights is against the One Ultimate Supreme Being as well:

*Behold, Pharaoh exalted himself in the land, and divided its people into castes. One group of them*

*he deemed utterly low; he would slaughter their sons and spare [only] their women, for behold, he was one of those who spread malevolence [on earth].*

(28:4)

In the same chapter, the Quran states that those who will attain to happiness in the life to come – as has been mentioned before – are

*those who don't seek to exalt themselves on earth, nor yet to spread malevolence; for the future belongs to the God-conscious.*

(28:83)

Thus, the Quran repeatedly emphasizes human rights and justice, as well as condemning injustice, aggression and oppression. It highlights the message of the Prophet Muhammad which

*...enjoins upon them the doing of what is right and forbids the doing of what is wrong, and makes lawful to them the good things of life and forbids the bad things, and lifts from them their burdens and the shackles that were upon them....*

(7:157)

Justice can be concisely and precisely defined as the maintenance of human rights and equality:

*Behold, God enjoins justice, and [going beyond justice to] the doing of what is magnanimous and kind, and giving to one's kinsfolk; and He forbids all that is shameful and all that runs counter to reason [and morality], as well as transgression; He exhorts you [repeatedly] so that you might bear [all this] in mind.*

(3:195)

Any discrimination between men and women in rights or responsibilities is forbidden according to divine justice, the same as any other discrimination:

*And their Lord does answer them: I shall not lose sight of the labor of any of you who labors [in My way], be it man or woman....*

(3:195)

*And [as for] the believers, both men and women – they are close unto one another [and form together one body], they [all] enjoin the doing of what is right and forbid the doing of what is wrong, and keep up their prayers, and render the purifying [social] dues, and pay heed unto God and the conveyer of His Message.*

(9:71)

Divine justice can never be for Muslims only: it secures the rights of all human beings regardless of belief. It especially secures the rights of belief and of practicing one's belief: “no coercion should be in matters of faith” (2:256).

Defending all houses of worship is legitimate and urged:

*...for if God had not enabled people to defend themselves against one another, [all] monasteries and churches and synagogues and mosques in [all of] which God's name is abundantly exalted – would surely have been destroyed (ere now), and God will most certainly support one who supports His cause....*

(22:40)

Muslims are taught by the Quran to build their relations with others on kindness; the minimum obligation which should be strictly observed is justice (60:8). Muslims should always

have in mind that no hostility stays permanently, and that if they follow God's guidance their behavior may turn an enemy into a close friend:

*Yet God may develop affection between you and those of them you felt were enemies, for God is All Powerful, Much Forgiving and Most Gracious.*

(60:7)

*But good and evil cannot be equal; repel [therefore, evil] with what is better; and so between yourself and one with whom there was enmity [it may then become] as though he/she had [always] been a close friend. Yet [to achieve] this is not given to any but those who are patient and enjoy self-control; it is not given to any but those endowed with the greatest good fortune.*

(41:34-35)

Islam secures even the human rights of those who may violate the human rights of others, since two wrongs do not make a right. Although a violation should be stopped instantly, the rights of the violator as a human being should be secured. Islamic law aims to fight the crime in its origin, not just to inflict punishment. Islamic penal law is enforced in order to prevent the sources of violation and transgression. It is required that every possible effort be made to educate and rehabilitate an offender, not to destroy him/her. Moreover, the Prophet states that a mistaken decision in acquitting a guilty person is better than a mistaken decision of punishing an innocent one. (From an authentic tradition of the Prophet compiled by Ibn Ali Shayba, al-Tirmidhi, al-Hakim and al-Bayhaqi in *al-Sunan* on the authority of Aisha, wife of the Prophet).

Islamic civil and commercial law prohibits illegitimate and exploitative gains while protecting principle which has been earned legitimately and legally before usurious additions :

*...and give up all outstanding gains from usury...for if you do it not, then know that you are at war with God and the Conveyer of His Message. But if you repent, you shall be entitled to your principals. You will do no wrong and neither will you be wronged.*

(2:278-279)

The Islamic law of war requires an open declaration of the start of military operations and limits fighting to the combatants only. As soon as the aggression itself is stopped and the aggressor submits to justice, justice should be maintained in relation to both parties equally:

*...but then, if one of the two [groups] goes on aggressing against the other, fight against the aggressors until they revert to God's commandment; and if they revert, make peace between them (both parties) with justice, and deal equitably [with them], for verily, God loves those who act equitably.*

(49:9)

Any of the enemy's army who asks for protection or shelter should be granted it, and may be returned to his camp if he so requests:

*And if any of those who ascribe divinity to aught beside God seeks your protection, grant him protection, so that he might [be able to] hear the word of God [from you]; and thereupon convey him to a place where he can feel secure....*

(9:6)



The wounded and deserters from the enemy's army should not be attacked, but should be cared for until they are cured or repatriated.

Human rights according to the divine message were considered by the Muslim jurists to be the "very goal of *sharia*", which they condensed in the securing and developing of the human personality in five main areas: life, family, mind, faith, and property. The human rights covered by these five areas include the collective rights of groups and peoples as well as the rights of individuals, and political and social rights have their place side by side.

A collective effort to defend the "powerless and the oppressed" against a powerful oppressor is an essential Islamic obligation. Every right is considered a responsibility and an obligation: in addition to human rights being considered a collective responsibility of the *umma* and the authorities, every holder of a right must also struggle for him/her self to obtain, maintain and enjoy this right.

An accurate balance has to be maintained between basic spiritual and moral development and education on one side, and the protection of values by the law and the state on the other. A balance should also be maintained between rights and duties:

*Indeed, [even after time] did We sent forth the Conveyers of Our Messages with all evidence of the truth; and through them We bestowed revelation from on high, and a balance [where with to weigh right and wrong], so that men behave with equity; and We bestowed from on high [the ability to make use of] iron, in which there is awesome power as well as [other] benefits for man; and [all this was given] so that God might mark out those*

*who would stand up for Him and the Conveyer of His Message, even though He [Himself] is beyond the reach of human perception. Verily, God is Powerful, Almighty.*

(57:25)

Being based on faith in God, the Islamic perspective on human rights is comprehensive and deep. When a Muslim fighter was asked by the Sassanian leader Rustum about the cause that he was fighting for, he simply answered, “God has sent us to transport human beings from the worship of one another to the worshipping of One God, from a narrow life to a wide world, and from beliefs connected with injustice to the justice of Islam.” (al-Tabari, in his reports about the battle of al-Qadisiyya in 17 AH/ 637 CE)

This was the message of Islam for the early Muslims: a universal liberation and establishment of justice and maintenance of human rights. We have thus to maintain, develop and spread such an understanding of the divine message in our times.

# SHARIA AND SOCIAL CHANGE

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**S**HARIA REFERS TO THE LAW OF GOD AS REVEALED BY Him to mankind through His Prophet and Conveyer of His Message Muhammad, to be observed in every time and place as soon as any individual or group becomes Muslim. The divine sources of *sharia* are the Quran and the words and deeds of the Prophet (*sunna*). This concept of *sharia* may become clearer through the following highlights:

- The Quran and *sunna* do not represent only legal commandments or prohibitions. Most of their contents are devoted – as in most other religions – to teaching the faith (belief in the oneness of God, His Prophets and revealed books, Judgement Day, and the life to come) as well as teaching ethics and their implications in human behavior under various circumstances. Glimpses of the perfect creation and function of the universe are presented in the Quran and *sunna*, not as dry scientific statements, but in an impressive style that aims to

guide mankind to the Almighty Creator. Significant characteristics of the Prophets and their practices in preaching their divine message are represented as ethical guidance.

- The implementation of *sharia* is a manifestation of one's obedience to God. It has its roots deep in the conscience of the faithful individual and the faithful society, and this foundation renders it a body of law efficient to implement. *Sharia* guards the moral values and ethics which are taught by Islam and it, in turn, is guarded by faith and morality. Morality is thus the basis as well as the outcome of a genuine implementation of *sharia*.

- Legal rules in the Quran and *sunna* are limited in number, although they cover extensive areas of life. Many of these rules offer general principles and guidelines. Justice is ordained for essentially all human activities: in the family, in business, in the whole society, between the rulers and the ruled, and in all universal relations in general. In the field of transactions, for example, the Quran and *sunna* emphasize the essential requirement of mutual consent for any contract and the prohibition of exploitation, fraud and usury. In addition, some principles about different kinds of evidence for settling disputes are mentioned. Some details are reported in the *sunna* about agricultural and commercial dealings which were common in Arabia at the time of the Prophet, and a few penalties are indicated for certain crimes.

The door is kept open to introducing more laws for other transactions and offenses which may emerge in different times and places. It is considered that new laws should be developed according to a human intellectual approach which is guided by the general principles of the Quran and *sunna* and which stringently avoid contradicting any text in the revealed sources.

The jurists developed a marvellous intellectual methodology, which includes analogy and generally allowed benefits to produce new rules in *sharia* to respond to changing circumstances. By observing the general principles of Quran and *sunna* and by applying suitable methods for developing new detailed rules to cope with changes and needs in different times and places, successive generations of jurists formulated copious detailed rules in varying fields.

In this way, the *sharia* allows human intelligence to interact with the divine sources on one side and the changing realities of the human existence on the other. Muslims are instructed to use their minds in order to understand the *sharia* in its revealed sources utilizing a systematic and synthetic approach which deals with the *sharia* and all the acknowledged texts as a whole, under the assumption that, up to a certain point, all are related. In addition, Muslims are required to respond intellectually, according to general Islamic principles, to the continuously changing circumstances and emerging needs and problems of different individuals and societies.

The *Sharia* does not represent a kind of dictionary or mathematical table which encompasses all information related to a certain subject. The mind is a gift of God to the human being, and He would not render it ineffective by His other gift, that is the divine law. Besides, *sharia* has to be carried out within the range of human ability: “*God does not burden any human being with more than one is well able to bear...*” (2:286), “*...God does not want to impose any hardship on you, but wants to make you pure....*”(5:6).

*...but if one is driven by necessity to do what is forbidden –either coveting it nor exceeding one’s immediate need – no offense shall be upon him/her....*  
(2:173)

*...and He has so clearly spelled out to you what He has prohibited unless you are compelled....*

(6:119)

- Any obligation according to the *sharia* should be based only on an authentic divine text, the outcome of which is definitely clear. The authenticity of the Quranic text is accepted by consensus among Muslims even if differences may arise about the interpretation of a certain part of it.

Traditionists (*muhadithin*) had their techniques in examining what was reported after the Prophet. For reaching a final conclusion from different texts, jurists developed certain methods. Historical and logical methods have been applied to distinguish between what was abrogated in the days of the Prophet and what is permanently effective, what may be a rule for a specific case and what is a general principle. When a tradition of the Prophet obviously denotes a revelation from God, it represents a permanent principle or a legal obligation that ought to be followed by every Muslim as long as it is possible for him/her in any time or place. However, a tradition may also represent a personal habit or a social custom, such as traditions which refer to the food and dress of the Prophet. Or it may obviously reveal the personal discretion of the Prophet, as in some cases of military decisions.

The Prophet himself sometimes indicated that he was speaking or acting according to his personal knowledge or thinking. Any deed of the Prophet (practical tradition or *sunna*) denotes merely that it is allowed to be done by any Muslim, unless a saying of the Prophet (oral tradition or *sunna*) indicates that such a deed is encouraged or ordered. A thorough examination of the text, and its context and the circumstances in which it emerged is necessary to determine the nature of the

statement given by the tradition. Judicial guidelines have been elaborated in this field. Deeds which are supported or rejected by *sharia* do not stand at the same level.

• What is accepted and what is rejected by the *sharia* do not have the same legal status. *Sharia* may order or only recommend on one side, or prohibit or simply discourage on the other. Between the two sides, *there is a spacious middle area of permission and allowance*, in which the human intellect has to practice its changeable discretion. For example, it is recommended for a man to be dressed as beautifully as he can in the mosque, but anyone who does not observe this recommendation does not jeopardize the validity and acceptability of his prayers so long as they are performed properly and his duty is fulfilled. Similarly, going to the mosque after eating garlic is discouraged, as those who pray beside someone who has eaten garlic will suffer from his/her bad breath, but doing what is discouraged does not affect whether or not one's duty in performing the prayers is fulfilled. Also, what is allowed or permitted cannot be considered an obligation, and what is permitted may not be necessarily the ideal or the preferable behavior. Divorce, for example, is permitted, but the Prophet considered it the most hated by God among all that is permitted. However, one may not prohibit, according to his/her personal wishes or on the grounds of caution and piety, what is permitted by God, because to do so is no less condemnable than the opposite case of permitting what is prohibited:

*O you who have attained to faith, do not deprive yourself of the good things of life which God has made lawful to you, but do not transgress the bounds of what is right....*

(5:87)

*Say: Have you ever considered all the means of sustenance which God has bestowed upon you and which thereupon divide into things forbidden and things lawful. Has God given you leave (to do this) or do you perchance attribute your guesswork to God?*

(10:59)

*Do not utter falsehoods by letting your tongues determine (at your own discretion) this is lawful and this is forbidden, thus attributing your own lying inventions to God....*

(16:116)

- Any detailed rule which is not indicated in the Quran and *sunna* and occurs as an application of the general principles or as a result of an intellectual approach of a jurist or a ruler is a guiding precedent, but it does not represent a part of the permanent mandatory *sharia*. Any Muslim individual or society may accept a rule thus derived as long as it is found to be reasonable and beneficial. This represents a practice of *ijtihad* and may in principle be replaced by another similarly derived ruling. Nevertheless, a rule based on *ijtihad* should be respected and obeyed when it is adopted by the legitimate authorities of an Islamic state to which, according to the Quran, obedience is a duty (4:59). It enjoys its mandatory power as long as it is applied by the authorities, but this enforcement at a certain time and in a certain place should be distinguished from the obligation toward a divine ordainment with its permanence and universality which characterize the revealed rules.

One should always keep in mind that what is represented as *sharia* in the voluminous jurisprudential works and the accu-



mulated Muslim practice of the rulers and the ruled, is a combination of what may be an obvious and definite outcome from a divine source, and what may be an intellectual outcome of a juristic method of inference. These two distinctive kinds of rules in juristic works may be mixed and confused both in the minds of some concerned non-Muslims and those of some enthusiastic Muslim activists.

- The *Sharia*, as a law based on faith and included in the divine sources, maintains its effectiveness and efficiency in application through its reliance on the deep moral roots dug in the conscience of the faithful, be they rulers or ruled. It is not something which may be imposed by force from above; it should come as a result of faith and public acceptance.

An assumed application of *sharia* by a despotic regime or a police state undermines the foundations of faith and betrays the whole *raison d'etre* of the *sharia*. The fundamental principle of Islam is that “*There should be no coercion in matters of faith; distinct is the right way from the way of error (for the human mind)....*” (2:256).

Once the Prophet had to settle a dispute about property and addressed both the parties in the case saying: “I am just a human being, and I rule according to what appears to me as true from what I hear. A party may be more expressive in presenting his case. Anyone to whom I give something according to what I hear, which does not actually belong to him/her, will be merely holding a firebrand.” Both men in the dispute shed tears and each tried to allow the other a full hand over the property (an authentic tradition of the Prophet reported by Malik, al-Bukhari, Muslim, Ibn Hanbal, Abu Dawood, al-Tirmidhi, al-Nasai and Ibn Majah).

Moreover, *sharia* determines what is just so far as to instruct the authorities of the state in the application of justice, but the ethics of Islam urge people to surpass the level of justice in their human relations and achieve a higher more preferable level of forgiveness (*afw*), favor (*fadl*), kindness and generosity, and performing in the most excellent ways (*ihsan*):

*...and to forgo what is due to you is more in accord with consciousness of God, and forget not that you are to act with grace towards one another; verily God sees all that you do.*

(2:237)

*...(the God-conscious and pious) who restrain their anger and pardon their fellow men because God loves the doers of good.*

(3:134)

*God enjoins justice, and the doing of the best...*

(16:90)

*...but let them pardon and forbear, do you not desire that God should forgive you (as soon as you forgive others).*

(34:22)

*But since good and evil cannot be equal, repel evil with something that is better, and thus one who is hostile to you may then become as if he had always been to you a close true friend.*

(41:34)

*But an attempt at requiting a wrongdoing should be proportionate to it; hence whoever forgives and reconciliates his/her reward rests with God; for, verily, He does not love wrongdoers.*

(42:40)

The concept of *sharia* among contemporary Muslims suffers from confusion, and thus a lack of distinction, about what is a permanent divine law as revealed in the Quran and *sunna* and what is a human interpretation or inference. Consequently, some hasty and mistaken judgments may be given for financial and commercial activities, in banking, insurance, mortgages, for example. A lack of precise knowledge of such contemporary activities in their totality and specifics, of the existing circumstances among Muslims, especially Muslim minorities, and of the *sharia* itself contribute to the confusion. In this way, Muslims deprive themselves of some of the benefits of the existing economical, cultural, intellectual and legal experiences of the contemporary world.

- Islam provides basic principles and laws, but it does not reject other practices which do not contradict these principles and laws. A clear distinction must also be made between the application of the *sharia* in a Muslim country and society, and its application among a Muslim community which lives as a minority in a non-Muslim country. The difference relates to the nature of the *sharia* rule itself, and it can be carried out by individuals and small groups, whether it needs a relatively large and cohesive community, or it requires a majority of people and the authority of a state.

Such a differentiation is essential for the application of *sharia* because its rules cover all fields of human activity. In any case, Muslims in any time and place should keep in mind the general principle of *sharia*: “God does not burden any human being with more than he/[she] is well able to bear...” (*The Quran*, 2:286), “...God does not want to impose any hardship on you...” (5:6).

The *Sharia* if understood and explained properly would provide deep moral and spiritual roots for the respect of human rights among Muslims, and in their relations with others. The laws of the *sharia*, enforced by the ruling authorities but based at the same time on faith and morals, would enjoy a unique effectiveness and efficiency among the rulers and the ruled. Values such as justice, kindness, altruism, unity and peacefulness would interact with legal rules. The moral and material development which might be maintained among the Muslims, and in the whole world, would have an enormous effect on the implementation of any law in general and the law of God in particular.

The *Sharia* is not a magic button which automatically provides every material and moral benefit just by being pressed. It represents only a part of Islam which is principally a faith and which combines moral education and social reform with the application of law. Even in the legal field, human rights should be preserved and maintained as a basis for the genuine application of rules concerning transactions, penalties, political and administrative systems and international relations. Islam as a whole rejects any narrow or partial conception; it actually mobilizes believers to work hard, persistently and productively, so as to fulfill the responsibility of human and material development in this world, which has been entrusted by God to human beings.

