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THE LEGAL CONCEPT OF HUMAN RIGHTS
IN ISLAM

THESIS SUBMITTED FOR THE DEGREE OF L.L.M. IN
THE UNIVERSITY OF GLASGOW

BY

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DEPARTMENT OF PUBLIC
INTERNATIONAL LAW,
UNIVERSITY OF GLASGOW,
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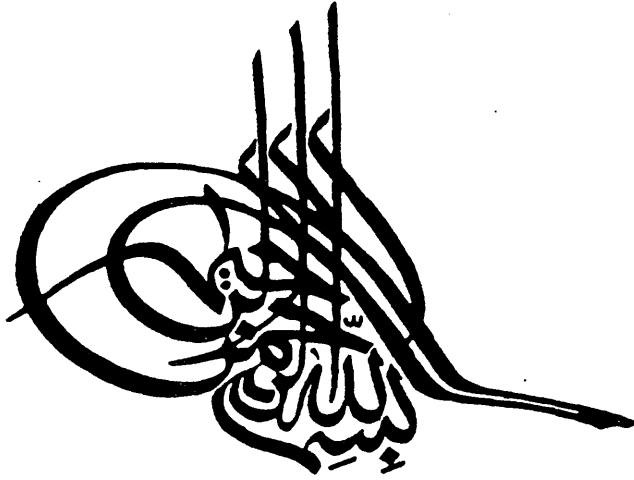
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IN THE NAME OF ALLAH,
THE MERCIFUL,
THE MERCY-GIVING

﴿٤٩﴾ mankind ! We created
You from a single (pair)
Of a male and a female,
And made you into
Nations and tribes, that
Ye may know each other
(Not that ye may despise
(Each other). Verily
The most honoured of you
In the sight of God
Is (he who is) the most
Righteous of you.
And God has full knowledge
And is well acquainted
(With all things).

يَا أَيُّهَا النَّاسُ إِنَّا خَلَقْنَاكُمْ مِنْ ذَكَرٍ وَأُنْثَىٰ
وَجَعَلْنَاكُمْ شُعُوبًا وَقَبَائِلَ لِتَعَارَفُوا إِنَّ
أَكْرَمَكُمْ عِنْدَ اللَّهِ أَتْقَاهُ إِنَّ اللَّهَ
عَلِيمٌ خَبِيرٌ

(CH. XLIX v. 13)

DEDICATION

To my parents; Khadija Khalid and Muhammad Ali,
my brothers and sisters,
the Libyan People,
and all mankind.

Acknowledgements

The people to whom I am grateful are too many to mention. However, I would like to express my deep gratitude to the following persons for the valuable assistance rendered to me in connection with this work.

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Finally many thanks to all those who in one way or another contributed to the fruition of this work but to whom dictates of space deny me the privilege of specific mention.

Summary:

Throughout the world, people other than Muslims always take a negative attitude whenever they try to give a fair statement about Islam or whether there are human rights in Islam. Because of lack of knowledge and strong influence from the media, which is well organised and controlled to reveal just all the distorted sides, the people, in the West in particular, could not have a clear view of Islam or its law, the law which is supposed to be the Mercy of Allah (God). Having said that, the main objective of this framework was to make the Islamic attitude towards issues relating to human rights as clear as possible. Thus away from the contemporary practices in the Muslim world which have, in my opinion, nothing to do with Islam, I have tried to tackle the issues in accordance with the Holy Qur'an and the Sunnah (the Shariah). However, beside the theoretical attitude of the Shariah, practices held in the golden age of Islam, in other words, practices of the Orthodox Caliphs, were highly considered.

The study, therefore, investigated issues such as the fundamental human rights, right to life, property, the individual's freedom and the legal status and rights of women. For its importance, freedom of religion was tackled in some detail. The Islamic state with its sovereignty and democracy was discussed, where the legal and political rights of the citizens were shown. In the ultimate part of the work, the Islamic humanitarian law was examined whereby issues relating to the subject of this study such as the civilians' immunity at the time of conflict and treatment of prisoners of war were clearly discussed.

As a result, what was emphasised in this work is that all that has recently been promulgated by the United Nations concerning human rights was recognized by Islam fourteen centuries ago. However, Islam has reserved itself the right to be entitled to its own interpretation of some conceptions, freedom of religion for example. As every issue needs study of its own, this work is only just a modest start.

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Introduction

Human rights is the most impressive subject which has, in the last few decades, attracted the writers of today: lawyers, politicians and economists all alike. Being the subject of this century the twentieth, in which humanity, by material civilization has done away with its progress, its main issues have been those which the said civilization has done little about. Fundamental rights and freedoms have been central to discussion of the subject. Having become the concern of all, many writers of different cultures have attempted to tackle it in a way which may not be against their ideological principles and cultures. However, because the subject was, in its modern mode, of Western initiation, of a secular ideology, the writers in general and the western in particular, tackled it from its initiator's fundamental point of view. In other words, most of the writings have somehow appeared to give no valuable assessments of the other's ideologies. Again, whenever this matter is discussed, rights such as freedoms and woman's liberation in particular are restricted to the west where rights such as these are more frequently put into practice. Nevertheless, within the last few years, after the Islamic revolution in Iran, human rights writers have gradually become interested in Islam, in other words, to study the subject from the Islamic point of view. The question which should now be put forward is, have these attempts been satisfactory? The answer is of course no! This can, however, be, in the view of this writer, reduced to two reasons: first, impartiality of the writers and this comes mainly from their ignorance of Islam (the Shariah or Islamic Law) or otherwise. E. Moritimer says, "One school of thought wishes to prove

that Islam as such is responsible for all the abuses and cruelties to be found in the Islamic world, as though such abuses and cruelties were quite unknown elsewhere".⁽¹⁾ Second, tackling the subject from the

present practice of the Muslim states' viewpoint. For the second point in particular, a fact which should be made clear is that there is no Islamic state in the full sense of the word, all that exists are Muslim states. In other words, none of the Muslim states, with no exception, properly applies the Shariah or Islamic law in full. "The need to take an interest in Islamic law is not", said S. Ramadan, "motivated, however, by the supposed fact that it reflects the actual way of life of the Muslim peoples. On the contrary, it could be said that Islamic law is not fully practised in any part of the Muslim world ..."⁽²⁾

Today, if it is true that a real observance of human rights is possible only in an actual democracy, it would be admitted that human rights, in the Muslim world, have not been observed since the disappearance of the Shurah (the Islamic way of democracy). Again, if such a kind of democracy cannot be attained except by returning to Islam which is "deed" rather than an "idea", human rights would not be possibly observed in the Muslim world. It is shameful enough to say that the practice of the Muslim states, even those which constitutionally pretend to be an Islamic, does not conform in any aspect with the true principles of Islam. Islam the faith as well as the way of life is that the humane principles persist by which the Muslim world once flourished and wholly prospered. It is not, therefore, anarchy, poverty, executions and destruction as it is regreably seen nowadays. The confusion as such in which the individual Muslim as well as the

(1) See Index on Censorship, vol. 12 - 1983 p.5.

(2) Islamic law "its scope and equity" - S. Ramadan p.12.

collective live, is, in the view of this writer, but resides in the emergence of different ideological ideas which have been adopted for Muslim society. The Muslim world, today, is either one of hypocritical Muslim states where there is Islam and no Islam, or capitalist states in which the majority are prejudicially poor, or socialist states where the individual has no chance to be a human being. Indeed, apart from the personal practice, none of the Muslim states is, from the practical view point, Islamic. Islam is only a theory when we come to talk about it as a way of life, in other words, as a code of law that should be again restored. This is the rationale behind this piece of work! The purpose of this thesis is, therefore, to demonstrate the potential of Islam in theory and practice to protect human rights, legal and political rights as they are enunciated in the Shariah or Islamic law, (the Qur'an and the Sunnah). Having intended to do so, I am pretty sure that whoever searches for the truth will find in Islam the most humane message that has ever existed!

However, human rights in Islam are all those rights which are sanctioned by the divine law. In other words, all rights, either legal or political, are derived from the Qur'an and the Sunnah. Being a constitutional derivative matter, the Qur'an and the Sunnah shall be taken as the basic references upon which I shall rely in my work. Therefore, whenever a relevant Qur'anic or prophetic text is found concerning the issue under discussion, it shall be purely revealed. If the text concerned, the Qur'anic in particular, seems somehow ambiguous or to have been construed from a different point of view, the most reasonable interpretation will be adopted. This will, however, be occasionally supported by relevant incidents which have taken place in the formative period of Islam, in other words, in the time of the

Orthodox Calips (successors). In addition to that, juridical decisions shall be cited whenever there is a lack of a direct constitutional text and a direct significant consensus among the Muslim juris-consults exists. Beside the Qur'an and the Sunnah, I shall also focus on the Islamic Universal Declaration of Human Rights which recently appeared to signify the Islamic attitude. The said declaration was initiated by the Islamic Council of Europe in which I see a good step which should be followed and promulgated by the existing Muslim states. It is because of, at least, a relative consensus among eminent Muslim scholars of today, as well as of a reflection of the spirit of Islam, that it should be, therefore, a good basis for my work.

My aim in what follows is, however, to tackle the subject "the legal concept of human rights in Islam" in five chapters.

Introductory chapter. This is meant to be primarily an introduction to the whole work and shall be divided into parts. A discussion of the difference between the Islamic law of nations and the international law will be given, encompassing a brief account of the nature and the chief sources of the Shariah or Islamic law.

In chapter one, we shall deal with issues which form, in general great importance in human beings' lives. In other words, the basic and fundamental human rights, namely right to life, the economic order and right to social security, the individual's right to freedom and the legal status and rights of women in Islam.

Chapter two. The aim will be to focus on a very important issue when talking of freedom, that is freedom of religion. In the first part, the Muslim concept of freedom of religion will be discussed,

whilst in the second, the tolerance of Islam shall be shown.

In chapter three, we shall examine issues relating to political thought. The first part of the chapter is to be confined to giving a general account of the Islamic state (i.e. its sovereignty and democracy), and its decline and revival shall also be examined. In the second part, we shall deal more specifically, with the kind of democracy Islam has, and how much is different from the occidental democracy. Meanwhile legal and political freedoms are to be demonstrated.

In the fourth chapter, although humanitarian law always forms somehow a different subject, we see, for the accomplishment of our present work, that some issues relating to the subject should be discussed. Therefore, we shall deal with two points, the civilians' immunity at the time of conflict and treatment of the prisoners of war.

However, the subject as it is, is so wide that every single aspect of it is worthy of its own study. Thus, I shall, in the following modest work, try to make it as clear and acceptable as I can, asking the respected leader to excuse any weaknesses that may exist.

An introductory chapter:

Being a subject of international law, it is always stressed that no real significance, either in theory or in practice, to international human rights can be attained unless there is adopted a principle to the effect that the individual can derive these rights directly from international law. In other words, "the conception of human rights in international law is entirely incomprehensible if the individual person is denied the status of subject - as opposed to the position of object (1) - under international law". Thus, for this developing idea, the present chapter, as an introductory to the main objective of our study as a whole, shall be devoted to tackling the Islamic law of nations from a methodological point of view on a comparison with the positive international law. In other words, since both modern international law and the Islamic one are based on different types of nature of law, by which each one has had a different ideology which characterises its own conception of human rights, it becomes, however, necessary to give a clear idea about the roots and sources of the Islamic law of nations.

A - The Islamic law of nations

The starting point of the following lines is that the reader ought to know, whether there is an Islamic international law or not and to what extent it looks like the modern international law in the sense of its systemisation. Although, modern international law as it appears today is, in fact, originated in Western Europe, "rules of the Islamic international law, in the sense of the conduct of the state in war as well as in peace and neutrality, have existed from the very lifetime of

(1) Human Rights as legal rights - Drost Pieter N. - Leyden 1951 - p.21.

(2)

the Holy Prophet Muhammad". Having stressed that, its very rules have been essentially latent in the roots and sources of the Shariah or Islamic law (i.e. the Qur'an and the Sunnah). However, when it can be suggested that only systems of nations were not world-wide or universal features, the Islamic law of nations has its own universal characteristics which are perhaps more natural and effective. Though its rules at the beginning were concerned with regulating the relations of entities and surrounding nations in a limited area; Islam, by its Shariah, deals with all the various peoples and nations on a universal basis. This can be clearly understood by then after the expansion of the Islamic state. Thus, by the very words of the Qur'an, Islam was revealed as a guidance to the whole nations without distinction and as law before which all people are equal and alike in the sense of humanity. The only basis upon which the Holy Qur'an, however, (3) distinguishes between people is righteousness : this is emphatically manifested by the Holy Prophet addressing the people in his farewell pilgrimage.

Being a branch of the Shariah as a whole, the Islamic law of nations is, for Muslims, an integral law; the law which can be a good model for universal application. Nevertheless, its non-universality for those other than Muslims, comes perhaps from being based on an ideology that would not be, by all nations, accepted. In other words, while modern international law has, since Grotius, been based on secular natural law, the Islamic one is founded on the basis of belief

(2) The Muslim conduct of state - M. Hamidullah - Sh. M. Ashraf, Kashmiri Bazar Lahore (Pakistan) - p.61.

(3) CH. XLIX v.13.

in God; who, through His divine law, is the sovereign (we shall come to this later). However, because of Islam's comprehensiveness and its resemblance to some other systems, a comparison between the Islamic system of law of nations and others, the communist in particular, took place. Hence, a writer like Prof. M. Khadduri suggested that "...Thus in its origin the Muslim law of nations, in contrast to almost all other systems, was designed to be a temporary institution - until all people, except perhaps those of the tolerated religions, would become Muslims".⁽⁴⁾

Having concluded that, the only argument he presented is "The ultimate aim of Islam was, of course, to win the whole world, but its failure to convert all people left outside its frontiers non-Muslim communities with which Islam had to deal throughout its history."⁽⁵⁾

Nonetheless, one could to the contrary, maintain that in its origin the Islamic law of nations is relatively permanent rather than temporary; that is, if it is not absolutely permanent. However, the Islamic law of nations is unlike the communist kind of law of nations practiced, today, in the Soviet Union which is the world-wide state idea as it seems to have a so called "Transition Period". "With the success of the Revolution and the advent of a single world-wide, denationalized, classless society there will be no place for a system of law regulating the international life of independent states. International law will be converted into a purely domestic inter-soviet law, a federal law for a world-wide Union of Socialist Soviet Republics."⁽⁶⁾

Despite the comprehensiveness of its religion, islam, in my opinion, has not,

(4) War and peace in the law of Islam - M. Khadduri - The John Hopkins press Baltimore p.44.

(5) Ibid p.44.

(6) The Soviet Union and International law - T.A. Taracoauzio - Macmillan p.10.

since the accomplishment of its revelation, thought of a period as being "transitional" until it is over, it would have to rule the whole world according to its values. However, the idea of the world-wide spread religion is the ultimate aim in Islam, but governing the world as one community which is basically dependent on the religion's conviction is out of the Muslims' hand. In other words, converting people to Islam as the only way for having its law extended over them cannot be gained except by the only way of persuasion rather than of (7) compulsion - which is not the manner of Islam. Had it not been what has just been suggested, a great deal of attention would not have been paid to the religious minorities and groups in the Shariah or Islamic law. Thus, it cannot be strictly reduced to Islam's failure to convert all people, and, some law should be remaining to govern the relations of Muslims with non-Muslims; when we know that Islam, from the very beginning, recognises the religious groups (i.e. Christians, Jewish and others) and gives them all their right to exist.

Soon after his "Hidjra" emigration with his companions, the Holy Prophet formed a Muslim community in "Madina" where he could successfully found what is called the city-state which had had more or less the conventional activities of today's modern state. Nevertheless, "when stable communities - whether Tribes or City - states, or states of a modern type - are permanently contiguous, customs hardening in time into law never fail to regulate their intercourse. Ubi societates, ibi ius; wherever developed communities are

brought in contact with each other, juridical relations must sooner or later be formed not mainly by agreement, tacit or express, but the very necessity of the case, and partly from the same causes as those which, (8) working internally, create states." Thus, the Islamic state - in its city-state type or as an empire later - had juridical relations with internal and external groups, tribes and states. Its relations with those different entities went, of course, in accordance with constant rules derived from the Qur'an during the Prophet's life and from both the Qur'an and the Sunnah in the Caliphs' time later. Those relations - whether with the internal or external entities - were considered, in the opinion of this writer, international as those various entities individually or collectively did not recognise the ideology of Islam. In Islam, nationality is, however, the faith, in other words, the nationals of the Islamic state are only the Muslims. But that should not, under any circumstances, deprive the internal individual of a different group from his Islamic citizenship. Again, what has been meant, by maintaining that the relations the Islamic state had with others were according to Islamic permanent rules is that these rules, regardless of the transition period that was needed for the Shariah before its accomplishment, are constant although having flexible different interpretations with an unanimous minimum understanding. If we could select some instances for backing up what has been suggested, it would be "freedom of religion" in the time of peace, and humane treatment of prisoners of war in the time of conflict. Islam has given non-Muslims (i.e. Christians, Jews and others) the right to freedom of religion. This right, which is

(8) The Muslim conduct of state - M. Hamidullah - p.3.

inviolable, is emphatically stressed as an immutable principle by the Qur'an (as shall be discussed in Chapter two). In war, when the conflict is over, Muslims are eventually recommended to treat their prisoners of war by choice of either generous freedom or against ransom. However, although some jurisconsults insisting on giving the Imam (leader) a choice even to condemn some of the prisoners, or all, into bondage or have them killed, such a choice, which was given to Muslims before the establishment of Islam or for other circumstances, should be now abandoned. For now when the exchange of prisoners becomes an international practice, the only treatment, in my belief, is freedom (this shall be tackled in chapter four).

Given the very facts that non-Muslims existed and would continue to exist within the Muslim world, and, being a part of the Shariah, the Islamic law of nations, therefore, exists, and is actually permanent rather than temporary. Even though, the world-wide religion of Islam might take place, its international rules would still be those of the past, of today and of the future.

However, while the systematisation of the Islamic law of nations, as the international law appears today, cannot be easily determined, its codification took place as early as the second century of al-Hidjra (Muslim calendar). That was probably due to "the notion of comprehensiveness and all-embracing nature of the law, which the Muslim jurists have had from the very beginning, must have been responsible for the fact that our subject formed part and parcel of the "Figh", that is a body of laws which describes details of Muslim conduct for 'ibadat' (cult), muamalat (contracts of all sorts, including marriage and 'uqubat (penalties for the infraction of these rules), in short the

(9)
entire body of the law". Thus, the earliest book to tackle the subject in question named as al-Majmu fil-Figh, was written by Zaid b. Ali (died in 120H). This was under a chapter entitled as kitab as-Siyar, the term which was happily used by all jurisconsults of all Muslim schools. (10) Later on, books attributed to al-Imam Abu Hanifa, came out to tackle in a broad sense the Siyar as a separate science and independent subject of study. Thus, kitab al-siyar was, for example, written by al-Shaibani, and Abu Yusuf's book was well known as kitab al-kharaj in which he also tackled al-Jizyah (poll tax). Al-Jizyah is a tax that should be taken from non-Muslims who live within the Islamic territory. Afterwards a discussion of the subject was carried on by most Muslim jurisconsults in their different books. In modern times, however, rules of the Islamic law of nations are usually discussed in comparison with the rules of the positive international law rather than as an independent study.

Nevertheless, despite the different ideological origin that each law has, it can be maintained that a relative if not absolute reconciliation between them is somehow attainable, since both of them are based on a principle of peace. It was mainly for the sake of the peace - the reason that made Grotius, father of modern international law, undertake to write upon the subject. This can be obviously understood when he suggested that "Throughout the christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up

(9) The Muslim conduct of state M. Hamidullah p.61.

(10) Ibid p.61.

(11)

there is no longer any respect for law, divine or human;" This was, however, the main principle upon which the relations between the Arabic tribes was based before the advent of Islam. Grotius then wrote his book "De jure belli ac pacis" (published 1625) in which he suggested that the law that would regulate relations between the states should be based on natural law; the law by which all the states become free and equal by having no superior. In contrast, the Islamic state conducts its international relations with non-Muslim states according to its Shariah or Islamic law; the law which is of a divine origin. In other words, it is a law based on belief in God. However, the idea of natural law, which Grotius adopted as a basis for his treatment of "De Jure Belli ac Pacis", existed and continued to flourish all through the sixteenth century in Europe. His work, as others observe, is "a direct continuation of the great natural law tradition which stretches from (12) St. Augustine to Suarez, and which culminated in St. Thomas".

Although the natural law has a divine origin since it was a scholastic idea as well as his own, Grotius, who hypothetically (13) denied the existence of God, elaborated his system of law in a way in which its self-evidence has made it exist with no need of God whose existence becomes superfluous. This is the statement as thus suggested by Grotius: "I have made it my concern to refer the proofs of things touching the law of nature to certain fundamental conceptions which are

(11) De Jure Belli Ac Pacis Libri Tres - Hugo Grotius Vol. II (Translation - Francis W. Kelsey) - Oxford: at the Clarendon Press London: Humphrey Milford p.20.

(12) Natural law (an introduction to legal philosophy) - A.P. D'Entreves - 1951 Hutchinson's University Library - Hutchinson House, London w.l. - p.51.

(13) Says Grotius: "What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him." De Jure Belli Ac Pacis Libra Tres - (prolegomena 11) p.13.

beyond question, so that no one can deny them without doing violence to himself. For the principles of that law, if only you pay strict heed to them, are in themselves manifest and clear, almost as evident as are those things which we perceive by the external senses." (14) Having introduced his new methodological assumptions, Grotius made the natural law entirely secular; the sort of law that was later fully appreciated by his successors. Thus, the main objective Grotius had in mind, by doing so, was to avoid all the theological controversy and to summon all people in a system of laws which would carry general conviction. Therefore he founded a law of nations based on natural law to be made applicable to the relations between equal and independent states. However, Islam emerged, fourteen centuries ago, to take the same philosophy - but in a different way - the philosophy which should carry the conviction of all people. In other words, it is to believe in God; the sovereign and make His revealed laws prevail.

Once again, the idea of the divine originality of the natural law seems to have existed in Islam as the createdness (15) of the Holy Qur'an is the doctrine of the Sunnate Muslims. Said Abu Hanifah "The Qur'an is the speech of Allah,... Our pronouncing, writing and reciting the Qur'an is created, whereas the Qur'an itself is uncreated." (16) This, however, would not be of great significance as Muslims have no choice but to apply the Shariah's (the Qur'an and the Sunnah). As that branch of the Shariah which acquired an independent

(14) De Jure Belli Ac Pacis (prolegomena 39) p.23.

(15) The Mutazalis, who were of a different school, had a different doctrine. They were, for instance, of a belief that the Qur'an was created. See Islamic political thought - H.M. Watt - Edinburgh University Press - p.87:89.

(16) Introduction to the Qur'an - R. Bell - Edinburgh at University Press - p.37.

status and may indeed become a full fledged science, the Islamic law of nations would still retain its ethical values and its sanction provisions would have to be derived from it. "No Muslim science was originally cultivated for its own sake, independent and regardless of others; but all were made subservient to the Shariah in order to contribute to the well-being of man in this world as well as in the (17) Hereafter." Moreover, the Islamic law of nations is not based on human reason according to which everything is guided by convenience. On the contrary, it is the law which should continue to retain its ethical basis of the immutable teachings of the Qur'an and the Sunnah. Thus, "the stress on the demand for doing justice, as the phrase goes 'even if the heaven fall', is paramount. The one concept which may be treated as a fulcrum on which the whole superstructure of Islam's (18) ethical system is firmly fixed is justice." Justice, in Islam, is to be done even at the detriment of self-interest. In all their conduct including that in foreign and war offices, Muslims are asked to do so.

In the old time, the kind of state which exists today was not known; so, the rules of the Islamic law of nations were, in fact, fashioned in a way to deal with non-Muslims living in the Abode of Islam and to regulate the hostile relations which often existed between it and the external non-Muslims. Nowadays, as the modern state appeared with a sovereignty fully recognized by all other states, the Muslim community represented by the Islamic state would have to recodify the rules of its law of nations to establish how to deal with

(17) The Muslim conduct of state - M. Hamidullah - p.74.

(18) Human Rights in Islam - International commission of Jurists - Kuwait University - Union of Arab Lawyers - p.47.

other, non-Muslim, states. So there should be a firm basis upon which the Islamic state constitutes its relations with the other states. This was, however, discussed in full by Muslim scholar-jurists. While they absolutely agreed that the Islamic state is an ideological one and all who believe in its ideology form one community regardless of their place, race, colour and language - since the religious tie has overcome all those distinctions - they differed among themselves about the basis upon which the Islamic state should constitute its relations with
(19)
others. Therefore, there are two different opinions drawn up by

the Muslim scholar-jurists. The first is that the Islamic state should not have any relations with others except by way of war. In other words, Islam should recognise no other nation save its own, since its ultimate goal is to subordinate the whole world to one religion
(20)
(Islam). This is, however, the opinion which is simply taken by

some orientalist who accordingly delivered a judgment which consequently negates for Islam any kind of permanent law of nations (this is already discussed). Nevertheless, this opinion seems to have been somehow peculiar to another group of Scholar-jurists who constructively discussed the problem in such a way as to prove the contrary. They, as also backed up by the later scholar-jurists, maintained that the only basis upon which permanent relations between Muslims and others can be constituted is that of peace rather than
(21)
hostility. Having concluded that, it has been declared that Islam

never contradicts what modern international law jurists have assessed as a basis for the relations between the states. Thus, this second point of view was not without strong arguments put forward by its

(19) As-Siyasa A- Sharaiah - Abdullwahab Khallaf - Dar al-Ansar - p.64.

(20) Ibid p.64

(21) Ibid p.71.

defenders. They clearly argued from the Qur'an⁽²²⁾ and the practice of the Prophet as well as his orthodox caliphs'. Also arguing for the same viewpoint was Ibn Tayymiah who was, in the mediaeval times, the most distinguished scholar-jurist, and in the modern times Muhammad⁽²³⁾ Abduh. However, this is the only opinion which can be throughout our thesis, maintained.