The Quran and *sunna* do not represent inclusive dictionaries, encyclopedias or mathematical tables, but are, rather, dynamic guides for the continuous development of human efforts in moral and material arenas of life. Islam does not seek to turn people either into angels or machines, nor does it allow them to live merely at the biological level of animals. It inspires

and guides the harmonious development of individual and collective human energy: spiritually, intellectually, physically, individually and collectively. The *Sharia* cannot be restricted to penal rules only, and such a way of thinking about *sharia* or presenting it, is a complete distortion. The fixed penalties which are indicated in the Quran and *sunna* for certain crimes are very few and have their strict individual and social requirements, while all other offenses and their punishments are left to the discretion of the authorities in the Islamic state.

Penal rules cannot be applied separately from other parts of the *sharia*, especially the rules which secure the fulfillment of human needs: whether moral or material. The right to work under humane conditions and for a just payment are protected by the *sharia*. Social security for the elderly, disabled, ill and unemployed should be provided by the state through *zakat* revenues and other possible resources. According to the Prophet's traditions, the state must provide assistance for marriage, housing and transportation. The Prophet said: "I have the ultimate responsibility for every Muslim, whether male or female. Possessions that are left by anyone who dies are for his/her inheritors, while obligations and needy children and family members are my responsibility and the concerned party should come to me and I shall take care of him/her" (tradition reported by al-Bukhari, Muslim, Ibn Hanbal, al-nasai, al-Tirmidhi and Ibn Majah).

A tradition reported by Ibn Hanbal states that the Islamic state is responsible for fulfilling the needs for public officials: housing, transportation, marriage and personal assistance in housework and other essential needs. Education represents both a right and a duty of the individual according to the *sharia* (An authentic tradition of the Prophet reported by Ibn Abdel

Basr and al-Bayhaqi in *Shu'ab al Iman*), and the state is responsible for educating its children and developing the knowledge of its adults as well. (Ibn Hazm, *al Ihkam fi Usul al-Ahkam*, Vol V, Ch. 31.) Ethical values should be nurtured and maintained by the family, the school, the mosque and all mass media and the society as a whole.

Maintaining such a moral and material standard for the society is an essential prerequisite for the infliction of penalties on offenders, and it is a foundation of *sharia* which cannot be ignored. The fixed penalties (*hudud*) especially those stated for theft and adultery, may seem too severe, but they cannot actually be inflicted in most cases because of the social and legal conditions which are required by the Quran and *sunna* for their infliction. In order to carry out the penalty for theft, the stolen matter must possess certain characteristics such as value and a clear sign of ownership made by the owner to secure it (Quran 2:282). The legal evidence which is required for proving adultery is almost impossible to obtain, except in case of a confession made without any pressure and without any mental or psychological deficiency. al-Nasai reported that the Prophet rejected the practice of any physical pressure on a defendant so that he might confess. (See also Abu Yusuf's *al-Kharaj*.) In general, according to the Quran and *sunna*, any physical or moral pressure on a defendant or witness invalidates his/her statement.

A judge should not push a defendant to confess; on the contrary, every defendant should be informed precisely of his/her rights as well as of the legal definition of the offense. Clarification should be made to remove any possible misunderstanding or confusion about related forms of behavior which may be distinctive legally from the specific offense under

question and may be assigned a lesser punishment. If any social or legal requirement is missing or if any suspicion may arise about the alleged commitment of the offense, the fixed penalty cannot be inflicted. In such a case, either the defendant is acquitted without any punishment, or a lighter discretionary penalty is inflicted if the judge is convinced that some offense has been committed even though the fixed penalty for it cannot be legally defined. The Prophet stated clearly that the mistake of acquitting a guilty man is better than that of condemning an innocent man (an authentic tradition reported by Ibn Abi Shayba, al-Tirmidhi, al-Hakim and al-Bayhaqi in *al-Sunan*).

The social and legal requirements for the fixed penalties do not represent modernized sophisticated apologetics: they are presented clearly in the Quran and *sunna*, the early judiciary practices under the Caliphs, and the classical juristic heritage. In this light, the few fixed penalties in *sharia* – especially those for theft and adultery – can be considered as primarily preventive or deterrent.

Some different points of view may develop among Muslims about the application of *sharia* in contemporary societies in areas such as acceptable dress for Muslim women, the proper education of children, legal ways of saving, borrowing or investing money, and intellectual and practical relations with people of different religions or ideologies. Such differences should be taken as something normal and inevitable in the practice of *ijtihad* and the application of *sharia*. They do not indicate any intention to deviate from *sharia* or deform its rules. Once a Muslim scholar rightly said: “I consider my view as the right one which may be proven wrong, while other views are for me the wrong ones which may be proven right.”

# SHARIA IN BRIEF

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**S**HARIA REFERS TO THE BODY OF LAWS OF ISLAM IN all fields, whether they are related to worshipping God (*ibadat*) or to dealings with people (*muamalat*). The divine sources of the *sharia* are the Quran and the *sunna* of the Prophet. However, the divine source must be understood, interpreted and implemented by the human mind.

- The laws of the Quran and *sunna* are either general principles of justice, or particular rules about certain essential family relations, civil and commercial dealings, or criminal offenses. The last are limited in number and must be understood and implemented within the whole structure of *sharia*, especially the principles which secure human rights including social justice and public education.

- In addition to the laws determined by the Quran and *sunna*, *sharia* can adjust to new circumstances through *ijtihad*, in which we use human intelligence in providing new laws to meet emerging needs based on the general objectives of *sharia*



(e.g. securing justice in all its dimensions, forbidding exploitation, fraud etc.).

- Muslim jurists have used their human intellect in understanding the divine laws in the Quran and *sunna*, as well as the practice of *ijtihad*. They have introduced new rules based on general Islamic principles to respond to changing circumstances, and have used several intellectual methods such as analogy, preferences in case of possible alternates, analogies, consideration of the allowed general benefit and so on.

- Juristic heritage includes what is related directly to the divine sources with necessary human interpretation, and what represents a human effort to respond to the emerging changes and needs guided by the general principles of *sharia*. In this way, the Islamic juristic heritage encompasses within the same framework both what is divine and permanent and what is human and changeable. Some have suggested that the term *sharia* be used for the laws of the Quran and *sunna* only, while the legal heritage may be called jurisprudence (*fiqh*). The confusion is not caused by the terms but by the meanings and connotations given to them. Whether the legal heritage of Islam is considered law or jurisprudence or both, the concrete fact is that it includes both what is divine and permanent and also what is human and changeable together in one place.

It is the responsibility of Muslims, and especially that of their leaders, jurists and thinkers, to make the clear distinction between both, and observe the permanent divine laws, while carrying on the practice of *ijtihad* in order to develop specific detailed rules to suit the contemporary circumstances of a given time and place and respond to emerging needs.

- According to Islam, laws enforced by state authorities should be preceded by and combined with a comprehensive

development of material and human resources and by securing social justice and public education. Caliph Umar, for example, did not enforce the fixed penalty of theft in a case when he realized that the essential needs of life had not been secured for the defendant by those who were responsible for him. In fact, the Caliph suspended the penalty for theft during years of famine, since all the people were under the pressure of necessity at the time.

# PERMANENT PRINCIPLES OF JUSTICE

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**M**USLIMS BELIEVE THAT ISLAM IS THE FINAL message of God and that its law suits every time and place. Non-Muslims, however, repeatedly question how laws which appeared fourteen centuries ago can apply to contemporary society, since in their view, laws reflect changing social needs, concepts and concerns. Unfortunately, either Muslims have been unable to present the case of Islamic law clearly and convincingly, or non-Muslims have not understood the merits of *sharia* and how it works. In any case, the burden of proof is on Muslims to explain the dynamism of Islamic law *vis a vis* human change clearly and concisely.

They should not feel upset or offended by continuous arguments and objections. Most arguments generally refer to a common idea of law and its function, and most have been influenced by modern developments in Judaism with regard to the Jewish law as indicated in the *Torah*, or by the separation of church and state in modern Christian thought.

The human mind has even recognized a kind of super-law which supersedes time and place and may be considered as a permanent and comprehensive source of justice which fills the gaps and complements the limitation of particular laws in given times and places. Through such a legal explanation, Greek philosophy and Roman jurisprudence recognized as permanent super-law what they called “natural law.” In England, the Court of Chancery developed the “Principles of Equity.” Likewise, in the eighteenth century Jean J. Rousseau (d. 1778) and John Lock (d. 1704) introduced their ideas known as *the social contract* to support the people and their common will over the rulers and their decisions.

According to Islam, God guides human beings to *super-principles of permanent justice* through human reason which is guided by divine message:

*And We have shown him/her [the human being] the two paths [of good and evil].*

(9:103)

*...there [on earth] shall most certainly come unto you guidance from Me; and one who follows My guidance will not go astray, neither will he [she] be unhappy. But one who shall turn away from remembering Me (and My guidance) shall suffer a hard life (sterile and spiritually narrow).*

(20:123-124)

*And set your face steadfastly toward the faith (in the One God), turning away from all that is false, in accordance with the human nature created by God, since such a nature cannot be changed; and this is the genuine faith, even if most people may not know.*

(30:30)

To emphasize the connection between human common sense and divine guidance, the Quran calls the good and the evil “the acceptable and the rejected,” (*maruf and munkar*) as if they are both recognized by common sense. As an example the Quran reads:

*...the Prophet who enjoins upon them the doing of what is right (as known by human reason and common sense) and forbids them the doing of what is wrong (as it runs counter to human reason and common sense), and makes lawful to them the good things of life and forbids them the bad things, and lifts from them their burdens and the shackles that had been upon them.*

(7:157)

*...and He (God) forbids all that is shameful and all that runs counter to reason and common sense....*

(16:90)

Thomas Aquinas, the thirteenth century Christian theologian, might have been influenced by such interaction of human recognition and divine inspiration in Islam, as he identified “the natural law” with “the law of God,” or that part of the eternal law of God, or the reason of divine wisdom, which is knowable by humans through their power of reason. These permanent principles of justice represent the cornerstone of *sharia*, which should not be overshadowed by small details incorporated into the Islamic legal heritage throughout the centuries by rulers and jurists.

*Sharia*, then, in its divine sources, the Quran and the *sunna*, presents mainly general principles. Some basic civil and penal rules are indicated to underline their importance and to show

how more can be developed to respond to social needs. Rules forbidding the exploitation of human beings through usury, fraud and unfair transactions, and rules forbidding transgression against the human body, dignity, or property are clearly stated, and these represent the essence of *sharia* as revealed by God in the Quran and *sunna*. The full development of *sharia*, however, comes in works of *fiqh*, or jurisprudence, which are not restricted to the limited revealed laws. Successive generations of Muslim jurists have added new laws, applying the techniques of interpretation and inference to what is already revealed in divine source. Examples of these techniques are analogy (*qiyas*), preference in case of alternate analogies (*istih-san*), consideration of an allowed general benefit (*maslaha*), and the general principle that everything is initially permitted until it is forbidden by the Quran or *sunna* (*ibaha asliyya* or *istishab al ahal*), the burden of evidence being on the one who claims the prohibition. Such human techniques and their outcomes are not part of the permanent divine law, since they merely represent human intellectual efforts, and since the results may change according to the change of cultural and social circumstances in different times and places.

Legal changes resulting from changed circumstances cannot be practiced arbitrarily nor can they cause a suspension or violation of *sharia*. God, who has “... *perfected your religion for you and has completed His gift to you...*” (Quran 5:3) has allowed the necessary mechanism for the change of law from within, to cope with the changing human circumstances and emerging needs, while revealing general principles to suit all times and places and provide a deep and wide basis of justice on which particular laws can be developed to cope with particular circumstances.

These general principles represent a permanent and rich source which cannot be ignored.

*God commands justice and kindness and caring for (one's) relatives; while He forbids all that is shameful and all that runs counter to reason (or common sense) and transgression.*

(16:9)

*...But what is with God is better and more enduring for those who believe and those whose (affairs are conducted through mutual) consultation among themselves.*

(42:38)

*We have conferred dignity on the Children of Adam and transported them around on land and sea and provided for them sustenance out of the good things of life and favored them far above most of Our creations.*

(17:57)

*...and We have made you into nations and tribes so that you may come to know one another, verily, the noblest one in the sight of God is the one who is the most conscious of Him.*

(19: 13)

*No coercion is allowed in matters of faith [2:256]. ...and no one who writes a document or is a witness must suffer harm (because of what, either may state)....*

(2:282)

*[the Prophet] who enjoins upon them the doing of what is right and forbids the doing of what is wrong and makes lawful to them the good things of life and forbids to them the bad things and lifts from them their burdens and the shackles that were upon them.*

(9:67)

*Do not devour one another's possessions wrongfully, and in case of trade it has to be [conducted] by mutual agreement, and do not destroy yourselves....*

(4:29)

*God does not like any evil to be voiced openly....*

(4:148)

*Those who love to spread evil among those who believe, grievous suffering awaits them in this world and in the life to come....*

(24:19)

*...and do not spy upon one another....*

(49:12)

*...one who does evil is requited for it.*

(4:123)

*...and whatever (wrong) any human being commits rests upon himself alone; and no bearer of burdens bears another's burden.*

(6:164)

The *sunna* also provides general rules of justice. For instance the Prophet said:

“No harm is allowed to be caused by anyone, whether inadvertently or deliberately, initially or retributively” (an authentic tradition reported by Ibn Hanbal, Ibn Majah) and “Deeds are judged according to intentions” (an authentic tradition reported by al-Bukhari and Muslim). According to the Prophet’s tradition, education is an obligation upon every individual (an authentic tradition reported by Ibn Abd al Basr and al-Bayhaqi in *Shuab al Iman*) and the authorities must provide the necessary means to fulfill the obligation (Ibn Hazm, *Al Ihkam* Vol. V, Ch 31.). Another tradition states that Muslim



authorities are responsible for helping any family whose supporters have left it without resources or with crippling debts (an authentic tradition reported by al-Bukhari, Muslim, Ibn Hanbal, al-Nasai, al-Tirmidhi, Ibn Majah).

These general principles of justice provide the society with a permanent, deep and wide source for different laws which are capable of responding to changing needs and circumstances. Particular rules in the Quran and *sunna* are limited in number and they deal only with basic civil and penal cases to deter the violation of essential human rights.

Muslim jurists who have analyzed the rules of *sharia* in the Quran and *sunna* have realized that all of these divinely revealed rules aim to secure and develop, physically and morally, the human individual and society in the areas of human life, family and children, the intellect, freedom and sanctity of faith, as well as property. Whenever changing circumstances may affect particular rules or raise needs for additional ones, the general goals of Islamic law stay permanently and guide the legal change. The Quran repeatedly stresses how *sharia* aims to remove hardships and pressures from human life:

*...God wills that you shall have ease and does not will you to suffer hardship....*

(2:185)

*God does not want to impose hardship on you.*

(5:7, also 22 78)

*Sharia* emphasizes the fundamental principle that everyone is responsible only within the limits of his/her own ability. God requires the believer to carry out what is possible, and He forgives what is beyond individual and societal abilities

...but if one is driven by necessity – neither coveting it nor exceeding the immediate need, he will have no offense held against him....

(2:173)

...As for one who is driven [to what is forbidden] by hunger without any deliberate intention to sin behold: God is much-forgiving, the most Merciful....

(5:3)

And He [God] so clearly spelled out to you what he has forbidden to you (from) unless you are compelled (to do so).

(6:119)

Accordingly, jurists have formulated a general rule that when a real hardship may be felt in carrying out a certain law, flexibility must be used in implementing that law in order to remove hardship and put the person at ease (*al-mashaqqa tajlib al-taysir*).

Cases of necessity and pressure are not restricted only to individuals, but also include communities and societies. A collective unavailability of something forbidden by *sharia* may lead to making it temporarily tolerable and forgivable (*umum al-balwa*). Such a valuable juristic rule was derived directly from the Quran and *sunna*, as the above-mentioned texts illustrate. The Prophet taught the Muslims that they must follow in the right direction and must be as close as possible to the teachings of God (*saddidu wa qaribu*) (an authentic tradition reported by al-Bukhari, Muslim, Ibn Hanbal and al-Tabrani in *Al Kabir*), since a perfect and complete abiding by all the rules of *sharia* may not be easy or possible for a certain individual or community in a certain time or place.

In this light, the enormous freedom which has been left for the human intellect to devise new laws (a mechanism technically called “the practice of *ijtihad*”) assures the capacity of *sharia* to meet emerging circumstances and needs. Among the many methods of *ijtihad* are some above-mentioned ones whose names reveal clearly their relations to the conceptual and practical circumstances, especially preference (*istihsan*), consideration of an allowed general benefit (*maslaha*), and the initial permissibility of everything until it is proven forbidden by the divine sources. Moreover, the general goals of *sharia* provide a wide base for producing new laws to cope with continuous change following broad principles and main directions.

Many of the enormous details in juristic books are a product of *ijtihad*. The Caliph Umar was a pioneer in making Islamic law cope with changing circumstances. Under his authority as caliph, he enforced laws he thought best suited the Muslim society in his time. In one well known case, Umar considered the pronouncement of three divorces at once as three separate ones, thus preventing the ex-husband from restoring the marriage with his ex-wife after she married a new husband and got divorced. This verdict differs from the guidance of *sharia*, which requires three separate pronouncements of divorce and other means as well to emphasize that the undesirable decision of divorce should be taken seriously and slowly.

In other cases, the Caliph restricted the marriage of Muslim men with non-Muslim women and stopped the payment of any revenue of *zakat* (social welfare dues) to those whose hearts were to be won over. Some may agree with the Caliph’s views and others may not, but everyone admires his courageous initiatives in responding to emerging circumstances and practicing *ijtihad*.

Two hundred years after the Caliph Umar, Imam Shafii (d. 819) changed many of his own views and even rewrote his own books after he moved from Abbasid Iraq to Fatimid Egypt. Consequently, he had within his juristic approaches what was described as “old” and “new,” and his works had versions related to Baghdad and others related to Egypt. While some of his followers restricted themselves to the new versions and views, assuming that they had abrogated the older ones according to a statement of Imam Shafii which his disciple Buwaayti reported, others chose the older or considered both as equal options.

Imam Shafii might have changed his thinking in Egypt as a result of new evidence or of a different interpretation, as well as a result of different features and needs in the new social environment. Ibn al-Qayyim (d. 1351) stated in his valuable work *I'lam al-Muwaqqin* that the change in rules by time is merely because of the change of time and circumstances, and not necessarily because of a change of evidence and arguments. (Ibn al-Qayyim, *I'lam al Muwaqqin*, Vol III, Ch. I).