Therefore, the Islamic external relations should be accordingly based on two rules; first, permanent peace unless something seriously happened to change this peaceful relations; second, the Abode of Islam is that in which its law prevails or where Muslims can peacefully live, and the Abode of war is that by which its relation with Muslims is somehow changed by launching an attack against Muslims or by other⁽²⁴⁾ hostile reasons.

However, being a law of a divine origin, the Islamic law of nations appears fundamentally different from the international law in regard to two aspects. First, when the law, today, is attached to a particular territory and binding upon the people who live in it, the Islamic law is supposed to be, on the contrary, obligatory upon the Muslims as an individual or as a group, rather than upon territorial groups. Nevertheless, such a viewpoint cannot be, in my opinion, attributed to the philosophical idea that Islam, being a universal religion, recognizes no boundaries, but rather that the individual, being a Muslim, should be judicially treated according to Islamic law.

(22) See CH. VIII v.61 and CH. II v.190.

(23) As-Siyasa l-Shar'aiah - A. Khallaf - p.81, 82.

(24) Ibid. p.75.

For this, the Islamic law, as we shall see, has given the non-Muslim minorities who live within the Muslim world a judicial autonomy in order to be able to apply their laws. Second, unlike the international law which is based on sources different from those which the national laws of states are based on, the Islamic law of nations usually comprises those rules which are derived from the Shariah. It is merely an extension of the Shariah designed to govern the Muslim and non-Muslim relations within or outside the world of Islam. The law of nations as such is, perhaps, superior to the international law in the sense of being more mature as well as being binding on people as individuals. Nevertheless, for such a conception of international law, for instance, H. Krabbe who maintains that "international law is distinguished from national law not in respect to its origin and foundation, but in respect to the extent of the community to which its commands apply ... So far as the organization of the international community is concerned, we are still living in the middle ages, when the political relations between citizens was as fragmentary and incomplete as that between nations at the present time."⁽²⁵⁾

**B. Nature and the chief sources
of the Shariah
(the Qur'an and the Sunnah).**

In the previous part, we have dealt enough with the Islamic law of nations and delineated its form and features, comparing it with positive international law. Thus, as the Shariah represents the main resource for the Islamic law of nations, the purpose of the following

(25) The modern idea of the state - H. Krabbe - Tran. by G.H. Sabine and W.J. Shepard. - New York 1922 London p.236, 237.

pages is to study, in brief, its nature and chief sources so that we may lay the necessary foundation for a consideration of the concept of human rights in Islam.

The goal of the Shariah or Islamic law, which is essentially religious and a harmonious blend of the temporal with the spiritual, is to win the approval of Allah (God). However, the ideology of Islam is definitely inconsistent with the concept of good and evil as thus interpreted in terms of pleasure and pain which are of the natural law philosophy. (26) "To the Muslim there is indeed an ethical quality in every human action, characterized by gubh (ugliness, unsuitability) on the one hand or husn (beauty, suitability) on the other. But this ethical quality is not such as can be perceived by human reason; instead, man is completely dependent in this matter on divine revelation. Thus all human actions are subsumed, according to a widely accepted classification, under five categories: as commanded, recommended, left legally indifferent, reprehended, or else prohibited by Almighty God. And it is only in regard to the middle category (i.e. those things which are left legally indifferent) that there is in theory any scope for human legislation." (27) Therefore, the Shariah or Islamic law is an ideal code to which man should conform. However, man - in Islam - has no full liberty in relation to legislation, for it might not be compatible with the spirit of the Shariah which controls

(26) Says Bentham "Nature has placed man under the empire of pleasure and of pain. We owe to them all our ideas; we refer to them all our judgments, and all the determinations of our life ..." Theory of legislation - J. Bentham - London: Kegan Paul, Trench, Trubner & Co. Ltd. 1894 - p.2.

(27) Islamic law in the modern world - J.N.D. Anderson - London: Stevens & Sons Limited, 1959 - p.3.

the human actions and, ultimately the society. "Law, therefore, does not grow out of, and is not moulded by, society as is the case with Western systems. Human thought, unaided, cannot discern the true values and standards of conduct; such knowledge can only be attained through divine revelation, and acts are good or evil exclusively because God has attributed this quality to them. In the Islamic concept, law precedes and moulds society; to its eternally valid dictates the structure of state and society must, ideally, conform."⁽²⁸⁾

Nevertheless, the Shariah's tendency is to allow human action the widest limits "but this liberty (ibahah) cannot be unlimited. Man is by his very nature greedy and ungrateful, covetous of other men's goods, niggardly of his own, disposed to sloth, ungrateful for the blessings that God has bestowed upon him. Human society would not have been possible, and the individual himself would not have been able to subsist, had God allowed free scope to the appetites of every individual as well as to the injustice and violence of all. God has therefore set a bound to human activity, and this bound (hadd) is precisely what we call law (hukm) which restrains human action within certain limits, forbidding some acts and enjoining others, and thus restraining the primitive liberty of man, so as to make it as beneficial as possible either to the individual or to society."⁽²⁹⁾

Moreover, "religion and law are two distinct others, but complementary to each other, being strictly connected through their

(28) A history of Islamic law - N.J. Coulson - Edinburgh University press - p.85.

(29) The legacy of Islam - (Ed. T. Arnold and A. Guillaume) - Oxford, the Clarendon press - see Law and Society - D. de Santiliana - p.289.

common end, which is the welfare of man".⁽³⁰⁾ Accordingly, man is charged by the Shariah with dual responsibility in order that the welfare of the community be secured. The two responsibilities are: one in relation to his Creator (Allah) and the other is in relation to society which results in "a law or doctrine of duties"⁽³¹⁾ rather than of rights, of moral obligation binding on the individual, from which no earthly authority can relieve him, and which he disobeys at the peril of his future life. One of the integral articles of the Muslim faith is to believe in the day of judgment. As long as one's faith is real and not a mere formality, his fearing Allah (God) makes him restrain from doing evil deeds. And this is more effective than punitive legislation of the severest type.

Once again, while the secular laws of the modern world are rationalistic and, depending on the vagaries of public opinion and, therefore liable to error, the Shariah "Finds its chief source in the will of Allah as revealed to the Prophet Muhammad. It contemplates one community of the faithful, though they may be of various tribes and in widely separated locations. Religion, not rationalism or geography, is the proper cohesive force. The State itself is subordinate to the Qur'an, which leaves little room for additional legislation, none for criticism or dissent. This world is viewed as but the vestibule to another and a better one for the faithful, and the Qur'an lays down rules of behaviour toward others and toward society to assure a safe

(30) Ibid p.290.

(31) Hurgronje, selected works (ed. G.H. Bousquet and J. Schact) Leiden, 1957 - p.52.

transition. It is not possible to separate political or juristic theories from the teachings of the Prophet, which establish rules of conduct concerning religions, domestic, social and political life".⁽³²⁾

Concerning its structure, the chief sources of the Shariah or Islamic law are, as often expressed, the Holy Qur'an and the Sunnah of the Prophet. After the declaration of the Qur'an: "This day have I perfected your religion for you, completed my favour upon you, and have chosen for you Islam as your religion,"⁽³³⁾ and just before his death, the Prophet explicitly said in his last sermon: "O people, bear in mind what I am saying, for I might not see you again. I have left you two things. If you hold fast to them, never will you go astray after me. They are: God's Book, and His Prophet's sunnah."⁽³⁴⁾ Nevertheless, even the authority of the sunnah itself is derived from clear injunctions of the Qur'an. Hence, it thus states: "so take what the Apostle assigns you and deny yourselves that which he withholds from you".⁽³⁵⁾ The Qur'an and the Sunnah are, therefore, the only chief sources of the Shariah.

However, by categorizing the Qur'an and the Sunnah as the chief sources of the Shariah we meant here to distinguish them from the sources which were later considered by the jurisconsults of al-Madhahib "schools of law" as supplementary in order to meet the necessities of a growing civilization. Thus, the supplementary sources as brought

(32) Jackson, Foreword to law in the Middle East (ed. Khadduri and liebesny), pp. vi, vii.

(33) CH. V v.4.

(34) Islamic law (its scope and equity) S. Ramadan - P.R. Macmillan Limited London - Geneve - p.24.

(35) CH. LIX v.7.

forward by the jurisconsults are: (a) al-ijma or the consensus of opinion; (b) al-Qiyas or judgment upon juristic analogy (c) al-Istitisan or the deviation, on a certain issue, from the rule of a precedent to another rule for a more relevant legal reason that requires such deviation; (d) al-Istislah, or the unprecedented judgment motivated by public interest to which neither the Qur'an nor the sunnah explicitly refer. As to their importance, the first two sources are, according to most of the jurisconsults, classified to be attached to (36) the chief sources. However, "with the exception of the Qur'an and the Sunnah, every other source, chief or supplementary, has been a (37) matter of controversy as to its validity or definition."

Nevertheless, as far as our work is concerned (human rights in Islam), the subject which is, in my opinion, a constitutional problem rather than anything else, we shall, in the following pages, consider in some detail the chief sources of the Shariah where the principles of human rights are clearly laid down. Later, some consideration shall be made of the Orthodox caliphs' practice as we would base our argument partly on them.

The Qur'an:

The Qur'an, in the belief of all Muslims, is the very word of Allah. It thus clearly states: "Your companion* is neither astray nor

(36) Al-Madkhal Al-fighi 'L-'Amm - M. al-Zarqa - Damascus University press - vol. 1 p.31.

(37) Islamic law - S. Ramadan - p.24. CH. LIII vs. 2:4.

*He was the Holy Prophet Muhammad who had lived among Quraishs (his people) all his life.

being misled, *Nor does he say (aught) of (his own) desire. *It is no less than inspiration sent down to him." (37R) However, during a missionary period which lasted for about twenty-three years, the Qur'an was, in fragments, revealed to the Prophet Muhammad. Says the Qur'an: "(It is) a Qur'an which we have divided (into parts from time to time), in order that thou mightest recite it to men at intervals: we have revealed it by stages." (38) Thus, whenever a portion of the Qur'an was revealed to him, he used to recite it in order that his companions can memorise it and some of them can take it down. He also used to ascertain and point out where the verse or verses just revealed should be placed. However, the Qur'anic verses were not compiled in chronological order. "This, Muslims believe, is due to the fact that the compilation and arrangement of the chapters was completed - under Divine instructions - by the Prophet himself." (39) During the lifetime of the Prophet the Qur'an was not written in a complete book form, but on leaves of paper, shoulder blades, date leaves, and other handy material.

Later, because of the battle of al-Yamamah which took place after the death of the Prophet where some of his companions who memorized the Qur'an, either in whole or in part, were killed, Umar b. al-Khattab (afterwards the second caliph) because so worried about the Qur'an which might be lost. Therefore he suggested to Abu Bakr, the caliph that the Qur'an should be collected and written down. Abu Bakr who deeply thought about it, eventually entrusted this job to one of the

(37R) CH. LIII vs. 2:4.

(38) CH. XVII v.106.

(39) Islamic law - S. Ramadan - p.31.

(40)

Prophet's secretaries called Zaid b. Thabit. Zaid, who then did the job, "applied a two-fold method of verification, comparing the original manuscripts with the texts memorized by the Prophet's companions; this method provided a double testimony for the accuracy of every injunction."⁽⁴¹⁾ In his reign 'Uthman, the third caliph, summoned all the Muslims by the only existing form of the Qur'an which has been the same all through the centuries. It is reported that Hudhaifa, who had been fighting with the people of Sham in the conquest of Arminya and with the people of Iraq in the conquest of Adharbijan came to Uthman and said 'O Chief of the believers! Save this nation before they differ about the Book (Qur'an) as Jews and Christians did before.' So Uthman sent a message to Hafsa (the widow of the Prophet) saying, "send us the manuscripts of the Qur'an so that we may compile the Qur'anic materials in perfect copies and return the manuscripts to you". Hafsa sent it to Uthman. 'Uthman then ordered Zaid bin Thabit, Abdullah Ibin Az-Zubair, S'aid bin Al-As and Abdur Rahman bin Harith bin Hisham to rewrite the manuscripts in perfect copies. 'Uthman said to the three Quraishi men, "In case you disagree with Zaid bin Thabit on any point in the Qur'an, then write it in the dialect of Quraish as the Qur'an was revealed in their tongue." They did so, and when they had written many copies, 'Uthman returned the original manuscripts to Hafsa. 'Uthman sent to every Muslim province one copy of what they had copied, and ordered that all the other Qur'anic materials, whether written in fragmentary manuscripts or whole copies, be burned ..."⁽⁴²⁾

Thus, the Qur'an is ever preserved and unsusceptible to change or

(40) Sahih al-Bukhari - (Arabic, English) - vol. VI Kazi publications p.476.

(41) Islamic law. S. Ramadan p.32.

(42) Sahih al-Bukhari - (Arabic, English) - vol. VI - Kazi publications - p.479.

alteration. It clearly says: "We have, without doubt, sent down the message, and will assuredly guard it (from corruption)."⁽⁴³⁾

Ever since its revelation the question has been raised as to whether the Qur'an was of divine or human origin. "The Qur'an was sent down at a time when, as is widely and confidently agreed, the Arabs had reached the finest point in their history. It was an age that was copious in literary eloquence and richer than any earlier time in men of noble speech and knights of the pulpit. The most precious of intellectual pursuits and achievements in which the Arabs competed was excellence in word ... Tradition also bears sustained witness to the fact that there was insistent opposition to the Prophet. His people used every sort of means, devious and obvious and their utmost vigour, to crack his message, and to give the lie to all he said of God ... For the Qur'an came to an Arabic speaking Prophet. Writing was well-known among the Arabs everywhere at that time, to a degree of excellence already described, and in the context of intense hostility already noted. Yet for all that the Arabs quite failed to produce from their whole mental effort anything to oppose it. It is then irrational to think that some Persian, or Indian or Greek, could have commanded such Arabic skill to achieve what had defeated the Arabs themselves? The powers of the Arabs quite failed them, despite their having comparable origins and education to Muhammad, and many of them special advantages of science and study. All of this is proof positive that the words of the Qur'an are in no way the sort of thing to originate from man."⁽⁴⁴⁾

(43) CH. XV v.9.

(44) The Theology of unity - M. Abduh (Trans. by I. Musa'ad and K. Cragg) - London, George Allen & Unwin Ltd. - pp 119 & 121.

For Muslims, being the very word of Allah, "The Qur'an laid down for men the principles by which their interests might be rightly served. Nothing could be clearer than the benefit which comes from being guided by them and preserving them jealously. Justice rests on them and the whole social order remains secure within their authority. Contrariwise, their neglect or abandonment, or any departure even from their spirit, entails great loss."⁽⁴⁵⁾ It is, therefore, for them, the chief source of authority wherefrom springs the very conception of legality and every legal obligation. However, its teachings are universal, addressed to all mankind throughout the world regardless of their origins or times and revealed to enlighten man's spirit, to purify his morals, to unify his society, and to replace the domination by the powerful with justice and fraternity. It thus states: "To thee the Book explaining all things, a Guide, a Mercy, and Glad Tidings to Muslims".⁽⁴⁶⁾

Nevertheless, being basically a Book of religious guidance, the Qur'an, apart from having unequivocal legal rule (hukm), is not an easy reference for anyone to reach a proper judgment in relation to any case which might arise.⁽⁴⁷⁾ This is, however, the reason why "al-Idjtihad" should be strictly confined to the people who, in great deal, devoted themselves to the Shariah study. "It (the Qur'an) is more particularly an appeal to faith and the human soul rather than a classification of

(45) Ibid p.118.

(46) CH. XVI v.89.

(47) It means the exerting of one's self to the utmost degree to attain an object and is used technically for so exerting one's self to form an opinion (zann) in a case (Radiya) or as to a rule (hukm) of law. Shorter Encyclopaedia of Islam - H. Gibb and J. Kramers - Leiden 1953 - p.158.

legal prescriptions. Such prescriptions are comparatively limited and few. Regarding family law, they are laid down in 70 injunctions; civil law in another 70; penal law in 30; jurisdiction and procedure in 13; constitutional law in 10; international relations in 25; and economic and financial order in 10. Such enumeration, however, can only be approximate. The legal bearing of some injunctions is disputable, whereas of some others it simultaneously applies to more than one sphere of law. The major portion of the Qur'an is, as with every Holy Book, a Code of Divine exhortation and moral principles."⁽⁴⁸⁾

The Sunnah:

It is an Arabic word which literally means "method".⁽⁴⁹⁾ Its technical meaning is a combination of all the Prophet said, did and agreed to (takir).⁽⁵⁰⁾ This triple authority of the Prophet is, however, derived from the Qur'an itself since he was given the full power to interpret the Holy Book, by word or action, for it thus states: "And we have sent down unto thee (also) the Message; that thou mayest explain clearly to men what is sent for them, and that they may give thought."⁽⁵¹⁾ Beside the Qur'an, the Sunnah is, no doubt, binding upon all Muslims as a second chief source of the Shariah, for the Qur'an commands Muslims: "O ye who believe! Obey Allah and His Apostle, and turn not away from him when ye hear (him speak)."⁽⁵²⁾ And it states in another text: "He who obeys the Apostle, obeys Allah: but if any turn away, we have not sent thee to watch over their (evil deeds)."⁽⁵³⁾

(48) Islamic law - S. Ramadan - p.33.

(49) Lisan al-Arab al-Muhit - lbn Manzur - Dar-Lisan al Arab, Beyrout - Vol. (Z-F) p.222.

(50) See Islamic law S. Ramadan p.33.

(51) CH. XVI v.44.

(52) CH. VIII v.20.

(53) CH. IV v.80.

Unlike the Qur'an, the Sunnah, apart from some private records of the Prophetic hadiths, was not officially written down until the reign of the Umayyad Caliph Umar b. Ab'dul Aziz (54) who wrote to his governors throughout the Muslim world asking them to exhort the scholars to do so. Traditionally, the Prophet was not so eager to have his sayings taken down by his companions, therefore, he did not encourage everyone to write down what he had said. This was to avoid a possible confusion of his hadiths with Qur'anic text. As soon as such a possibility of confusion faded away, in other words, Muslims became familiar to the Qur'an, they were later encouraged to compile the Sunnah. "But this, as S. Rammadan said, did not affect the status of the Sunnah; it only rendered more difficult the later recording thereof. This difficulty was the price Muslims had to pay for keeping their Holy Book unquestionably authentic and unique. Such a difficulty, indeed, is a result of the basic separation between the Qur'an, which is the letter and spirit of God's will, and the Sunnah, which is the human, though prophetic, clarification of the Qur'an by Muhamad." (55)

Speaking of its authenticity, the Sunnah, in the early days of Islam, was, however, safely kept away from any kind of distortion and this was perhaps attributed to the actual adherence and devotion of the Muslims to their faith. Later, because the strong hold of Islam gradually appeared, for some reasons, to be attenuated and also because political intrigues became active in the community, the Sunnah was

(54) As-Sunnah Qabal At-Tadween - M. al-Khateeb - Wahaba bookshop, Cairo - p.329.

(55) Islamic law - S. Ramadan p.34.

taken as an easy instrument for serving one group against another. Forgeries were deliberately instituted as many hadiths (sayings) were ascribed to the Prophet. This was one of the reasons which later made the Caliphate worried about the future of the Sunnah and order its pure compilation. Nevertheless, with the great help of those private records which were, early on written in the presence of the Prophet, and by applying the verification policy i.e. the chain of authorities (sanad), Muslim scholars could successfully overcome the problem of forgery. "In the course of time, a separate "science of Hadith" was built up, whereby not only the chains of authorities could be traced back to the Prophet himself, but also the biographical data about all narrators was investigated and classified." (56) Thus, the most reliable work in the foregoing field is, today, the six authentic books. Sahih al-Bukhari and Sahih Muslim are of the highest position in the sight of Muslims.

The sunnah, being one of the chief sources of the Shariah, its role is not, however, restricted to only clarifying the Qur'anic texts. It often brings about new obligations and prohibitions which cannot be easily traced in the Qur'an. "This is, as Dr. Draz suggested, not, however, an addition to the legislation of the Qur'an, for a careful study will show that each of these traditions expresses the spirit of a more general teaching in the Book, even though the ties connecting each tradition with its appropriate foundation in the Qur'an are not easily discovered." (57) Thus, when the Qur'an prescribed that the alms (Zakat) be deducted from, for instance, gold, silver and crops, the Sunnah, relying upon the more general terms such as "possessions" and

(56) Ibid p.39.

(57) Islam, The Straight Path - Morgan - New York, 1958 p.38.

from the herd, with clarification to the amount and the number of every sort of the Zakat. Again, usury "riba al-Nasia" is forbidden by the Qur'an, in addition the Sunnah forbids those usurious sales "riba al-fadle" in which the increase in price has the same effect. "Since such sales, halfway between a legitimate sale and forbidden usury, fell within a doubtful and suspect area of business activity, tradition rightly forbids them under the legislation of the Qur'an which (58) recommends that we abstain from any action when in doubt."

The Orthodox practice:

It is the practice of the Prophet's Orthodox Calips (successors) who rightfully ruled the Muslims in the early days of the Islamic Caliphate. Indeed, Muslims owed great debt to the Prophet's companions, the Orthodox caliphs in particular, in constituting the important legal and political practice during the formative period of the Muslim era.

Although, they have never been considered as being as infallible as the Prophet, but as those who knew the Qur'an and the Sunnah more than any of the later jurists, their practice has legal authority in (59) Muslim jurisprudence. "Their piety and their devotion to their leader (the Prophet) could never have induced them to violate

(58) Ibid p.39.

(59) Says the Prophet in one of his hadiths "I enjoin you to fear God, and to hear and obey even if it be an Abyssinian slave, for those of you who live after me will see great disagreement. You must therefore follow my Sunnah and that of the rightly guided Caliphs. Hold to it and stick fast to it. Avoid novelties, for every novelty is an innovation, and every innovation is error." Mishkat al-Masabih (Trans. J. Robson) Vol. 1 (being parts 1-v) SH. M-Ashraf, publisher & Booksaler, Kashmiri Bazar - Lahore (Pakistan). p.44.

deliberately the prescriptions of the Prophet; and if one, ignorant of the law, acted in some way contrary to it, others would at once have corrected him." (60) Thus whenever there was consensus of opinions among them upon a case, Muslim scholar-jurists cannot depart from that legal or political decision unless it reflected a particular matter in that time.

However, in individual opinions regarding cases for which there was no clear provision in the Qur'an and the Sunnah, preference is given to how eminent the persons of the conflicting authorities are "the opinion of any of the first four caliphs and of Ibn Masud, for (61) instance, prevailing over the opinion of other companions." Thus, 'Umar, the second Orthodox Caliph was the dominant figure in the legal and political history of Islam.

(60) The conduct of Muslim state - M. Hamidullah p.22.

(61) Ibide p.23.

Chapter one:

Basic and fundamental human rights

"Behold, thy Lord said to the angels: I will create a vicegerent on earth" CH. II v.30.

("See how great is the value of man in Islam! Even the European post-Renaissance humanism has never been able to impart such glory and sanctity to man and his mission in the creation) God, the most Almighty, the most Perfect, the Creator of man, and the Master of the cosmos, proclaims to the angels that He wishes to appoint man as His vicegerent on earth. In choosing man to be His appointee on earth, God bestows the highest spiritual status upon him and thus entrusts him with a divine mission in the Universe. Upon the earth he is missioned to represent his Creator and mirror His qualities. And this is man's first excellence to possess, of all the created entities in the creation. ^{„(1)} This great position God bestows on man, as it is expressed in the above quotation, is also made manifest in the ensuing Quranic excerpt:

"We have honored the sons of Adam; provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favours, above a great part of Our creation."⁽²⁾

Nevertheless, all rights - in Islam - are sanctioned by the Shariah (the Qur'an and the Sunnah) even the rights of our fellowmen are derived from it. What is called in the Shariah "Haq al-Allah" (i.e.

(1) Man and Islam - Ali Shariati - (Translation) - University of Mashhad press, Iran. p.6.

(2) CH. XVII v.70.

duties owed to Allah such as prayers, fasting, etc.) and Hoqooq al-lbad (i.e. rights owed to fellowmen) are binding on the Ruler as much as on the ruled people. "Thus it would appear there is a sense in which man as such has no rights within a theocentric perspective where God, the only reality, is in the centre: he has only duties to his Maker. But these duties in their turn give rise to all the rights, human rights in the modern sense included."⁽³⁾

The Holy Qur'an is full of numerous guidelines in terms of which a Muslim should conduct himself and behave with others. Here are, for example, some verses from Chapter "Bani Israel" which clearly illustrate the sublime morality and legal precepts of the Holy Qur'an:⁽⁴⁾

"Thy Lord hath decreed that ye worship none but Him, and that ye be kind to parents. Whether one or both of them attain old age in thy life, say not to them a word of contempt, nor repel them, but address them in terms of honour.

And, out of kindness lower to them the wing of humility, and say: "My Lord! bestow on them thy Mercy even as they cherished me in childhood.* ...

And render to the kindered their due rights, as (also) as those in want, and to the wayfarer: but squander not (your wealth) in the manner of a spendthrift.* ...

And even in thou hast to turn away from them in pursuit of the Mercy from thy Lord which thou dost expect, ye speak to them a word of easy kindness.

Make not thy hand tied (like a niggard's) to thy neck, nor stretch it forth to its utmost reach, so that thou become

(3) Human Rights in Islam - ICJ Kuwait University p.51.

(4) Ibid p.51.

blameworthy and distitute.* ...

Kill not your children for fear of want: We shall provide sustenance for them as well as for you. Verily the killing of them is a great sin.* ...* ...

Come not nigh to the orphan's property except to improve it, until he attains the age of full strength; and fulfil (every) engagement for (every) engagement will be enquired into (on the Day of Reckoning).

Give full measure when ye measure, and weigh with a balance that is straight: that is the most fitting and the most advantageous in the final determination. And pursue not that of which thou hast no knowledge; for every act of hearing, or of seeing, or of (feeling in) the heart will be enquired into (on the Day of Reckoning).

Nor walk on the earth with insolence: for thou canst not rend⁽⁵⁾ the earth assunder, nor reach the mountains in height."