It may be helpful in the field of juristic studies to follow a certain topic or point historically, vertically, through successive generations of the same school or of different schools, or followed geographically – horizontally – through various regions and environments in the same school or in different schools. By examining the contributions of Abu Hanifa (d. 767) and those who followed, such as Ibn al Humam (d. 1456) and Ibn Abidin (d.1836), or by examining the juristic Hanafi heritage in Syria, Egypt, Iraq, India and Central Asia, one can realize how the Muslim jurists even within one school coped with changing circumstances in different times and places. The same result can be reached by examining the contributions through successive

generations of Maliki jurists from Malik (d. 795) to Sahnun(d. 854), Ibn al-Arabi (d. 1147), al-Qurtubi (d. 1272), al-Shatibi (d. 1388), until we reach later ones such as Shaykh Bakhit in Egypt, or by examining the Maliki contributions in Hejaz, Egypt, North Africa (Maghrib) and Southern Spain (Andulus).

In the Hanafi and the Maliki school juristic opinions (*fatwas*) which differed from previous ones on the grounds of either common necessities (*umum al balwa*) or emerging ones (*nawazil*) present examples of the flexibility of *sharia* and its dynamism in facing human change.

Contemporary Islamic jurisprudence must follow the same dynamic mechanism to respond to present needs and to expose how faulty the assumption is that *sharia* was developed in previous centuries and has become now merely a closed book and a permanent code of laws of which nothing can be revised or changed.

# DYNAMICS OF SHARIA

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**A**WARE OF THE FACT THAT MUSLIM JUDGES WOULD confront cases not directly related to a Quranic text or the *sunna* (the Prophet Muhammad's words and deeds), Prophet Muhammad asked Muadh ibn Jabal, who was going to be a judge in Yemen, how he would tackle such cases. Muadh answered that he would do his best in using his human intellect and common sense. The Prophet was pleased. He asked God to guide the future judge to the right way in his future rulings. The word which Muadh used in his reply to the Prophet became a classical term for the intellectual response to emerging needs which is used in addition to the Quran and *sunna* in the formulation of Islamic law: the term is *ijtihad*.

Even understanding and interpretation of the texts of the Quran and *sunna* themselves require a human effort or *ijtihad*. One must know the totality of the texts themselves, their historical background, the nature of the issues treated in them, and the circumstances of the times and places. *Ijtihad* is essen-

tial in responding to emerging problems and coping with changing circumstances with reference to these divine sources. The divine and final message revealed fourteen centuries ago allows within itself spacious room for coping with change, as change is fundamental in human nature and is always noticeable in the individual and collective intellectual and social developments of human beings.

Al-Shihristani, the prominent author of a comprehensive work on the religious beliefs of his time (d. 1153), stated clearly that the Quran and *sunna* have a limited number of texts which cannot cover the unlimited number of continuously emerging events except through the intellectual dynamics of *ijtihad*; and this fact was repeatedly emphasized by other Islamic authorities such as Ibn Khaldun (d. 1405) (al-Shihristani, *al Milal wa il Nihal*, Vol. I, Chapter on differences in legal details [*al-furu*]; see also Ibn Khaldun, *al-Muqaddima*, Chapter on the Science of Fiqh). The general principles of the Quran and *sunna* and the goals of *sharia* as developed by prominent jurists like al-Shatibi (d. 1388), (Al-Shatibi, *al-Muwafaqat*, Vol. II), represent an invaluable guide to the practice of *ijtihad*.

One must remember that in order for the practice of *ijtihad* to provide suitable legal rules in response to social changes, the human intellect must play a major role. The human intellect is crucial in comprehending the general principles and the goals of *sharia* as represented in the Quran and *sunna*, as well as in understanding the existing social circumstances and needs which brings the necessity of *ijtihad*.

Examples of the general and permanent principles of *sharia* have been mentioned in a previous chapter. Some are mentioned here again to bring them to mind now:

*God does not burden any human being with more than he(/she) is well able to bear*  
(2:286)

*And He has laid no hardship on you in religion.*  
(22:78)

*...And let not your own hands throw you in destruction...*  
(2:195)

*There should be no coercion in matters of faith.*  
(2:256)

*God will not take you to task for oaths which you may have uttered without thought, but will take you to task (only) for what your hearts have conceived (in earnest).*  
(2:225)

*But if you repent and give back what you get (by exploitation and injustice,) you are entitled to your principal; you will do no wrong, and neither will you be wronged.*  
(2:279)

*And neither one who writes nor the witness must suffer harm.*  
(2:282)

*Do not devour one another's possessions unjustly, and (be aware that) legitimate gain should be only through business based on mutual consent among you, and do not destroy one another.*  
(4:29)

*God commands justice, and doing the best (and the kindest) and giving (one's dues) to near relatives, while He forbids all that is shameful and all that runs counter to reason (common sense and good taste), as well as (any form) of oppression.*  
(16:90)



The traditions of the Prophet are a treasure trove of general principles of justice such as “Actions are but by intention,” (an authentic tradition reported by al-Bukhari and Muslim).

“That which I have forbidden you to do: you should avoid; what I have ordered you to do: do as much of it as you can.” (This authentic tradition was reported by al-Bukhari, Muslim and ibn Hanbal.)

“Verily, God has prescribed proficiency and magnanimity in all ideas” (an authentic tradition reported by Muslim, Ibn Hanbal, Abu Dawood, al-Tirmidhi, al-Nasai and Ibn Majah.)

“There should be no harm caused by someone to another neither initially nor retributively” (an authentic tradition reported by Ibn Hanbal and Ibn Majah);

“My followers have been exempted from any responsibility for their mistakes, (their) forgetfulness and for what they may do under duress” (an authentic tradition reported by al-Tabrani in his work *al-kabir*.)

Another significant *hadith* was reported by al-Daraqutni and others:

God has ordained obligations: do not neglect them; and He has set boundaries: do not trespass them; He has prohibited certain things: do not violate these prohibitions. He might not mention it out of compassion for you, not forgetfulness: do not seek after it.

The goals of *sharia*, as established by our jurists, provide a solid basis for, and a well-constructed presentation of, human rights. Islamic law aims to secure and develop: life in all its dimensions (physical, intellectual, psychological and spiritual), the family and children as a continuation of human life, the

human mind, freedom of belief and expression of one's beliefs, and private and public ownership. *Sharia* secures human needs, whether they are essentials or refinements. Priorities can be arranged according to the goals of particular deeds and to the levels of requirement that the deeds are related to. In addition, there is the known differentiation in the force of what Islam may require or forbid. Whether a deed is an obligation or recommendation on one side, or a prohibition or discouragement on the other, is something that is clearly established in *sharia*, provided that the relevant text is authentic and its meaning is obvious or can be supported according to the technical ways known to specialists.

When some Muslims seem reluctant to accept change as something fundamental in human nature, or when they seem reluctant to use the dynamics of *ijtihad* to cope with change, they may be pushing people to argue about the binding of the *sharia* or the binding of the Prophet's traditions or other essentials, in order to secure for themselves the necessary flexibility which they have been denied within the system. In their mistaken rigidity about *sharia*, these Muslims may unconsciously provide the grounds for those who may say that the Quran, the traditions, and the *Sharia* are wholly or partly inapplicable to our time. Technological progress has made the whole world smaller and closer through mass communication and mass production. Accordingly, multinational and international activities have become dominant, and the circulation of commodities, currencies and credit has become universal, huge and transient. Some may see and say that Muslims cannot be isolated from such contemporary globalization to live on their own and by laws which are different from the universal legal development, coping with the continuously emerging realities.

Muslims have to show that *sharia* can cope with change through *ijtihad* and that it is still relevant in contemporary daily life. Muslims cannot isolate themselves from the dynamism of the whole world if they want to be successful participants and contribute to progress. They feel increasingly uncomfortable with past judgments made to cope with the then-existing circumstances, when transportation and communication facilities were limited. The degree of international contact and the spread of intellectual and social change which occurred in the past cannot be compared with that of the increasingly accelerated pace and scope of the contemporary world.

It is thus essential to draw a line between the permanent, divine guidance in the Quran and *sunna* and the human contributions which have been the product of a given time and place and represent merely a heritage, even if that heritage was guided in general by the Quran and *sunna*. With regard to the *sunna*, we should realize that Prophet Muhammad was a human being who received the divine revelation, no more and no less: *Say (O Prophet): I am only a human being like yourselves, but I have received revelation (from God)....* (18:110).

A denial of Muhammad's humanity is no less serious and no less heretical than a denial of his prophethood. In the fundamentals of jurisprudence, it is a well known fact that the practice of the Prophet might or might not represent a binding revelation. Among such practices of the Prophet that could not be considered as binding for all, one may mention what might be restricted to himself personally (like some of his practices in marriage or fasting) or what might be related to his human nature and habits or what was done through his human discretion as a leader of the community on the grounds of *ijtihad*.

The practical *sunna* cannot be considered as an obligation for Muslims in general, unless we find some indication or support for this, but instead they mean that, with a few named exceptions, such practices are permitted. Sayings addressed by the Prophet to his followers may have been intended to be taken as orders, recommendations or mere guidance, or as prohibition, discouragement or mere permission. An arrangement of priorities can be made according to the place of any instruction of the Prophet through the above mentioned goals of *sharia* and through the various levels of Islamic rules as they deal with essentials, needs, or refinements. In the science of *hadith*, traditions which were widely circulated (*mutawatir*) or well known (*mashhur*) or singly reported cannot be taken equally, especially in certain matters. Much confusion about the authentic *sunna* arises when all traditions are given the same bindingness.

It is essential to secure such an intelligent and knowledgeable differentiation between what is divine and permanent and what is human and temporary, between what represents an obligation or a prohibition and what represents an encouragement or a discouragement, between what is strong and what is weak, in the form and content of different texts, in order to provide cogency to our contemporary Islamic jurisprudence. This should go hand in hand with the accurate evaluation of the reporters of *sunna* and their conceivable interpretation. The contemporary responsibility of Muslim thinkers and jurists is two-fold: how to deal with the past, and how to cope with the present and plan for the future. Both are logically and practically connected, and both require the serious application of the divine gift of human intelligence.

God's messages taught His divine guidance and this should interact with human intelligence, "the Book and the wisdom" (2:129, 151, 231, 3:48, 81, 164, 4:54, 113, 5:110, 62:2) :

*And whoever is granted wisdom has indeed been granted wealth abundant; but none bears this in mind save those who are endowed with genuine thinking [2:269].*

# PRIORITIES IN SHARIA

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**I**N UNDERSTANDING AND IMPLEMENTING ISLAMIC LAW it is essential to look at it, and at Islam as a whole, as a dynamic process, not as a static entity. The Quran was revealed over a period of 23 years, spreading the message of Islam according to a certain plan which dealt with circumstances that existed and developed in Makka and Medina during that time.

The response of Muslims to aggression provides an example of how events in the early history of Islam were dealt with in an emerging dynamic system of law. At first, in spite of the severe attacks on Islam and on the Prophet Muhammad and in spite of the torture which many believers suffered in Makka, Muslims stood firmly, but they were not allowed to defend themselves or their beliefs by using force. Then, after receiving the divine command to emigrate to Medina, the Muslims studied the surroundings, geographically and demographically, and changed their strategy. Muslims, wherever they lived in Arabia, were mobilized and ordered to gather in Medina.

*And as for those who have come to believe without having moved (to Medina), you are not responsible for defending them until they move (to it) ...*

(8:72)

With this strategy, Muslims were able to pressure the belligerent tribe of Quraysh and defend themselves against its attacks, even when Quraysh mobilized a tribal alliance to besiege Medina. Later, when Muslims felt strong enough morally and physically to go to Makka for a peaceful visit to the Kaba, (the House of God) established by Ibrahim (Abraham), but finding their attempted visit obstructed by the leaders of Quraysh, they relied on another strategy: negotiation.

Negotiations between the Muslims and their enemies led to the agreement of Hudaibiya, which enabled the Muslims to extend their activities all over the Arabian peninsula, and although they had to return without visiting the Kaba that year, according to the agreement, they were able to visit it the following year. Shortly afterwards, they entered Makka victoriously, after having been forced to fight because of their enemies' violation of the agreement.

Such a dynamic course of events cannot be looked at horizontally, ignoring how planned strategy interacted with changing circumstances. Also, an event can neither be studied in isolation, nor be viewed at the same level as other events. Individually or grouped, events cannot be taken out of their context in order to be repeated by Muslims in different circumstances, as time and place have determined certain interactions in the past which may not fit a later situation and may not necessarily produce the previous successes.

Nevertheless, the moral lessons of the past about persistence, firmness, and patience in adversity apply to any time and place. What may differ according to changing circumstances is the planning of an ideological or practical strategy. Determining priorities comes at the head of such planning.

The Quran shapes the Muslim's mind to consider the priorities in its teachings, and to avoid seeing them in a vacuum, or in a one-dimensional way. Some examples can be given in the following verses:

*True piety does not consist in turning your faces toward the east or the west: but the truly pious is the one who believes in God and the last day and the angels and revelation and prophets, and spends what he/she may own - however much he/she may cherish it - upon his/her near of kin, and the orphans and the needy and the wayfarer and those who ask for help, and for freeing human beings from bondage; and the one who keeps up the prayers and renders the purifying dues for those who are in need; and (the truly pious are) those who keep their promises whenever they promise, and are patient in misfortune and hardship and in time of peril: it is they who have proved themselves true, and it is they who are really conscious of God.*

(2:177)

*Do you, perchance, regard the (mere) giving of water to pilgrims and the tending of the inviolable House of Worship as being equal to (the works of) one who believes in God and the Last Day and strives hard in God's cause. They are not equal in the sight of God ....*

(9:19)



*Such of the believers as remain passive – other than the disabled – cannot be deemed equal to those who strive hard in God’s cause with their possessions and their lives....*

(4:95)

*Not equal are those of you who spent and fought (in God’s cause) before the victory (of entering Makka), and others: (the former) are of a higher rank than those who may spend and fight (only) after it....*

(57:10)

Moreover, God’s rewards for good deeds have their grades, since good deeds cannot themselves be equal just because they are all good. There are *the foremost who will be drawn close unto God in gardens of bliss....*(56:10-11), beside “*those at the right*” or “*who have attained to what is right*” (56:8).

*Some (of the believers) stick to the minimum (of the required deeds of goodness), while others – by God’s leave – are foremost in deeds of goodness: (and) this, indeed, is a merit most high.*

(35:32)

Looking to the development of *sharia* as the Islamic system or as the organized way of life in various areas, it is clear that the legislative process started in Medina, when an Islamic state with all its requirements – including land, people, sovereignty and authority – was established. Not all prohibitions were decided at once, but they were distributed over the nearly ten years that the Prophet was in Medina. The *sharia* should not be understood as split parts, with every part equal to the other in

importance regardless of different circumstances. On the contrary, priorities for implementing *sharia* should be set by any modern Islamic movement or state, considering the particular circumstances of a given time and place.

Steps in implementing *sharia* ought not to be considered horizontally as equal bits, but should be considered as parts of a dynamic development. Some may believe that all rules of *sharia* are equally required at once without delay or differentiation, while others may think that the historical development of presenting the message of Islam to the Arabian society by the Prophet (*dawa*) or implementing its laws should be repeated literally, whatever the difference in contemporary circumstances may be.

Agricultural or industrial societies may now need a process in *dawa* or sets of legislation which is different from what was followed in the Arabian tribal society during the Prophet's lifetime. Islamists should develop their own plans which deal with the realities they face today, such as automation and computerization, mass economics (mass production, mass distribution) and globalization. Such planning allows for a variety of possible outcomes according to different ideas and circumstances of particular situations, whereas imitating a pattern derived from medieval practices or judicial traditions may produce a mere illusion.

The moral essence and the legal principles of Islam based on its values are universal and permanent, but the detailed specifics worked out by human intellect (*ijtihad*) have to account for the huge qualitative changes in the contemporary world. Since Islam is the last and final of God's messages revealed to humanity, and since no other prophets are expected to "make lawful to you some of what was previously for-

*bidden to you,*” as Jesus did in relation to the Laws of Moses (3:50), Islamic *sharia* is planned to enable Muslims to cope with changing circumstances from within.

One of the basic mechanisms of *sharia* in this respect is to set priorities and goals, and use appropriate methods to achieve them. Until the battle of Uhud, drinking alcohol was not yet forbidden by God, and the prohibition of usury came late in the life of the Prophet. Each of these legal rules had to come after a certain educational and legislative process to reach the required goal. It is essential to thoroughly study the methodology and dynamics of this process in order to apply the principles and rules of *sharia* to our contemporary circumstances, and not to simply repeat the implementation of a certain rule, even if the existing circumstances would abort it from the very beginning or kill in the process any constructive results expected from it.

Our previous jurists were aware of the concept of priorities in *sharia*. What was required was graded into mandatory and recommended, and what was forbidden was graded into prohibited and discouraged. Between the “required” and the “forbidden,” the jurists pointed to a wide and spacious area of what is permitted. Any permitted deed or thing can be moved to the side of the “required” or the side of the “forbidden,” according to developing circumstances. Smoking may be a good example in this respect.

The jurists graded the entire body of the teachings of Islam, whether they be moral values or legal rules, and whether they be about what is required, permitted or forbidden, into three levels: the essentials: “darurat,” the needs: “hajat,” and the refinements: “tahsinat.” For example, one may ignore some refinements of washing (*ghusl* or *wudu'*) although washing is

considered in itself an obligation, if the water to be used is desperately needed for drinking. The goals of *sharia* were ascertained by the jurists to be securing and developing humanity: life, family and children, the mind, spirituality and property.

Bearing these goals in mind one can see why a prayer which maintains and develops human spirituality can be interrupted to save a human life which is at risk. Jurists stated that a public need has a priority over an individual essential. If a prohibition is an essential for an individual or a society, it may be allowed. One may eat pork or drink alcohol if he/she would otherwise die from starvation or thirst in a desert and this is the only food or drink that is available.

A society may be likewise exempted from certain prohibitions to overcome certain pressures. For example, in a case of famine, the punishment for stealing was suspended by Caliph Umar. At the same time, forbidding evil has priority over bringing out good, and consequently Islamic authorities may not allow gambling or prostitution to encourage tourism or increase the national income and the revenues of taxes. Unless the priorities of *sharia* are set out and arranged according to existing circumstances, *sharia* as a means to achieve justice will not be appreciated by Muslims or others.

How can a legal system developed over centuries of continuous practice of *ijtihad* by the rulers and jurists be implemented at one stroke in the present? How can the rules reached by one of the methods of *ijtihad* in a medieval society apply to a modern society? It is essential to understand the dynamism of *sharia* in its historical development and to benefit from our judicial heritage. This is not accomplished simply by repeating the legal formulated details which jurists worked out by *ijtihad*; it is accomplished, rather, by following the dynamic process in

which they engaged again and again over the centuries. In this way, Muslims in different contemporary societies can apply *sharia* to their needs and prove the value of Islamic justice in all its dimensions – social, political, administrative, legislative, judicial, national and international. Priorities must be set according to *sharia* and organized according to the circumstances of a particular society, so as to present divine guidance to contemporary beneficiaries in a sensible and practical way. Repetition of vague rhetorics and generalization leads inevitably to failure in both the conception and the implementation of *sharia*.