On the part of the Sunnah, a Universal comprehensive charter founded upon the basic fundamental human rights which are guaranteed in the Holy Qur'an, is to be found in the address delivered by the Holy Prophet in his Farewell Pilgrimage. Says the Prophet of Islam proclaiming in his last sermon:

"O men, listen to my words I do not know whether I shall ever meet you in this place again after this year. Your blood and your property are sacrosanct until you meet your Lord, as this day and this month are Holy. You will surely meet your Lord and He will ask you of your works. He who has a pledge let him return it to him who entrusted him with it; all usury is abolished, but you have your capital, Wrong not and you shall not be wronged. God has decreed that there is to be no

usury and the usury of Abbas. b. Abdul Muttalib is abolished, all of it. All blood feud in the pagan period is to be left unavenged. The first claim on blood I abolish is that of b. Rabia b. al-Harith b. Abdul Muttalib (who was fostered among the B. Layth and whom Hudayl killed). It is the first blood shed in the pagan period which I deal with... You have rights over your wives and they have rights over you. You have the right that they should not defile your bed and that they should not behave with open unseemliness. If they do, God allows you to put them in separate rooms and to beat them but not with severity. If they refrain from these things they have the right to their good and clothing with kindness. Lay injunctions on women kindly for they are prisoners with you having no control of their persons. You have taken them only as a trust from God (bi amantillah) and you have the enjoyment of their persons by the words of God, so understand my words, O men, for I have told you. I have left with you something which if you will hold fast to it you will never fall into error - a plain indication, the Book of God and the Practice of His Prophet, so give good heed to what I say... Know that every Muslim is a Muslim's brother, and that the Muslims are brethren. It is only lawful to take from a brother what he gives you willingly, so wrong not yourselves."⁽⁶⁾

(5) CH. XVII vs. 23, 24, 26, 28, 29, 31, 34, 35, 36, 37.

(6) The life of Muhammad - Ibn hisham - ISHAQ - (Translated by A. Guillaume) Pakistan branch Oxford University Press - Lahore Karachi Dacca. p.651.

In the following part, I shall proceed to deal in detail with some of the basic fundamental rights namely right to life, economic order and right to social security, right to the individual's freedom and the rights and legal status of woman in Islam.

1 - Right to life

"... That if anyone slew a person - unless it be for murder or for spreading mischief in the land it would as if he slew the whole people:..." (CH. V v.35)

Of all human rights, the most fundamental right is the protection of human life as clearly manifested in Article 3 of the Universal Declaration of Human Rights. In Islam, when nobody has a right to give life, no one possesses the right to take away any life, even if it is his own. (7) Human blood is very sacred and is not to be spilt in vain. Hence, the Holy Qur'an declares:

"...Nor take life - which Allah has made sacred - except for just cause" (8),

and in terms of warning, the words of the Holy Qur'an run as follows:

"If a man kills a Believer intentionally, his recompense is Hell, to abide therein (forever): and the wrath and the curse of Allah are upon him, and a dreadful penalty is prepared for him." (9)

(7) Says the Holy Prophet: "Whoever purposely throws himself from a mountain and kills himself, will be in the (Hell) Fire falling down into it and abiding therein perpetually forever;..." Sahih al-Bukhari - Arabic- English Vol. VII Kazi publications (Pakistan) p.451.

(8) CH. XVII v.33.

(9) CH. IV v.93.

Making it clearer, said the Holy Prophet (S.A.W.): "the greatest sins are to associate a partner with Allah and to kill human being ..", and also in his farewell address said: "O people, verily your blood your property and your honour are sacred and inviolable until you appear before your Lord ..."

Thus, following the way of the UDHR, this is unequivocally manifested by the Universal Islamic Declaration of Human Rights, Article 1(a) of which states: "Human life is sacred and inviolable and every effort shall be made to protect it. In particular no one shall be exposed to injury or death, except under the authority of the law." Article 4 (a) of the Proposed Islamic Constitution follows the same philosophy when it says: "Human life, body, honour and freedom are sacred and inviolable. No one shall be exposed to injury or death, except under the authority of the Shariah."⁽¹⁰⁾ However, while Article 3 of UDHR seems to have been revealed without any restrictions with regard to (life), as it deals with an infallible creation rather than with human beings, both preceding Muslim Articles, which come in accordance with the Holy Qur'an and Sunnah, made it clearly restricted to the effect that human life may, in certain circumstances and by process of justice, be exposed to injury or even death. In other words, when a crime such as murder, for example, takes place, the murderer must be brought before the law to face the appropriate penalty therein.

This shall, however, lead us to give a brief account of capital punishment with regard to murder cases.

Since its emergence by which time all kinds of vendetta, tribal or individual, were absolutely forbidden, and peace was utterly restored in Arabia, Islam, has, logically or philosophically, believed that human life cannot be secure or safe unless a proper penal code is imposed upon the people. That is clearly to say the more serious the crime committed against life is, the more tough a punishment is provided for. Hence, in cases of murder, however, the Holy Qur'an clearly states:

(11)

"O ye who believe! the law of Equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman ..."

(12)

and in more explicit, in chapter "Maida" (Food), the Holy Qur'an states:

"We ordained therein for them: "life for life, eye for eye, nose for nose, ear for ear, tooth for tooth and wounds equal for equal ..."

(13)

Thus, having accordingly stressed capital punishment (death penalty) in cases of crime, such as murder in particular, the Shariah (Islamic law) justifies it with a belief that it is the most effective deterrent punishment which can be ever imposed. In other words, as the Holy Qur'an rhetorically puts it:

"In the law of Equality there is (saving of) life to you O ye men of understanding! that ye may restrain yourselves .."

(14)

(11) It is in Arabic "Qisas" which is also translated as retaliation. It does, however, mean: if you must take a life for a life at least there should be some measure of equality in it.

(12) CH. II v.179.

(13) CH. V v.48.

(14) CH. II v.179.

Accordingly, the question of whether or not the Islamic society has a legitimate right to apply the said penalty is, therefore, unarguable.

But should the Islamic state exercise capital punishment? In addition to the Quranic argument (CH. II v.179), one could argue that when the absolute sacredness and inviolability of life as well as of the society as a whole, as above expressed, is unquestionable, its absolute sacredness is, in my opinion, well dependent on its full recognition and respect by the others. Had not its sacredness been restricted, it would not have meant anything; in other words, if the violator of a life cannot be adequately punished and exposed to the same fate to which that life was unjustly exposed, life in general would not be any longer sacred and inviolable. This is, however, what Lepelletier actually meant when he spoke for the death penalty:...

"Though the basis of the right (right to life) is unquestionable, it is only from its necessity that the legitimacy of the use of the penalty is derived. Just as a private individual cannot kill in self-defence except when this is the sole means of saving his own life, society cannot legitimately exercise its right over life and death unless it is clearly proved that no other punishment suffices to repress crime."⁽¹⁵⁾

It could be also added that applying such a punishment would be so effective in avoiding undesirable consequences that result from primitive practices (e.g. vendetta and disorder) which existed prior to the advent of Islam. Thus, substituting capital punishment with

(15) Capital punishment - ed. Thorsten Sellin - Harper & Row publishers New York, Evanston and London p.56.

imprisonment would never be so effective. "Inmates (in prison) are likely to become worse rather than better in prison, due to their association with other criminals and, furthermore, the professional criminal, who appears the best adjusted in prison, simply knows how to adapt and is in reality unchanged."⁽¹⁶⁾

Nevertheless, in contrast with crimes which are punishable by hudud⁽¹⁷⁾ (fixed penalties) the "crime against the society" in the full sense of the term, according to the Shariah (Islamic law) the death penalty, in case of murder, may not be executed upon the murderer if the victim's party (hiers), who may wish to exercise their right, decide to waive that right to the said penalty and accept blood-money^(17R) (diya) alternatively. This can be clearly understood from the end of the above mentioned verse (CH. II v.178) where Allah goes on to state:

"...But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude, this is a concession and a mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty."

But the wrongdoer shall not, however, be immune from the spiritual consequences; in other words, he will not be able to escape punishment in the Hereafter. The Holy Qur'an thus states:

(16) Ibid p.56.

(17) They are, for example, theft, fornication and adultery .. etc.

(17R) Islamic law⁴ in the contemporary world - S.H. Amin - Royston Limited 1985 - p.28.

"If a man kills a Believer intentionally, his recompense is Hell, to abide therein (for ever): and the wrath and the curse of Allah are upon him, and a dreadful penalty is prepared for him."⁽¹⁸⁾

In short, having hinted about the punishment which might be faced by the murderer, it is not the intention to stress the Islamic penal code's rigidity in this case, rather it is the intention to show how sacred and inviolable the human life is in Islam, and how much it means to the Islamic society.

Moreover, in Islam, life is life, Muslim or non-Muslim. Thus the Arabic term by which the Holy Qur'an unequivocally expresses its law in this context is "Nafis" (soul), which simply means any person in general. Therefore, the Qur'an makes no difference between the life of a Muslim or a non-Muslim. Both of them are equal and the blood of a non-Muslim is as sacred as that of a Muslim.

In terms of practice, this is therefore applied without any distinction between the Islamic State's citizens. In the life of the Holy Prophet, for example, a Muslim murdered a Dhimmi (non-Muslim). The Prophet (S.A.W.) ordered his execution immediately saying: "I am responsible for obtaining redress for the weak."⁽¹⁹⁾ In the reign of 'Umar, the second caliph (R.A.A.), one of the tribe of bakr b. wail killed a Dhimmi of Hirah. The Caliph ordered that the murderer had to be handed over to the kith and kin of the deceased, who later executed

(18) CH. IV v.93.

(19) Shawkani, Nail al-Autar - see The Islamic law and Constitution - Abul A'la Maududi - p. 270 \

him. Again during the time of Ali, the fourth Caliph, a Muslim was accused of murdering a Dhimmi, Ali ordered the execution of the Muslim. It was submitted that the brother of the deceased had forgiven him. But Ali was not satisfied and thought that perhaps the man had been threatened by some means. It was only when the man sought pardon for the murderer and he had received the blood-money (diya) ... then and only then did Ali give his permission to release the murderer and said: "Whosoever is our Dhimmi his blood is as sacred as our own and his property is as inviolable as our own property."⁽²⁰⁾

(20) Maududi Ibid p.270.

2. The Economic Order and the Right to Social Security.

"It is He (Allah) who hath created for you all things that are on earth ..." (CH. II v.29).

The economic order, in Islam, has been based on philosophy as well as belief that no human being is originally entitled to any exclusive or absolute right to anything found on earth. The real ownership of everything belongs to Allah; the Holy Qur'an says:

"Unto Allah belongeth the dominion of the heavens and the earth, He giveth life and He taketh it. Except for Him ye⁽¹⁾ have no protector nor helper."

Man is only entrusted to make use of it, and he will be accountable to Him in accordance with unequivocal rules laid down in the Shariah (Islamic law). This is the philosophy which is recently manifested by the Universal Islamic Declaration of Human Rights when Article (XV) states: "(a) In their economic pursuits, all persons are entitled to the full benefits of nature and all its resources. These are blessings bestowed by Allah for the benefit of mankind as a whole. (b) All human beings are entitled to earn their living according to the law."

However, the Islamic economic philosophy, therefore, stands in definite opposition to both economic systems of the world today (i.e. Marxist scientific socialism and individualistic monopoly capitalism). It opposes the former as much as it strongly opposes the latter. For

(1) CH. IX v.116.

Islam, both are the same, that is to say, when Marxism establishes "state capitalism" at the expense of the individual whose talents and ambitions are unjustifiably killed and suppressed, as he cannot get what he strives for; the other gives birth to business magnates and industrial lords who, with no interest except accumulating wealth by any means, exploit other individuals and monopolize everything in the society. However, the opposition of Islam to both economic systems of today, gives rise, at the same time, to a great similarity to both of them. Putting aside for a moment the divine originality of the Islamic system, which by its spiritual illumination, has an essential influence on its working, we find that the Islamic economic system forms a position with different dimensions between the two economic systems. In other words, Islam has no objection to either private enterprise or private ownership of property, rather the latter is protected by the Shariah (Islamic law). Ownership gained by way of injustice, deceit and harm is absolutely forbidden. "But possession of a thing is not an end in itself: just as its origin should be honest work, its aim should also be honest and useful, both individually and socially: in Islam (2) individual ownership is a social duty." Nonetheless, the Islamic state is entitled to make "the communisation of any resources and material which, if allowed to remain in private hands, might lead to (3) monopolized exploitation of public needs."

In modern times, this similarity, particularly to the socialist system, has given rise to a socio-political thought that never existed before, that is so-called Islamic socialism. But this socialism is

(2) Modern Islamic Political thought - H. Enayat -M- p.146.

(3) ibid p.147.

completely different from that officially initiated and enforced by the State, which took or has taken place in some Arabic countries, such as
 (4) Egypt in the sixties or Libya (5) in the seventies.

However, the experience of this sort of socialism, which is obviously based on no Islamic teachings, appeared, in my opinion, to have a negative effect, rather than a positive one, on economic situations, as well as the morality of the people. In other words, though adopted socialism was officially practised, it could not satisfactorily work in Muslim societies in as effective way as it was supposed to. Its failure can, in the view of this writer, be attributed to two main causes: first, the people's feeling that it is an imported idea which negates many principles of Islam, on the one hand, and on the other, that Islam in itself contains all the possibilities for reform; second, the absolute abolition of private ownership and business gives rise to an official corruption between all classes of society.

Indeed, Islam, the ignored ideology of life's way, contains all possibilities of the best way which can be adopted towards reform, without blindly taking either of both directions, in other words, the east or the west. Neither the eastern ideology nor the western can be successful in an alien environment such as the Islamic, nor can they conciliate between the individual's interests and the collective's, as Islam does. Historically, when Islam, in its early days was once put

(4) That was at the hand of Nasir (52 - 70).

(5) The first Libyan official socialism which has been put into practice since 1973 is by Colonel M. Qadhafi. That is when he introduced the so called "The third theory" embodied in his "Green Book" (the solution of the Economic problem - socialism part two).

into practice, the Islamic state as a whole flourished and the individuals prospered satisfactorily. (6) The greatness of a state, in the view of this writer, comes always from the amount of attention which the state pays to its citizens, individually as well as as a whole. Although Islam allows slight differences take place between people, (7) in the materialistic sense, this sort of difference has no advantage at all and is not as desirable as one's righteousness. (8) Rather, extraordinary wealth is decried in the Holy Qur'an. So inevitable ranking in degree of wealth with no harmful impact, in my opinion, is acceptable, but wide gaps between the rich and the poor which allow powerful positions for the former and exploitation against the latter, should not be permitted in Islam.

But a complete abolition of private ownership (i.e. property, business etc...) runs against one's instinct of desiring to own property; (9) the instinct that is latent behind the most effective motivation to develop one's living standard as an individual whose

(6) Of this Yahya Ibn Sa'd says: "Umar Ibn 'Abd al' Aziz sent me to distribute alms, but I could not find anyone to whom to give alms, for 'Umar has made everybody contented. So I bought slaves with the money, and freed them." See Islamic Review vol. 54 May 1966. p.28.

(7) Says the Holy Qur'an:

Is it they who would portion out the Mercy of thy Lord? It is we who portion out between them their livelihood. In the life of this world: and we raise some of them above others in ranks, so that some may command work from others. But the Mercy of thy Lord is better than the (wealth) which they amass." (CH. XLIII v.32).

(8) To this effect the Holy Qur'an says:

"Nay, but man doth transgress all bounds, * in that he looketh upon himself as self-sufficient." (CH. XCVI vs. 6,7)

(9) Within this context the Holy Qur'an says:

"Fair in the eyes of men is the love of things they covet: Women and sons; heaped-up hoards of gold and silver; horses branded ... Such are the possessions of this world's life; but in nearness to Allah is the best of the goals (to return to)." (CH. III v.14.)

consequences leads to the whole society's development and prosperity. Once man is deprived of being capable of gaining what he has worked for, he would not be concerned too much to produce for society as a whole, rather than by any means of corruption, to take from it. Therefore, an equal chance should be given to every individual, as a member of society, to work and to own, with limitations. This would surely lead ultimately to the development of the state as a whole.

However, when socialism, as it appears from its practice in some parts of the world, is based on the expense of the individual who is considered to be only a number, without real human rights, capitalism is based on the expense of the majority of the individuals which collectively forms the society which is inhumanly exploited by a handful of its members, who have all rights. If Islam, with its fundamental differences, looks, therefore, like socialism, at no time could it have appeared to resemble capitalism.

Theoretically, on some of Muslim intellectuals' level, however, the Islamic economic structure was given such a name as "socialism", jointly with the word "Islamic", to express a special kind of socialist system. It was during the early sixties, when one of the Syrian Muslim Brotherhood called Mustafa as-Sibai wrote a book entitled "Ishtirakiyyat' al-Islam" (The Socialism of Islam). In his work, from the Qur'anic statements such as (CH. II v.284 and CH. XXII v.65) Sibai derives two conclusions:" first, there is nothing in the material world which cannot be possessed by Man given determination, intelligence and effort. Second, all groups of people are equally entitled to make use of "the good things of the earth". Once a person has taken possession of a thing through honest means, he is recognized by Islam as its

rightful owner. And no means is more honest in attaining ownership than work." (10) But as is said, the most important part in Sibai's work is his justification of the so called "ta'mim" (the Nationalisation) of certain categories of property. Upon a prophetic Hadith reported by Ahmad and Abu Dawud, which says people own three things in common: water, grass and fire, (another narration mentions salt too), Sibai based his argument in favour of Nationalisation. He accordingly says that "since these three things were the basic necessities of desert life at the time of the Prophet their enumeration should on no account be regarded as exhaustive or exclusive. Thus, in a modern context, 'water' can be taken to stand for the entire installations of water-supply, 'fire' for electricity, and 'grass' and 'salt' for all the indispensable requirement of contemporary life." (11)

In other words, in Islam all the natural resources, such as oil in the contemporary time, on which the state's economy is absolutely dependent, should under no circumstances be privately owned by an individual or a group of individuals.

Though this well-known work was written by as-Sibai, who was the leader of the Syrian Muslim Brotherhood in Egypt, his work was ironically recommended as a good support to the state's ideology of socialism. As a matter of fact, as-Sibai's work, in the view of this writer, represents neither known socialism nor the socialism of Egypt, rather it reflects the teachings of Islam in its true origin in respect of the economic aspects, though he called it "Socialism of Islam".

(10) Modern Islamic Political thought - H. Enayat - M - p.146.

(11) *ibid* p.146.

However, while he considerably shares his views with as-Sibai, Sayyid Qutab differ with him in rejecting the use of alien terminology, which is often employed nowadays to describe Islamic ideals. So he named his works with regard to the socio-economic system "at-takaful al-ijtamai" (mutual social responsibility), where the Islamic solution to the problems of social injustice and poverty was offered. Therefore, for him, Socialism in general and in the Egyptian case in particular, which he bitterly criticised, as can be seen from the following points, has nothing to do with Islam:

"(a) Islam and socialism are two separate, comprehensive, and individual systems of thought and living. No reconciliation, or synthesis, is therefore possible between them. If there are occasional similarities between them, this does not warrant their identification with each other, just as the similarities between Islam and Communism cannot be taken as proof of that they are congenial or based on the same principles ... (b) socialism, like communism and Capitalism, is an exherescence of jahili (i.e. pre-islamic period) thought, and therefore carries all the vestiges of its corrupt origin. It stresses such notions as social welfare and material prosperity at the expense of moral salvation. Islam never rejects the material aspects of human life, and this can be particularly demonstrated by its detailed scheme of "social justice". But Islam considers the first step towards the realisation of this scheme to be the liberation and purification of the soul. Without this moral catharsis no attempt at improving human life can be successful. (c) Egyptian socialism is closely bound up with nationalism - another jahili creed which is repugnant to the spirit of Islam. (d) Although because of the interruption in the growth of Islamic jurisprudence, some of the Islamic tenets stand in need of reinterpretation, the means of achieving this aim is not in having

recourse to any of the brands of Western political philosophy, or to materialistic idea. Islamic jurisprudence itself possesses adequate resources for adaptation to unforeseen circumstances. The Islamic socialistss admit this, but in their casuistical arguments succumb to foreign ideological influences."⁽¹²⁾

Now let us, therefore, discuss, more specifically, some of the Islamic economic order rules, through which we shall see the kind of social justice which is attainable under the Shariah (Islamic law).

As can already be implicitly or explicitly understood from the previous introduction, Islam bases its economic structure on freedom of action. Nonetheless, freedom of action in this context is, however, guaranteed by law so long as its consequences in general accordingly occur, coupled with a relationship of complete co-operation and exchange of mutual services among all individuals. Thus, to achieve this integrated system, the system by which all members of the society, individually and collectively, would surely enjoy the utmost degree of welfare, Islam has therefore used two methods. The two methods are: first, Islam has radically rooted out all the possibilities and blocked all the roads which lead to all unlawful and unjustified accumulation of wealth. Second, it has, by many channels, made wealth in general not be restricted to a mere handful of members of society. This shall be shown later in this section.⁽¹³⁾

For the first method, generally speaking, which is to establish justice and eliminate exploitation in business transactions, Islam came

(12) Ibid p.151.

(13) Inheritance is, of course, one of these channels which plays a great role in distributing wealth.

to prohibit all sources of unjustified enrichment. Hence Muslims are emphatically instructed by the Holy Qur'an, not to acquire each other's property by a wrongful deeds:

"And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other)
(14)
people's property."

However, on the contrary Muslim are explicitly encouraged to increase their property by proper economic acts (i.e. traffic and trade). The Holy Qur'an says:

"O ye who believe! eat not up your property among yourselves in vanities: but let there be amongst you traffic and trade by mutual good will: nor kill (or destroy) yourselves: for verily Allah has
(15)
been to you most Merciful:"

This is clearly emphasized by the Universal Islamic Declaration of Human Rights, Article XV(F) of which states: "In order to promote the development of a balanced economy and to protect society from exploitation, Islamic law forbids monopolies, unreasonable restrictive trade practices, usury, the use of coercion in the making of contracts and the publication of misleading advertisement."

Thus, among all the sources mentioned above, Riba (Usury) represents, in Islam, the most prominent source of unjustified advantage. Literally, "Riba" derives from the Arabic verb "Raba" which

(14) CH. II v.188.

(15) CH. IV v.29.

(16)
gives the meaning of "increased". "As a technical term, usury and interest, and in general any unjustified increase of capital for which no compensation is given."⁽¹⁷⁾ In other words, no monetary advantage is to be received in a business transaction without giving a just countervalue. In the Holy Qur'an, its prohibition can be clearly bases on four different revelations. Here the verse (275 of Chapter al-Bagara (the Cow) states:

"Those who devour usury will not stand except as stands one whom the Evil One by his touch hath driven to madness. That is because they say: "trade is like usury" but Allah hath permitted trade and forbidden usury."

Just after the preceding verse, usury is repeatedly prohibited and strongly condemned to the extent that Allah and His Apostle declare war against those who deal with it. The Holy Qur'an says:

"O ye who believe! fear Allah, and give up what remains of your demand for usury, if ye are indeed believers. *If ye do it not, take notice of war from Allah and His Apostle: but if ye turn back, ye shall have your capital sums: Deal not ⁽¹⁸⁾ unjustly, and ye shall not be dealt with unjustly."

This was unequivocally manifested by the Holy Prophet (s.a.w.) in his Farewell Pilgrimage. When he addressed the people saying: "...He who has a pledge let him return it to him who entrusted him with it; all riba (usury) is abolished, but you have your capital. Wrong not and you shall not be wronged. Allah has decreed that there is to be no

(16) LISAN al-Arab al-Muhit - lbn Manzur vol. A,R p.1116. Within this context says the Holy Qur'an:

"... and (further), those seest the earth barren and lifeless, but when we pour down rain on it, it is stirred (to life), it swells (Rabat) and it puts forth every kind of beautiful growth (in pairs)." (CH. XXII v.5).

(17) See Encyclopaedia of Islam vol. 3 (L-R) p.1148.

(18) CH. II vs. 278, 279.

usury and the usury of 'Abbas b. 'Abdul'l-Muttalib⁽¹⁹⁾ is abolished, all of it ..."

However, riba (usury) of the Jahiliyyah (the time of ignorance) were of two kinds, riba al-Nasiah and riba al-Fadle. While the former which derives from the Arabic very "nasaa" (to postpone), refers to the time that is allowed for the debtor to repay the loan in return for an additional fixed sum, the latter, which means extra, can take place in a transaction involving the six articles mentioned in one of the Holy Prophet's hadiths.⁽²⁰⁾ If those, which are gold, silver, wheat, barley, dates and salt, are exchanged against themselves, they should be exchanged promptly and be equal and alike. Nonetheless, when generally translated into English as "usury", which signifies, in modern parlance, only an exorbitant rate of interest rather than a reasonable one, riba, in the Qur'anic sense, means without distinction both the exorbitant and reasonable rates. In Islam, all riba, whether small or big, are equally forbidden.

The question now is, why does Islam prohibit riba (usury) with all forms of interest? In addition to the inhuman exploitation on which riba (usury) is originally based, to answer this question, it would be sufficient to let the reader know some of the essential differences between the selling transaction and riba's:

(a) The exchange of benefits occurs equally between the seller and the purchaser; the latter on the one hand enjoys the commodity which he has

(19) He was the Holy Prophet's uncle.