Disputes and troubles about women's code of dress in Iran, or among the women personnel of the international agencies that work among the refugees of Afghanistan, or about political alliances in Malaysia, or about allowing the production and distribution of liquor in certain Muslim countries, or about allowing interest, banking, insurance and mortgage in many countries – all such disputes and troubles not only show a weakness in understanding contemporary problems and responding to them according to the principles of *sharia* and methods of *ijtihad*, but also expose our failure in establishing priorities for a productive Islamic reform in contemporary Muslim societies.

# POLITICS AND STATE

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**T**O SAY THAT ISLAM DEALS ONLY WITH THE SPIRITUAL life and has no relation to state and society, is as far from reality as saying that Islam provides a comprehensive and detailed social, economical and political system.

The law of Islam, *sharia*, in its two divine sources the Quran and the *sunna*, is permanent but its direct legal rules are limited. On the other hand, the intellectual derivatives as represented in the jurisprudence works, and the accumulated practices of Muslim societies and governments as represented in the historical works, are both dynamic and extensive. Both human and divine efforts are at work in *sharia*, and failure to understand the dynamics of this mixture leads to confusion, not only in the view of some non-Muslim observers and scholars, but also in the view of some enthusiastic Islamists. Islam in its revealed sources provides limited legal texts in various fields. Many of the texts offer general principles and guidelines, espe-

cially in the political field. In the field of transactions, for example, there are general principles of mutual consent and the abolition of exploitation, in addition to limited details about some agricultural and commercial dealings known in Arabia at the time of the Prophet. In addition, a few penalties are indicated for certain crimes. The door is kept open for introducing new laws for all other transactions and offenses which may emerge in different times and places, according to a human intellectual approach, guided by the general principles of the Quran and *sunna*. These are perfectly formulated and presented in the divine sources in a general way to fit the changing circumstances and impose such principles as the observance of justice and consent and the avoidance of harm and aggression. Following such general principles and applying analogy to some other detailed rules, jurists over the centuries have built up a legal system and produced a huge heritage which covers various fields and provides much detail.

Now that the central dynamics of *sharia* have been again reviewed, with an eye to politics in general, we turn to what could be called the making of politics per se. To begin with, the Quran and *sunna* introduce certain principles which deal with counsel (*shura*), justice, and legitimate struggle against aggression (*jihad*). However, until our modern times, these Islamic political rules were not treated in the majority of juristic works at the same length as the rules of worship such as prayers, fasting, pilgrimage, required social welfare payments (*zakat*), the rules of family matters, transactions and penalties. Since divine revelation that deals with politics is so limited, any approach in this field has had to rely basically on human thinking, and thus we may find this approach to be nearer to philosophy than to law.

Nevertheless, a few juristic works tried to work out certain regulations for the Islamic state based on the general principles of the Quran and *sunna*, in addition to the accumulated historical practice of successive Muslim rulers. It may be significant that these works were called rules for the rulers (*al-Ahkam al-Sultaniyya*), as they related more to the practice or art of ruling than to Islamic public law or the rules of *sharia* in the relationship of the state to its people. Later a few juristic works dealt with “the practice of political authority according to the principles of *sharia*” (*al-siyasa al-sharia*). The name which was given to the subject and to the titles of the works on it indicates that such a practice should be inspired and guided by the general principles of *sharia*; although it has, at the same time, its own dynamic character, which may make it nearer to being parallel to *sharia* or complementing it, than to being a formal part of it.

The Quran considers *shura* as one of the main pillars of the Muslim society, thereby recognizing the role of the people in making the policy and/or decision. In fact, in the Quran *shura* is connected with obedience to God, keeping up prayers and spending money for social needs (42:38).

*Shura* is worthless unless it involves active participation by citizens in policy and/or decision-making. This shows clearly the importance of human initiative and contribution to a Muslim society as accorded by the teachings of the Quran. However, *shura* did not get the attention it deserved either in juristic works or in the practice of rulers after the early decades of the Islamic state. Enjoining what is right and good and forbidding what is wrong and evil (*al-amr bil-maruf wa al-nahy an al-munkar*) is a human right and duty for individuals, groups, the government and the society as a whole, according



to Islam. Offering any advice (*nasihah*) to the rulers or to the ruled and even within the family itself, in private or in public, (Quran 2:233, 31:17) encourages the individual and the society to speak their views, whether positive or negative. This establishes and develops in every individual a sense of responsibility towards God, towards other individuals and the society as a whole, and even towards the universal Muslim body (*umma*) and the whole world.

However, the public practice of *shura* ought to be distinctive from individual advice. It should be an obligation for the rulers and the ruled, not a mere right or option. It should be practiced during daily life openly and normally through an open expression of views; there should be no need for underground opposition or extremist and violent attempts for change.

Therefore, Islamic morality does not leave the people helpless in their political life, however at the same time Islam as a religion is not expected to provide a political system in detail, as some wishful thinkers among contemporary Islamists believe and propagate. The place of politics in Islam may be in fact somewhere between two extreme views: the one of Ali Abd el-Raziq, the Egyptian Azharite, who wrote *Islam and the Fundamentals of Government (al-Islam wa Usul al-Hukm)*, and the other of Abul Ala al-Mawdudi, the founder of al-Jama'a al-Islamia in the Indian sub-continent, and Sayyid Qutb, the Egyptian writer who was associated with the Muslim Brotherhood in Egypt during the last years of his life until he was executed by Jamal Abdel Nasser.

This exaggeration on both sides emerged as a result of the impact of the West on contemporary political thought among Muslims: either in the form of following the ideas of national-

ism and separation of church and state as in the West, or as a challenge to Western thought by the attitude favoring a restoration of the Islamic state. The impact of the West on the advocates of a national secular state is obvious to those familiar with traditional Muslim countries and can be easily recognized from their recent histories, while such an impact on Islamic thinking may need some discussion.

The Western colonization of Muslim lands in the eighteenth century led to the development of secular laws and to the restriction of Islamic law to family affairs in these lands. Then, in the struggle for independence, Islamic '*jihad*' was combined with modern nationalism in nurturing the feelings of the masses. However, as soon as independence was achieved, most of the Muslim states (we may say all of them with very few exceptions in the Arabian peninsula) adopted constitutions or actual governments of the national secular type, under which secular laws have continued to be issued and under which, as in colonial days, Islamic law pertains to a limited sphere of activity in the society.

Over time, frustration developed over the national secular leadership, and feelings of rejection began to stir for what some Islamic thinkers and activists might term the "cultural invasion" of Western secular law into the society. Islamic movements developed in several countries soon after the announcement of formal political independence (e.g. the Muslim Brotherhood in Egypt in 1928 after formal independence was declared in 1922), and their voice became heard inside and outside their countries between the two World Wars, especially around the end of the Second World War in 1945. The Islamists called for the application of *sharia* or the Islamization of the state and expressed their hope for unity among the Muslim

people. Their proposals for the form of government to be instituted ranged from a revival of the caliphate to the adoption of a sort of commonwealth as suggested by the late Algerian Muslim thinker Malik ben Nabi.

In spite of the Islamists' rejection of a Western style national secular state, they have been influenced sometimes indirectly and unconsciously by Western ideologies. During the nineteenth century, Jamal al-Din al-Afghani (d. 1897) and Muhammad Abduh (d. 1905) seemed sometimes inclined to wish for a "just despot," an idea which probably reflected that of the 'enlightened despot' in Europe before. Facing the extremes of democracy – political disputes and conflicts that may lead to political vacuums or paralyses, permissive liberalism, unhealthy individualism, opportunism, passiveness, or materialism – on the European side, and the extremes of Marxism, with all its totalitarian, atheistic and oppressive evils on the other side, Muslim movements have tried to work out Islamic economic and political systems between the two extremes, relying on relevant Islamic teachings such as *shura* and earning money (*kasb*) and spending it on private and public needs (*infaq*). However, *shura* has still been dealt with vaguely in these approaches, and the modern Islamic state has not been given a clear democratic character.

In the past, Islamic economy has been more inclined to be controlled and directed, and the importance of free enterprise has not been strongly emphasized. The historical practices of the early Caliphate, as well as any later practice chosen selectively or arbitrarily, have been used in the formulation of the desired ideology. Even the term "ideology" has been transliterated in Arabic to describe the Islamic formula, although the root of the word, 'idea', deals with a product of the human

mind, which undermines the essential merit of a system based on the permanent general guidance of God, the Lawgiver. Sometimes the word “theory” has been used, even by al-Mawdudi himself, although it also is related to human thinking. This unconscious adoption of certain terms may reveal the impact of Western political culture on contemporary Islamists themselves.

In addition to making use of Western political thought in the formulation of an Islamic “ideology,” Islamic activists have made use of Western organizational experience in the construction and function of Islamic parties and associations, in such aspects as their internal mechanism and public activities. Constituent assemblies and executive boards have been organized, and the relations between these bodies, and between the center and the branches have been codified in the regulations of the party or the association according to the Western model.

Further proof of the adoption of western models can be seen in the fact that many organizations use publications, including journals, brochures and booklets, to address the public about the movements’ principles, views and activities. Some Islamic organizations, functioning openly or underground, have organized their members into small units (cells) following the communist organizational pattern. Demonstrations and other means of public pressure which are common in Western democracies are sometimes implemented by Islamic organizations, and some of these organization have been known to practice violent actions along the Marxist model.

Mistrust and fear of theocratic authority has built up in the Western mentality over the centuries since the Renaissance and the Enlightenment. Although a few Western scholars of Islamic Studies such as Thomas Arnold (who pointed out in his *The*

*Caliphate* that the Caliphate was different from the Church and that Muslim jurists (*ulama* or *fuqaha*) were different from the Christian – especially the Catholic clergy) exist, their works have not been widely read or appreciated.

The fact that the Islamic legal heritage developed through human intellectual efforts, including the relevant contribution of non-Muslims, has not been sufficiently obvious even among many Muslims who have found it easy to challenge the well-developed Western systems by Islamic assumptions which claim political and economic projection. Dealing with the traditions of the Prophet himself and with juristic history alone, Schacht's approach in his *Origins of Mohammedan Jurisprudence* and in other works have provoked Muslims and caused them to resent and resist, rather than to be convinced to take a historical approach to the body of laws built up over the centuries and to understand it in the light of socio-cultural developments, since these laws were mostly derived through the practice of *ijtihad*.

The late Muslim scholar, Fazl ur Rahman criticized Schacht (Schacht, Joseph, *the Origins of Mohammedan Jurisprudence*, Oxford) and tried to achieve the same goal on different grounds, but his approach in *The Historical Methodology* did not seem more acceptable for many Muslims (Fazl ur Rahman, *The Historical Methodology in the Study of Islam*).

Some Marxists have been recently trying to review and reformulate their theses about religion and its historical and contemporary role, dealing specifically with Christianity and Islam, so that they may not lose the religious masses in Christian or Muslim societies. This development has not yet been successfully mainstreamed in Marxist thought, however, and the political collapse of communist states has paralyzed

contemporary Marxist thinking. Nevertheless, such a change in the basic tenet of Marxism is significant, as it highlights the need for reviewing socio-cultural theses and assumptions, especially those given in a generalized form, however deeply rooted and widely accepted they may seem.

It can be seen from the above mentioned examples that it is not just the West which suffers from ungrounded fears about Muslims, Muslims too, have suffered from their paranoiac complex, even after decades of independence and development. Their convulsive reaction might have been understandable during the colonial era for the protection of their cultural identity, but it now represents a paralyzing obstacle for their cultural and material development.

Free cultural exchange which is based on conviction is distinct from the imposition of any culture or the abolition of another by force. Indeed, intercultural relations have never stopped since the dawn of history, especially during the period of the flourishing Islamic civilization itself, which assimilated Greek, Persian, Indian and other heritages into its own, producing a centrally Muslim civilization with its own distinctive character. The Prophet of Islam taught his followers that any true believer should search for wisdom, and wherever he finds it, he/she should hold it (a well-accepted tradition reported by al-Tirmidhi).

Muslims have nothing to offer contemporary civilization if they keep themselves isolated from it. Due to amazing technological advances in the field of communications, the present civilization is actually global and may not be properly called "Western" except for its historical origin. Today, Japan, India, China, South Korea, and Taiwan are as much a part of the present civilization as Britain, France, Germany, Russia, other

developed European countries and the United States. Democracy in its concepts and institutions has no better alternative, in spite of the existing drawbacks which have been noticed and made known by westerners themselves who have enjoyed the blessings of democracy in criticizing its mechanism and practicalities. The teachings of the Quran and *sunna* allow ample room for human intellectual activities through *ijtihad*, which may find in democracy and its institutions a useful organizational experience. If Muslim and Western thinkers can clarify that democracy does not necessarily and inevitably imply secularism, Islamic political culture may flourish again in the contemporary world, and the cultural and social gap between the West and the Muslim world may be narrowed, although it will not be fully bridged. Deadly conflict can be replaced by healthy competition or vivid challenge.

There are Christian democrats and Christian socialists among the political parties in Western Europe. Among Islamists, even al-Mawdudi has described the Islamic political system as “theo-democratic” and later in his life, after a period of reluctance, he accepted elections as the best available means for the expression of the people’s wishes. For the sake of accuracy and good faith, it should be emphasized by thinkers and politicians that secularism, which has been advocated by the West in modern times, after long, fierce religious wars in Europe, does not mean, in its correct definition, a hostility to religion itself or atheism.

A healthy development in Islamic political thought would observe the divine teachings and allow Muslims to receive fresh ideas and experiences from the West (or elsewhere), while holding on to what has proven to be beneficial in the Muslim heritage without complexes or sensitivities. Initiating a cultural

change to cope with changing circumstances is not always easy, especially when the culture has a religious base, but it is essential.

Muslim jurists in classical times showed intelligence and wisdom in perceiving the changes of their times and responding to them. The Maliki school had a long experience in dealing with emergent problems (*nawazil*) in different times and places. The Hanafi school dealt with dominant and unavoidable issues in public practices, which were not recommended by Islam (*umum al-balwa*). In the political field, Ibn Taymiyya (d. 1328), realizing that the time of one ideal ruler such as the early caliphs had passed and might not shortly return, suggested in his book, *al-Siyasa al-Sharia*, that an Islamic state could have a ruling team in which required merits are distributed among its member. Now we realize clearly that a modern state (as all modern bodies) should be run by efficient institutions, not merely by capable leaders (Ibn Taymiyya, Taqiyy ul Din Ahmad, *al-Siyasa al-Sharia*).

Having more than one Islamic state with more than one ruler (*imam*) was accepted by several of the Muslim theologians who dealt with the imamate in lands originally part of the Caliphate (e.g. al-Baghdadi, author of *Usul al-Din* (d. 1028) and Abdel Malek al-Juwayni, author of *Ghiyath al-Umam* (d.1085). These lands, partitioned after the Caliphate ended, re-emerged, under these theological influences as Islamic states and even in some cases as new Islamic caliphates.

Imam al-Juwayni, suggested that if it became impossible at any time to know about the Islamic law of transactions, one basic principle at least should be observed: that any contract is to be by the free consent of every party involved. If contemporary Muslim jurists carried out the heavy intellectual responsi-



bility of making the distinction between what is a permanent divine teaching and what is a human practice of *ijtihad*, and if they followed their prominent predecessors in pointing out the priorities and offering their legal contributions according to the present socio-cultural circumstances, Islamic political thinking would suffer no more from stagnancy or fossilization.

The late Shaykh Abd el-Wahab Khallaf, a distinguished contemporary jurist who lectured for many years at the School of Law in Cairo University and can be considered a pioneer of modern Islamic legal thinking, clearly pointed out that the practice of political authority according to Islamic principles (*al-Siyasa al-Sharia*) can make use of any experience which is not against the principles of Islamic law in general and which fulfills the public needs and interests, even if no evidence can be provided from the Quran and *sunna* to support this experience specifically (Khaled, Abd ul Wahab, *al Siyasa al Sharia*). The precedent of Caliph Umar in establishing several institutions that were influenced by non-Muslim administration, land-taxation and military organization supports this practice. If such concepts could become clear to contemporary Muslims, channels between Islamic culture and the contemporary world would be strong, and mutual approaches on both sides would enrich human knowledge and support universal cooperation. Meanwhile, non-Muslim scholars and all advocates of the modern secular state are invited to investigate thoroughly what the Islamic concept of a state really means, instead of being trapped or misled by prejudice. A constructive discussion by all parties would lead to a clear Muslim vision of the required Islamic state in its nature, structure and function.

*Give this glad tiding of happiness to those of My worshippers who listen (closely) to all that is said and follow the best of it, (for) it is they whom God has graced with His guidance and it is they who are truly endowed with insight and constantly use their intellect.*

(39:17-18)

# SHURA AND DEMOCRACY

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**A**ND THOSE WHO RESPOND (TO THE CALL OF) THEIR Lord, and keep up their prayer, and whose rule (in all matters of common concern) is consultation among themselves, and who spend (on common needs) out of what We provide for them.

(42:380)

No Muslim would question the obligation of *shura* in Islamic society. The argument in several Muslim countries is, rather, about the relation between the Islamic principle of *shura* and democracy. Since democracy as practiced in the West is secular, some Islamists distance themselves from democracy to such an extent that they have begun to raise a slogan: “*Shura*, not Democracy!” When *shura* and democracy are seen as contradictory to each other, a political confrontation between the Islamists who believe in such a contradiction and the democrats who believe that there is no contradiction seems inevitable.

The confusion has come from the apparent difference in nature between an Islamic state which enforces *sharia* as divine law and a democratic state which represents the people and legislates what they want. However, recognition of *sharia* does not necessarily eliminate the role of human opinion, nor does the establishment of a democracy entail the complete elimination of rigidity or restriction.

First of all, in the judicial system of Islam, when no text of direct and specific relevance can be found in the Quran or the *sunna* to address a particular judicial question at hand, a procedure called *ijtihad* is authorized. In order for the Islamic state to respond to its own emerging needs, *ijtihad* allows for both the rendering of an understanding of the divine text according to established linguistic and juristic rules, and the inferring of a judicial conclusion from general principles of *sharia*, analogy, or other recognized intellectual means. Ever since the early days of Islam, the Prophet himself authorized governors, military leaders and judges to practice *ijtihad*.

Al-Qurtubi, the prominent commentator on the Quran, stated in his *tafsir* (commentary) on verse 3:159 of the Quran that the Prophet's practice of *shura* with his companions was to consult them in matters of common interest (*masalih*) but not in laws which were revealed. However, after the death of the Prophet, the companions had to practice *shura* even in the field of law. Al-Shihristani states in "*Al-Milal waal-Nihal*" his well known book on the faiths and cults:

“We certainly know that events cannot be counted or limited; also we know definitely that the revealed texts did not cover in detail or with direct relevance all events from the time of revelation onwards. In every place texts have been limited, while the events are not limited, and thus (the

events) should not be controlled by what is limited. The practice of *ijtihad* should be definitely able to face the continuously emerging events.” (Vol I, Chapter on Muslim’s differences about legal rules *al-Furu*).