(20) Says the Holy Prophet (s.a.w.): "Gold for Gold, silver for silver, wheat for wheat, barley for barley, dates for dates, and salt for salt - like for like, equal for equal, and hand-to-hand; if the commodities differ, then you may sell as you wish, provided that the exchange is hand to hand." (Muslim, kitab al-Musaqat, Bab al-sarfi wabay'i al-dhahabi bi al-waragi naqdan.)

bought, and on the other the seller takes a wage for the effort and time which he devoted for preparing it for the purchaser. But, in contrast, the exchange of benefits does not occur between the lender and the debtor on equal grounds in the usurious transaction. While the lender undoubtedly takes an extra sum of money, in return the debtor, who has to pay his debt, will get only an extra time which might be beneficial or not. If he borrows the money to use it for his personal consumption, this extra time will be definitely not be useful for him. If the debtor borrows the money to use it in trading, manufacturing, or farming, there is the possibility of profit as well as loss. That is to say that the usurious transaction is based either on the gain of a party at the expense of the other's loss, or the definite profit to a party and the indefinite profit of the other party. (b) No matter how exorbitant the profit gained from the purchaser is, the seller gets it only once; but the profit, which the lender gets from the debtor in the usurious transaction, has an uninterrupted series and it becomes stronger and stronger with time. And no matter how much profit the debtor gets by his money, it is only a limited one, while there is nothing to limit the creditor's profit vis a vis the debtor's. Also, the former can possess everything which the latter has and then his credit is still the same. (c) The business between the seller and the purchaser ends immediately after the exchange of goods. And the seller then owes nothing more to the purchaser. Also, the essential demand of the property, for the use of which compensation is paid in renting land, a house ... etc., is not consumed and remains as it was and eventually is returned to its owner. But in the usurious transaction, the debtor consumes the money he borrows from the creditor, and he must return the consumed money plus an interest to the creditor. (d) In commerce, agriculture and industry, man uses his capacities and time

and therefore gets his wages and enjoys the profit. But in the usurious business, he becomes the biggest shareholder, just because he has extra money, which exceed his needs without making any effort, so, he does not have the status of the well-known decent (reasonable) shareholder, who apportions profit and loss with the others and those participation is not based on gain without waste. (21)

However, there is no difference of opinion among all schools of Muslim jurisprudence that that riba transactions which take place between men are prohibited, and that the nature of the prohibition is strict and unambiguous. But riba (usury) which occurs between persons and an institution such as a "bank" is still till now controversial, though most Muslim jurists have, by anology, prohibited it. (22) Thus, due to the fact that the banking system has obviously become desperately necessary for any economic system of this era, and that it is one of the good characteristics of it, Muslim scholars exerted themselves to have a similar system but with an absolute elimination of interest therein. (23) Theoretically, a scholar called Muhammad Bakar al-Sador appeared in the last two decades with an intellectual attempt in which he tried to constitute some sort of banking system, similar to the conventional one, free of interest, according to the teachings of

(21) A. al-Mawdudi - al-Riba (Arabic) p.98, 99.

(22) Within this context says the Holy Prophet (s.a.w.): "That which is lawful is plain and that which is unlawful is plain and between the two of them are doubtful matters about which not many people know. Thus he who avoids doubtful matters clears himself in regard to his religion and his honour, but he who falls into doubtful matters falls into that which is unlawful, like the shepherd who pastures around a sanctuary all but grazing therein. Truly every king has a sanctuary, and truly Allah's sanctuary is His prohibitions ..." (B & M.Sh) An-Nawawi's Forty Hadith - Trans. E. Ibrahim, D. Johnson-Davis p.43.

(23) Muhammad Bakar al-Sador was one of the most distinguished scholars belonging to the Shi'it School of thought in this era. He is the author of "lqtisaduna" (our economy) and "Falsaftuna" (our philosophy). He was killed by the Iraqi Bathi regime.

Islam. This appeared when he wrote his book with the title "al-Bank alla Rabawi Fi al-Islam" (the Interest free Bank in Islam).

On the practical level, these individual efforts were recently put into practice in various Muslim countries. "These efforts present not only an excellent working example for those who did not believe in the practicality of the institution but also provide a spade-work over which the infrastructure of interest-free banking for a country could be built up."⁽²⁴⁾

Having prohibited riba (usury) and whatever relates to it, Islam wishes to establish a very human economic system, where all forms of exploitation whatsoever are eliminated.

The following few pages shall be devoted to the second method in which we discuss, in brief, the distribution of wealth in Islam, as well as the light of social security therein. The persisting just distribution of wealth that always takes place by the application of the inheritance rules and welfare tax which is represented in Zakat (it shall be discussed later), plays a vital role in distributing the private wealth among people. Nevertheless, there is, however, a general principle, in Islam, to the effect that the public wealth must be justly distributed among the needy people who happen for some reasons to lag behind in the struggle of life, and are denied all amenities of a decent living. Otherwise, wealth would be a thing taken by turns among the wealthy ones in society. This can be clearly based on the words of the Holy Qur'an, which after telling us that al'fai (Booty) must be distributed, says:

"What Allah has bestowed on his Apostle (and taken away) from

(24) Money and banking in Islam - Z.Ahmed, M. Iqbal, M. Khan - Institute of policy studies Islamabad - p.259.

the people of the townships, - belongs to Allah - to His
 Apostle ... in order that it may not (merely) make a circuit
 (25)
between the wealthy among you ..."

Moreover, in addition to the obligatory tax (embodied in Zakat), the government, in the opinion of this writer, can sometimes intervene to do and restore economic justice. Thus, in the Holy Qur'an and the Sunnah, as well as the Orthodox caliph's practice, there exists what can be considered as good approval for the government as such to take just steps to regain for the community, as a whole, some of the income surplus of the wealthy to be distributed therein. Here, in this context, the words of the Holy Qur'an have two considerable meanings. While the Ma'arij's verse, together with the word "recognized", revealed the right of the poor - the ZAKAT - the Holy Qur'an, in (26) chapter the "Zariyat", in another verse, gives an impression to the effect that there is a financial due, in addition to the Zakat. Thus, says the Qur'an, by way of promising and complimenting the righteous:

"As to the Righteous, they will be in the midst of Gardens and springs, ...* And in their wealth and possessions (was remembered) the right of the (needy) him who asked, and him (27) who (for some reason) was prevented (from asking).

In tradition, this was clearly emphasized by the Holy Prophet (s.a.w.) when he said: "In (one's) wealth there is a due besides the Zakat" then he recited:

"It is not righteousness that ye turn your faces towards East or West; but it is righteousness - to believe in Allah ... to

(25) CH. LIX v.7.

(26) قَالَ اخبرني عبد الله بن عباس قال قال زيد بن اسلم في قول الله (والذين في اموالهم حرم) (للمسائل المحرم) قال ليس ذلك بالارادة ولكن ذلك مما ينفقونه من اموالهم بعد اخراج الزكاة
 See Jami al-Bay'an - Ibn Jarir vol. 8 p. 112.

(27) CH. LI vs 15 & 19.

spend of your substance, out of love for Him, for your kin,
 (28) (29)
 for orphans, ..." ..."

On the part of the Orthodox Caliphs, it was 'Umar the second Caliph who, after the conquest of al-Iraq, decided not to distribute the Sawad lands among the Muslim participant warriorss. He was recorded to have said: "how can I distribute the lands amongst you and leave those who come after you without share". (30) When 'Umar exerted himself and reached the said decision, he obviously based his argument on the teachings of the Holy Qur'an, and the spirit of Islam. Also, he, the caliph as a Mujtahid, previously knew the essential role that land played in the state welfare for the whole community and the community of that region in particular at that time.

However, social security - in Islam - is traditionally financed from two sources - voluntary contributions and the obligatory tax (Zakat). The former is not so reliable as the latter, which is imposed by the law, though the latter's income also is not, as might be admitted, very adequate to promote the full welfare of the community.

If voluntary contributions were of some efficiency in the time of the traditional Islamic state, it would not be so in modern times. This is probably because of the following two facts: first, Muslims of contemporary times are not like those of the past. They are rather more considerably effected by today's materialistic civilization than influenced by righteousness, upon which the prosperity of society

(28) CH. II v.177.

(29) (Tr.Msh 6:6) see A Manual of Hadith - M. Ali p.214.

(30) Taxation in Islam - A. Ben Shemesh vol. 3 (Abu Yusuf's kitab al-Kharaj) Leiden E.J. Brill London Luzac & Co. Ltd. p.98.

should depend, rather than the rigours of the law. Second, life is becoming increasingly more complex and sophisticated, to the extent that a state sometimes finds itself unable to fulfil properly its job concerning economic matters.

Therefore, the Islamic state, relying on the Shariah values mentioned above, coupled with the latter facts, can legally impose tax other than the 'Zakat' on the wealthy class of the community. However, the tax should never harm them or deprive them of freedom in their economic actions. Here, the state can, in my opinion, take such an action for only two reasons; first, when the state has no public revenue (e.g. oil) upon which she can sufficiently rely, and the private sector forms the most important nerve in the state's economy. Second, whenever the gap in the economic sense between the social classes looks so wide that the lower class would be considerably dominated.

As for the "Zakat" itself, Islam has provided a social welfare tax for insuring basic needs to the disabled and the unemployed. It literally derives from the Arabic verb "Zakha" which means "to purify". The Holy Qur'an says:

"of their Goods take alms, that so thou mightest purify and
(31)
sanctify them; and pray on their behalf ..."

Technically, "it means the alms-tax, one of the principal obligations
(32)
of islam. By this, the law means a tax, which is levied on

(31) CH. IX v.103.

(32) Says the Holy Prophet (s.a.w.) "Islam has been built on five (pillars): ..., paying the Zakat, ..." (B.2:1) see An-Nawawi's Forty Hadith by E. Ibrahim, D. Johnson - Davies p.35.

definite forms of property and is distributed to eight categories of persons".⁽³³⁾ It is to be applied in accordance with the following text of the Holy Qur'an:

"Alms are for the poor and the needy, and those employed to administer the (funds), for those whose hearts have been (recently) reconciled (to truth); for those in bondage and in the debt; in the cause of Allah; and for the wayfarer: (thus is it) ordained by Allah, and Allah is full of knowledge and wisdom."⁽³⁴⁾

Accordingly, the eight categories of people upon which the Zakat" is to be spent are: (a) those who are concerned with collecting it, as a reward for their services; (b) on slaves, for the purpose of liberating them; (c) on those who recently embraced islam; (d) for the general good of the community. (e) on the poor; (f) on the needy; (g) on those in debt; (h) on the wayfarers.

Nonetheless, this Qur'anic text and the objects for which the poor rate may be spent therein, can be, today, interpreted to conceive the full meaning of the concept of modern social security. The obligatory alms was, therefore, meant for raising a public fund, whose management should entirely be in the hands of a public institution in the state. The institution as such should afterwards spend the collected amounts in a way that would be a good practice for what is, for instance, emphasized by the Universal Declaration of Human Rights. Thus, Article (XVIII) states: "Every person has the right to food, shelter, clothing,

(33) Encyclopedia of Islam. Vol. S.7 P.1202.

(34) CH. IX v.60.

education and medical care consistent with the resources of the community. This obligation of the community extends in particular to all individuals who cannot take care of themselves due to some temporary or permanent disability." In modern time, what the social service, however, stands for, can be summarised in the following points: (1) relief of physical hardship, as where a person has an injury, sufferage or illness, or becomes incapacitated from working by old age or anything else; (2) unemployment that might exist, for instance, due to retirement or lack of jobs; (3) supplementary income, which should be given to the breadwinner, whose family has increased in
(35)
size.

In fact, the foregoing aspects of modern social security were well-treated and highly guaranteed in the glorious time of the Islamic state. This can be understood from the words of the fourth Caliph Ali's (R.A.A.) letter sent to his governor in Egypt "The real love of God is found in lower rank of the helpless, the poor, the needy, the miserable and the aged. Among these are to be found the very desperate people. Be faithful to God in the task that He entrusted to you in regard to these people. Give them a share of your treasury and a share of the income of the prosperous Muslims everywhere. Those near you must have the same share as those distant from you. Do not be so contented as to forget those needy people, and never ignore them. Be careful to investigate the circumstances of those whose conditions are not so obvious to you, particularly those who are meek and humble and do not bring matters to your notice. Look after the orphans and the very

(36)
 young who are in need." However, in the reign of the second 'Umar, there is an incident which significantly touches the concerned problem, and gives the full impression that the contemporary social security was highly practised fourteen centuries ago. This when 'Umar was once wandering in Medina (the city of the Prophet); he heard a child crying, so he proceeded to the place and enquired what had happened. Soon afterwards the child cried again, and "Umar went up to the mother and asked what was the matter. The mother said "O 'Umar I weaned the child too early and that is why he is restless". "And why did you wean him too early?" asked 'Umar. The woman replied, "Because 'Umar does not give an allowance for babies until they are weaned, and I had to wean him in order to get the allowance which I needed very badly, for I am a poor woman". Umar went home and thought very long about this incident, and was very distressed about it. Then he ordered the public crier to tour the town and ask the people not to wean their children too early and promised that the state would give an allowance for babies before weaning.
 (37)

This is just an enlightening fragment shown from the history of the early Islamic state in its marvellous period, when it used to practice more or less the responsibility being carried by today's kind of state. So what it would be in its sophisticated structure if it is restored again!

(36) Islamic Review vol. 54 - May 1966 - p.29.

(37) Ibid p.30.

3 - The individual's right to freedom.

With regard particularly to this sub-chapter and coming chapters, a brief introduction can be given, in which we may well literally and juridically get an idea about the concept of freedom in Muslim thought.

The Arabic terms hurr (free), and hurriyya (freedom), with their inferences and equivalents in the other languages of Islam, implied the status of hurr, freeman in law, as opposed to abd (slave).⁽¹⁾ The Holy Qur'an explicitly states:

"...is prescribed to you (Muslims) in cases of murder: the free for the free, the slave for the slave .."⁽²⁾

Thus traditionally the Islamic practice of freedom as it appears in the Holy Qur'an is a legal, rather than a political concept. Also "it is possible, and indeed likely, that hurriyya, in the abstract meaning of "freedom" was current among pre-Islamic Arabia, ... in verse by Dhu-r-Rummah (around 700 century), hurriyya was used in the meaning of "nobles" and the use of hurr in the metaphoric meaning of "noble, good" was common in early Arabic speech. Hurriyya "freedom" may have existed in Arabic at an early date especially for expressing the opposite of the legal term "slavery", but it does not seem improbable that it started to be used more widely when Islam came into contact with philosophical thinking of the Mediteranean world that had known speculation about freedom for many centuries ...".⁽³⁾

(1) Lisan al-Arab al-Muhit - Ibn Manzor Vol. (A - R0 Dar lisan al Arab, Beyrout - p.604 and see also Muajam al-fad al-Qur'an al-Karim - Majmaa al-lugha al-Arabia - Dar As-shrooq - p.129.

(2) CH. II v.178.

(3) The Muslim concept of freedom - F. Rosenthal - Leiden 1960 - p.9.

Unlike the concept of the western liberal, which emphatically places stress upon freedom from restraint and signifies the ability to act, in Islam, it is the ability to exist or, more precisely to progress toward becoming a noble human being.⁽⁴⁾ The Holy Qur'an clearly says:

"... we have indeed created man in the best moulds ..."⁽⁵⁾

in other words, innocent, pure, true, free, willing to right and virtue. That was the original on which Allah has initiated mankind individually; concerning this pattern the Holy Qur'an says:

"... to the pattern on which He (Allah) has made mankind: no change (let there be) in the work (wrought) by Allah: that is the standard Religion ..."⁽⁶⁾

Then the verdict of the Qur'an against whoever is rebelling and breaking Allah's law is unequivocal:

"... Then do we abase him "man" (to be) the lowest of the low, - * Except such as believe and do righteous deeds: for they shall have a reward unfailing."⁽⁷⁾

Again, in some ages and places, the foregoing words meaning free were applied to certain privileged social groups which were not subject to taxes and other burdens, from which at the same time the commoners were not exempt. However, this as a social usage is exceptional and untypical, and normally the term hurr (free) was only used in the juridical sense, with little social and no political content. For instance, the opposing of the tyranny of any reign was a matter of

(4) Within this context says the Holy Qur'an: "We have honoured the sons of Adam ..." See CH. XVII v.70.

(5) CH. XCV v.4.

(6) CH. XXX v.30.

(7) CH. XCV v.5.

(8)

justice, not a matter of freedom; also, the converse of freedom was not tyranny but legal and personal slavery.

In Islam, existence is a reflection of the Supreme Being (Allah) who Himself is paramount, and all human beings are created in His image. On the earth they are His representatives and divinely empowered to govern themselves. The Holy Qur'an says:

"Behold, thy Lord said to the angels: "I will create a
(9)
vicegerent on earth ..."

and Allah Himself is complete freedom and complete necessity. Man accordingly participates in both. However, personal freedom lies in surrendering to that Divine will and must not be sought without but looked for within oneself. Thus, freedom of the individual Muslim comes second after the beliefs, morality and customs of the group, as determinant of the only proper course of behaviour. The individual's freedom ends where the freedom of another individual or the collective begins.

A - The individual's freedom in Islam.

"O Amr*since when have you enslaved the people, though they were born free of their mothers?" (Caliph ii 'Umar).

Islam, not only in theory but in practice, recognises no slight distinction of race or colour, citizens or foreigners, rulers or

(8) Tyrannical governments of the Muslim world, for instance, from which all people generally suffer everywhere, today, is a matter of justice when we all know that they got their political freedom back a long time ago.

(9) CH. II v.30.

subjects, they are all perfectly equal in freedom. As far as Muslims are concerned freedom is the basic principle for all children of Adam. This was explicitly manifested in the above-mentioned words of the second caliph 'Umar (R.A.A.). His statement, which was made fourteen centuries ago, did, indeed, give all mankind their humanity and dignity back after they had been deprived of it for a long time.

Thus, the Holy Prophet (S.A.W.), strongly condemning the institutional practice of slavery and warning Muslims, said in one of his sacred hadiths: "... Allah says, I will be against three persons on the day of Resurrection:- ... one who sells a free person (as a slave) and eats the price".⁽¹⁰⁾

(11)

Following the way of the United Nations, and repeating what Islam has declared since its emergence, article II of the Universal Islamic Declaration of Human Rights states: "Man is born free. No inroads shall be made on his right to liberty except under the authority and in due process of the law." and it goes on to state: "...every individual and every people has the inalienable right to freedom in all its forms - physical, cultural, economic and political ...". As has been asserted, no obstacles whatsoever would be allowed

*Amr b. al-'As was the Caliph 'Umar's Governor in Egypt. The former's son, Muhammad whipped an Egyptian. The Egyptian went to Madina (the capital of Islam), lodged his complaint with the Caliph, who immediately summoned 'Amr and his son. When they appeared before him, the Caliph handed a whip to the plaintiff and asked him to whip the son of the governor in his presence. After he had done so, 'Umar asked him to give one stroke of the whip to the honourable governor as well. His son certainly not have beaten you were it not for the false pride that he had in his father's office" and 'Umar turned to Amar and said the above mentioned word.

(10) Sahih al-Bukhari (Arabic, English) vol. iii Book of sales - Kazi Publications p.236.

(11) See Article 4 of the Universal Declaration of Human Rights.

to be made to one's right to freedom in all its aspects and physical manifestations, in particular.

In the modern sense of freedom, UIDHR in the same article has also stressed its view about its support to not only the individual but also to the people and the groups in a collective manner who for a long time have been struggling for the sake of their priceless freedom. This is when it states: "... and shall be entitled to struggle by all available means against any infringement or abrogation of this right; and every oppressed individual or people has a legitimate claim to the support of other individuals and/or peoples in such struggle".

In view of the Holy Qur'an such people (those who are oppressed) are not to be blamed, though they are following the lower law:

"But indeed if any do help and defend themselves after a
wrong (done) to them, against such there is no cause of
(12)
blame."

However, the blame would be on those who arrogantly ride rough-shod over the world, subjecting people to grievous wrong:

"The blame is only against those who oppress Men with wrong-
doing and insolently transgress beyond bounds through the
(13)
land, defying right and justice:..."

However, some might argue in such a way as to prove that slavery was an accepted institution in Islam, basing their arguments on, e.g.

(12) CH. XLII v.41.

(13) CH. XLII v.42.

the non-existence of a definite text in the Holy Qur'an referring to an absolute abrogation of slavery. It is true that there is no explicit Qur'anic text forbidding slavery, but this does not mean that Islam accepts it. The fact is that all religions as a whole and Islam in particular were all sent to bring about to all mankind the best guidance, which is to lead to happiness in this and the other life to come. The last fundamental form - in the belief of Muslims - which enshrines the concept of religion in the Holy Qur'an is Islam:

(14)

"..The religion before Allah is Islam .."

Islam as a religious term means "submission to the Divine will". For there is none other than He "Allah" worthy of our devotion. The Holy Qur'an says:

"Say: Truly, my prayer and my service of sacrifice, my life and my death, are (all) for God, the Cherisher of the worlds:"

(15)

Therefore, "Man came by the doctrine of Divine unity to serve God's purpose only. He was no longer in bondage to another. He now had the right of one free man among free men: there were no in qualities of high and low, in respect of these rights. There was no "inferior" and "superior". The only distinction between men was in their deeds:..."

(16)

As to the contrary, the word slavery means in English "an institution of the ius gentium whereby someone is subject to the dominium of another contrary to nature" and its meaning can be

(17)

(14) CH. III v.19.

(15) CH. VI v.162.

(16) The Theology of Unity - M. Abduh - p.125.

(17) The jurist Florentinns definition - the Oxford classical Dictionary p.994.

found in the Arabic dictionary as "submission of someone to another"⁽¹⁸⁾. By logical conclusion, slavery whatever it means is absolutely incompatible with Islam and its teachings. Such an inhuman institution can never be tolerated at all in peace time by the Holy Prophet of Islam who was sent but as a mercy to all mankind. The Holy Qur'an says:

"...we sent you "Muhammad" not, but as a Mercy for all nations .."⁽¹⁹⁾

or even by faithful Muslims when they all know the Holy Prophet (S.A.W.) in one of his sacred hadiths says: "O my servants, I have forbidden oppression for Myself and have made it forbidden amongst you, so do not oppress one another ...",⁽²⁰⁾ hence, to enslave one another, is after killing, the most oppressive deed which can be perpetrated, that has been experienced by mankind.

Though, no particular text existed in the Holy Qur'an prohibiting bondage in one word, yet the Holy Qur'an and the Sunnah of the Prophet laid down conditions and set up guarantees to govern such a serious problem. In other words, the Shariah or Islamic law has employed methods by which justice and rights to slaves of that time could be granted and by which enslavement could be only brought to an end. These were the only methods whereby society could reach a point of readiness for the implementation of the Islamic enjoinders⁽²¹⁾ concerning the matter in question. This was perhaps because the

(18) Lisan al-Arab al-Muhit - Ibn Manzur p.1209.

(19) CH. XXI v.107.

(20) It was related by Muslim - see Forty Hadith - An Nawawi's (Trans. by E. Ibrahim and D.J. Davies) - p.81.

(21) For its deep rooted habit of the Arabic society and the intoxicants was gradually prohibited (The Qur'an, CH. II v.219; CH. IV v.43; CH. V v.93).

institution of slavery, having taken such deep-roots among the Arabs and surrounding nations, and due to the natural obliquity of the human mind, needs such a mode of treatment. This leads us, in the next part, to give a brief account about the position of slavery in Islam, through which we shall see how Islam justly dealt with it.

B - Slavery and its position in Islam.

Islam came to existence in Arabia, and the practice of slavery runs concurrently with human existence. In history, its traces are noticeable in every age and in every nation. Its inceptions were developed in a savage stage of society, and it continued to flourish even when the progress of material civilization had done away with its (22) necessity in the last three centuries. It was recognised and practised among peoples such as the Jews, the Greeks, the Romans, and the ancient Germans whose legal and social associations have most (23) affected the new era's manners and customs.

Two kinds of slavery were, for example, practiced among the Hebrews. The Israelite slave, given into bondage as a punishment for a crime or for a failure on the payment of a debt, took a higher position than that of alien birth. The primitive law allowed the former and his wife their liberty if he is married after six years of servitude, unless he did not want to avail himself of his right. The foreign

(22) The economic progress and development of the new colonial world, relied mostly upon bondage. There were two kinds of bondage, indentured servitude for whites and slavery for negroes. Slaves were used to take up the labour slack everywhere, especially when the indentured one diminished or became inefficient or so costly. A history of negro slavery in New York - E.J. McManus - p.1.

(23) The Spirit of Islam - A. Ali - Idarah - 1 Adabiyat - Delli - p.259.

slaves were entirely excluded from the benefits of that sort of arrangement, which were made by way of national partiality and characteristic isolation. (24) In Christianity, as Will Durant observes

"An institution that had lasted throughout known history appeared inevitable and eternal, even to honest moralists. Pope Gregory I continued to use hundreds of slaves on the papal estates, and approved laws forbidding slaves to become clerics or marry free Christians. The church denounced the sale of Christian captives to Muslims, but permitted the enslavement of Muslims and of Europeans not yet converted to Christianity. Thousands of captured slaves and saracens were distributed among monasteries as slaves; and slavery on church lands and papal estates continued till the seventh century ... St. Thomas Aquinas interpreted slavery as one consequence of Adam's sin, and as economically expedient in a world where some must toil in order that others may be free to defend them. Such views were in the tradition of Aristotle and the spirit of the times." (25)

However, "the decline of slavery, said Will Durant, was due not to moral progress but to economic change." (26) Such was the situation of slavery under the most advanced system of laws known to the ancient world, let alone talking about it under the pre-Islamic Arabia where aliens could hardly survive.

It is a fact that, Islam, by its emergence, could successfully

(24) The Hebrew Code - Exod XXI says "1. Now these are the laws which you shall set before them. 2. When you buy a Hebrew slave, six years he shall serve and seventh year he shall go out free for nothing. 3. ..if he is married his wife shall go out with him" primitive law - A.S. Diamond - London 1935. p.103.

(25) The age of faith - Will Durant - Simon and Schuster, New York 1950 - p.554.

(26) Ibid p.554.

handle the problem in such a manner that slavery could be better rather than worse. It established justice and peace all over the Muslim world. Under its banner, all people became brothers holding fast all together the Rope of Allah. The Holy Qur'an says:

"And hold fast, All together by the Rope which Allah (stretches out for you), and be not divided among yourselves; and remember with gratitude Allah's favour on you; for ye were enemies and He joined your hearts in love, so that by
(27)
his Grace, ye became brethren."

The establishment of peace among all people was, in my opinion, the first step taken by Islam which greatly reduced slavery. In other words, Islam, by prohibiting all kind of wars, could close the main gate which had, for a long time, lead to continuing slavery. This was, however, different from that which lead the nations in the last few centuries, to slavery. The reason was, of course, economic rather than anything else.

However, war - in the Shariah - seems to have been maintained as the only justification for Muslims to place others into bondage. This occurred with regard to captives taken in Jihad "Muslim war" waged by Muslims against those who persecuted the faith. The permission of such a practice was revealed in the Holy Qur'an in an implicit way rather than an explicit, that is when a phrase such as "Right hands
(28)
possess" are frequently repeated in some verses concerning marriage. In other words, in the Qur'an there is no explicit text

(27) CH. III v.103.

(28) See, for example, the Qur'an, CH. IV v.3.

which clearly says: enslave your prisoners of war whether they are men or women.

Therefore, for some reasons (which shall be mentioned in their proper places) Muslims were temporarily allowed to take such steps as should, be, in my belief, left as a matter of the past. Today, the only suitable treatment of prisoners of war is either to release them generously or against ransom. The Holy Qur'an states:

"Therefore when you meet the unbelievers 'in fight' ..., bind a bond firmly (on them): thereafter (is the time for) either generosity or ransom: until the war lays down its burdens
(29)
..."

Returning to the point, Islam thought that enfranchisement of those already in bondage, whether in spirit or otherwise, was to be achieved only by continued wise and humane laws. Therefore, Islam started according them the same status as their masters, and looked at them as brothers. The Holy Prophet says: "Slaves are your brothers, so
(30)
feed them with the like of what you eat ...". The people are all equal and none of them have superiority over another, except those who have the careful observance of duty - moral greatness. The Holy Qur'an says:

"Verily the most honoured of you in the sight of Allah is (he
(31)
who is) the most righteous of you ..."

Regarding daily treatment of slaves, it was considered hateful to

(29) CH. XLVII v.4.

(30) Sahih al-Bukhari (Arabic, English) Vol. III p.433.

(31) CH. XLIX v.13

look down upon them or to say: "my slave" or "my slave girl". "You should not say "Feed your Lord (Rabbaka), ... but should say, 'my master (e.g. Feed your master instead of lord etc.) ... and one should not say, 'my slave ('Abdi), or my girl-slave (Amati) but should say my lad (Fatai) my lass (Fatati), and my boy (Ghulami)"⁽³²⁾ said the Prophet. As far as Islam is concerned slavery is considered a casual practice which should fade away anytime. It was related that the Prophet says: "Allah made you their master, and if He wills, make them your masters"⁽³³⁾ ..."

By the same token, Islam protected the existing slaves from being maltreated or oppressed by their masters. Those who killed or mutilated their slaves, for instance, must be punished in the same degree: "Whoever killed his slave, we would kill him, or mutilated his slave we would mutilate him etc."⁽³⁴⁾ said the Prophet. Such a treatment in kind made the other observe that "The Muslim ... handled them (slaves) with a genial humanity that made their lot no worse - perhaps better, as more secure - than that of a factory worker in nineteenth-century Europe. ...The off-spring of a female slave by her master, or of a free woman by her slave, was free from birth. Slaves were allowed to marry; and their children, if talented, might receive an education. It is astonishing how many sons of slaves rose to high places in the intellectual and political world of Islam; how many, like Mahmud "of Ghazni" and the early Mameluks became kings ..."⁽³⁵⁾

(32) Sahih al-Bukhari - vol. III p.437.

(33) This saying of the Holy Prophet was mentioned by al-Imam al-Ghazali in his book "Ihya Ulum a-Din - See Shubahat Hawel al-Islam - M. Qutb - p.35.

(34) Ibid p.36.

(35) The age of faith - W. Durant p.209.

Ultimately, these two practical methods were used by Islam to overcome this problem, and to liberate fully those in bondage. The first was voluntary manumission (ITQ); the Holy Prophet who was the first example, repeatedly exhorted his followers in the name of Allah to free slaves as "the best act acceptable to Allah that can be done."⁽³⁶⁾ In addition to that, he ordered that sums should be given to slaves from the public treasury in order to purchase their liberty. Also, it was ruled by the Prophet that for certain sins of omission, the penalty should be by choice, one of them is to manumit a slave. In the Holy Qur'an, a believing slave should be liberated by whoever unintentionally killed a Muslim as well as giving compensation to the latter's family. Says the Holy Qur'an:

"Never should a Believer kill a Believer; but (if it so happens) by mistake, (compensation is due): if one (so) kills a believer, it is ordained that he should free a believing slave, and pay compensation to the deceased's family,
(37)
..."

The Muslim society, accordingly, was compensated as a free person had been added to it and at the same time the family received financial compensation for its loss. Therefore, both the family and society received compensation.

The second method was the conditional manumission (al-Mokataba) which means a slave, male or female could ask for his/her freedom by a written deed fixing the amount required for it and allowing the slave meanwhile to earn money by lawful means. The Holy Qur'an says:

(36) The Spirit of Islam - A. Ali p.263.

(37) CH. IV v.92.

"..And if any of your slaves ask for a deed in writing (to enable them to earn their freedom for a certain sum), give them such a deed if ye know any good in them; yea, give them something yourselves out of the means which Allah has given (38) to you."

Such a deed was not to be refused if the request was genuine and the slave had character. In addition, the master is directed to give his slave help with money out of his own resources in order to enable him/her to regain his/her liberation. By those two methods, a huge number of slaves, for the sake of Allah regained their freedom and got their dignity back. If some of the followers of Islam ever allowed slavery to flourish, they utterly (in direct contravention of the injunctions of the Qur'an) ignored the spirit of Islam and the teachings of its Prophet. "The time is now arrived when humanity at large should raise its voice against the practice of servitude, in whatever shape or under whatever denomination it may be disguised. The Moslems especially, for the honour of their noble Prophet, should try to efface that dark page from their history - a page which would never have been written but for their contravention of the spirit of his laws, however bright it may appear by the side of the ghastly scrolls on which the deeds of the professors of the rival creeds are recorded. The day is come when the voice which proclaimed liberty, equality, and universal brotherhood among all mankind should be heard with the fresh vigour acquired from the spiritual existence and spiritual pervasion of thirteen centuries. It remains for the Moslems to show the falseness of the aspersions cast on the memory of the great and noble Prophet, by

proclaiming in explicit terms that slavery is reprobated by their faith
(39)
and discountenanced by their code."

4. The legal status and the rights of woman in islam.

"O mankind! reverence your Guardian - Lord who created you from a single Person, created, of like nature, his mate, and from them twain scattered (like seeds) countless men and women;- reverence Allah, through whom ye demand your mutual (rights), and (reverence) who wombs (that bore you): for Allah ever watches over you." (CH.IV v.1.)

Contrary to all the beliefs which divide them into two different
(1) beings, man and woman, according to the above Qur'anic verse, are equal in creation. They were simultaneously created from the same essence and substance by the same Creator, and they are, no doubt, brothers and sisters from the same parents, race, and origin. (2) Thus, the only world scripture in which expressions of contempt for women, or regard them as base-born creatures can never be found, is the Holy Qur'an. On the contrary, expressions such as "the believing man and believing woman" are frequently repeated, constantly linking man and woman together on a basis of personal equality in regard to their
(3) duties, rights and merits.

With all its legal and social implications the woman in Islam is a human being created to enjoy as many rights as the man. However, the

(1) In the European modern times, Nietzsche, for instance, believed that man and woman originally descended from two different beings. By their constant association over the ages they developed many points of resemblances and kinship. Man and Islam - Ali Shariati - University of Mashhad press Iran p.10.

(2) Ibid p.13.

(3) The Islamic Review vol. 53 (Nov.-Dec. 1965) p.13.

Shariah (the Holy Qur'an and the Sunnah) does not arbitrarily confer any favour on or deprive anyone of his natural privileges; but on the basis of their human nature with natural evolution of each one of them, it states facts upon which it prescribes the social order. So when the Holy Qur'an states:

(4)

"Men are the protectors and maintainers of women ...",

it actually does not give the man any superiority over the woman, as it connects the degree, which the man has been given, with a materialistic meaning. The Holy Qur'an goes on to say:

"... because Allah has given the one more (strength) than the other, and because they support them from their means. Therefore the righteous women are devoutly obedient, and guard in (the husband's) absence what Allah would have them guard..."

(5)

Here, "the Qur'an states that men are quwwamuna ala al-nisa, which in all probability means that men are guardians over, protectors and maintainers of, or responsible for women. The degree of men above women is the former's guardianship over and responsibility for the latter because, as the passage has put it, Allah has made some of them excel others and also because men expend their means. The degree is "operationalized" as the man's role of guardianship, a role which is based on the differential capacities of men and women. It is this role differentiation, together with differential capacities, that may provide

(4) CH. IV v.34.

(5) CH. IV v.34, Ibid

(6) The Holy Qur'an says:

"... And women shall have rights similar to the rights against them, according to what is equitable; but men have a degree (of advantage) over them and Allah is Exalted in Power Wise". (CH. II v.228).

a satisfactory explanation of the degree. It is probably interesting to note that the Qur'an does not state it categorically that men are superior to women or that Allah has made men excel women. The passage (CH. IV v.34) is unequivocal in specifying the financial role of men as a factor in their designation as guardian of women. But when the verse speaks of excellence, it does not allocate it to any particular sex. (7) Much less does it associate excellence with men exclusively."

Further, another argument might be needful in connection with the matter of bearing witness in certain matters. This is when the Holy Qur'an states:

"... And get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind her ..."

(8)

It is not in the sense of capability the Holy Qur'an brought the matter of bearing witness. Muslim woman is as absolutely capable as her opposite sex of discharging the duty of giving testimony. However, a policy of one man to two women witnesses is suggested by the Holy Qur'an in matters of transactions only and probably for the following reasons: "... considering the testimony of two women equal to that of one man is a concession in the woman's favour, aimed at lightening her moral burden and relieving her conscience, rather than a curtailment of her equal rights. Moreover this Qur'anic stipulation was probably made in recognition of the social fact that the conclusion of such contracts women were not usually present; and if they were, they might not be

(7) The family structure in Islam - H. Abdal Ati ATP P.178.

(8) CH. II v.282.

interested enough or closely attentive to the degree that would warrant their responsibility for giving the necessary testimony. Thus, instead of discharging the validity of the women's testimony altogether or holding them as equally responsible and equally experienced in financial matters as men, the Qur'an took what Muslims may call a cautious position: it prescribed the witness of two trustworthy men or one man and two equally trustworthy women."⁽⁹⁾

Nevertheless in islam, woman (in her infancy or childhood) is not regarded as a curse⁽¹⁰⁾ as she used to be in al-Jahiyylia (time of ignorance), in her father's home she enjoys absolutely the same status as that of a boy. In other words, whatever rights her brother enjoys, she is no doubt entitled to the same such as food, clothing, health care, and education etc. When of marrying age, with exclusion to those certain categories to whom the Muslim cannot get married, she, just like the man, has been granted the right to marry any man of her choice. No one, not even her father has any right to force a husband on her. Concerning this point, the choice of women is, in the opinion of this writer, stipulated for as much as that of men, when the Holy Qur'an states:

(11)
"...Marry women of your choice..."

If she is, for instance, coerced by her legal guardian to get married

(9) The family structure in Islam - H. Abd al Ati - ATP - p.174.

(10) In this connection says the Holy Qur'an:

"When news is brought to one of them, of (the birth of) a female (child), his face darkens, and he is filled with inward grief!" (CH. XVI v.58)

(11) CH. IV v.3.

to anyone she does not like, she can repudiate her marriage before it is consummated. It is reported by al-khan-sa that "her father gave her away in marriage, and she was a thayyib, and she did not like it. So she came to the Messenger of Allah (s.a.w.) and he annulled her marriage." (12) (13)

Moreover, by way of comparison, while by a custom or otherwise her counterpart in the west is identified by her father's or husband's name, Muslim woman is known by her own name. Furthermore, unlike the civilised laws of the west, according to the Shari'ah (Islamic law) married or unmarried woman has the absolute right to retain her separate estates. In other words, she can hold property in her own name and administer it independently if she wishes. She is also (14) (15)

(12) The word thayyib includes both a woman whose husband has died and a woman who has been divorced. (B.67:43) See A manual of Hadith. M. Ali p.272.

(13) In this connection the Holy Prophet said: "The widow shall not be married until she is consulted, and the virgin shall not be married until her consent is obtained: They (Muslims) said O Messenger of Allah: How shall her consent be obtained? He said "(It is sufficient) that she remains silent." (B.67:42) A manual of Hadith - M. Ali - p.271.

(14) "By modern custom a married woman usually takes the title Mrs. and substitutes her husband's surname for her own but there is no obligation to do this. For legal purposes she is designated Mrs. (christian names) (maiden surname) or (married surname). Her husband's designation, if any, may be assumed with the rest of his name." Principles of Scottish Private law - Walker Vol. 13th edition clarendon press Oxford 1982 p.236.

(15) At common law, and before the intervention of the statute in nineteenth century by the jus mariti, a wife's whole moveable property passed automatically to her husband on marriage as his absolute property ..." Principles of the law of Scotland - G.T. Bell Edinburgh - p.606.

(16)

entitled to invest whatever she may acquire by inheritance, dowers or by gifts ... etc. This right was recognized for woman by Islam fourteen centuries ago, a fact which is sometimes regarded as astonishing and remarkable by some western writers. Hence, Domombynes notes that Qur'anic law has given the wife "a status which is, in many respects, more advantageous than that bestowed by modern European law". In similar statemen, Lichtenstadt has observed that the Qur'anic attitude "is astonishing ahead of its own time and environment". And by ruling in favour of the woman's right to personal property, "the Prophet anticipated western legislation by many centuries". H. Abd al-Ati, commenting on this, said: "This doctrine of economic independence was probably too far in advance of its own time and environment to be implemented easily even though it may have been accepted as a part of the religious teachings. Western writers, who view the doctrine with an almost enthusiastic astonishment or admiration, hasten to cast doubt on its practicability in everyday life. They claim that it is difficult in practice for a woman to exercise thses economic rights, although she is certain of maintenance and service according to her

(16) Within this context the Holy Qur'an says:

"God (thus) directs you as regards your children's (inheritance): to the male, a portion equal to that of two females:..." (CH. IV v.11)

Islam is often accused for being unfair with women in the matter of her interitance. In fact, "the girl's inheritance, in the Islamic law, is not meant for its sake, rather it is built up on the marriage system in it. And it is like the subtracting process after summing up in order to get a correct result from the two processes. If the woman is allowed to take from one side, she has to let go from the opposite one ... When the woman has an obligatory right to use her husband's money, the man does not have the right to use his wife's. And Islam exhorts marriage, if not makes it obligatory, therefore it adds to the woman a husband and gives her a new rights. Had she become equal to man in inheritance in addition to her exclusive privilage, there would in fact be no equality as she prospers while he declines since she is eligible to inheritance and the right of expenditure whereas he has only an equal right in inheritance if they were treated equally in this matter ..." See Mustafa Sadek al-Rafii (Arabic) Al-Shak'a - AUB1970 p.159 - 161.

rank. This difficulty, it is suggested, seems to arise from the fact that law books and custom, according to Demombynes," give the husband absolute authority over his wife and children"; and other than these economic rights, "the theoretical subjection of the wife to her husband is," says Jeffery "almost complete ... (which) seems to be a survival from pre-Islamic custom ..." However, the only Muslim school of law which regarded the wife's economic rights doctrine as too far reaching and tried to set certain limits to it is the Maliki's. (17)

Now let us briefly give the reader an account about the case which has been one of the issues of doubt in the sight of western writers or others which can be exploited whenever they want to talk about Islam. That is the case of polygamy in Islamic law. At the time Islam emerged, the antiquity polygamy was a recognized institution, and highly practiced by most nations, the Arabic in particular. In Arabia, for instance, the typical Arab used to exercise his natural right to unrestricted polygamy; he used to get married to a countless number of wives. These numerous wives could not be justly treated as they were regarded by their husband as no more than cattle; some of them were absolutely neglected, as they became neither wives nor divorced, but just in between. Here the words of the Holy Qur'an came down to make the point of the impossibility of absolute fairness between women (wives), warning the Muslims (who might have more than one wife) not to practice such a jahili usage and not to neglect anyone of them:

"Ye are never able to be fair and just as between women,
even if it is your ardent desire: but turn not away (from a

(17) The family structure in Islam H. Abd al-Ati ATP p. 166 .

woman) altogether, so as to leave her (as it were) hanging
 (18)
 (in the air) ..."

The Arabs also had a custom to the effect that whenever a woman was to
 finish her "iddat" (19) they used to keep her in order to prejudice her.
 She must be returned on equitable terms or set free on equitable terms
 states the Holy Qur'an:

"When ye divorce women, and they fulfil the term of the
 (iddat), either take them back on equitable terms or set them
 free on equitable terms; but do not take them back to injure
 them or to take undue advantage; if anyone does that, he
 (20)
 wrongs his own souls."

Thus we have an example from woman's miserable history in Arabia before
 the advent of Islam.

Soon Islam emerged and man's natural right to polygamy was
 restricted to a limited number which would never exceed a maximum of
 four at the same time. In Islam, polygamy is not a thing which is
 highly recommended, rather a permission is made with regard to certain
 circumstances and at certain times. It may not arise at all unless
 some conditions have been strictly fulfilled. Neverthelese, this
 restricted polygamy is obviously dependent on whether man is able to
 deal justly with more than one wife or not. If he is not able to do
 so, he must be restricted to one only. The Holy Qur'an thus states:

"... Marry women of your choice, two or three, or four; but

(18) CH. IV v.129.

(19) It is the waiting period in which the woman cannot be free until
 it expires.

(20) CH. II v.231.

if ye fear that ye shall not be able to deal justly (with
(21)
them), then only one, ..."

dealing justly with women (wives) therefore, is an irrevocable condition without which such a right to polygamy may not be exercised.

However, in view of this Qur'anic text the meaning of justice is to be that which can be done, such as justice in material and unmaterial things (e.g. food, cloth, shelter and sleep), rather than (22)
which is beyond one's control, such as justice in affection. This is the only interpretation which one can suitably reach when we come across another Qur'anic text, such as the above mentioned (CH. IV v.129), which came to tackle any conflict which might happen between the husband and one of his wives. Had justice excluded a matter such as affection, polygamy would have never been permitted in the first place, as it would be contrary to justice, though certain circumstances may desperately request it. Nevertheless, as A. Ali noted "the clause in the Qur'an which contains the permission to contract four contemporaneous marriage, is immediately followed by a sentence which cuts down the significance of the preceding passage to its normal and legitimate dimensions ... The extreme importance of this proviso, bearing especially in mind the meaning which is attached to the word "equity or justice" (adl) in the Qur'anic teachings, has not been lost sight of by the great thinkers of the Muslim world. Even so early as the third century of the Hejira (Muslim calender), during the reign of

(21) CH. IV v.3.

(22) It is reported that the Holy Prophet used to say: "O Lord this what I can justly do, blame me not for what I have no power over but you have:" (Tharmadi, Abu DAWAD ..) See Fi Dhil'al Al-Qur'an - Sayyid Sayyid Qutb - vol. 1 (Arabic) p.582.

al-Mamun, the first Mutazalite doctors taught that the developed
(23)
Qur'anic laws inculcated monogamy ..."

But the fact which should be borne in mind is that there is sometimes a justifiable reason, which cannot be overlooked, latent behind restricted polygamy, which makes it highly needful; that is, when certain conditions occur at certain times. In A. Ali's words, for instance, it is needful for the preservation of women from starvation or utter destitution; the state from which immorality arises in a
(24)
society. However, the utter destitution, from which the woman might discriminately suffer, is not the only cause of immorality, though it is partially to be blamed, rather, the way in which a woman is brought up, and how much she needs someone to tie her down, and how the opposite sex reacts in society. In other words, this writer considers, that, if there is any destitution or other hardship, which affects only woman or her children, this would be attributed only to the failure of the state and the inequality which prevails in that society. Thus, destitution cannot be the only justification for the allowing polygamy in Islam.

Irrespective of all personal reasons which can be sometimes good justification for it, the main reason, in the opinion of this writer, that may be presented to the modern mind, is the aftermath of the state of war which has often come about since then. With the exception of nuclear war which wholly causes destruction, whenever a conventional war took place the casualties would be mainly among men whose job in such an emergency state is to defend the country. This very high percentage of killing among men, would obviously leave behind many

(23) The Spirit of Islam. A. Ali - Idarah-1 Adabiyat - 1 Deui p.229.

(24) Ibid p.230.

families consisting of married and unmarried women, whose number is already higher than that of men (see for instance what happened in Germany, just after world war II). In such terrible conditions, woman needs terribly a man to look after her and her children, and needs to be tied to him in such a desperate society. It could be argued that woman can be taught how to look after herself as well as her children, and guaranteed a job by which she can be able to feed herself and her children. This argument can be partially accepted, but this is not the end of the problem - woman, being in Muslim society, cannot after all freely exercise her natural sexual activity unless it is carried out legally (i.e. marriage). The semi-communist way of noncontractual sexual intercourse which is allowed in the civilization of the West, today, is not acceptable in Islam as it is always a source of unchasteness and immorality in society. The Qur'anic injunction thus runs as follows:

"... (lawful unto you in marriage) are (not only) chaste women who are believers, but chaste women among the people of the Book, revealed before your time, - when ye give them their due dowers, and desire chastity, not lewdness, nor
(25)
secret intrigues ..."

So, in the Muslim society which is supposed to be obedient to the ordinances of Allah, whose words in His holy Book says:

"Who abstain from sex, * Except with those joined to them in the marriage bond, or (the captives) whom their right hands possess, - for (in their case) they are free from blame, *
But those whose desires exceed those limits are
(26)
transgressors;-"

(25) CH. V v.6.

(26) CH. XXIII vs. 5,6,7.

there is no alternative but to permit restricted polygamy (i.e. not more than four wives) with conditions (e.g. justice plus financial capacity), so that the surplus of women can be faithfully secured and well looked after.

For this issue, the continuing war (forgotten war) between two Muslim countries, Iran and Iraq, can be a good study case. The heavy casualties of the war, so far mostly men, are estimated as not less than half a million. And surviving those who are killed, countless unattended families have of course been left without anyone to look after them. The question is now how a problem like this can be solved, if polygamy is not allowed. Therefore, I am of the opinion that the statesmen of both countries should attempt wisely to find a solution to this problem. This would be to encourage polygamy, at least in the coming years, in order not to be entrapped in endless social problems.

Returning to woman's right, she, as a wife, is entitled, like the husband, to initiate and actually dissolve the marriage tie independently. "In certain case she may do so without the permission of any court of law or the husband's consent. These cases are: (1) what is commonly called "delegated divorce", in which the man agrees in the marriage contract to transfer, irrevocably, his right of divorce to the woman, so as to empower her to free herself from the marriage bond if and when she so desires; (2) what is also commonly called "suspended" or "conditional" divorce, in which a man stipulates at the time of marriage that if he does a certain thing (3) contrary to his wife's wish, she will be free to divorce herself from him." However, it should be pointed out that some of these forms of divorce are unacceptable to certain Muslim jurists who, nevertheless, accord the woman in principle the right to seek her freedom through alternative

(27)
channels.

Moreover, through proper judicial processes, she may initiate and actually obtain a divorce if she is aggrieved or betrayed. The husband's consent to her request would be immaterial when she has valid reasons for divorce in such cases. It becomes the duty of the proper authorities to enable her to gain her freedom from the marital bond. Grounds for such an action may include: (a) the so called "option puberty" in which the wife is entitled at puberty to either retain or dissolve a marriage that was previously contracted on her behalf by a fully qualified guardian, (b) long absence of the husband through desertion, (c) mistreatment, (d) impotence and (e) physical or financial inability".⁽²⁸⁾ This is a vast issue which cannot be adequately discussed in brief, the above summary is intended only to show some of the woman's legal rights in Islam.

Finally, concerning her social and political activities, the woman, like the man, can undoubtedly be an eminent Muslim scholar-jurist, whose sound opinion is recognized in all matters (i.e. religious and political) and widely considered as being as capable as man to do so. On the practical Shurah (Muslim democracy) level, she is entitled to vote, to elect and to be probably a candidate to hold some political positions in the State. However, for the issue of whether a woman can be appointed as the general leader (greater Imamah) or not, it seems, according to the words of al-Naysaburi in his Tafsir that it should be confined to the male sex as one of its conditions. He says

(27) The family structure in Islam H. Abdal Ati ATP p.243.

(28) Ibid 244.

"The Ulemas (scholars) have laid down the following attributed for the general Imamate: Islam, wisdom, maturity, male sex, justice, sufficiency, and capacity for ijtihad (original views on religious matters)."⁽²⁹⁾ This view, nevertheless, is not without authority; the scholar-jurists, whenever they reach such a conclusion, have relied on the sole hadith of the Holy Prophet (s.a.w.) relating to this matter, in which he says: "No people will be successful if they entrust their affairs to a woman". However, woman, in accordance with the following record, can be entrusted with leading positions in the State. "...It is reported of "Umar b. al-khaltab that he entrusted a leading position to a woman. When it was reported to him that the Prophet Muhammad had said "No people will be successful ... etc." (the above mentioned hadith), he (Umar) said that the Messenger of God had been speaking about general matters, namely the caliphate, and that this is evident from another saying of the Prophet that "woman is guardian over her husband's property, and she is responsible for her flock ..."⁽³⁰⁾ This⁽³¹⁾ is thus the opinion of Ibn Hazam and Abu Hanifa as well.

Nevertheless, in the past as well as probably in modern times, the issue of the "leadership by women" has not received sufficient attention to be fully considered by Muslim scholar jurists. This is perhaps because of being regarded as a matter of no importance, or perhaps for some other reasons. Neither al-Mawardi in his book al-Ahkam al-Sultaniyah, nor others after him, bothered much to pay great attention to whether women can rule or not when dealing with the

(29) The Islamic Review vol. 53 (May 1965) p.27.

(30) Ibid p.27.