Sometimes it is forgotten or overlooked that *ijtihad* is a technical judicial function of a certain number of jurists and judges, which is far from legislation that is mainly divine. In fact, *ijtihad* was also practiced by Muslim rulers who could enforce it through governing. *Ijtihad* can be legislative, and by such *ijtihad* the institution of the Caliphate itself was established and the laws of land taxation (*kharaj*) were decided. As long as there is room for the practice of *ijtihad* in *sharia*, there is room for legislation. Inferences made from the Quran and *sunna* to cope with continuously emerging needs should be decided collectively, and one view has to prevail over others. This a mere legislative function, whatever the name given to it may be.

The term “legislation” may be accepted and justified by some, while others who prefer to keep the word for the revealed laws only may have some reservations about it. However, the legitimacy of the function itself in an Islamic state is beyond any argument. Ibn Taymiyya and Ibn al-Qayyim convincingly explained how the practice of authority according to *ijtihad* (*al-siyasa*) cannot be separated from *sharia* and is actually a part of it (Ibn Taymiyya, *al-Siyasal-Sharia*; Ibn al-Qayyim, *Ilam al Muwaqqin*, vol. IV, also: *al Turuq al Hukmiyya*).

In addition to the legislative function, the *shura* body has to carry out other responsibilities of a modern parliament, such as determining the budget and checking governmental and administrative functions directly or through other authorized persons

and bodies like ombudsmen, special bodies concerned with public accountancy or with inquiries about administrative practices, individually authorized investigators and prosecutors, and/or special courts for ministerial offenses and abuses of power. Al-Qurtubi quotes a juristic statement (see his commentary on verse 3:159) which indicates that a ruler's practice of *shura* is a duty that can be carried out with scholars (*ulama*) in the fields of religion and *sharia*, with army leaders in the area of military affairs, with leading persons in general in cases of public interest, and with top administrators when the common good and the development of the country are discussed. *Shura* should cover the political, administrative and social responsibilities of the government. In a modern state, *shura* may be practiced either directly by the main *shura* body or indirectly through specific bodies which focus on certain fields and are provided with experts under the supervision of the main *shura* body.

Democracy, as it has been practiced in the West, does not exclude in principle or in practice certain norms which should not be challenged. For example, many supporters of democracy believe that democracy should not allow its own abolition. Following this principle they hold that a communist party by its very nature, ends and means would inevitably conflict with the *raison d'être*, structure and function of a democratic state, and therefore it should not be legitimized. Moreover, a democratic constitution may indicate permanent fundamentals which it considers unchangeable, on the grounds that they secure social stability and moral ideals. Many philosophical and legal arguments have been made to assume an abstract source of super and permanent legitimacy which is superior to the momentary desires of the ruler and the ruled. This source may

be “natural law,” the “social contract,” the “individualist“ or the “socialist” doctrine, “social solidarity” or any other concept which sets restrictions on the state’s authority. It is admitted now by many political thinkers that ideology (or ideal directives of justice, as some prefer to call it) should be considered superior to any authority including the constitutional and legislative powers themselves.

No one argues that democracy in its conceptual and practical dimensions does not mean authority of the people, by the people, for the people. However, this does not necessarily mean that a democratic government must be atheistic or even secular. If the majority of the people believe that the establishment of an Islamic state and the enforcement of *sharia* represent a religious obligation, their practice of democracy will be directed to the extensive fields of *ijtihad* without the violation of any divine text. As previously stated by al-Shihristani and Ibn Khaldun (al-Shihristani, *ibid*; Ibn Khaldun, Abd ul Rahman, *al-Muqaddima*, Chapter on *Ilm al Fiqh*), the number of revealed laws is limited, and thus the laws which can be formulated by the practice of *ijtihad* to cope with countless emerging needs should be unlimited. Therefore, neither human thinking nor legislative function (under any name) can be stopped because of this limited number of revealed laws. At the same time divine laws cannot be ignored just because they are limited in number. The human mind and divine guidance are both God’s blessings, and they ought to interact with each other, not contradict one another. However, if the majority of any Muslim people expresses through legal and free voting, that they do not want to be bound anymore *sharia*, how could *sharia* be imposed on them by force, when Islam emphatically states that there is no coercion in matters of faith? (The Quran 2:256, also 6:66,107, 10:108, 11:12, 42:256, 50:43, 88:21-22)

The relationship between the permanent and the changeable has been observed in Islam since the Prophet allowed rulers, military leaders and judges to practice *ijtihad* for a specific case as long as they could not find a revealed text with direct relevance to that case. The practice of *ijtihad* in running the governmental, administrative, and judiciary affairs was called *siyasa* and was considered as a necessary complement to the revealed *sharia*. *Siyasa*, or the legislative function as it may be called now, has to be guided by the general goals of *sharia* known as *maqasid* – on which the distinguished jurist al-Shatibi elaborated (al-Shatibi, *al-Muwafaqat*, Vol. II). The *maqasid* can be derived from the teachings of the Quran and *sunna*.

The difficulty in thinking about the role of democracy in an Islamic state arises from the concrete fact that to date no serious practical approach in this field has ever been made. The separation between democracy as a modern approach towards the maintenance of public authority and human rights and religion in general in the West or wherever democracy was followed in other countries, has led some Islamists to think that an incorporation of the democratic mechanism in the Islamic state would be impossible.

This way of thinking has probably been nurtured by a belief that when basic ideological differences exist between two systems, the only solution is that one should prevail while the other should be completely excluded. However, while Islam emphasizes its own authentic merits, it has always incorporated in its structure human experiences which do not contradict any of its teachings and prove to be useful. As has been stressed before, the Quran teaches:



*Give this glad tidings to (those of) My worshippers who listen (closely) to all that is said and follow the best of it; it is they whom God has graced with His guidance and it is they who are (truly) endowed with and constantly use their intellect.*

(61:17-18)

The Prophet emphasized that a believer is the most deserving of wisdom wherever he finds it (a well-accepted tradition reported by al-Tirmidhi). Such a marvelous synthesis between divine revelation and human creativity was evident in the long golden age of Islamic civilization.

An issue that may be raised here is that in a democratic state all citizens – Muslims and non-Muslims – should be equal and share authority and many may think that this would not be the case in an Islamic state. However, Islamic principles emphasize the equality of human beings at both the moral and legal levels. (See for example the Quran 17:70) What is required from a non-Muslim citizen in an Islamic state is to accept the authority of the state and the supremacy of its law, whatever his/her belief about the divine source of Islam may be. The goals and objectives of *sharia* and its emphasis on human rights for all human beings would make its principles acceptable for all people if these principles are preserved, interpreted and implemented properly.

In an Islamic state, non-Muslim citizens should enjoy equality with Muslims in rights and duties. In the twelfth century the prominent jurist al-Mawardi stated that a *dhimmi* a non-Muslim subject of the Islamic state – could be appointed to a position as high as that of a minister with executive powers (*wazir tanfidh*), a position similar to that of a secretary in a

special field like public health, education or labor in the United States. Moreover, the codification of Islamic law, in which many rules based on *ijtihad* would be incorporated, would make it both possible and acceptable to have a non-Muslim serving as a judge, especially when he/she sits with other members to give collective rulings.

There are precedents for the above examples in history. Several Coptic professors of civil law in Egypt learned *sharia* well and referred to its rules with admiration. Shafiq Shihata, a Christian, wrote his doctorate thesis on the general theory of obligations in *sharia*. The prominent Egyptian lawyer and politician Makram Ubayd knew the Quran by heart and used its verses capably in court. The Syrian Christian lawyer Faris al-Khuri was widely knowledgeable in *sharia*.

A non-Muslim can also be a soldier or an officer in the army to defend his/her country even if he/she does not believe in Islam. There is historical evidence as reported by al-Baladhuri and al-Tabari about certain events in the days of Caliphs Abu Bakr and Umar. Al-Baladhuri in his *Futuh al Buldan* reports on the agreements with al-Jarajima, a Christian group in Lebanon, and al-Samira or Samavitans, a Jewish sect in Palestine, and the Muslim's withdrawal from Hims; also al-Tabari in his *Tarikh* reports that in the conquest of Iran non-Muslims carried out military duties and were consequently exempted from the payment of poll tax. It has been legitimately concluded that a non-Muslim citizen of the Islamic state (a *dhimmi* in the classical juristic terminology) has to pay poll tax (*jizya*) only when he is exempted from military service. This is supported by a judgment that a *dhimmi* who cannot fight – a child, a woman, an elderly or disabled person – should not pay a poll tax according to several early traditions and to many

later jurists. In fact, Caliph Umar ibn al-Khattab allowed the Christian tribe of Taghleb in northern Mesopotamia to pay some other dues for social welfare since they felt offended to pay *jizya*. (See the reports about Muslim treatment of the Christian tribe Taghleb in: Abu Yusuf, *al-Kharaj*; al-Baladhuri, *Futuh al Buldan*.)

Are contemporary Muslims as enthusiastic as Caliph Umar to gain the hearts of non-Muslim citizens, and to prevent any disloyalty to the Islamic state and any discomfort about Islam? Would they seriously do their best to nurture among the non-Muslim citizens a sincere understanding of the merits of the Islamic state that are best proved by securing justice and human rights in all dimensions, and thus a genuine loyalty in their hearts and minds which would naturally develop? Can they be inspired by the Caliph's precedents to distinguish between the permanent fundamentals of the divine law and the changeable ways of interpretation and implementation which have to be affected inevitably by changing human circumstances?

Some may argue that in a democracy, decisions reached by the people or their representatives should be carried out whether these decisions are right or wrong, whether they accord with the *sharia* or contradict it, and whether or not they are supported by the government and its leader (whom some people prefer to call the *imam*, adhering to the classical title). If the majority of people are Muslims, their representatives must know their obligation towards the *sharia*. When the majority of the people freely elect to establish an Islamic state, then the constitution must declare the absolute supremacy of permanent principles of *sharia* as indicated in the Quran and *sunna*. Democracy practiced in an Islamic state is directed by

Islamic teachings and laws. However, as it has been repeatedly stressed, there is a spacious room for legislative power because of the *sharia's* allowance of *ijtihad*. If any difference arises between the government (led by the head of state) and the *shura* body which practices legislation, one cannot suppose that the government or its leader is always right. The *shura* body will naturally include various experts. However, the *shura* assembly or its specialist committee can always arrange special sessions to hear governmental representatives, other experts or even concerned persons from the public, as world parliaments practice when such sessions are needed.

In addition to these allowances, the head of the state or the executive branch can have the right to veto a decision of the *shura* body with or without conditions, but when a decision is approved for the second time with a certain majority, it should be enforced. Technical differences can be solved in joint meetings of the experts from the executive and legislative branches.

In cases of legal differences about the *sharia*, a supreme court can make a ruling regarding whether a certain law complies with or violates any permanent divine guidance. When the representatives of the people are found wrong in their assessment of the public interest, they have to bear the consequences before the people in ensuing elections. It goes without saying that they are responsible for any felony or abuse of power.

In this way, all the state branches, and all the people behind them, can be involved in the political process. Instead of being trapped into a passive obedience to a ruler, an attitude which destroys the potential for developing alternatives and which nurtures autocracy or dictatorship on one side and indifference or bitterness on the other, these people would be involved in developing their country. The prominent jurist Ibn al Arabi as

quoted by al-Qurtubi intelligently pointed out that *shura* maintains public unity and warms relations among the people, allows chances for developing and judging intellectual potential, and ultimately leads to fruitful decisions. *Shura* benefits the best of the present capabilities, while it develops potential for future ones.

*Shura* was practiced by the Prophet himself in the battles (*ghazawat*) of Badr, Uhud, and al-Khandaq, and during the conflict of al-Hudaybiya, as well as on many other occasions as recorded by many historians. Ibn Kathir indicates (Ibn Kathir, *Tafsir*, Vol. I, Commentary on the verse 3:159) that the Quran directed the Prophet to practice *shura* in areas not dealt with directly or in detail by revelation, an example that stresses how *shura* is strictly required for a Muslim society and state.

Decisions reached by *shura* were carried out during the life of the Prophet and in the appointments of the earliest four caliphs (*al-Rashidin*) and the caliphs themselves employed *shura* in making their own decisions. When Umar sought to levy *kharaj* on conquered land and to keep it from distribution as booty (*ghanima*), he did not impose his opinion, but rather he continued to present his argument to different people and chose arbitrators from the *muhajirin* of Makka and the *ansar* of Medina to discuss the matter, until he gained support for his opinion and it prevailed. (Abu Yusuf, *al-Kharaj*)

According to the texts and contexts of the Quran, *sunna* and historical precedents, *shura* means an actual participation in the policy and/or decision-making process, not a superficial or ceremonial procedure. The juristic term for those eligible to participate in *shura*, “eligible for binding and dissolution,” (*ahl al-hal wal-aqd*)” is significant. It underlines the decisiveness and effectiveness of *shura*. Involving people in policy and/or

decision-making is obligatory for the head of the state and the government whether it is binding or dissolving rules or laws. Al-Qurtubi agrees with Ibn Attiyya (another commentator on the Quran) in his statement “*Shura* is one of the fundamentals and obligations of *sharia*, and a ruler who does not practice it should be deposed; no difference is to be found among jurists about that” (al-Qurtubi, *Tafsir*, Commentary on the verse 3:159).

Some opponents of democracy among the Islamists may say that a majority may not always be right according to the Quran. The possibility of making mistakes is inevitable for both a majority and a minority, but would be less with a majority. The Quran seeks more to emphasize human limitations than to blame majority decisions. The possibility of human error simply draws attention to the need to rely on divine guidance, which is the basis of the Islamic state, and to reduce human error to the minimum through the participation of the people and their representatives and through a process of decision-making reached by the majority. The Quranic condemnation of the majority attitude in certain cases should not be considered separately from the Quranic condemnation of the unreasonable imitation of others, whether such an imitation comes consciously or unconsciously:

*But they say: ‘Behold, we found our forefathers agreed on what to believe, and verily, it is in their footsteps that we find our guidance.’ And thus it is: whenever We sent before your time a warner to any community, those of its people who had lost themselves entirely in the pursuit of pleasures would always say: ‘Behold, we found our forefathers agreed on what to believe, and, verily, it is but in*

*their footsteps that we follow. (Whereupon a Prophet would) Say: 'Why? Even though I bring you a guidance better than that which your forefathers believed in....?'* (43:22-24)

*And they will say: 'O our Lord, Behold, we paid heed unto our leaders and our great men, and it is they who led us astray from the right path.'* (33:67)

In an Islamic society and state, the majority would be guided by the divine teachings in conducting constructive discussions and would be arguing in the best way conceptually and ethically.

Another argument may claim that democracy would lead to increasing differences and splits which would undermine Islamic unity. On the contrary, the practice of autocrats and dictators who do not allow open discussion on differences always leads to the aggravation of these differences, and the development of rigidity, stubbornness, bitterness and extremism. Political parties, whether Islamic or not, can be accepted in an Islamic state, as long as they abide by the state's directives and laws and respect the authorities chosen by the majority of the whole people. (These authorities should not advocate imposing or work to impose their views by violence.) Islamic ethics and procedures should be applied to any political difference whether it emerges between individuals or between parties:

*... and if you are at variance over any matter, refer it unto God and the Conveyer of His Message if you (truly) believe in God and the Last Day: this is the best for you (and your relationship) and the best for good understanding (of all angles of the problem).* (4:59)

Ibn al-Arabi was deeply aware of human nature when he stated that *shura*, despite the fact that it extends possibilities of differences, actually maintains the unity of the people and warms their relations (al-Qurtubi in his commentary on the verse 3:159). People can talk to each other about their differences, and they can settle their differences legitimately and efficiently through a majority decision after a reasonable discussion.

The observance of *shura* in a Muslim state has wider and deeper dimensions than an abstract philosophy or imposed order. *Shura* is a religious duty, and in an autocratic or authoritarian regime the Muslim rulers and the ruled may find themselves close to worshipping another god, for it is only God who rules without need for advice or control:

*He cannot be called to account for whatever He does, whereas they will be called to account.... they speak not until He has spoken unto them, and whenever they act they act at His behest.*

(21:23, 27)

Thus, observing *shura* maintains the true faith in the one God (*tawheed*). Islam establishes and nurtures *shura* in the daily life of the individual and society. Even a decision about weaning an infant should be taken by both parents and based on *shura*: “*And if both parents decide by mutual consent and counsel on weaning there is no blame on them,*” as both have mutual responsibilities in the family and towards the children:

*No human being shall be burdened with more than he is well able to bear, neither shall a mother be made to suffer because of the child nor because of his child he who has begotten it.*

(2:233)



Finally, the Prophet emphasized that it is a religious obligation to introduce one's different view or opinion to any concerned party among the rulers and the ruled as well (an authentic tradition by Muslim, Ibn Hanbal, Abu Dawood, al-Tirmidhi and al-Nasai). Removing the illusionary contradiction between *shura* and democracy, as well as preventing the groundless confrontation between the supporters of each, may be a step in the right direction for the establishment of an Islamic state, for the reasonable presentation of Islam in any case, and probably for the establishment of a genuine state in some cases.

# VOTING

## HOW TO DETERMINE THE PUBLIC WILL

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**O** YOU WHO HAVE ATTAINED TO FAITH! PAY HEED unto God, and pay heed unto the Messenger and unto those from among you who have been entrusted with authority by you; and if you are at variance (or dispute, conflict) over any matter, refer it unto God and the Conveyer of His Message .... (4:59).

Islamists sometimes suggest that the historical precedent of *baiy'a*, which was used in choosing the early four caliphs, should be followed in the choosing of the head of a modern Islamic state, to whom is given the classical title of *imam* to emphasize his leadership and the pledge of obedience by the Muslim people. In fact, the opinions of certain individuals, however influential or representative they may be, or the opinions of any limited selected group cannot replace the need for a free public election or referendum. This fact may not be clear to Westerners or to some Muslims as well, since it is often thought that a limited number of Muslims chose each of the

first four caliphs (*al-Rashidin*). Several jurists have ruled that an *imam* can be appointed by a limited group of individuals who are eligible for binding and dissolving (*ahl al-aqd wa al-hal*). However, defining those who are eligible for binding and dissolving represents a practical problem in a contemporary society. It is therefore essential to ensure that *baiy'a* not be used as a tactic to avoid the expression of the public will through an election.