(31) Ibid p.27.

leadership "Imamate". All they mentioned is the qualities which should be possessed by the person who is going to be elected, leaving aside the sex question, which was not discussed. Al-Mawardi, for instance, says "... the qualities needed for the imamate are several: justice.., knowledge .., healthy sense .., healthy physique .., sagacity .., (32) courage .. and family relationship (i.e. membership of Quraysh)".

The only explanation for such a scholar-jurists omission to deal with the foregoing question is, in my opinion, that the male sex quality at that time was an axiomatic one. However, N. Shanan, in her article "The Muslim woman and Imamate", who strongly argues for women, has a different view in explaining this phenomenon. With regard to the two assumptions she made, she favours that in which the male sex is not considered to be a necessary qualification for electing or being elected to the Imamate, rather than that which states that to be of male sex is an essential prerequisite to acting out the function which would have been taken for granted by all people. Being taken for granted by all people, in my opinion, was the reason why the male sex quality has not been mentioned specifically. Moreover, she supported her view by quoting an extract from al-Mawardi himself, dealing with the executive ministry, in which he suggested that woman cannot undertake this function. She said: "The specific mention of women in this context is proof of the fact that the male sex was not in al-Mawardi's opinion something to be taken for granted as an essential (33) qualification."

It could be, however, argued that the reason why al-Mawardi specifically mentioned women here is because women probably can hold positions other than greater Imamate (leadership), but this

(32) Al-Ahkam as Sultaniyya - al-Mawardi (Arabic) - Dar al-Kutab al-Ilmiah p.6.

(33) The Islamic Review vol. 53 (May 1965) p.28.

woman cannot hold, as al-Mawardi suggests, for the reason given.

However, holding such a position as the greater Imamate is not an easy one which can be easily entrusted to woman in Muslim society, though it can be logically concluded for the woman to do so when she, according to the beginning of this discussion, has been given all rights to vote, elect and to be a candidate in Shurah Council. Therefore, this issue should be fully discussed by the Scholar-jurists, whose decision would be accepted by consensus. A negative decision would not be, in the opinion of this writer, harmful to her political rights, rather to lightening her burden from a lot of responsibilities she might not bear.

CHAPTER TWO

Freedom of religion

Freedom of religion is one of the fundamental human rights, it could have been dealt with in the previous chapter. However, owing to its important objective and purpose, I intend to deal with the topic in the present chapter and at the same time discuss related issues.

Historically, Islam is the last of the three monotheistic religion. It emerged in the Arabian Peninsula, amongst various divine and non-divine cults followed by Arabs and non-Arab peoples, who inhabited Arabia and its surrounding lands. The Holy Qur'an tells in chapter "al-Hajj", after enumerating the faiths which existed at the time of the Prophet, that the only one who shall judge between people of different faiths is Allah, once they are invited to Islam the latest and last religion:

"...Those who believe (in the Qur'an), those who follow the Jewish (scriptures), and the Sabians, Christians, Magians, and Polytheists, - Allah will judge between them..."⁽¹⁾

Beside the followers of the Holy Qur'an, who came later, there were two other originally divine religions. The Jews had come to Arabia, seeking asylum from persecution by the Romans; Christians also had come to Arabia to escape the massacres perpetrated by non-christians and Arian descending. The religious Sabian communities were considered to be one of the sects of Christianity.⁽²⁾ The other forms of religion which existed among people in Arabia in the 7th century AD were temporal, Magians "Majus", the worshippers of fire e.g. the

(1) CH.XXII v.17.

(2) In Arabic they are called "subba". They are also called Nasoraean or Mardaeans, or Christians of St. John.

ancient Persians and Medians, and the Polytheists, that those who identified gods with Allah e.g. most of the Arabs before the advent of Islam.

To these different believers, the Prophet Muhammad (s.a.w.) eventually appeared to the world as a whole, inviting to Islam and reforming whatever had been morally and religiously corrupt. He wisely preached to them to adopt the straight path

"...Invite (all) to the way of the Lord with wisdom and beautiful preaching; and argue with them in ways that are best and most gracious..."⁽³⁾

Soon, he (s.a.w.) found himself and his earlier disciples in confrontation with a most vigorous hostility to his people by the tribe of "Quraish". The Jews, who had established themselves in Arabia for ages and had formed a very powerful party, often promoted plots. The Holy Qur'an describes their abhorrence to the new faith:

"...strongest among men in enmity to the Believers will you find the Jews and Pagans; and nearest among them in love to the Believers will find those who say "we are Christians"..."⁽⁴⁾

A - The Muslim concept of freedom of religion

"Say "Muhammad": O ye that reject faith! I worship not that which ye worship, nor will ye worship that which I worship.

(3) CH. XVI v.125

(4) CH. V v.85

And I will not worship that which ye have been wont to worship, nor will ye worship that which I worship. To you be your way, and to me mine." (CH. CIX)

Islam from the beginning has manifested that faith as a matter of personal conviction, should not lead to conversion by force or compulsion. Forced conversion is incompatible with religion, for (1) religion logically depends entirely upon faith and the will of the person concerned and faith and free will would be meaningless if induced by force; (2) Truth and error are clearly shown and explained by the Holy Qur'an; hence there should be no doubt in minds of people as to the fundamentals of faith. The Holy Qur'an in stressing this point says:

"...Let there be no compulsion in religion: Truth stands out clear from Error; whoever rejects Evil and believes in Allah hath grasped the most trustworthy hand-hold, that never
(5)
breaks..."

In interpreting this verse, with reference to another verse previously mentioned in the same chapter of the Holy Qur'an, which says:

"And fight them on until there is no more tumult or oppression, and prevail justice and faith in Allah; but if they cease, let there be no hostility except to those who
(6)
practice oppression.:"

(7)
Sayyid Qutb, one of the most learned scholars of Islam in our era, has said that some superficial dishonest orientalist have accused

(5) CH.II v.256

(6) CH.II v.193

Islam or rather the Holy Qur'an of contradicting itself and have alleged that Islam was spread widely throughout the world by the sword. Others have intended to say the opposite in order to discourage Muslims, and to suppress in their hearts the spirit of Jihad. He has further explained that in fact Islam has been wrongly accused without reference to knowledge. Islam actually took up the use of the sword and strove, in the name of Allah, not to induce conversion by force but to secure substantially valuable goals for humanity.

It (Islam) strove to eliminate tumult and subjugation which made Muslims suffer from the beginning and to ensure peace for their life, and wealth, and protection for their faith. The Holy Qur'an considers that turning Muslims away from their faith, and oppressing them, is worse than slaughter. Adopting this principle, Islam does wholeheartedly uphold "freedom of religion". Moreover, Islam struggled against obstacles in its attempt to bring its message to non-Muslims. This message points to the path which, in Muslim belief, is the best for this life and the hereafter. So long as there are no obstacles made to Muslims' right to invite, with wisdom, others to Islam, there is no compulsion in religion. Thus Islam has guaranteed what is known as "freedom of preaching".⁽⁸⁾

(7) Sayyid Qutb is a foremost Muslim thinker of the latter half of this century. Born in 1906, he came from a deeply religious Egyptian background. He started his career as a literary man, and progressed to become one of the most original thinkers of the contemporary Islamic Movement "Muslim Brotherhood". He wrote with a profound sense of conviction which led him to give his life for his beliefs when he was executed in August, 1966 by the Nasser regime of Egypt. (From his book "In the shade of the Qur'an").

(8) See "Fi Dhilal Al-Qur'an" (Arabic) VOL.1 P.294.

In addition to that, the Holy Qur'an often repeats and stresses that the Prophet's mission is confined to reminding and conveying his message, not more:

"Therefore do thou give admonition, for thou art one to admonish * Thou art not one to manage (men's) affairs * But if any turn away and reject Allah, - * Allah will punish him (9) with a mighty Punishment",

Consequently, the function of the Holy Prophet (s.a.w.) was not to impose Islamic faith on others by compulsion, physical or otherwise, for compelled faith means no faith. He and his followers should not but strive spiritually and let Allah's Plan work as He wills. (10) The Holy Qur'an clearly states

"If it had been thy Lord's will, they would all have believed, - all who are on earth! wilt thou then compel mankind, against their will, to believe!..." (11)

The foregoing statement was generally emphasized in the following words of the Universal Islamic Declaration of human rights which recently appeared. This states explicitly:

"Every person has the right to freedom of conscience and worship in accordance with his religious beliefs..."

(9) CH. LXXXVIII v.21,22.

(10) Even the closest person to the Prophet (s.a.w.); his uncle Abu-Talib whom the Holy Apostle loved dearly and who supported Islam till the last second of his life. The Prophet could unsuccessfully have him but remained in his father's belief. In this connection the Holy Qur'an says:

"It is true thou wilt not be able to guide every one whom thou lovest; but Allah guides those whom He will..." (CH. XXVIII v.56).

(11) CH.X v.99.

This goes in conformity with the United Nations in so far as the latter states in Article 18:

"Everyone has the right to freedom of thought, conscience and religion,..."

But when it goes on to state that:

"...the right includes freedom of change his religion or belief,..." the conformity is lessened, as each one of them is seemingly based on a completely different approach towards life, this needs to be made very clear.

The United Nations' Article is concerned to secure absolute freedom of thought, conscience, religion, including the right to change one's faith and to manifest it in teaching, practice, worship and so on. The latter aspect is obviously one of the consequences of the original principle, which can logically be denied by no one in the sense of its absoluteness, with the existence of different religions' missionaries in every part of the world. This very liberal attitude of Article 18 in particular, and of the United Nations as a whole does not exist in the Islamic version which is motivated by a full awareness that adherence to Islam for those of Muslim origin is a matter of public order (11)R in the Islamic state. Violating it constitutes a serious offence that the Islamic law heavily punishes for.

The international approach can be relatively accepted if we can interpret it to have only meant the non-Muslims, whoever they are and whenever it is construed in connection with the Islamic State. Otherwise, our statement would be concluded as opposing the values of

(11)R "...Faith in the Islamic state is a matter of public order against which attack by any means is absolutely prohibited..." see "Nizam al-Islam, al-Hukum wa al-Dawla" - M.al-Mubarik. p.126.

the Shariah (Islamic law), which must be constitutionally adopted by Muslim states as the supreme law to govern their whole affairs. In regard to this, the proposed model of the Islamic constitution states in Article 3 of Chapter 1 that:

"The state and society are based on the following principles:

(a) the supremacy of the Shariah and its rules in all walks of life;..."

Therefore, whatever statement appears generally either in the United Nations or in the Islamic declaration counterpart should be confined to the law governing that part of the world. In other words, international declarations as such should not ignore laws existing in different parts of the world as long as these laws can be recognized as humane and civilized. For instance, the Islamic constitution, with regard to freedom of conscience, states in Article 8:

"Every person has the right to his thought, opinions and beliefs. He also has the right to express them so long as he remains within the limits prescribed by law..."

Accordingly, apostasy as far as the Shariah (Islamic law) is concerned, is the most abhorrent crime that can be committed; the crime which Islam can never be pleased with and against which it passes great punishment because of its negation of its basic principles. (This point shall be examined in the next few pages).

One might argue accordingly that Islam ostensibly guarantees the right to freedom of religion and its consequences but in fact such freedom does not exist in it, since it punishes, on the one hand, its Muslim people for changing it and welcomes, on the other, the others who embrace it. In fact, as has been previously said, Islam

undoubtedly does so and does additionally demand more than that; it requires from the others the right to freedom of preaching. The argument to the contrary, whatever it is, would fade away when we could argue in the light of the following facts and be aware of them. Firstly, once the Islamic state is restored, the Muslim polity will be constituted on a religious base and not ethnological or linguistic, appreciating the reason for penalising an act such as apostasy, would not be difficult, as it constitutes a politico-religious rebellion. The greater the harm of a given rebellion to a polity, the greater is the severity of repression. Every civilisation, even the modern western or eastern one, based on secularism - has provided capital punishment against violating the integrity of what it considers its very *raison d'être*; and one cannot deny that right to Islam.

Secondly, by guaranteeing the said rights, Islam has mainly meant the non-Muslims who live in its territory, and simultaneously taken the benefit of the principle of reciprocity by which Muslims in non-Islamic territory can freely practice their religion. Muslims there might also be permitted to invite Non-Muslims to Islam; the most righteous religion. The Holy Qur'an in stressing this point says:

"Such is Allah, your cherisher and sustainer in truth: apart from Truth, what (remains) but error? How then are you
(12)
turned away?.."

Thirdly, no act shall be considered by Islamic law a crime and no punishment awarded therefore unless it stipulated as such in the clear wording of the law.

Now let us consider "a postasy and its position" from an Islamic legal point of view. A postasy (Ridda), and a postate (Murtad) in Islamic law means turning away from Islam by a Muslim. Not only does it occur when a person declares his conversion to some non-Islamic religion or otherwise, but also when he refuses to believe in any and every basic Article of the Islamic faith. (13) This is an absolutely unacceptable deed in Islam, for the Holy Qur'an says:

"...But whoever changeth from Faith to Unbelief, hath strayed without doubt from the even way." (14)

Therefore, capital punishment for an apostate is prescribed with no distinction made between a Muslim born of Muslim parents and a convert; and similarly there is no difference between accepting Judaism or Christianity, Atheism or any other non-Islamic faith. This was unequivocally decided by the saying of the Prophet (s.a.w.) and his deeds. Stressing this point, he says:

"Whoever changed his Islamic religion, then kill him." (15)

Also it was related by al-Bukhari and Muslim on the authority of Ibn Musud (R.A.A.) who said: The messenger of Allah says

"The blood of a Muslim may not be legally spilt other than in one of three (instances):... and one who forsakes his religion and abandons the community." (16)

(13) The Prophet (s.a.w.) says:

"Islam has been built on five (pillars): testifying that there is no god but Allah and that Muhammad is the Messenger of Allah, performing the prayers, paying the Zakat, making the pilgrimage to the sacred house, and fasting in Ramadan." (al-Bukhari & Muslim).

(14) CH.II v.108. In another place the Holy Qur'an says:

"...And if any of you turn back from their faith and die in unbelief, their works will bear no fruit in this life and in the hereafter; they will be companions of the fire and will abide therein..." CH.II v.217.

(15) Sahih al-Bukhari-Arabic-English - Kazi Publications - Lahore (Pakistan). Vol. IX p.45.

(16) It was related by al-Bukhari and Muslim - An-Nawawi's Forty Hadith translated by E. Ibrahim & D. Johnson-Davies. p.59.

As a matter of fact, by the consensus of opinion of the companions of the Prophet, the Caliph Abu-Bakr waged war against the Bani Hunayafa tribe when they decided not to give "al-Zakat" (the obligatory alms) after the death of the Holy Prophet. This was also the decision of all the later Muslim juris-consults. What has been stated can be plainly understood from the words of al-Qadi (the judge) Abu Yusif in his book "al-Kharaj", advising the commander of the Muslims with regard to al-Jizya-tax. He says:

"From apostates, Arabs or non-Arabs, no Jizya is collected, as only
(17)
accepting Islam or death is offered to them ...:

"...but if they repent before the battle, or before they are
vanquished, their lives and properties are spared and their women are
(18)
not captured..."

Thus, Muslim jurists emphasize that before prosecuting and condemning an apostate, it is necessary officially to discuss the matter with him. For if the one who had declared his faith in Islam under coercion, and a person whose faith in Islam has not been known or established were to become apostate, they would not suffer the supreme penalty. So, too, an apostate woman, and a hemaphrodite according to
(19)
Hanafiy school of law would not be condemned to death.

In this era, the so called Bahaism in Iran is a good example which may be considered as a case study on apostasy. Since the resotation of Islamic law in the Islamic Republic of Iran, the Bahais who are a generation of those who forsook Islam nearly a century ago, are considered as apostates and accordingly they have been harshly treated. This is as they often claim and protest in the current western media.

(17) Ben Shemesh - Taxation in Islam Vol. 3 (Kitab al-Kharaj) p.92.

(18) Ibid p.92.

(19) For more details see any jurisprudence book.

For all Muslims, the last century was a period of misery, catastrophe and misfortune. In Iran as well as other Muslim countries, (20) Muslims suffered from governments of tyrannical rulers who were either appointed or at least overrun by the dark imperialists forces which spared no effort to utilize every opportunity and means to create chaos, social and religious tensions in order to break up the unity of the people. Under those circumstances, and during the latter half of the nineteen century, Babism "Bahaism"; the pseudo religion was founded by a person called Ali Muhammad Bab and Husain Ali who later called himself Baha-ullah (Grace of God). Within the same short period of time, and in the holy name of religion, Islam, the greatest obstacle in the way of imperialism in the middle east, was undermined and (21) Qadiyanism was founded in India.

Originally, the main objective of these heretic pseudo religions was to discourage Muslims and suppress the spirit of "Jihad", in order that their colonial masters could execute their sinister designs and achieve their goals. However, Bahaism's falsehood was confirmed by its founder himself the "Bab". When a debate between him and leading Muslim scholars of that time took place, the Bab failed to advance a convincing argument, not even a single sentence with any profundity. All that he said was nonsense in such imperfect Arabic that it caused his audience to mock him. He decorously apologised and withdrew his claim. Later he was again misled by the foreign powers and another

(20) Alas, this is still the condition of the most Arabic countries, though they got all their independence a long time ago.

(21) This sect was founded by Mirza Ghulam Ahamad Qadian; around 1840. Its followers called it the Ahmadiya movement. Since then all Muslims opposed it, and due to their belief in the finality of the Prophet Muhammad (s.a.w.), they considered Ghulam Ahmad an imposter. Even Christians and Hindus refuted his claim of Messiah.

debate was arranged, this time in Tabriz in the presence of the Crown Prince of the state. Again he failed to make any impression and the same story was repeated; his apology and disclaimer, this time in his own handwriting, were handed to the Prince. The document is still preserved in Majilis library in Teheran. Once he broke his pledge again, he was ordered eventually to be executed by the government. (22)

The Bab was succeeded by Hussian Ali who continued with the development of Bahai movement.

Since then, members of the Bahai movement have not been considered as members of a different faith whom Islam may tolerate and give rights to freedom of religion - which is what the Bahais themselves claim; Islam sees them as heretics from Islam. This was clearly emphasised by Ayatullah Shaikh Mahmoud Halbi in his book "The right Path and the wrong Path". 'It is the duty of every Muslim to spend a maximum of eighteen months trying to bring back to "the right Path" those who have taken the "wrong Path". At the end of that period, death would be the just punishment to those who continue to cling to their idolatrous superstitions'. (23)

In the present time in Iran, where the law of the prevailing religion "Islam" was restored after a long period of absence by Ayatullah Khomeini in 1979, the critical position of Bahais is of immediate importance because it might effect a lot of them still in Iran. Nevertheless, according to the words of one of them who was interviewed by Newsweek (June, 1984) they still have a chance to

(22) This is summarized from the book "Finality of Prophethood and A Critical Analysis of Babism, Bahaism, Qadiyanism" - Yahya Noori Iran, Tehran.

(23) Taken from "Index on censorship" Oct. 1983 - p.19.

embrace their original faith (Islam) again; even if the Bahais do not do so, one cannot believe that a decision such as to have all of the Bahais exterminated would be taken by the Government of Iran. This decision would be standing against the goodwill of humanity, particularly when we all know it is too late to convince by force the later generation who innocently inherited this heretic religion. Therefore, I am of the opinion that the case of Bahaism in Iran should be leniently given special treatment and wisely corrected without any harm. At the same time the government must be very strict not to allow
(24)
its public order to be broken again.

For the accomplishment of analysis of whatever has been connected with religion in the United Nations', Article 16(i), which concerns marriage and structure of family, should be given great attention, since it creates a clear incompatibility with some reasonable restrictions Muslims must obey in serious events such as these, on which the whole structure of Muslim society later depends.

This appears in the Article adding the word religion. It states "Men and women of full age, without any limitation due to.... or religion, have the right to marry and to found a family..."

This Article thus touches upon some aspects of what is known in certain legal systems as personal law or the law of personal relationship. If it is literally construed, the first paragraph of it would lead to results some of which would border on absurdity, while others would be abhorrents as offending against universally accepted norms and standards of decency.

(24) Modern Turkey, for example, is the Muslim state which has constitutionally rejected "religion", so the religious status of the individual is not important at all. Thus the case of apostasy never arises in such Muslim states. See Chapter three (the Islamic state).

The only limitations upon marriage mentioned by the Article are that the parties should be of full age and their full free consent to the marriage. Yet the Article has obviously no intention to be interpreted as authorizing marriage between the prohibited degrees, though there is nothing in the language of the Article to suggest that such unions would be repugnant either to its letter or to its spirit. (25)

Even if that were to be accepted at first glance, how are prohibited degrees to be determined? The Article says the right to get married shall be enjoyed with no attention to religion while the notion of prohibited degrees in its essence and its origion, has its roots in religion. (26)

Thus in some orthodox societies, religion regulates fully the law of the family and give its protection. Discarding it in the first paragraph of the Article causes a contradiction with the next sub-article (3) of the same Article. It states:

"3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state..."

However, for example Islam recognizes that "the family is the natural and fundamental group unit of society" and not only accords it the fullest protection but also shows how that protection can be made

(25) I cannot unexpect that the marriage between the prohibited degrees would happen one day in Europe, when we know that the illegal relationship between the said degrees already took place in some parts of Europe.

(26) For example, the prohibited degrees in Islam as the Holy Qur'an states are:

"Prohibited to you (for marriage) are:- your mothers, daughters, sisters; father's sisters, mother's sisters; brother's daughters, sister's daughters; foster-mothers (who gave you suck), foster-sisters; your wives' mothers; your step-daughters under your guardianship, born of your wives to who you have gone in, - no prohibition if ye have not gone in; - (Those who have been) wives of your sons proceeding from your loins; and two sisters in wedlock at one and the same time, except for what is past; for Allah is oft-forgiving, most merciful;" CH.IV v.23.

effective. At the same time, Islam never accepts or endorses the attitude, more and more current in certain sections of society, that the sanctity of the marriage covenant, which lies at the root of all family relationships and supports, sustains and nourishes them, may be fully exposed to every kind of pre-marital and post-marital hazard and yet survive unblemished and unscathed. Also the Article can lead to difficulties in implementation; for instance, when there are consequences of the dissolution of a marriage such as questions of guardianship, custody and inheritance. Although it is not possible to deal with it in these pages, Islamic law has dealt with it in full.

Now let us give a brief idea about the only lawful intermarriage between Muslims and non-Muslims which might legally happen according to the Shariah (Islamic law). No doubt for the probability of mutual harmony, which might be highly assured when parties to the marriage adhere to Islam, the marriage of two Muslims, takes preference as the first choice. Yet there is no absolute condition that parties be of the same religion.

Marriage between Muslim men and non-Muslim women belonging to the people of Book, in other words who do believe in "God" and have a divine scripture, is permitted in Islam. The injunction of the Holy Qur'an in respect of intermarriage with non-Muslims runs as follows:

"(Lawful unto you in marriage) are (not only) chaste women who are believers, but chaste women among the people of the Book revealed before your time, - when you give them their due dowers, and
(27)
desire chastity, not lewdness, nor secret intrigues."

Accordingly, non-Muslim women must be fully given an economic and moral status, and must not be actuated merely by motives of lust or physical desire. Also in her marriage-time the non-Muslim woman may undoubtedly stick to her faith and celebrate her festivals and the husband cannot force her to recant her religion to embrace his faith. For the type of this marriage the best example can be given is of the Prophet (s.a.w.) himself. When he had married a Coptic lady, Mariyah Qibtyyah who was the mother of his son, Ibrahim who died during his lifetime.

However, on the contrary marriage between non-Muslim males whether they are notably Jewish and Christians or otherwise and Muslim female, is unanimously prohibited. Such intermarriages, if allowed to take place, would be considered by Muslims as impractical and disadvantageous to the most delicate side in the family; the woman involved as well as to her co-religionists. It is believed that a Muslim wife of suppositional non-Muslim husband will not to have the same degree of religion freedom which fully assures to her a respectable religious position and personal rights as does her counterpart with a Muslim partner. Moreover, "reciprocity" as a principle is not completely implemented, when on the one hand the acknowledgement and honour of the previous divine religions "Judaism and Christianity" and all prophets without any distinction between them, is an integral part of the Muslim wife's faith. The Holy Qur'an provides:

"The Apostle believeth in what hath been revealed to him from his Lord, as do the men of faith. Each one (of them) believeth in Allah, His angels, His books, His Apostles. "We make no distinction (they say) between one and another of His apostles." And they say "we hear, and we obey: (we seek) Thy

forgiveness, Our Lord, and to thee is the end of all
 (28)
 journeys."

On the other hand, her suppositional husband does not do the same and he does not wish to adopt her faith or reciprocate. If he does so, then he may be regarded as a Muslim, which will change their illegal intermarriage to a legal one. But if he does not do so, some logical alternatives might happen: (1) the Muslim woman may lose her "most valuable" asset (faith), (2) she will not be immune from unnecessary tensions and mental conflicts, (3) the marriage may break up, (4) both the wife and the husband may gradually become of no religion. Besides that a Muslim woman will live in relative lack of security and freedom.

Finally, it may obviously be pointed out here that no Muslim male or female, is permitted to get married to any one who has no divine book or Allah - sent Prophet to follow (e.g. an atheistic or agnostic). The Holy Qur'an in stressing this point says:

"Do not marry unbelieving women (idolaters), until they believe; a slave woman who believes is better than an unbelieving woman, even though she allure you. Nor marry (your girls) to unbelievers until they believe; a man slave who believes is better than an unbeliever, even though he allure you..."
 (29)

This previous injunction restricts the intermarriage with non-Muslim eligibles to those who do believe in Allah and have a divine scripture (the people of Book).

(28) CH.II v.285.

(29) CH.II v.221.

B - Islam and its message of tolerance

Freedom of religion in Islam is in fact but one of the aspects of the Islamic message of tolerance; the message which concerns people other than Muslims (e.g. dhimmis or non-dhimmis), either who obtain Islamic citizenship or who do not. These fall within the purview of internal law. I shall in the next few pages deal with the legal derivation of the message of tolerance and its characteristics with a discussion of the related issues. Relations between Islamic and non-Islamic States and the human rights of their peoples are covered by Islamic international law. This shall be dealt with in the following chapters.

The first goal of Islam, was to overcome the most awful atrocities which were perpetrated in the name of religion by the followers of different religions periodically sent to mankind. This is obviously shown in the following words of the Holy Qur'an:

"Mankind was one single nation, and Allah sent messengers with glad tidings and warnings; and with them He sent the Book in truth, to judge between people in matters wherein they differed; But the people of the Book, after the clear signs came to them, did not differ among themselves except
(30)
through selfish contumacy..."

By avoiding such sharp differences which exist between the various religions, and through having goodwill and mutual respect for one another's religion, Muslims learned to believe sincerely that every true divine prophet and every true revealed religious book all came to preach the one and the same religion of Allah. This is one of the

Muslim faith's articles, in which Muslims must believe. Hence the Holy Qur'an says:

"They say "Become Jews or Christians if ye would be guided (to salvation) say thou: "Nay! (I would rather) the religion of Abraham the True, and he joined not gods with Allah. Say ye "we believe in Allah, and the revelation given to us, and to Abraham, Ismail, Isaac, Jacob, and the Tribes, and that given to Moses and Jesus and that given to (all) Prophets from their Lords: we make no difference between one and another of them, and we bow to Allah (in Islam)."

Moreover, Islam goes so far as to invite in particular people of the book (i.e. Jews and Christians) to a common word testifying that there is no god but Allah; the word upon which the whole mankind in this Universe should be summoned and about which should be in agreement. Having done that, Islam has sought the best that can ever be gained for mankind in the present life and the life to come. Thus the Holy Qur'an says:

"Says:" O People of the Book! Come to common terms as between us and you that we worship none but Allah; that we associate no partners with Him; that we erect not, from among ourselves, lords and patrons other than Allah. If then they turn back, say "Bear witness that we (at least) are Muslims (32) (bowing to Allah's will)'. "

By the same token, in order to achieve peaceful life among all different communities, the Holy Qur'an asked its followers not to

(31) CH. II vs. 135, 126.

(32) CH. III v. 64.

vilify even those who worship idols or other subjects of worship of other peoples:

"Revile not ye those whom they call upon besides Allah, lest
(33)
they out of spite revile Allah in their ignorance.."

For having all nationalities of the world harmonized with one another, and an actual way of democracy established, all distinctions between human beings, wherever they come from, and whatever nationalities they belong to, were removed when the Quranic verse says:

"...The most honoured of you in the sight of Allah is (he who
(34)
is) the most righteous of you..."

"All mankind is the progeny of Adam and Adam was fashioned out of clay. Behold! every claim of privilege whatever that of blood or property, is
(35)
under my heels..." Thus said the Holy Prophet (s.a.w.) in his last sermon.

Muslims are also directed to be fully just and fair with all people; even with those who hate them or to whom they have an aversion:

"O ye who believe! stand out firmly for Allah, as witnesses to fair dealing, and let not hatred of others to you make you swerve to wrong and depart from justice. Be just: that is
(36)
next to Piety."

Furthermore, the social relationship between Muslims and non-Muslims should be so deepened so that the public charity, for instance, should be directed to the national welfare or the amelioration of mankind in

(33) CH. VI v.64

(34) CH. XLIX v.13

(35) Sirat - (the life of Muhammad) Ibn Ishaq. p.649.

(36) CH. V v.9 - This uprightness principle which has not met yet with anywhere but in Islam, the International law of the modern West still stands sorely in need of, for a world dominated by the stronger.

general. The following Quranic verse shows that Muslims and non-Muslims should not only give charity for the welfare of their own co-religionists but also for that of non-Muslims. Thus Islam does not allow the difference of religion to be a hindrance to the bestowal of charity upon a deserving person:

"It is not required of thee (O Apostle), to set them on the right path, but Allah sets on the right path whom He pleaseth. Whatever of good ye give benefits your own souls, and ye shall only do so seeking the "Face" of Allah. Whatever good ye give, shall be rendered back to you and ye shall not be dealt with unjustly."⁽³⁷⁾

These previous guiding principles were practically enhanced as early as the advent of Islam, in forms of so known "securities" between Muslims and non-Muslims. The Holy Prophet (s.a.w.) acted upon these, and his Orthodox Caliphs (successors) later after him. Almost in the middle of the first decade of al-Hegerah, the first charter between Muslims and non-Muslims was concluded. It was granted to the Christians of St. Catherine's church near Mount Sinai.⁽³⁸⁾ Through this the Prophet himself and his followers erected the most noble monument of enlightened tolerance that has been produced in the history of the World, and themselves guaranteed the following legal rights for the benefit of non-Muslims in general: (a) They (the Christians) were not to be unfairly taxed (with regard to this point in particular I shall try to give a full account later on). (b) No bishop was to be driven out of his bishopric. (c) No Christian was to be forced to reject his religion. (d) No monk was to be expelled from his

(37) CH.II v.272.

(38) The spirit of Islam - A. Ali p.79.

monastery. (e) No pilgrim was to be detained from his pilgrimage. (f) Nor were the Christian churches to be pulled down for the sake of building mosques or houses for the Muslims. (39) In addition to that, Christian women married to Muslims were to enjoy their own religion, and not to be subjected to compulsion or annoyance of any kind on that account. If the Christians should stand in need of assistance for the repair of their churches or monasteries, or any matter pertaining to their religion, the Muslims were to assist them. Should the Muslims be engaged in hostilities with outside Christians, no Christian resident among the Muslims should be treated with contempt on account of his creed. However, for the first clause stated in the beginning of this charter, Muslims were to protect the non-Muslims (Christians), to defend their churches, the residences of their priests and to guard them from all injuries. Concerning this point the Holy Qur'an says:

"To those against whom war is made, permission is given (to fight) because they are wronged; - and verily, Allah is most Powerful for their aid; - (They are those who have been expelled from their homes in defiance of right - (for no cause) except that they say, "our Lord is Allah". Did not Allah check one set of people by means of another, there would surely have been pulled down monasteries, churches, synagogues, and mosques, in which the name of Allah is commemorated in abundant measure..." (40)

(39) In his book "Futuh al-Buldan" translated by P. Hitti p.192 al-Baladhuri recorded that in the reign of al-Walid b. Abd al-Malik, the Cathedral of St. John was pulled down to be joined to the Mosque. Later when Umar b. Abdul-aziz became caliph, the Christians complained of what al-walid had done "Umar (R.A.A.) wrote to his Amil (Governor) ordering him to return to the Christians that part which was added to the mosque from their church."

(40) CH.XXII vs. 39,40. Again, in his lifetime the Prophet (s.a.w.) concluded a treaty with the Christians of Najran in al-Yaman, in which he, besides their security of person and property, granted to them the entire authority of nominate their bishops and priests to the community itself. al-B-baladhuri - "Futuh al-Buldan" - translated by P.Hitti p.98.

Later in the glorious reign of the second caliph 'Umar, history recorded the best practical example of the fair treatment of non-Muslims in the matter of their religion. Over there in AElia "Jerusalem" when it submitted to Muslims, 'Umar, upon his entering it, went straight to the Temple of the Prophet David where he offered his salat "prayer" under the Prophet's Arch. Meanwhile, the people of AElia were given the well known 'Umar's Security", in which the forestated legal rights of non-Muslims were again emphasised:

"In the name of Allah, the Merciful, the Compassionate! This is the security which 'Umar, the servant of Allah, the commander of the faithful, grants to the people of AElia. He grants to all whether sick or sound, security for their lives, their possessions, their churches and their crosses, and for all that concerns their religion. Their churches shall not be changed into dwelling places, nor destroyed, neither shall they nor their appurtenances be in any way diminished, nor the crosses of the inhabitants nor aught of their possessions, nor shall any constraint be put upon them in the matter of their faith, nor shall any one of them be harmed."⁽⁴¹⁾

However, the foregoing human rights are not resstricted to a particular sect or group of a particular religion, but to all non-Muslims. In the following words of Habib Ibn. Maslamah's treaty concluded with Dabil there is clear reference to various groups of religion:

(41) Preaching of Islam - T.W. Arnold p.56.

"In the name of Allah ... This is treaty of Habib ... with the Christians, Magians and Jews of Dabil, including those present and absent. I have granted you safety ..."

(42)

Therefore, besides their rights to keep their own languages and customs, to open their own schools and colleges and to be visited by missionaries of their own faith from Christendom, Islamic law has ever since given the non-Muslims rights which are still up to now unknown in the West, such as judicial autonomy. This principle, which exists due to the great respect attributed to religion and to the fact that it is the only way of ensuring the integrity of all religious groups existing among Muslims, forms one of the basic characteristics of Islamic law. In the following verses of the Holy Qur'an, the said principle is obviously prescribed:

"Let the people of the Gospel judge by what Allah hath revealed therein. If any do fail to judge by (the light of) what Allah hath revealed, they are (no better than) those who rebel. To thee we sent the scripture in truth, confirming the scripture that came before it in safety, so judge between them by what Allah hath revealed, and follow not their vain desires diverging from the Truth that hath come to thee. To each among you have we prescribed a law and an open way."

(43)

Though the forestated verses were revealed to concern the Christians in particular, the following Qur'anic statement came to give the Jewish people the same right:

(42) Majmouat al-Watai'q al-Saiasiah - M. Hamid-ullah - dar at Arshad publications - par. 346 p.370. See also Futuh al-Buldan-al-Baladwi translated by P. Hitti p.314.

(43) CH. V vs. 50,52.

If they (Jews) do come to thee, either judge between them, or decline to interfere. If thou decline, they cannot hurt thee in the least. If thou judge, judge in equity between them.⁽⁴⁴⁾
 For Allah loveth those who judge in equity..."

The practice of the Holy Prophet (s.a.w.) concerning this matter, was in harmony with the spirit of the Holy Qur'an. According to al-Bukhari, it is stated that "the Prophet is recorded to have delivered a judgment, in an adulterous case involving two Jews. He asked for their Book "Law of Moses", and accordingly ordered them to be punished.⁽⁴⁵⁾

The said autonomy, however, as the Muslim jurists have inferred, is not applicable only to the Christians or Jews, who were obviously mentioned in the Holy Qur'an, but also covers all people of different religions. At the same time, the Islamic jurisdiction can however be applicable to them whenever the two non-Muslim parties so choose. "Neither in the Holy Qur'an or Sunnah is there any authentic text that confines this judicial autonomy to personal behaviour or intergroup relations of non-Muslims communities. Rather, it tends to relieve non-Muslims subjects from any Islamic prohibition relating to matters which are permitted in their respective. Perhaps the best examples are intoxicants and pork. The practice of the Prophet and that of all Caliphs had been that whereas these are forbidden to Muslims, dhimmi subjects are permitted their free use and allowed to trade in them. Muslim jurists are unanimous on the point that in any suit of law regarding trade in intoxicants or pork wherein one of the parties is a

(44) CH. V v.45.

(45) Sirat (the life of Muhammad) - lbn Ishaq - Arabic p.393.

Muslim, only the rights of the dhimmi party are recognised and
 (46) guaranteed." Nonetheless, with the exception of "Personal Law",
 this is not, however, the case, since the western legal codes have
 been adopted by most Muslim countries, where the actions of all
 subjects including Muslims are to be regulated by such codes.

Now let us demonstrate the point which has been often cited as
 the main discriminatory feature in Islamic human rights. This point
 is the concept of "al-Jizyah" in Islam. Traditionally, al-Zizyah is
 an Arabic term deriving from very (Ja-za) "he gave satisfaction",
 which means "poll tax". This is the tax that is levied on the free
 non-Muslim subjects of the Islamic state, because it is a compensation
 for the protection which guaranteed them, the non-Muslim subject,
 freedom from military service.

Regarding the people from whom it should be collected, said Abu
 (47) Yusuf in his letter to Caliph Harun: "the Jizyah tax lies on all
 inhabitants, except women and children, of Ahl al-Dhimma in al-Sawad,
 al-Hira and other places, i.e. on Jews, Christians, Majus, Sabis and
 Samaritans ... Jizyah is not collected from the poor on whom Sadaga
 (charity) is spent, nor from a blind man without craft or occupation,
 (48) nor from a cripple;..."

It is always thought that al-Jizyah is a tax imposed on non-
 Muslims in exchange for allowing them to maintain their faiths; but
 though in fact, it quite differs from al-Zakat (obligatory charity)
 which is taken from Muslims, it is unfortunately misunderstood.

(46) Islamic law - S. Ramadan referred to al-Gasas p.134.

(47) Taxation in Islam - Ben Shamesh (Kitab al-Kharaj) vol. 3 p.84.

(48) Upon this decision all Muslim jurists agreed - Ahkam Ahl al-
 Dhimmah - lbn Qayyim p.49.

Religion, according to the Holy Qur'an and sunnah, rises far above all material values. This was so emphasized by the well known Caliph 'Umar Ibn Abd al-Aziz, when he wrote answering one of his governors' letter: "You have asked me to allow you to collect the huge amounts of al-Jizyah owed by Jews, Christians and Majus of al-Hira before they accepted Islam. My reply is that Allah has sent the Prophet Muhammad (S. A.W.) to invite people to Islam and not as a tax collector..." (49)

Again, according to the practice of Caliphs and the majority of Muslim jurists al-Jizyah cannot be considered as a punishment for rejecting Islam. (50) If it is so considered (this is the opinion of Ibn al-Qayyim), it would then be a form of compulsion which runs against the spirit of the following Quranic injunction:

"Let there be no compulsion in religion: Truth stands out clear from Error...." (51)

Were it a fine for rejecting Islam, those who are women, children, the poor, monks, and all those who cannot afford al-Jizyah would not have been exempted under it.

Moreover, such people who became in need are not only exempt from paying it, but are entitled to be given pensions from the Islamic treasury. Umar, the Caliph was reported to have: "once met a blind old man begging and asked him how he came to this state. When he informed him that he was a Jew of ahl al-Dhimma, and that the demands of the authorities for the payment of his Jizyah coupled with his needs and

(49) Taxation in Islam. p.93.

(50) "This tax was not imposed on the Christians, as some would have us think, as a penalty for their refusal to accept the Muslim faith, but was paid by them in common with the other dhimmis or non-Muslim subjects of the state whose religion precluded them from serving in the army, in return for the protection secured for them by the army of the Muslims" said T.W. Arnold - The Preaching of Islam p.60.

(51) CH.II v.256.

old age had brought him to this state, he took him by his hand and ordered the treasury officials to allow him something. He then ordered the Treasurer to look after such people incapacitated by old age, reciting:

(52)

"Alms are for the poor and the needy..."

Al-Jizyah was imposed on the non-Muslims by the following Quranic verse, which explicitly states:

"Fight those who believe not in Allah nor the last day, nor hold that forbidden which hath been forbidden by Allah and His Apostle. Nor acknowledge the religion of truth, (even if they are) of the people of the Book, until they pay the "Jizyah" with willing submission, and feel themselves subdued..."

(53)

This is the only Qur'anic injunction which mentions al-Jizyah in the whole Qur'an and brought about a peculiar treatment to the non-Muslims (i.e. Christians, Jews and Majus). This should be well understood in order to make sense of the nature of al-Jizyah when considering the fact that the non-Muslims are exempted from military conscription. Its fair imposition can be easily realized, when we all know that the Islamic State is an ideological one. The ideology is one in which the non-Muslims do not believe. At the same time they are subjects with rights and duties equal to those of any Muslim subject, who need to be protected and defended against any internal or external aggressions. For this alone they pay al-Jizyah. That is why it was called by some Muslim jurists "protection tax". In backing up the foregoing

(54)

(52) Taxation in Islam - Ben Shamesh - vo.3 p.87.

(53) CH. IX v.29.

(54) Islamic law - S. Ramadan p.124.

inference, the Holy Prophet (s.a.w.) was reported to have written to one of his Governors saying:

"He who says our prayers turning his face (direction to Meccah) where we turn ours and shares our food is considered a Muslim under Allah's and the Prophet's protection. Those of the Majus who accept Islam are safe but those who refuse have to pay al-Jizyah for their protection."(55) As matter of fact, during the time of Umar the second caliph, on being informed that the Romans had raised an enormous army with which to drive back the Muslims, the Muslim commander in cheif, Abu Ubaydah, accordingly wrote to the governors of Syria, ordering them to pay back all al-Jizyah that had been collected from the cities, and wrote to the people, saying "We give you back the money that we took from you, as we have received a news that a strong force is advancing against us. The agreement between us was that we should protect you, as this is not now in our power, we return you all that we took. But if we are victorious we shall consider ourselves bound to you by the (56) old terms of our agreement."

In answering a question such as whether or not the imposition of al-Jizyah tax is obligatory on the part of Muslim rulers over the non-Muslim subjects in the modern times, Prof. A. Doi says: its imposition or not will depend on the circumstances under which the Muslim country lives. On the basis of al-Jizyah being a tax like any other tax, he concluded by giving an example of Saudi Arabia as an oil rich country;

(55) Taxation in Islam - Ben shamesh vol. III p.89.

(56) Preaching of Islam - T.W. Arnold p.61. He also carried on to say: "in accordance with this order, enormous sums were paid back out of the state treasury, and Christians called down blessings on the head of the Muslims, saying "May Allah give you rule over us again and make you victorious over the Romans; had it been they, they would not have given us back anything, but would have taken all that remained with us".

if it can do away with a number of taxes which are payable by the citizens in other countries, al-Jizyah may be abolished. Also he added that in the modern times, non-Muslims may be exempted on the basis of reciprocity for the fact that many Muslims nowadays live in non-Muslim and secular states.
(57)

Even if I do agree with Prof. A. Doi on exempting the non-Muslims from paying it for one of the reasons he mentioned e.g. "reciprocity", I do not share with him the idea of taking the richness or prosperity of the state as a reason. From what has been above stated, we have learned that al-Jizyah was not imposed for a material purpose, rather than for making the non-Muslims take part of the responsibility and pay for the defence of the state, in which they have willingly chosen to live, at least by a symbolical amount of money, once they were exempted from the compulsory military service. Therefore, non-Muslims may be free from paying such a tax even under the foreseeable Islamic State, if they are willing to involve themselves in defending the state instead with Muslims alike.

For a long time, al-Jizyah tax has been discarded in the Muslim world, and in modern times, the emphasis has been on equality, as is demonstrated by the constitutions of its states. To cite some examples: The Egyptian Constitution of 1964, Article 24 states: "Egyptian are equal before the law. They have equal public rights and duties without discrimination between them due to race, origin, language, religion or creed".

Also Article 8, Paragraph 1 of the Malayan Constitution 1957 states: "All persons are equal before the law and entitled to the equal protection of the law."

Paragraph 2 of the same constitution goes so far as to provide: "Except as expressly authorized by this constitution, there should be no discrimination against citizens on the ground only of religion, race, descent or place of birth in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment".

In intercourse between religion and taxation, an explicit statement is demonstrated by the Constitution of Pakistan under the principle of "freedom of religion" where Article 10 (b) states: "Every religious denomination and every sect thereof has the right to establish, maintain and manage its religious institutions". Afterwards Article 11 comes to make any taxation paid in connection with the maintenance and support of the religion, null and void when it provides: "Safeguard against taxation for purposes any particular religion. No person shall be compelled to pay any special tax the proceeds of which are to be spent on the propagation or maintenance of any religion other than his own."

However, it is unnecessary to mention that people without any distinction, in exchange for their enjoyment of whatever constitutional rights must simply take part in the defence of the homeland. Concern-
(58)
ing this point, Article 60 of the constitution of secular Turkey of 1961 runs as follows: "Taking part in the defence of the homeland is

the right and duty of every Turk. This duty and the obligation to serve in the armed forces shall be regulated by law."

Finally, the following words will be sufficient with which to conclude the present chapter. Hence the Holy Qur'an says:

"Allah forbid you not, with regard to those who fight you not for (your) faith. Nor drive you out of your homes, from dealing kindly and justly with them: "for Allah loveth" those
(59)
who are just."

By stressing the same great spirit of the Holy Qur'an, said Umar Ibn al-Khattab, the Caliph: "I recommend my successors to treat Ahl al-Dhimmah (non-Muslims) well, to comply with their covenants, protect them from those who persecute them and not burden them with more than they can bear."
(60)

(58) Compare with Article 57 of (A model of an Islamic Constitution) which says:

(a) Jihad is a perpetual and inalienable duty, (b) it is incumbent on every Muslim to defend the land of Islam and Islamic order.

(59) CH. LX vs. 8,9.

(60) Taxation in Islam - Ben shamesh vol. III p.86.

CHAPTER THREE

The concept of the Islamic State
"its sovereignty and democracy"
and the legal and political rights
of the citizens.

The major concern of having this chapter as one of the chapters of our work, is to tackle the important legal and political rights of Muslims and non-Muslims "i.e. the sanctity of private life and its security, personal freedom and its security, freedom of expression and association, and participation in the affairs of the state... etc." With regard to the basic and fundamental rights, these were discussed in the first chapter.

But before doing so I would like to give a hint about the nature and characteristics of the Islamic state i.e. its traditional form in theory and practice, its decline, and its revival in the twentieth century.

As I have previously dealt with the sources of Islamic law "Shariah" in part two of the introductory chapter I shall confine my coming discussion to the sovereignty and democracy of the said state in the following pages.

1 - Islamic state "its sovereignty and democracy"

As for 'sovereignty, unlike the western one, or elsewhere, where legal and political sovereignty is philosophically or otherwise considered as belonging to the people, in Islam the only and the sole sovereign and also the lawgiver is Allah the almighty. He alone is the

Creator, the principal unifying factor, and the master of the universe and of all that exist in it.

The Holy Qur'an provides:

"He to Whom belongs the dominion of the heavens and the earth: no son has He begotten, nor has He a partner in His dominion: it is He who created all things, and ordered them
(1)
in due proportions."

In another glorious Qur'anic chapter, it says:

"Yea, to Allah belongs the dominion of the heavens and the earth; and to Allah is the final goal (of all)."
(2)

Also, Allah's exclusive right to the absolute authority over all can obviously be seen and recognised by reciting the following holy verse:

"the Command is for none but Allah: He hath commanded that ye worship none but Him: that is the right religion, but most
(3)
men understand not ..."

This is clearly emphasized in another verse, as it stated:

"He created the sun, moon, and the stars, (all) governed by laws under His Command. Is it not His to create and to govern? Blessed be Allah, the cherisher and sustainer of the
(4)
worlds..."

Accordingly, Allah's right to sovereignty (legal and political) has been, for all true Muslims an untouchable, and irrevocable principle since the advent of Islam. It is as often stated above, a complete code of life suitable for all people and ages, and a universal and eternal mandate of Allah which undoubtedly can be applied to every sphere of human conduct and life.

- (1) CH. XXV v.2
- (2) CH. XXIV v.42
- (3) CH. XII v.40
- (4) CH. VII v.54

However, understanding the term "sovereignty" in its meaning that the state must submit to and obey the supreme power, which is here crystallized in Allah's law "Shariah" in its internal and external affairs, has become a controversial matter among Muslims themselves; Arabs or non-Arabs since about the beginning of this century. This controversial matter was eventually solved for the European imitators (so called Modernists) by being put into practice by force.

In Turkey, for instance, the Nationalists abolished the Caliphate (Sultante) - the symbolical name of the traditional Islamic state ever since - in 1922, as they revolted against corruption and injustice. But abolition of the Caliphate, which has become an idea of Islamic state today, in the point of the reformists' view, is not really the problem per se; the gist of the problem in fact is the Turkish denial as well as that of other Muslim peoples after their independence, of the above-mentioned sovereignty. The Caliphate as an Islamic institution, as we shall see later, in the opinion of many Muslim authors, is not terribly important, so long as the Islamic law is fully observed.

In Egypt, exactly the same crisis to the core of the said sovereignty was perhaps unintentionally brought about by the Egyptians under either the influence of the colonial power, or laziness of and the differences between the Muslim scholars who undoubtedly, I think, were partially to be blamed. Also theoretically, and after the fall of the Ottoman empire, the idea itself was adopted by a learned A Zharit scholar called Ali Abd al-Raziq. In his principal work, "Islam and the fundamentals of Government", where he explicitly pleaded the separation between religion and state in Islam, he also presented arguments based on the same three sources upon which the establishment of the necessary

character of the Caliphate is based, these sources are: the Qur'an, the Tradition, and Consensus. (5) More arguments about this particular issue and its aspects shall be presented in its relevant place later in this chapter.

Historically, the foregoing sovereignty, which after a short period of its state of decay in Turkey - the state which eventually became secular, has gracefully regained its decency in another part of the Islamic world. That is when Pakistan was cut out of the Indian sub-continental in 1948. From the beginning, Pakistan has constitutionally been founded as a fully Islamic state. This is clearly understood from the preamble of its constitution of 1964, when it states:

"Whereas sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority exercisable by the people within the limits prescribed by Him is a sacred trust;" and which goes on to say:

"C, the Muslims of Pakistan should be enabled, individually and collectively, to order their lives in accordance with the teachings, and requirements of Islam as set out in the Holy Qur'an and the (6) Sunnah;..."

Whether this sovereignty has been completely practiced and fulfilled ever since in Pakistan or not, this is what shall be considered when we come to talk about Pakistan as an example of an Islamic state.

Also recently, as a result of the revival movement of Muslim fundamentalists everywhere, the said sovereignty has been restored in

(5) See the introductory chapter (sources of the Shariah-Islamic law).

(6) Constitutions of Nations - Peaslee Vol. II p.983.

Iran after not less than two centuries of absence by Iranian revolutionaries. In its constitution under Article 2, there is a clear statement to this effect, when it says:

"The Islamic Republic is a system based upon faith in the following:

1 - Monotheism (as reflected in the phrase, 'there is no God but Allah'), His sovereignty and His legislation of the law solely belongs to Him and the necessity of surrender to His command."⁽⁷⁾

Later, in 1983 the European Islamic Council called upon a number of eminent Muslim scholars and leading figures in the Muslim world to draft a model of an Islamic constitution in which there is a very strong emphasis on returning to the origin of "Islam" so that religion and the way of life can be obviously recognized (as Islamic Article one of the proposed constitution says:

"(a) Sovereignty belongs to Allah alone, and the Shariah is paramount.