The shortcomings of a voting system are often emphasized to support *baiy'a* as a decision of a selected group or even of one person. Historical precedents and juristic statements should be analyzed to determine the proper requirements for the appointment of a head of an Islamic state. Any Muslim who is enthusiastic about the creation of an Islamic state should have no ambiguity or vagueness about such an essential issue. Much confusion exists concerning how modern elections can be considered legitimate in the light of what has been stated in the Islamic historical and juristic heritage about *baiy'a*.

It is well known, for example, that *baiy'a* was used, or abused, in the early days of the military regime in Egypt in 1952 to legitimize the power of the president of the revolutionary council without facing the risks of public elections after the overthrow of the monarchy and the banning of political parties. The minister of *awqaf* who graduated from the College of Arabic Language at Al-Azhar University attended public meetings in several provinces where he read a statement of *baiy'a* for General Muhammad Najib, the president of the revolution's consulate at that time, and the audience repeated the statement after him. However, even such a superficial and ceremonial procedure was not performed when General Najib was deposed and Gamal Abdel Nasser replaced him.

When the caliphs held their positions as a result of a free public selection, the agreement drawn between the ruler and the ruled was given the term of *baiy'a*. That contract was a concrete historical fact, not a mere hypothesis like the social contract of Locke and Rousseau. The Arabic root of *baiy'a* means “selling, or making a transaction.” The term has been used in the Quran for the promise given to the Prophet from early Muslims to obey God and His Messenger (e.g. 48:10, 28, 60:12).

The *baiy'a* statement was pronounced while the believer put his hand on the hand of the Prophet and gave a pledge of obedience. According to Ibn Khaldun, this putting of their hands together was similar to the actions of a buyer and a seller when a transaction was completed (Ibn Khaldun, *al-Muqaddima*, ch. on *baiy'a*). Just as the seller has an obligation to provide satisfactory goods to the buyers for the price paid by them, the ruler is obligated to secure justice in all its dimensions when enforcing Islamic law, and to ensure public satisfaction in return for the pledge of the people to obey and support him. The Hanbali jurist Abu Ya'la made it clear that *baiy'a* is a mutual pledge of the ruler and the people as indicated above (Abu Yala, *al-Mutamad fi' Usul al Din*). In addition, such a contract of appointing the *imam* represents, as jurists have explained, a combination of the right of God *haqq Allah* and a human right. According to the jurists, the right of God can be what we now call a public right, while a human right is mainly private. The appointment of the leadership of an Islamic state is entrusted to the whole people, but the leader-elect is an individual who can accept the responsibility or reject it. Such a public position does not put the person above the law, which should be enforced on all the citizens equally.

Now comes the essential question: who would actually be responsible for choosing the leader of an Islamic state? Should all adults be eligible, or should they be represented by a smaller group? And in the case of representation, how would representatives be chosen? How can we set an appropriate size and determine adequate requirements for this body?

According to juristic heritage, those who qualified to choose the *imam* and make the contract of *baiy'a* with him were called, as mentioned above, “the eligible for binding and dissolving (*ahl al-aqd wa al-hal*) or the eligible for choosing the *imam* (*ahl al-ikhtiyar*).” The suggestion of such a body may call to mind the idea of the electoral college in the United States, but such a body was never delineated or listed practically by any Muslim administration in history, although the qualifications for eligibility were stated by jurists.

Such a formal procedure was not necessary in the days of the early Caliphate because the Muslim population was limited, and the prominent Companions were well known. Furthermore, in a tribal society like Arabia the influential clans and their leaders could be identified without difficulty. Thus, from the time of the Ummayyad dynasty onwards, the Islamic state (or the several Islamic states in later times) came under the authority of monarchic dynasties or military leaders, and because their rule was authoritarian even at times autocratic, administrative procedures for establishing the presence of *ahl al aqd wa al-hal* were never developed.

Jurists legitimized the existing status quo of rulership in Muslim countries so as to legalize the decisions of rulers, as well as administrators and judges who were appointed by those rulers. The jurists, who considered the contract of *baiy'a* effective with any number of *ahl al-aqd* assumed that such a num-

ber, however limited it may be, should represent the whole of those who were qualified for that responsibility and that their choice of a person for the position should be followed by the agreement of the masses, whose consent and support were essential to the practice of authority and the enforcement of law and order. The requirements suggested by the jurists for *ahl al-aqd* or *ahl al-ikhtiyar* and for the candidate for the leadership of the Islamic state seemed satisfactory to them for securing a good choice and preventing a misplacement of authority or abuse of power, but this proved to be theoretical in many cases. Nevertheless, it seemed difficult for Sunni jurists to admit that the teachings of Islam were not being observed among the ruling circles in the Muslim states, since doing so would have the logical and legal consequence of considering such authorities illegitimate. Yet, some jurists such as the Hanbali Abu Yala adhered to the ideal and stated that the majority, the *jumhur* of *ahl al-aqd*, should participate in the *baiy'a* of the *imam*. It should always be kept in mind that the Islamic political experience, whether historical or juristic, was merely a practice of *ijtihad* in given circumstances and like any human attempt might have its shortcomings.

One modern Egyptian jurist and historian, Muhammad al-Khudari, rightly argued that the glorious Islamic institution of the caliphate which was based on *shura* actually lacked a concrete assignment of those eligible to choose the caliph (i.e. the voters), and this gap led the Muslims to ceaseless conflicts and bloodshed. He believed that the precedent of Caliph Umar in nominating a certain *shura* body for choosing his successor and in defining the voting procedure for that body was unique in the history of Islam, since it was neither repeated and developed in the later political practices nor seriously considered in

the juristic heritage. However, each member of this *shura* body chosen by Umar was himself a candidate for the caliphate, and thus the group were the only voters for one among themselves.

It appears that most of the early Muslim people in Medina personally knew of one another; they especially knew about the prominent Companions of the Prophet. By the time the caliphate came to be extended to new lands, and Muslim societies with the potential for leadership became far flung, the authoritarian and autocratic rulers of the era were not concerned about an electoral body or an elected caliph.

The essence of *baiy'a* is free public consent. Therefore, those who make this contract on behalf of the people should be their trusted and followed representatives rather than their oppressors and intimidators. The best available way to reach this goal in a contemporary Muslim society is the public vote. Historical sources report that each of the early four caliphs, after receiving the *baiy'a* of the *ahl al-aqd* went to a public meeting in the mosque to receive the *baiy'a* of the masses (*al-jumhur, al-'amma*).

In Muslim countries, expanding urbanization and industrialization have led to a continuous movement from rural to urban areas and from one urban area to another. There is thus no place in such a continuously changing society for such static institutions as tribes or clans or for hereditary privileges. Modern societies may have other entities such as political parties, trade unions or local voluntary organizations for social services but the membership and the leadership of these are always changing. Abu Yala rejected the idea that the members of the body of *ahl al - aqd* or *ahl al-ikhtiyar* could be appointed by an *imam* to choose that *imam's* successor (Abu Yala, *ibid; al-ahkam al-Sultaniyya*). Instead, this body, being an elec-

toral college, should merely be the representatives of the people: the *ahl al-'aqd* would nominate a candidate for the *imamate* who meets all the requirements, but he cannot be an *imam* unless he gets the approval of the people. A considerable majority of these representatives should be present for the nomination of the candidate.

The modern Egyptian reformer Muhammad Abduh indicated that *ahl al-aqd* may consist of the tops of the ruling hierarchy (*al-umara*); the rulers (*al-hukkam*) in general, a term which may include others of lower ranks in the center, regional rulers and administrative chiefs, as well as the judiciary; the scholars (*ulama*); the military leaders; and “all other chiefs and leaders whom the people would ask for help and support in what they need and in anything of public interest” (Muhammad Abduh, Rashid Rida, *Tafsir al-Manar*, commentary on the verse 3:159). Later, Hasan al-Banna, the founder of the Muslim Brotherhood in Egypt, pointed out that the qualities of *ahl al-aqd* apply to three groups: jurists capable of *ijtihād*, experienced people in public affairs, and those “who enjoy a kind of leadership among the people as heads of families and tribes or heads of groups” (Hasan al Banna, *Mushkilatuna fi daw al Nizam al Islami*). Expressions such as “experienced people in public affairs” and “heads of groups” still require a clear delineation.

In fact, the best way to select representatives who would nominate a candidate to lead an Islamic state is a public election. A suitable number of seats may be allocated to the representatives of trade unions or similar professional organizations who should also be elected, while other seats should be filled by public voting. This electoral body may be the legislature itself or a separate body. This method of selection does not rule



out, from an Islamic point of view, the possibility of direct nomination of a candidate by political parties (or organizations) themselves or by a certain number of eligible voters, nor does it rule out any other nominating procedure preliminary to action by the *ahl al-aqd*. Social and political experts can decide what may be the best for a certain people in their circumstances. The supreme court may be involved in the nomination process to assure that a candidate for the legislature or the presidency or any public position filled by election fulfills the legal requirements for that position, and in addition it may adjudicate any serious complaint about the elections for high political positions. It may also make inquiries and decisions about cases of a later loss of any of the legal requirements for these positions and report this to the legislature. A particular quorum or majority may be required for a candidate's nomination by the concerned body, if the nomination is not allowed to be made by an individual decision.

In short, no modern electoral experience which may be beneficial for the nomination or election of the head of a modern Islamic state should be ignored. The *baiy'a* of the early caliphs was practiced according to *ijtihad*, and each one of the first four caliphs was chosen in a way different from the other. The essential content of the whole practice is the free expression of public will, which should not be restricted to only previous particular practices of *ijtihad* which reflected the existing circumstances in a certain time and place.

Considering that *baiy'a* is a legal contract between the ruler and the people, in which public consent and support is crucial, it should be practiced by the masses (*al-jumhur al-'amma*) whose will is indispensable for the legitimate occupation of the position of Islamic head of state, and it cannot be merely

demonstrative or ceremonial. The traditional form of *baiy'a* might have been a historical convenience in given circumstances, but it should not remain as the permanent and single form. Contemporary Muslims should adhere to the permanent and essential content, not to the changeable form:

*... one who breaks his/her pledge, breaks it only to one's own hurt, whereas one who remains true to what he/she has pledged unto God, on him/her will He bestow a reward supreme.*

(48:10)

# FREEDOM OF EXPRESSION

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**T**HE MAIN GOAL OF GOD'S MESSAGE TO humankind is the attainment of justice in all of its fairness. This justice, the foundation of Islam, cannot be achieved unless human rights are secured for every individual and group in a Muslim state. The members of such a state must be free to choose just rulers, to observe these rules as they practice their authority, and to stand firm against any injustice from them. Primary among human rights are the rights to believe, to express one's beliefs, and to assemble to defend one's group's beliefs.

The rights of expression and information cannot be separated from freedom of thinking and believing. Intellectual and linguistic capabilities characterize human beings, and thus the right to form and express opinions represents an essential manifestation of human merits and of God's gifts. The right to inform and to be informed should therefore be secured by all who are respectful of humanity or grateful to God. Indeed, if

one is allowed to think and believe but not to communicate with others or exchange views, one's freedom of thought and belief is actually restricted. The human being is a social creature, and therefore genuine intellectual activity in which a thinker considers more than one perspective on an idea and learns the strengths and weaknesses of it when debated, cannot be practiced individually or in isolation. Moreover, the basic condition for freedom of expression and information is that it extends to different viewpoints; otherwise expression is merely an imposition of ideas and exercise in brain-washing.

Many national and international documents on human rights acknowledge the fact that freedom of thought and freedom of expression are intertwined. The Universal Declaration of Human Rights which was issued by the General Assembly of the United Nations in December 1948 has dealt with both in two successive articles (18, 19).

Freedom of thought and belief is repeatedly emphasized in the Quran:

*There shall be no coercion in matters of faith.*

(2:256)

*And had your Lord so willed, all those who live on earth would have attained to faith - all of them, do you then think that you could compel people to believe.*

(10:99)

*Said (Noah): O my people - what do you think? If (it be true that) I am taking my stand on a clear evidence from my Lord ... to which you have remained blind, can we force it on you even though it is hateful to you.*

(11:28)

*And so (O Prophet) exhort them; your task is only to exhort; you cannot compel.*

(88:21-22)

As long as freedom of expression and information is maintained, different views can be expressed and must be respected:

*Call you (all humanity) unto your Lord's path with wisdom and goodly exhortation, and argue with them in the most kindly (and convincing) manner.*

(16:25)

The Quran repeatedly reports the arguments of atheists and polytheists and replies to them objectively in order to teach Muslims how freedom of expression and information should be maintained to make such a dialogue fruitful. Freedom of expression and information is a basic human right, and it is a duty of everyone according to Islam. Islam condemns spreading lies and false information as well as passiveness and reluctance when the truth should be spoken: “*And do not overlay the truth with falsehood, and do not knowingly suppress the truth*” (2:42).

A believer who is conscious of God should always maintain and defend truth and justice:

*O you who have attained to faith! Be ever steadfast in upholding equity, bearing witness to the truth, for the sake of God, even though it be against your own selves or your parents and kinsfolk....*

(4:135)

*... Be ever steadfast in your devotion to God, bearing witness to the truth in all equity, and never let hatred lead you into the sins of deviation from justice ....*

(5:8)

Providing false information about an event which one has witnessed (22:30, 25:4, 72, 58:2), as well as refraining from

providing the facts which one knows (2:146, 283, 3:71, 167) are both considered grave sins which should be avoided and prevented by every possible means.

The teachings of the divine message should be revealed to the public and not concealed, even when the message criticizes or condemns an influential party or authority (2:159). It is significant that the Arabic word *kafir* and its origin *kafara* mean originally “to conceal, or to hide.” (See the word in a lengthy Arabic dictionary such as *Lisan al-Arab*; and see the Quranic verses 6:35, 37:14, and 31:32.)

The vice of hypocrisy (*nifaq*) is not less condemned in the Quran than *kufr*:

*They (the hypocrites) are the real enemies ..., how perverted are their minds.*

(63:4)

*Behold, together with those who deny the truth, God will gather in hell the hypocrites ....*

(4:140)

*Verily the hypocrites shall be in the lowest depth of hell ....*

(4:145)

Likewise, one who is reluctant to provide the facts is actually concealing the truth and such a person is described as “evil at heart” in the Quran (2:283) and as “a muted devil” in the tradition of the Prophet. Providing the known facts and cooperating constructively so that truth may prevail are fundamental parts of the Islamic obligation of enjoining the doing of what is right and forbidding the doing of what is wrong (3:110).

One who provides false information or is reluctant to provide the right information becomes a participant in the prevalence of falsehood and evil. Every believer is a witness and protector of the truth during his/her whole life:

“... so that you may bear witness to the truth before all humanity ...” (2:143 ) God Himself is the “Ultimate Truth” according to the Quran (22:6, 24:25), and it is incumbent upon every believer to support the truth in all forms so that it will always prevail.

Muslims are addressed as a community to work together in their efforts for progress. The right of assembly is thus essential to secure correctional efforts against any powerful supporter of deviation from truth and righteousness:

*And the believers, both men and women, are responsible for (and the supporters of) one another; they all enjoin the doing of what is right and forbid the doing of what is wrong.*

(9:71)

*And that there should arise among you a band of people who invite unto all that is good and enjoin the doing of what is right and forbid the doing of what is wrong.*

(3:104)

*But help one another in furthering virtue and God-consciousness, and not in furthering evil and enmity.*

(5:2)

*And enjoin upon one another the keeping to truth ... and enjoin upon one another patience (and firmness) in adversity.*

(103:3)

Freedom of expression and information, which constitutes both a right and a duty for every believer, as previously mentioned, should be established and maintained by all Muslims – men and women, rulers and ruled. The Quran orders those who have been entrusted with authority “*to deliver all that you have been entrusted with unto those who are entitled thereto, and whenever you rule between people rule with justice*” (4:58-59).

The rulers are responsible for securing the doing of what is good and preventing the doing of what is evil (22:41). Their responsibility is not limited only to allowing the people to express themselves as individuals or groups, but they are also obligated to develop a sound public opinion by providing correct information to the people. The authorities cannot maintain their credibility among the people if they expose only what supports their position while concealing what may arouse criticism of their rule. If individuals can be blamed for not revealing the truth, then rulers must receive greater blame for that same evil since they have been entrusted with authority by the people for the public benefit; moreover, they have the sources of information and the authority and capability to obtain information. How can Muslim rulers discharge their responsibility of forbidding what is wrong unless they themselves provide a model by courageously airing their faults?

*Do you bid other people to be pious , while you forget your own selves, and yet you recited the divine writ; will you not then use your reason?*

(2:44)

Rulers may not, by concealing or manipulating information the sources of which they may monopolize, use their authority



to conceal facts which may hurt them personally or damage their authority. Their responsibility is to maintain freedom of information, allow its flow, and tolerate any individual effort to obtain essential information from governmental sources within reasonable limits of state security, which themselves ought to be delineated by the people. Rulers have the obligation to display all the facts and release all the required evidence about an issue either at their own initiative or in response to a request, even if their interests suffer:

*...if they but refer – any matter pertaining to peace or war - unto the Conveyer of the (divine) Message and unto those from among them who have been entrusted with authority, such of those who are engaged in investigating the matter would indeed know it (directly and properly).*

(4:83)

Therefore, according to Islamic teachings, just as the Muslim people may not be passive subjects, the Muslim rulers do not enjoy absolute powers. To use political terminology, Islam establishes an institutional and constitutional authority, not a personalized one. This set of restrictions on Muslim rulers is similar to that which Rousseau has elaborated on: in any society past the primitive level, the ruler's authority and the citizens' rights and liberties may not conflict with each other. The citizens' rights are opposed by the ruler's authority only in a society which is deprived as a whole of participation in the practice of political power; in such a society only the rulers enjoy absolute authority.

The Islamic state is an institutional and constitutional one because the divine law, *sharia*, defines the rights and obliga-

tions of the ruled and the rulers. The Islamic rulership by the contract of the caliphate or the *imamate* is a legal and historical fact. The Quran stresses that absolute sovereignty and authority belong only to God and that anyone who is entrusted with authority from among the believers by them should be obeyed as long as such a person maintains divine justice and public consent. The Muslim people are not always expected to be obedient, as cases of variance and even clashes of views between rulers and ruled are possible. Such differences should not be settled by suppression, but through a constitutional political and judicial process, according to the Quran and *sunna* (3:159).

The principle that the rulers should not use their authority to conceal facts from public control or from judicial inquiry is reminiscent of the classical legal principle of habeas corpus, regarded as “the great writ of liberty” when it was formalized in the Habeas Corpus Act of 1679 in England. Under this law, any authority who detains any person for any reason is forced to bring the detained person to a judge to explain what has led to the detention, and to report procedures followed in effecting the detention. The judge, in addition to deciding what allegations are to be brought against the person being detained, must also ascertain that any harm which has befallen him/her – including death – has not been caused by the concerned authority. No abuse of power on the side of the authorities should be tolerated, and all relevant evidence should be introduced.

The responsibility of the authorities to provide relevant documents in general, with certain specified and conditional exceptions, has also been stated recently by certain legislations in the United States, Canada and a few other countries (see for example James Michael, *The Politics of Secrecy*). Such a guar-

antee of freedom of information is required in principle by Islam and should be formulated in detail and sanctioned. Facts must be displayed by anyone who holds them, and Islamic authorities have greater responsibility than ordinary individuals in this respect, *to bear witness to the truth for the sake of God, even though it be against their own selves* (4:135).

At the same time, Islam cannot ignore a reality accepted by contemporary legislation: that in some cases freedom of expression and information may be restricted temporarily or partially to maintain other human rights or public interests. For example, privacy and justifiable security requirements, especially in time of war, have to be considered. According to Islamic legal principles, a line should be drawn, in practicing the right of expressing one's views, between criticizing an ordinary man and criticizing one who occupies a public office, especially a high office. Freedom of expression has a broader range in the latter case than in the former, especially with regard to public activities and to behavior in personal life that may affect the practice of public authority. The ethical values and legal principles of Islam which secure privacy and forbid spying or any violation of personal rights should be observed. A groundless allegation cannot be tolerated:

*...if any iniquitous person comes to you with a tale, use your discernment lest you hurt people unwittingly, and afterward be filled with remorse for what you have done."*

(100 :6)

*God does not like any evil to be mentioned openly, unless it be by him/her who has been wronged*

....

(4:149)

*yet indeed as for any who defend themselves after having been wronged - no blame whatsoever attaches to them; blame attaches but to those who oppress (other) people and behave outrageously on earth, offending against all right ... but withal, if one is patient in adversity and forgives - this is indeed something to set one's heart upon.*

(42:41-43)

In *sharia*, calumny, libel and slander or any other offense of that kind are forbidden and punishable. However, the right of self-defense may justify some permissiveness in this respect:

In any expression of thoughts or feelings by words, drawings, music, performance or otherwise, one should observe the values of Islam and present them. A speech, writing, work of art or any other human expression cannot by any means persuade a deviation from Islamic values or a perpetration of what is prohibited. Any discussion which may arise about the beliefs and the laws of Islam should observe objectivity and avoid illegitimate offense, agitation and provocation. Arguing with non-believers, which the Quran cautions against, would necessarily draw them to defend their beliefs which are rejected by Islam or to give their opinions about what they are invited to follow. Maintaining the human rights of expression and wisdom in presentation and argument are essential for such a dialogue, which must be conducted within methodological and ethical guidelines on both sides in order to make it fruitful. Those who are born Muslim should not be deprived of the right to a similar discussion of their faith within the same lines.

Rights of expression and information should be protected by all authorities: legislative, executive and judiciary, internal and universal. A specific Islamic court for human rights should be established in every Muslim country and on a global level, and the special court of the glorious historical precedent which was concerned specifically with cases of injustice committed by one who occupied public positions or were politically or socially influential should be revived. Disputes with rulers should be settled according to the superior legal sources: the Quran and *sunna* (4:59). Any violation of human rights from rulers or from any group of the ruled (*baghy*) should be stopped (49:9). Islamic judicial protection of human rights must be more comprehensive and effective than any in the contemporary world. It must show concern for any moral harm which is caused by the authorities to individuals, groups or the whole society, as well as for material transgression: “... *and who can be a better lawgiver than God?*” (5:50).

# WESTERN MISAPPREHENSIONS

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**I**F THE FOREGOING ARE THE CONCEPTS AND PRINCIPLES of the *sharia* and the Islamic state which enforces it and if they represent and secure justice in all its dimensions and are dynamic in responding to emerging needs and coping with human change, why do we find many Muslims and non-Muslims along with Westerners worried about any movement or state which may commit itself to Islam and Islamic law? Whenever any individual or group from an Arab or Muslim country is accused of an act of violence, especially if the group's name contains *jihad*, Western media automatically accuse and attack Islam. Not a single sensible and conscientious human being accepts terrorism, and no one can tolerate the horror of a hijacked aircraft or a senseless bombing. All humanity ought to co-operate to defend itself against any form of spreading terror and horror among the elderly, women, children and all innocent people who do not initiate fighting and cannot defend themselves. However, fighting a disease – or an epidemic –

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requires accuracy in tracing the symptoms and analyzing the possible causes, because a correct diagnosis is the prerequisite of a cure.

Sometime ago, a university in Israel organized a conference on "Islam and Terrorism," and published a selection of the papers. One scholar rhetorically asked why Islam alone, and not other religions, was associated with terrorism. His answer was that since Islam is both a faith and a political system, and it contains *jihad* in its teachings, it is legitimate to discuss its relation to terrorism. He ignored the historical relationship between Christianity and the Crusades, the wars between European kings and the Popes, the bloodshed between Catholics and Protestants, and the colonial aggression which claimed Christianization as its main purpose and which was supported, as well as blessed, by missionary organizations. Although the ethnic and social reasons for the differences between the Catholics and Protestants in Northern Ireland are obvious, the religious factor cannot be ignored, and several leaders of the loyal Unionists who support the political union with Britain are Protestant clergy. The terrorist actions of the IRA in Ulster enjoy understanding, sympathy and sometimes material support from many people in different corners of the world, including the United States. Liberation theology is dominant in the social and political struggle of Latin America, and many of the Catholic clergy support the militants by word and actions, which include the use of weapons.

As for Judaism, the scriptures and Jewish history record successive military conflicts. If Zionism has its roots in Judaism itself, as most Zionists believe, modern militancy -- or even terrorism -- has been added to the historical precedents.

A struggle for justice by force that is legitimized by a reli-

gion when all other peaceful ways are blocked is understandable and justifiable for those who think deeply and fairly. When a high-ranking figure in the Vatican said that he could not imagine Jesus with a gun, many others responded that Jesus could also not be imagined standing passive towards social and political oppression. He could not stand by while the House of God was turned into a den of thieves:

*And (he) cast out all of them that sold and bought in the temple, and overthrew the tables of the money-changers....*

(Matt.21:12-13)

However, a line should be drawn between the legitimate use of any principle and the abuse of any principle, and a just cause may be stained by the malpractice of those who claim to fight for it. Such abuse is human and universal, and if we trace the human experience in the past and the present, abuses cannot be limited only to Arabs or Muslims.

Terrorism, in fact, has become a universal phenomenon. Historians, social scientists, lawyers, criminologists, administrators and politicians are showing an increasing awareness of the need for a more multi-disciplinary approach towards “the growing international incidence of acts of terrorism perpetrated by extremist groups of almost every ideological hue and in every continent,” as Yonah Alexander, David Carlton, and Paul Wilkinson have stated in *Terrorism: Theory and Practice*.

What should be delineated is what the word “terrorism” actually means.

According to *Encyclopedia Britannica*, terrorism is the systematic use of terror, or unpredictable violence, against governments, peoples or individuals, to attain a political objective. Terrorism has been used by political organizations with both



rightist and leftist objectives, by nationalistic and ethnic groups, by revolutionaries and by armies and secret police of governments themselves.

Terrorism, then, can be connected with human nature itself, not with a special group or belief.

Governmental terrorism practiced by state agents should be labeled as terrorism, whatever the excuses may be. A government cannot use public revenues provided by the people to defend their rights and maintain justice in order to violate those rights and undermine justice, particularly as state terrorism is likely to be on a larger scale than individual terrorism. Encyclopedia Britannica indicates:

Terrorism was adopted as virtually a state policy, though an unacknowledged one, by such totalitarian regimes as those of Nazi Germany and the Soviet Union under Stalin. In these states: arrest, imprisonment, torture and execution were applied without legal guidance or restraints to create a climate of fear and to encourage adherence to the national ideology and the declared economic, social and political goals of the state.

Such policies of spreading fear in the hearts and minds of a whole people were and are also adopted by many oppressive regimes in Latin America, the Arab World, Indonesia, the Philippines under Marcos, and other countries.

The same source continues: "Terrorism has been practiced throughout history and throughout the world." Examples were mentioned by the ancient Greek historian Xenophon (C. 430-C. 349 BC) in dealing with enemy populations. The Spanish Inquisition used arbitrary arrest, torture and execution to pun-

ish what it viewed as religious heresy.

The use of terror was openly advocated by Robespierre as a means of encouraging revolutionary virtue during the French Revolution, leading to the period of his political dominance that was called the Reign of Terror (1793-4).

After the U.S. Civil War (1861-5), defiant Southerners formed the Ku Klux Klan, a terrorist organization to intimidate supporters of the Reconstruction.

In the latter half of the nineteenth century, terrorism was adopted by the adherents of anarchism in Western Europe, Russia and the U.S. They believed that the best way to accelerate revolutionary political and social change was to assassinate persons in positions of power.

The twentieth century witnessed great changes in the use and practice of terrorism. Terrorism became the hallmark of a number of political movements stretching from the extreme right to the extreme left of the political spectrum. Terrorism has most commonly become identified, however, with individuals or groups attempting to destabilize or overthrow existing political institutions. It has been used by one or both sides in the anti-colonial conflicts between Ireland and the United Kingdom, Algeria and France, Vietnam and France, followed by the U.S.A. Later, terrorism has erupted in disputes between different national groups over possession of a contested homeland (e.g. Palestinians and Israel), in conflicts with religious tokens, even if religion may not be the only factor (e.g. Catholics and Protestants in Northern Ireland), and in internal conflicts between revolutionary forces and established governments (e.g. Malaysia, Indonesia, the Philippines, Iran, Nicaragua, El Salvador and other countries in Central and South America).

This may show how widely terrorism ranges throughout the contemporary world. Several factors have contributed to it, most of all, the social and political oppression which is often connected with state terrorism. Arabs and Muslims are no exception in this regard, however strictly Islam tries to control them. In *Islam in Modern History* (New York 1957, p.163) , Wilfred Cantwell Smith was fair enough to clarify the general climate of suppression and frustration under which Arabs and Muslims work:

The society has deteriorated to a point where violence is almost inevitable...It is the expression of the hatred, frustration, vanity and destructive frenzy of a people who for long have been the prey of poverty, impotence and fear.

Several names such as the Red Brigades in Italy, the Baeder-Meinhof in West Germany, ETA (the Basques) in Spain, Direct Action in France, the Red Army in Japan, have been connected with violence all over the world, in addition to violent actions practiced under nationalist or ethnic labels by the Armenians, the Tamil in Sri Lanka, the Sikhs in India, and others elsewhere. Under the significant title “Keeping Count of Terror,” the special correspondent of *The Economist* reported in the issue of 26 July, 1986:

Three months after the bombing of Libya, the temptation is to call it a success. Was it? The Middle East is not anyway the worst part of the world for the Americans. The number of Latin American-related acts of terrorism in which Americans have been killed over the past five years is on average 40 per cent higher than the number of Middle East-related

acts. In 1985, there were some 86 terrorist acts in Latin America involving US citizens compared to 16 similar incidents in the Middle East. Contrary to popular American belief: relatively little Middle East terrorism is directed against Americans. Terrorism in Europe, according to American statistics, accounted for a fifth of all terrorist deaths last year. Europe's own groups (IRA, ETA, etc.), being credited with the highest scores, killed 118 people. Middle Easterners working in Western Europe killed 65. State-terrorism represents a formidable brand of terrorism which should be considered seriously whether it is conducted against internal or external enemies.

The correspondent further explained that in 1957 France forced a plane, in which leaders of the Algerian Liberation Front were flying from Morocco to Tunisia, to land in France, and the leaders were arrested. In 1986 the U.S. forced an Egyptian airplane going to Tunisia with some Palestinians on board to land in Sicily. More recently the US allocated \$100million openly to support the Contras who aimed to overthrow the government in Nicaragua. Israel practices state terrorism regularly by bombing the Palestinian refugee camps in Lebanon, and occasionally kidnapping any citizen from any country to be tried and punished by Israeli courts for alleged harm against Israelis or Jews in general. The white minority government of South Africa has been carrying out formidable state terrorism against the majority, including the torture of detainees. State terrorism is practiced under totalitarian and despotic regimes in many countries of the Third World, and it was practiced for a long time in the communist block.

A modern arsenal of oppressive equipment developed and supported by a state to maintain and extend its power, forces dissidents to the use of violence to attract public and international attention to their grievances. As constitutional jurists and political scientists have observed, advanced technology provides the modern state with accurate spying devices and crowd-dispersing equipment, which undermine the rights of expression and assembly, even if such rights are acknowledged in the first place. The oppressive measures of the state and its forces, supported sometimes by legal provisions, develop bitter feelings of helplessness and frustration among the public. Labor unions, political parties, the parliament and the mass media may be directed and controlled by small groups, if not by state agents openly, and this does not allow a great number of ordinary citizens any channel for the expression of views and demands.

The courts should represent an essential safeguard for the public, but the costs of litigation are often high for the average citizen, and impossible for the poor. Until some effective way can be found for the ordinary citizen to voice complaints, which will be received positively and responded to justly by the state, individuals and groups will be tempted to look for other dissidents to make grievances known through extraordinary actions.

According to *Encyclopedia Britannica* Technological advances such as automatic weapons and compact, electrically detonated explosives, gave terrorists a new mobility - and lethality... Terrorism's public impact has been greatly magnified by the use of modern communications media." However, even those who may be sympathetic to the cause of any terrorist group "may be alienated by an indiscriminate use of terrorism" as the same source states.

There are other factors which may have contributed to the violent attitude of younger generations. Psychological factors such as deterioration in family and school discipline for the youth, in addition to a social and economic deprivation may lead a young man or woman to take revenge for such negligence without regard for others. Some television programs, as proved by recent research, may also encourage violence and guide viewers to some of its practices and techniques. Certain games reflect and encourage violent attitudes. The remarkable increase of crimes against the elderly, women and children, of masochistic and sadistic practices, of suicide, even among children, of the use of drugs, and of sexual assaults connected with violence and murder all indicate that television cannot be separated from the general psychopathic phenomena. One can see from books such as Erich Fromm's *The Anatomy of Human Destructiveness* how widely and deeply the roots of aggression and violence are spreading in contemporary society.

Like any other community, Arab and Muslim groups include some psychopathic and violent elements. Nonetheless, many Western politicians and mass media professionals remember scattered incidents of violence attributed to Arabs or Muslims, while completely failing to recall the Muslim world's long history of peaceful and legitimate political activity, including patient negotiations in the United Nations and other international organizations.

Moorehead Kennedy was in the foreign service of the United States for twenty-one years, and was in the American Embassy in Tehran when he, with fifty-two other American officials, was seized as a hostage for 444 days. He told the London-based *The Times* on 20 January, 1986, how his cap-

tivity led him to an enlightenment about the suffering of those who are labeled terrorists

I was suddenly free from having to think like a foreign service officer, free from state department smugness and assumptions, attitudes I had been part of. I went through a form of mental hygiene. I began to see more clearly that if we are to confront terrorism, we have to change our old-fashioned assumptions.

Moorehead believed that the crisis held important lessons for Americans, but that they didn't learn from it. "The whole thing was treated by the American people as an aberration and the Iranians were dismissed as mad...." He wrote.

The only way out of this is for us to start listening to the Middle East. We have to reconsider our attitudes of superiority. We think and act as if we are God's chosen instrument. We have been brought up to assume that the rest of the world thinks, or should think, as we do.... I am not condoning or caving in to terrorism, but we must know the other side. Terrorism challenges our thinking, not our military might. When talking of the Iranians he said, These people both admire and envy us. "We like the Americans, but we hate the U.S.," they said. We have disappointed them. In the Middle East and elsewhere, people take the Declaration of Independence more seriously than we do. We have talked of freedom and human rights, but our conduct in the world has caused disillusionment and bitterness and made us hypocrites. As a victim of terrorism I abominate it, but it holds up a mirror to us. As I say: we should start listening.

When Moorehead Kennedy came home to a hero's welcome after his release, he turned down a good position and resigned from the foreign service, since he believed that "you can't be part of an organization and go around criticizing it in public." Now he devotes himself to spreading the lessons of the "American's traumatic experience with the Iranian revolution."

What Kennedy says about his experience makes him a controversial figure among the Americans who hear his lectures on terrorism and see him on television. Through the Council of International Understanding, which he has established in New York, he lectures and writes tirelessly on terrorism and its challenges to the American mind: "I talk to parents and church groups and schools, wherever people are committed to serious listening and discussion," he said.

Similarly, the Italian actress Sandra Milo witnessed a moment of truth and enlightenment during the attack on Rome's airport, in which she and her daughter miraculously escaped death. In an interview which was published on 31 December 1985, she stressed that a miserable life leads one to plant misery in others' lives, and she gave as an example the situation of Napoli and southern Italy.

As Moorehead Kennedy said, some "make efforts not to hear," and instead blame others' beliefs. In fact, Islam teaches its believers how to cure egoism and remove hostility and aggression, through both faith and ethics on one side and the law and the state on the other. Justice should be maintained in all fields: social and economic, political and legal, internal and universal.

The protection of human life, body, dignity, family, mind, freedom of belief, and rights of private and public property rep-



resent the main goals of the *sharia*. The divine teachings indicate how grave the taking of human life is:

*If anyone slays a human being – unless it be (in punishment) for murder or for spreading mischief on earth, it shall be as though such a person had slain the whole of humanity; whereas, if anyone saves a life, it shall be as though he had saved all the lives of the whole of humanity.*

(5:32)

Those who spread mischief and destruction are condemned severely, regardless of what their arguments may be:

*There is one whose speech may please you greatly in this world, and (he/she) cites God as witness to what is in his/(her) heart, and is moreover exceedingly skillful in argument. But when this person turns back, his/her aim everywhere is to spread mischief through the earth and destroy crops and progeny, and God loves not mischief. And whenever one says to this person: fear God, false personal pride (and arrogance) drives him/her into evil; wherefore hell will be the allotted portion of such a person - and how vile a resting place.*

(2:204-6)

*It is but a just recompense for those who make war on God and His Messenger and endeavor to spread mischief on earth, that they are punished by death...; such is their ignominy in this world, but in the life to come (yet more) awesome suffering awaits them.*

(5:33)

Universal cooperation is required to fight terrorism and terrorists by securing justice in the first place. Sincere efforts for social and political reconciliation need to follow, and coordinated universal measures, preventive and defensive, may be the last resort, as the Quran counsels in the case of a clash between two groups:

*... make peace between them; but then, if one of the two (groups) practices aggression towards the other, fight against the one that practices aggression until it reverts to God's commandment; and if they revert, make peace between them with justice.*

(49:9)

The Quran teaches that the party which initiates aggression should be treated in the end with justice, as soon as it reverts to God's commandments, because only justice can halt the vicious circle of reciprocal violence. *Jihad* is allowed for Muslims only to repel those who initiate an attack: "*And fight in God's cause against those who are waging war against you, and do not transgress limits, for God loves not transgressors*" (2:190).

The common translation of *jihad* as "holy war" is misleading, since Islam has never justified a war to impose its faith on others by force. *Jihad* aims only to prevent intimidation (2:193), not to spread it. All races are equal members of humanity, and good relations and cooperation have to be developed in the whole world, whatever the racial and ethnic differences may be (49:12). Justice and fairness should dominate the relationship between Muslims and believers of other faiths (60:8). No group should suffer for an individual offense, and no collective accusations or punishments are accepted by

Islamic justice, since every individual has to be accountable only for his/her own deeds and should never bear another's burden (53:38-9).

In the case of an undesirable but legitimate defensive war which might be imposed on Muslims as a response to aggression, this war should be declared openly (8:58) and conducted against the combatants only. Therefore, the women and the children, the elderly, the clergy and the monks, as well as the peasants and all who have not been involved in fighting the Muslims directly, must not be hurt by them. A distinction should be drawn between a legitimate struggle on one side and common criminality on the other, even if drawing such a line may be sometimes difficult.

All houses of worship must be defended, whatever the belief of the worshippers may be:

*For had God not enabled people to defend themselves against one another, (all) monasteries and churches, synagogues and mosques, in which God's name is abundantly extolled, would surely have been destroyed. And God will most certainly support one who supports His cause.*

(22:40)

Even the life of plants and animals should be preserved except in a pressing need. Martyrdom is quite distinct from meaningless and fruitless suicide: "*and let not your own hands throw you unto destruction, and persevere in doing good*" (2:195).

The goal of a legitimate war is to prevent mischief and aggression (2:251), and to replace them with righteousness and justice (22:41). Facts about any matter of war or peace should

be discussed honestly between the people and the authorities who are responsible for providing accurate information to the public through the available media:

*And if any matter pertaining to (public) safety or fear comes within their knowledge, they spread it abroad – whereas, if they would but refer it unto the Conveyer of the (divine) Message and unto those from among the believers who have been entrusted with authority, such of them who investigate should indeed know (directly the truth of) the matter.*

(4:83)

Can Muslims expect from others more fairness in dealing with Islam and more seriousness in discussing the wide-spread epidemic of terrorism instead of the chronic prejudices that they often face? Can we hope to eliminate indifference to state terrorism, and to social and political injustice in the whole world? If so, there may be more progress in securing peace and fighting terrorism, rather than blaming Islam and Muslims for something that they have never initiated, and that their faith and majorities have never supported.

# CONTEMPORARY CIVILIZATION

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**I**T MAY BE OBVIOUS NOW THAT ISLAMIC LAW OR *SHARIA*, through the spacious room allowed for human intellectual efforts to cope with change (*ijtihad*), can benefit from any contemporary experience, especially that of the developed Western countries in their political, administrative and economical systems. An essential question may be raised by some Islamists: how can Muslims rely on the products of a civilization that has denied God and has opposed or ignored any collective practice of religion from the society as a whole? Modern Muslim thinkers, such as Jamal ud Din al-Afghani, Muhammad Iqbal, Abul Hasan Ali Nadwi, Hasan al-Banna, Abul Ala al-Mawdudi, Muhammad Asad, Malik ibn Nabi, Sayyid Qutb and others, in their efforts to build up self-confidence and mobilize the Muslims against Western colonization, imperialism and neo-imperialism, have sharpened the contrast between Islamic values and Western values and practices. Their works have provided ammunition for Islamists to attack, some-

times indiscriminately, the West and all that may be related to it, including modernity itself. It may be the time now to discuss with some seriousness both the Western attitude toward religion and the anti-modernity attitude of some Islamists, and to trace the origin and development of each.

In the beginning of the eighteenth century, when the Europeans colonized Muslim lands, the people experienced shocking material and moral changes and found themselves in a puzzling dilemma. On the one hand, the humiliation of invasion and suppression created strong feelings of anger and resentment. On the other hand, the inhabitants of the Muslim lands were dazzled by modern European civilization with its advanced technology and organization, a sentiment that had not been strongly felt during previous confrontations with the west. There is a great difference, for example, between the impression which the Crusaders left on the Muslim knight Usama ibn Munqidh (d. 1188), as recorded in his memoirs *Al-I'tibar*, and that which the French invaders of Egypt left on Muslim scholar and historian al-Jabarti (d. 1825), as reported in his *Aja'ib al-Athar*.

Usama witnessed the European Crusaders who appeared strange to him in their way of life. He might have found them militarily strong and victorious but he did not feel for a second that they were the representatives of a civilization superior, or even equal to his, in military or civil life. For al-Jabarti, on the other hand, the impact of the French invaders was tremendous. Not only did they have superior military technology but also better organization and administration.

Colonialism left Muslims with mixed feelings of hatred and admiration. Muslim reaction to colonial occupation varied. Some Muslims believed that they should swallow the bitterness

of colonialism and adopt a positive attitude for the sake of progress. This attitude was emphasized by successive generations of Muslim thinkers and writers such as Shaykh Rifa'a al-Tahtawi (d. 1873), Shaykh Muhammad Abduh (d. 1905), Qasim Amin (d. 1908), Lufti al-Sayyid (d. 1963) and Taha Husayn (d. 1974) in Egypt, Medhat Pasha (d. 1883) in the Ottoman Sultanate, Khayr ul-Din Pasha (d. 1879) in Tunisia and Sayyid Ahmad Khan (d.1889) in India.

However, between the two world wars in the twentieth century, hostility towards European civilization began to grow among Muslims. Shocked by the impact of the so-called modernization on their social traditions and cultural identity and provoked by certain missionary activities and liberal opinions about religion, those who were committed to Islam struggled enthusiastically to defend their faith and way of life. Al-Azhar University in Cairo established a post-graduate diploma in preaching (*dawa*) and published a monthly journal to defend the faith and the Islamic identity against the threatening Westernization. Some collective activities began to be organized among Muslims, spurred on by their knowledge of the pioneering efforts of Jamal al-Din al-Afghani (d. 1897), Muhammad Abduh (d. 1905) and Abd al-Rahman al-Kawakibi (d. 1902). In Egypt, the Association of Muslim Youth was established, followed in 1928 by the appearance of the Muslim Brotherhood.

Muslim preachers, thinkers and activists began their efforts by emphasizing that all the merits of European progress could be supported by the teachings of Islam. But later such apologetics were followed by a critical approach towards European civilization, whether in its ancient roots or in its modern products, which aimed to undermine its credibility among Muslims.

In spite of the benefits of the application of Greek logic to Arabic linguistics and Islamic theology and jurisprudence, the classical argument of some Islamic scholars such as Ibn Hazm and Ibn Taymiyya against it, as well as the argument of al-Ghazali against Greek philosophy in general, were revived to prove that any foreign epistemological approach could damage genuine Islamic knowledge. Some supporters of such an attitude went further to restrict the genuine Islamic civilization that truly represented the teachings of Islam to the period of the early four caliphs (al-Rashidin).

As more information about the political and economic problems of the West became available, especially after the worldwide depression of the 1930's and the attacks of fascism and communism against democracy, the Islamists thought that attacking European civilization might be the most effective way to defend Islam and to nurture self-confidence.

As soon as the Second World War came to an end, national frustration fuelled by external Western pressures and internal Westernized leaders increased the hostility of Muslims against the West. This provided a suitable climate for the Islamists to carry on their campaign against Western civilization on cultural and ideological grounds. The intellectual and psychological roots of the West that did not care about religion or were hostile to it were used to support moderate criticism (e.g., views of Muhammad Iqbal, Muhammad Asad, Abul Hasan Ali Nadwi, Malik Ibn Nabi) or absolute rejection (e.g., al-Mawdudi, Sayyid Qutb). Western historians themselves did not conceal such roots. Robin W. Winks wrote, in *Western Civilization*, (Prentice-Hall, New Jersey, 1979, pp. 176-178) that “the Renaissance was a time when people were rethinking their old assumptions. It heralded the Reformation, and both must be



seen as a continuum." He explained that during that time some people wished to return to antiquity, and to the values they associated with Greek and Roman civilization; others consciously attempted to promote new, experimental and somewhat unusual ideas. Still others held even more strongly to the firm beliefs of the Middle Ages. "In this contention of idea against idea," wrote Winks.

People experienced a liberation that stimulated innovation in many aspects of life. Particularly important was the literary movement labeled "humanism," to which Petrarch contributed so much in Renaissance Italy. The humanists emphasized the importance of humanity as opposed to the significance of systems. Many of the humanists were lay writers, not members of the clergy, who wanted to turn back to the ancients - especially to Plato, Homer, Cicero and Horace - for inspiration. These ancient writers were thought of as men of reason, secular men who did not quarrel over petty matters of church doctrine....

Winks explained that "Renaissance thought also promoted science, not only in the practical sense of new discoveries and experiments or in terms of pure theory, but in finding ways for reconciling God and human."

Winks points out that it was Aquinas's (d. 1274) feat to show that faith and reason need not be at war and that faith was under no challenge from reason. Aquinas made it possible for people to hold to the truth of the church while attacking specific clergy members. Not only was reason acceptable to the Church, but the Church was acceptable to reason. Those who

followed Machiavelli (d. 1527) cast such reconciliations aside, and freed politics from theology or moral teachings. But there were some people who longed for the world of Platonic idealism. Others wanted to give the Church first place in their lives.

In such an environment, European civilization was born. As it developed, religion became less important. Winks (pp. 228-9) explains that the Enlightenment, which is said to run from 1687, the date that Newton's work was published, to the outbreak of the French Revolution in 1789, was seen an age of light, of special wisdom about human nature.

There was no longer any need for a God as the Creator of all things; Universal gravitation provided the First Cause. There no longer was either need or justification for miracles, for all so-called miracles should be capable of scientific explanation. The universe was governed by precise mechanical laws that were capable of mathematical proof; this universe could run for eternity without the intervention of God. The world was a machine.

Those holding this view did not believe that God was without purpose, however, because while science can explain the operations of the machine, even this compromise had lost its attraction for evidence for a Creator of Divine Intelligence, and that accident and chance had created the universe, even though it might operate laws that would ensure for all time and that could be mathematically investigated. The individual became all important. Evil arose not from Original Sin but from bad institutions. Rational individuals should be capable of reforming their institutions to the point that the environment reinforced the good in people.

All social institutions should be remodeled in the light of Reason. History studied closely would reveal the mistakes of

the past and guide the society of the future. Nature and Reason would unlock the meaning of all experience...Nothing could stop the advance of knowledge.

A revolutionary practice was inspired by rebellious thought, and vice versa. Robert Anchor in *The Modern Western Experience* (Prentice Hall, N.J., 1978, pp. 65-67) pointed out that when the 1848 revolutions failed to achieve "the victory of liberalism, democracy and social justice.... Gone was the high-minded romantic and idealistic utopianism that had come in the wake of the triple revolution." However, "gone too was the die-hard based on a hopelessly obsolete alliance between throne and altar and a policy of modernization." A new mood which was described as a blend of disillusionment with the old and fascination with the new; a distrust of intellectual speculation and infatuation with hard facts; an indifference towards the past and a boldly optimistic attitude toward the future now settled over Europe and the West.

The new mood manifested itself in Karl Marx's tough-minded revolutionary theories, which claimed to be more realistic than the "utopian" socialism of the first half of the century, which Marx scorned. Liberals themselves, originally dedicated to the ideals of liberty, equality and fraternity, now concerned themselves more with material well-being and with strengthening the political and social position of the middle classes. The new mood pervaded Victorian England: proud, prosperous and practical. This new mood was manifested in positivist philosophy, Darwinian science, the enthusiastic acceptance of industrial civilization, and the rise of the social levels and school of naturalism.

During the 1850s and 60s nationalism pervaded all spheres of life in the Western world because all pre-industrial intellec-

tual, moral and social models, whether conservative, liberal or radical were now obsolete. In order to survive at all, these movements had to adapt to the new urban and industrial setting, to the now indisputable dominance of the middle classes and growing importance of the factory proletariat, and to the reality of emerging mass society. Even the critics of materialism, to be effective, had to learn to speak its language and appreciate its importance. What occurred during the age of materialism and under its aegis was the transition of those Western countries where age old tradition in turn marked the secularization of western culture and laid the foundations of contemporary history.

In such a psychological and intellectual climate arose the modern European civilization. Through the development of education and information, the advocates of Islam became aware of the philosophical basis of modern civilization that averts religion and restricts objective knowledge to the sensory. Since religious faith is based on the belief in the existence of that which is beyond the reach of human perception (e.g., Quran 2:3), the modern epistemological approach has been labeled as material, and thus anti-religion or even atheistic. Many Islamists have come to believe that the evils of modern civilization cannot be described merely by certain emerging ideas or practices, for, they believe, these evils lie deep within the very nucleus and basis of that civilization.

According to these Islamists, Muslims should make use of Western technological achievements, but they should reject Western values and ideas. As technology relies on science, we should be very cautious about any anti-religious orientation of science which may infiltrate the Western approaches. Muslims should stay close to the concrete facts and abide by them with-

in the general Islamic scope of God as the Almighty Sovereign and the Creator of the universe. Some Islamists have recently emphasized the great need for an Islamic approach to the physical and biological sciences themselves. In the fields of social sciences and humanities, Western methods and data should be scrutinized and restated according to Islamic criteria and principles.

The suspicious attitude of Islamists towards modern civilization in the early decades of the twentieth century can be understood and justified. However, continued adherence to such a standpoint should be revised as Western civilization has become global, spreading over the whole world with its various denominations, cultures, social structures and political systems. The technological revolution in the fields of transportation and mass communication has spread Western civilization everywhere, and thus maintaining cultural isolation has become impossible. The countries of Europe and North America are now no more representative of this civilization than Japan or even Taiwan, China and South Korea. One can assume that the present global civilization has been separated from the cultural atmosphere which witnessed its beginnings. The technological aspects of contemporary civilization – neutral in their origins and nature – are becoming dominant, and thus the contemporary civilization has been unanimously accepted by liberals and conservatives, atheists and religious people.

Is this global civilization unable to survive or to fit in a religious society, just because it originated in a climate which did not like religion? In the past, some of the components of the Byzantine and Sassanian civilizations continued under the Islamic Caliphate. Would such a survival of two worldviews be thought impossible now, when human contacts and cultural

exchanges have become so rapid and widespread? The Islamists need to reconsider the relationship between culture and civilization as anthropologists and social scientists have been doing, in the light of the present circumstances in which civilization has become unprecedentedly universal and dynamic.

The assumption that modern civilization must be accepted as a whole, forcing us to take both what we may like and what we may not, is an exaggerated determinism. Islamists have to realize that there is a place for cultural and ideological differences within this global and dynamic civilization itself, and therefore any rigid rejection of it would be against the interests of Muslims in their practical life. Besides, even in its origins and early stages, contemporary civilization has not always advocated an individual or a narrow national utilitarianism. Social values such as respect for others' rights and views, organization, cooperation, observance of one's duties (especially those related to work and country) and endurance in fulfilling them, and loyalty in human relations to others or to social and political institutions have flourished in Western societies.

On several occasions, these societies have shown their support for international cooperation, and they present from time to time strong voices and movements devoted to universal welfare. With burgeoning knowledge and an increasing conception of relativity, probability and abstraction, science has become less arrogant. Empiricism in the field of concrete matters has led to a vast space related to the nature of energy.

Well-known scientists and artists in various fields have in large numbers increasingly emphasized their faith in a Creator. Increasing disasters of unemployment, economic hardships, pollution and environmental deterioration, drought and

famine, emerging unknown diseases, in addition to looming nuclear holocaust and self-destruction have shaken the previous certitude about the future according to the doctrine of permanent and continuous progress, which was “the most original aspect of the Enlightenment, since taken for granted,” as John Bowle stated in his *History of Europe* (Book Club Association, London, 1980, p. 473). Under such pressures, societies that seemed most steeped in individualism and materialism have shown an increasingly positive attitude toward religion as they become aware of the growing spiritual emptiness in contemporary civilization.

The Islamists should realize that they cannot create a contemporary Islamic civilization in a vacuum. They have no choice but to be a living part of contemporary civilization if they want to suggest another direction. Without a positive approach and active participation, it is impossible to graft Islamic values onto the present civilization.

A “decline of the West,” which the German philosopher Oswald Spengler (d. 1936) foresaw, may not necessarily lead, as Arnold Toynbee (d. 1975) strongly argued, to the fall of contemporary civilization, a civilization that is no longer limited to the West but has become global. However, such criticism by leading thinkers proves a healthiness and a liveliness, in addition to proving the worth of the argument. Building a contemporary Islamic civilization in the individual or collective imagination will not establish it in reality.

Our Muslim ancestors were more aware of the succession of civilizations than we are today. They adopted what was useful in the achievements of existing civilizations in science, mathematics, philosophy and humanities, as well as in state organization and administration. The intellectual heritage of Greeks,

Persians and Indians was translated and systems of administrative organization (*dawawin*), land-taxation (*kharaj*), customs (*ushur*), police and prisons were introduced.

We should think seriously and concretely about the Islamic civilization which we believe in and look for. Adhering only and always to the rejection of others' achievements is a very poor means of confirming one's identity. The Prophet of Islam emphatically taught self-confidence and human universality in such inspiring and well-accepted traditions as that reported by al-Tirmidhi: "The believer should search always for wisdom, wherever he/she may find it: he/she is the most deserving of it."



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# Sharia

in  
Contemporary Society

## The Dynamics of Change in the Islamic Law

### About the Book:

This book is a landmark on the road towards a clear understanding of Islam and its sources on which the legal system is built and of the evolution of the Islamic law throughout history. The author uses his study of common law and his vast knowledge in Islamic jurisprudence together with his qualifications as an eminent historian to explain the subject.

The book sets the distinction between **what is divine and permanent** and **what is human and changeable** in the Islamic legal heritage, all of which is often oversimplified as *sharia*. The first refers to the word of God pointing the direction, setting the attitudes and forming the basic general rules, the latter is the effort of human beings to interpret His Words and implement His guidance with its general principles in search of justice and of happiness in this life and in the hereafter.

The author explores the intrinsic dynamism embedded in the system offering a continuous, dynamic and multidimensional growing corpus of legality that copes with change of time and place and is by no means totalitarian, authoritarian or limiting, but rather conducive for liberty and progress.

### About the author:

Fathi Osman is a distinguished Islamic scholar who has taught in several universities all over the world. In addition to his contributions to the modern Islamic thinking published in Arabic, he was the Editor-in-Chief of the London-based international Islamic magazine, *Arabia: The Islamic World Review* from 1981 to 1987. Some of his books in English are: *Jihad: A Legitimate Struggle for Human Rights*, *In Fraternity: A Message to Muslims in America*, (co-authored) *The Muslim World: Issues and Challenges*, and *Muslim Women in the Family and the Society*. His major work on *The Concepts of the Quran: a Topical Reading of the Divine Message* is in print.

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