(b) The Shariah - comprising the Qur'an and Sunnah - is the source of legislation and policy."⁽⁸⁾

But quoting the previous phrases from the above-mentioned constitution, as it was drawn up by the Islamic Council, might raise an argument that the model constitution does not mean in reality anything, and is not valid as long as it remains unadopted by any of the contemporary Muslim states. Therefore, its value has become more or less nothing. This argument is, in fact partially true in the sense that the constitution has not been adopted by one of the Muslim states; so it cannot be taken as a good evidence for discussion of the present issue or other issues alike, if we should attach significance to the non-adoption of the constitution. Nevertheless, the validity of involving the said constitution here

(7) The constitution of the Islamic republic of Iran p.19.

(8) See a Model of Islamic Constitution - Islamic council, London.

comes about from being made by consensus on the part of a number of eminent Muslim scholars in the Muslim world; and of course consensus, as we all know, is one of the most important of the Shariah's (9) sources. Also it can more or less be considered as a good model for the Islamic state of today. Furthermore, from the same Council, the first Universal Islamic declaration of human rights has been brought about; the document on which I am basing my present study.

Now let us return to the sovereignty of Allah in the Islamic state itself, and see the high position attained by Man.

Sovereignty of Allah as the source of law and legality leaves to Man, His vicegerent and trustee, the prerogative of application, development, and exercise of His commands, mandates, and the fulfillment of mankind's purposeful creation on earth.

Man's vicegerency is clearly stated in the following terms of the Holy Qur'an:

"Allah has promised to those among you who believe and work righteous deeds, that He will, of a surety, grant them in the land, inheritance (of power), as He granted it to those before them ..."

(10)

Accordingly, if it is a divine contract afforded to Man by the Creator - sovereign, its full beneficiary is dependent on man's submission to Allah's will, rather than a social will, as was wrongly understood by the Orientalists who frequently fail to comprehend Allah's sovereignty and man's vicegerency. Here the great Orientalist

(9) See the introductory chapter (Sources of the Shariah - Islamic law).

(10) CH. XXIV v.55.

Coulson in his book "A history of Islamic law" states "while Muhammad's position gradually developed into one of political and legal sovereignty, the will of God as transmitted to the community by him in the Qur'anic revelations came to supersede tribal custom in various respect, ..."⁽¹¹⁾ In fact, Muhammad (s.a.w.) himself, as well as his successors, (R.A.A.) has no legal sovereignty or otherwise, as is often asserted.⁽¹²⁾ He the Prophet was but a judge applying Allah's law which is exemplified in the Holy Quran. So the Qur'an states:

"We have sent down to thee the Book in truth, that thou mightest judge between men, as guided by Allah ..."⁽¹³⁾

And being a judge the Prophet (s.a.w.), his decision is the most just one; the Muslim acceptance of it, during his lifetime or after, is a remarkable sign for the true Muslims in obeying his Holy Tradition. The Holy Qur'an in stressing this point says:

"But no, by thy Lord they (Muslims) can have no (real) faith, until they make thee judge in all disputes between them, and find in their souls no resistance against thy decisions, but accept them with the fullest conviction..."⁽¹⁴⁾

(11) A history of Islamic law - Coulson p.11.

(12) Although everybody has a right to forsake any lawful thing on account of his personal reasons, the Prophet (s.a.w.) was asked not to exercise his right, when he did so. Here the Holy Qur'an says:

"O Prophet, why Holdest thou to be forbidden that which Allah has made lawful to thee ..." CH. LXVI v.1. The reason as S. Nadri stated" is that there are two dangers, in the event of its happening. The first is that every act of Shariah by the Prophet, which might not be particularly for him, would be classed under the head of commands of Allah ... Secondly, it would have proved that the Prophet also has a right of issuing laws, without the permission of Allah, which would not have been right." With regard to ordinary men the Holy Qur'an states: "But say not - for any false things that your tongues may put forth 'This is lawful and this forbidden' so as to ascribe false things to Allah." CH. XVI vx. 116 & 117.

Islamic culture vol. 22 year 1948 p.245.

(13) CH. IV v.105.

(14) CH. IV v.65. also the Holy Qur'an in this connection says "Nor does he say (ought) of (his own) desire. It is no less than inspiration sent down to him..." CH. LIII vs. 3 & 4.

However, in the case of the two basic facts, which are: 1 - the sovereignty of Allah the lawgiver, which is embodied in the Qur'an and; 2 - His Prophet's sunnah which clarifies, explains, and exemplifies the meaning of the Qur'an, the term legal sovereignty is applied to both in accordance with jurisprudence and political science. Said Professor M. Bassiouni: "during the course of man's exercise of his derived powers over other created matters, he (the man) will be judged according to the law, laid down by the sovereign in His revelations. Thus free will, which is indispensable to the attainment of this delicate and precise balance, is not man-made but divinely endowed. Its operation is manifested by the obvious need to choose, but the creation of choice lies in the purpose for the choice and its empirical existence."⁽¹⁵⁾

Talking in terms of man being the lawmaker, the whole Islamic Ummah (Nation) as collectively or individually presented (i.e. legislative assembly or otherwise) is empowered to legislate complementary laws. The validity of these laws will obviously be dependent upon their compliance with the Shariah (Islamic law). The Ummah, therefore, enjoys a derivative rule - making power, and not an absolute law - creating prerogative. Nevertheless, law-making in this sense is not real and the legislators are but the executors of law and they stand equally with ordinary peoples.⁽¹⁶⁾

In the following pages, I would like to place before the respected reader a clear idea about the nature of the Islamic state. It is not

(15) The Islamic Criminal Justice System - M. Bassiouni - Oceana publications, Inc - London p.11.

(16) The concept of state and law in Islam - Farooq Hassan p.36.

the case, as one might think, and it should be borne in mind, that the Islamic state is not institutionally religious in the sense of Medieval western Theocracy, though it is an ideological one. Theocracy is a Greek word (theo-cracy) which means "a form of government in which God (or a deity) is recognized as the king or immediate ruler, and his laws are taken as the statute-book of the kingdom, these laws being usually administered by a priest order as his ministers and agents; hence (loosely) a system of government by a sacerdotal order, claiming a (17) divine commission; also a state so governed."

However, Theocracy as above defined seems to give rise to two arguable ideas, which are in fact one as the second is the inevitable and logical result of the first. The idea is absolutely acceptable whenever it is related to Islam. If it just meant that God who must be believed in as the direct ruler and His laws the book-statute must be fulfilled exactly as He is hypothetically being seen, this hypothesis for Muslims would be clear and desirable. For the saying of the Holy Prophet (s.a.w. in one of his hadiths:

(18)

"He (Gabriel) said: Then tell me about 'ihsan'. He said: It is to worship Allah as though you are seeing him, and while you see Him not yet truly He sees you ..."

(19)

But the sacerdotal authority, which is later mentioned in the definition, that the priests enjoyed and by which they as ministers claimed a divine commission or agents in ruling the state, is absolutely rejected in Islam.

"It is the Muslim belief, said Prof. Rammadan that no man, or class of people, or mosque (priesthood does not exist in Islam) is

(17) The shorter Oxford Dictionary Vol. II p.2279.

(18) Literally meanings for IHSAN are "right action", "goodness", "charity", "sincerity" and the like.

(19) An-NAWAWIS Forby hadiths - (it was related by Muslim (Sahih).

privileged with a private relationship with Allah or a special right to speak for Him. Allah spoke only to Prophets (A.S.), and all other men stand on equal footing. Muslims differ with regards to divine texts, in interpretation or in application, just as they differ with regard to any other code of law. There is no authority beyond the text itself, and the authority of the text extends only in so far as its language implies and human thought may comprehend. All men are human: no man (20) impeccable or infallible..."

The preceding assertion can be proved (unequivocally by judicial and political practice throughout Muslim history.

Judicially, the Prophet himself said when two people had come looking for his judgment in a case:

"It may be that some of you fail to prove his right in the case. I am but a human being. If my judgment wrongly favours one undeserving, his (21) shall only take him to Hell..." Hence, it is clearly pointed out that even Muhammad (s.a.w.) has no divine authority by being a Prophet (which is entirely private) over the others. So he insisted emphasizing his humanness, that he might have failed unintentionally to satisfy the deserving one.

Politically, in the great Battle of Badr, the Prophet (s.a.w.) was asked, "This place where we (Muslims) have been stationed, is it Allah's ordained selection (by revelation), or is it a matter of opinion and military tactics? He replied: "it is the war and trick".

(20) Islamic law (its Scope and Equity) - S. Ramadan MacMillan Limited London-Geneva p.43

(21) Muwatta Imam Malik lbn Anas - kitab al-Agdiyah - Kitab Bhavan New - Delhi-110002 p.313.

Then said al-Hubab b.al-Mundhir, one of his companions: "This is not the proper place". And he suggested some other place for reasons which he explained. The Prophet, convinced by this reasoning, ordered the Muslim army to change station. (22)

Just after the death of the Prophet (s.a.w.) (the city-state founder), came the reign of Caliphate (where the Islamic state was vastly extended). However, the earlier Caliphs always insisted on making their status as rulers more explicit before the people who had elected them. In the inception of his reign, the first Caliph, Abu Baker declared:

"O people, I have been appointed to rule over you, though I am not the best among you. If I do well, help me, and if I do ill, correct me. Truth is loyalty and falsehood is treachery; the weak among you is strong in my eyes until I get justice for him, please Allah, and the strong among you is weak in my eyes until I exact justice from him, please Allah...Obey me as long as I obey Allah and His Prophet. And if I disobey Allah and His Prophet, you do not owe me obedience..." (23)

However, Khalifa (or Caliph as it is usually written in English) is an Arabic word deriving from verb khalafah (succeeded) which means "to take someone's place in his absence or after his death." (24) The Holy Qur'an states:

"...and Moses said to his brother Aaron: Take my place among my people, and act well and do not follow the way of the mischief-makers..." (25)

(22) Sirat (The life of Muhammad) Ibn Ishaq (Ibn Hisham) (English) p.297.

(23) Islam - politics and war - B. Lewis Harper & Row, publishers - London p.6. Translations from Ibn Hisham, Sirat II p.651.

(24) Lisan al-Arab al-Muhit - Ibn Manzur p.883.

(25) CH. VII v.142.

And thus the "caliphate " in this sense can never either literally or logically be applied with Allah, who is immortal and always present. Hence the Holy Qur'an says:

"Allah! There is no God but He, - the living, the self-subsisting, Eternal. No slumber can seize Him nor sleep..."
(26)

Therefore, "the successors of the Prophet were not the heirs of his spiritual ~~mission~~. They were in fact, and claimed to be, nothing more than substitutes or vicars, who carried on his work by furthering the religious and temporal interests of the community. Abū Bak declined the title of Vicar of God (Khalifat Allah), and was content to be called 'the Vicar of God's Apostle'. Later on, under Umar, the title of Amir al-mu'minin 'Commander of the Faithful', came into use and defined still better the representative of supreme power who was not a sovereign (malik) but a prince, in the original sense of the word,
(27)
namely primus inter pares."

Behind him and after his death, the Prophet (s.a.w.) has, in the sense of fulfilment, left for the Muslims the Shariah. The Shariah (the Qur'an & Summah) are simply not Allah Himself, but Allah's law by which and accordingly Muslim ruler must faithfully carry out his difficult duty and responsibility. And only by that responsibility can a Muslim ruler undoubtedly gain his people's obedience. If it should happen that he failed, he would no longer be ruler, and another one would be elected soon.

(26) CH.II v.255.

(27) Legacy of Islam. Ed. T. Arnold - Oxford (1931) - see Law and Society - by D. De Santillana - p.298.

Accordingly I would like to ask if any divine link ever existed between the leader in Islam and Allah which would give a chance to anyone whoever he is, to say that the Islamic state is a Theocracy in the meaning of the Medieval Europeans.

Islam, I might assert, or the Islamic state is "Theo-demo-
(28)
democracy" following a distinguished scholar, with some reservations, I shall demonstrate later. In summary, as Prof. D. De Santillana says:

"The truth is that the caliph in his capacity as religious chief is not a pontiff: he has no priestly character whatsoever, because Islam has no hierarchy nor apostolic succession. Neither is he a master (rabb) in his political capacity. The caliphate is not an office instituted by the divine law in order to provide for the general welfare; it is a public trust having as its object the service, the
(29)
protection, and the enforcement of the holy law."

My main purpose in the following pages will be to discuss the Muslim governmental structure (its traditional and modern forms) and its Shurah (democracy) in all its aspects. Afterwards, it shall be followed by the major concern of this chapter (mentioning the humanitarian side of it).

As I have previously stated, in connection with the fall of the caliphate (the traditional Islamic state) and its revival in this era, the dark side of it, I should again say, is not its abrogation, but the

(28) The Islamic law and constitution - al-Maududi Islamic Publications Ltd. Lahore (Pakistan) p.133.

(29) Legacy of Islam p.298.

sores consequences ever following that historic event, if we take for instance Turkey as an empirical study. Such consequences generally speaking contradict sometimes partially if not completely the way of life of the people which used to follow and suppress the possibility of restoring it in its true form. In the past as well as in modern times, the establishment with which as Prof. Ansari states "the collective effort of the Millat (Religion) for the moral perfection and happiness of the individual can not, however, gain its ends truly and comprehensively unless it transforms itself into a free theo-democratic state, whose function should be to enforce the Islamic Way of Life in its totality and to act as a condition for the natural flowering of the
(30)
Ideals of Islam..."

Here I would proceed briefly to examine its legal and political aspects, rather than follow its historical development. Traditionally "the caliphate in reality is a substitute for the Prophet Muhammad (s.a.w.) in as much as it serves, like him, to protect religion and to
(31)
exercise political leadership of the world". And by analogy the orthodox caliphate and its orthodox caliphs were by a sound judgment elected, Muslim jurists exerted themselves to have almost agreed on some qualities that should be highly considered in electing or choosing the Muslim leader. The conditions or qualities governing the institution of the caliphate upon which most of the Muslim jurists
(32)
agreed are four: 1 - knowledge, the leader cannot execute the Shariah unless he properly knows it. His knowledge is only adequate if

(30) The Qur'anic foundations and structure of Muslim Society - M. Ansari - Indus Educational Foundation - Karachi (Pakistan) - Vol. II p.343.

(31) The Prolegomena lbn khaldun p.388 - also see al-Ahkam al-sultaniyah-al-Mawardi p.3.

(32) The Prolegomena lbn khaldun p.395. See also al-Ahkam al-Sultaniyah - al-Mawardi p.5.

he has an ability to make independent decisions. This condition, I might argue, is not terribly important nowadays, so long as the leadership institution is supported by Shurah Majlis (Council) which is simply backed up by the most knowledgeable figures in the state. 2 - Probity ('adalah') is the most valuable characteristic which the Muslim leader must possess as a leader in this institution, in his private life as well as in his internal or external policy, he must be the best example for his people. The lack of probity in the leadership, I should admit, has for a long time cost the Muslim world excessive crises. His tough attitude or sometimes dictatorial behaviour, in my opinion, shall not injure his probity as someone might argue, whenever he meant by this peculiar behaviour to keep the public order or to save the state's principles. Said Iqbal "It is quite true to the spirit of Islam when Turtushi a Muslim lawyer of Spain says "Forty years of (33) tyranny are better than one year of anarchy". 3 - Competence, which means the willingness of the leader to execute and carry out the values of the Shariah without any hesitancy or postponement. 4 - Freedom of whatever might affect his ability to act, for instance free senses and limbs from defects or incapacitations. These are the principal qualities which must be available in the Muslim leader (or Imam).

Traditionally, election of the said leader (Imam) can by shurah (democratically) be done in two ways; oath of allegiance or appointment.

Oath of allegiance "bayah" is to conclude a contract between the people and the elected leader to the effect of rendering their obedience as well as surrendering their internal and external affairs to him. And the contracts effects must be faithfully fulfilled by both parties; obedience on the part of the people and loyalty on the leader's (Imam) part.

In practice, Abu Baker as the first Caliph got the oath of allegiance as soon as he was chosen for the Muslims by the "Shurah Council". Later Muslims agreed upon Ali (R.A.A.) the fourth Caliph to be their leader after the murder of Uthman (R.A.A.).

Concerning the second method; "the appointment", the former leader (Imam) is to appoint someone whom he knows, that he should be given the oath of allegiance to take over the office after him. Umar (R.A.A.) the second Caliph was appointed by Abu Bakr, upon whom Muslims later agreed. Sometimes the leader (Imam) appoints more than one to be put up to the Shurah Council to make the choice for Muslims, for example, the six members whom Umar (R.A.A.) appointed for Muslims to choose. It was Uthman (R.A.A.) as one of them who was eventually chosen and given the oath of allegiance. However, the oath of allegiance (bayah) is absolutely essential for the leader (Imam) to be received from the commons in general, otherwise the elected or even the appointed person would definitely not be considered as such.

Historically, the above-mentioned qualities and the proper kind of election in the Muslim point of view, did not unfortunately last very long. After nearly thirty years, the period of the Orthodox Caliphs (R.A.A.), the Caliphate (Imamate), was transformed into a semi-royal

authority if not a genuinely royal one. This serious event in Muslim history took place, however, at the hands of Muawiyah (R.A.A.) who is well known among Muslims as "the last of caliphs and the first of kings" when he was succeeded by his son Yazid, accordingly to his word. (34) Ibn Khaldun, the great philosophical historian in his Prolegomena, did not decry Muawiyah's action or his successors in the Umayyad's reign, and found an excuse for him on the basis of the good "group feeling" which he believed to be the essential element in a powerful reign. Indeed, the modified direction of the Caliphate was not throughout history unsatisfactory in bringing to its office people as excellent as the first Caliphs, and in pushing the state towards more justice and progress. Here in Umayyad's time Souliman b. Abd al-Malik appointed Umar b. Abd al AZIZ to succeed him. Umar (R.A.A.) refused the job and asked the people to choose; they eventually chose him. That is why Muslims called him the fifth orthodox Caliph.

Since that time, the dynastic form of Caliphate (Imamate) continued successively until it was inherited by Uthmans, who successfully ruled a very vast empire, which was later shrunk into contemporary Turkey, where the Caliphate (sultanate) and its legacy were wholly abolished in 1928.

But just before analysing Turkey prior to and after the fall of the Caliphate (sultanate), the reader ought to be aware of the legal fact of the institution and the appointment of its leader.

(35)
The Caliphate (Imamate) is, according to the Shaiate Imam-

(34) The Prolegomena - Ibn Khaldun. Vol. I p.421.

(35) For more explanations - see Ibid p.436.

Iyah's standpoint, one of the pillars (articles) of the faith, and the leader (Imam) could not have been omitted by the Prophet (S.A.W.). Therefore, the Prophet appointed his causon (Ali) (R.A.A.) as his successor, which made the succession normally confined to his relatives, in other words, to Ali and his sons. According to the majority of Muslims (sunnates), the Caliphate is undoubtedly one of the public interests of which the people are delegated to take care, even though the appointment of the leader (Imam) is an absolutely necessary element. With regard to other opinions, people like al-Mutazilah or Karijites held the opinion that the Caliphate is not necessary at all and it becomes necessary only if it is needed to observe the Shariah (Islamic law). In other words, as Sir Igbal (36) put it, the Caliphate (Imamate) is regarded by al-Mutazilah as a matter of expediency only.

I will now consider the Caliphate (Imamate) as an institution, Muslims have different opinions on this subject. In modern times, Rashid Rida, for example has suggested that "the obligatory nature of the office is sustained by traditional arguments: principally, the "ijma" of the companions, and also the practical consideration that without the Caliph the law can not be enforced nor can the welfare of the community be guaranteed..." (37) Later, after the crisis of the Caliphate at the hands of the Turkish secularists, a very different and peculiar idea of the Islamic system was suggested by Ali abd al-Raziq when he proposed "the separation of religion and politics". In his view the Imamate (Caliphate) is neither an Islamic dogma nor is it demanded by the Qur'an and Sunnah. According to him, the theory of the Imamate (Caliphate) is the work of theologians and jurists and is to be

(36) The Reconstruction of Religious thought in Islam. M. Iqbal - Lahore (Pakistan) p.157.

(37) Islamic Reform - M.H. Kerr p.159.

strictly distinguished from the 'history of the Caliphate' which he views critically. For him, the application of Muhammad's religious message has nothing whatever to do with politics which is exclusively
(38)
man's rational task.

Abd Raziq's idea, unusual for Muslim thought, was badly received by most Islamic scholars who wrote many books criticizing it. In fact not only did Abd al-Raziq reject the idea of the Caliphate as an institution, but also went so far as to claim that Islam should be distinguished from politics.

As a matter of fact, Islam (the Holy Qur'an and sunnah) did not demand the institution known as the Caliphate, Im̄rate or Imamate but left it up to Muslims to choose for themselves. When the earliest Muslims chose the head of their state and called him Caliph (or successor), it was in my opinion merely a word to denote the position which he occupied, without any connections of being divinely ordained.

Thus in my personal opinion Muslims should be allowed to call the head of their state whatever they deem suitable - President, Governor, Amir etc. ... Provided he applies Islamic law properly.
(39)

When Turkey decided not to recognize the Caliphate (sultant) any more, some Muslim scholars thought that it had just shifted to the view that the Caliphate is unnecessary unless it is needed to enforce the Shariah as had been suggested by the Mutāzilāh School. Thus the
(40)

(38) Al-Islam wa Usul Al-Hukm - Ali Abd al-Raziq p.64 and after.

(39) See Islamic Review Oct./Nov. p.40.

(40) The Reconstruction of Religions thought in Islam - M.Iqbal p.157.

question we must ask ourselves is: "has the shariah been respected in modern Turkey in the absence of the Caliphate (Sultant) thus rendering it unnecessary?" For, if the shariah has not been respected, and yet Turkey will not reinstate the Caliphate, then she obviously does not adhere to Mutazilah's doctrine.

In my opinion, Turkey's abolition of the Caliphate was inevitable, given the terrible social, political and economic conditions which prevailed before the first world war. Nearly three centuries before the abolition of the Caliphate, reforms and modernizations were initiated by the traditionalists themselves.

When the Ottomans felt that they were too far behind Europe they changed their ancient attitude towards western civilization. The first movement of reforms was carried out and continued by a group called "the new Ottomans".

Later influenced by ideas such as Nationalism, Turkish liberals after the 1870s give much thought to two approaches to political reform. The first was "Pan Islamism" which was introduced and given a religious basis by one of the greatest leaders of the reform, Jamal al-Din al-Afghani (1838-1896).

With him was his pupil Muhammad Abduh who advocated the modernization of Muslim world by only the adoption of western scientific achievements. The second approach was "Pan-Turkism" which called for the unity of all Turks worldwide.

However, the movement was succeeded by "the young Turks". In May

1889 a group of students at the Imperial Military Medical school formed a revolutionary society with the purpose of overthrowing the Sultan. At that time the whole of Turkey was swept by social strife and political disorder.⁽⁴¹⁾

These miserable situations that surrounded the Sultanate (Caliphate) and Turkey's defeat later in the first world war in particular, made the Turks think seriously of a radical transformation. Hence Mustafa Kamal (who was later called Ataturk) and his Nationalist followers appeared to have the chance to form a government in Ankara. By doing so they disobeyed the Istanbul government and called the sultan a traitor because he had accepted Turkey's most humiliating treaty ever. Thus was the treaty of Sevres which deprived the Turks of almost all their motherland. As the author of (History of the Ottoman Empire and Modern Turkey)⁽⁴²⁾ said: What was left of the Ottoman Empire State? Additional provisions made certain that Turkish sovereignty would be very limited. For example, the Ottoman army could have no more than 50,000 ... etc.

Therefore, the Nationalists declared war on the Greeks whom they decisively defeated at the Battle of Sakarija. Then when they had regained their State's dignity they displayed their readiness to sign another treaty with the Allies, whom were obliged to negotiate a new armistic agreement. The treaty was at Lausanne (July 23, 1923). In the meanwhile the Nationalists had abolished the Sultanate (Caliphate) 1922 and started a new era by proclaiming a Republic, a state

(41) The Ottoman Empire - W.S. Vucinich see p.88 and after.

(42) History of the Ottoman Empire and Modern Turkey - Shaw. p.359.

constitutionally based on the two principles: "Nationalism and
(43)
secularism".

Sir Iqbal said of the changes which took place in Turkey: "I believe the Turkish view is perfectly sound ... The republican form of government is now only thoroughly consistent with the spirit of Islam, but has also become necessary in view of the new forces that are set
(44)
free in the world of Islam." In my opinion, however, Sir Iqbal, in so saying, was only partially right. Even if an entire change was absolutely necessary, the actual change which took place was not entirely I think consistent with the spirit of Islam. The two principles on which the new Turkey had been founded were completely contradictory to Islam as a whole.

Nationalism is an imperialistic tendency which was brought to the Muslim world; which consists of different ethnic groups so that Muslim unity is precariously balanced. It was partly imported to the Arabic Moslim world by Arabic christians who by using it later successfully founded very powerful parties.

In Egypt, however, it was counter-balanced by an idea based on the

(43) Art. 1 of Turkish constitution - see Peaslee Const. of the Nations.

(44) Ibid - M. Iqbal p.157.

Spirit of Islam. This was the "Muslim brotherhood movement which was
(45)
founded by al-Imam Hasan al-Banna (R.A.).

In their view the Muslim world is one nation and Muslims
regardless of nationality, social class etc..., are brothers. In other
(46)
words, the religious tie unites them despite racial differences.

(45) Hasan al-Banna, the founder and first head of the Muslim Brotherhood - Al-Ikhwan al-Muslimun - was born in 1906 in the delta town of Mahmudiyya to the modestly well-off family of a local religious notable, Shaykh Ahmad Abd al-Rahian al-Banna "al-Saati". Like some Muslim reformers from the early nineteenth century on, al-Banna and his colleagues believed that it is possible to pick and choose those aspects of Western civilization that they could accept as compatible with Islamic doctrine and morality. About the Movement's mission, he said "Listen Brother! Our mission is one described most comprehensively by the term "Islamic", though this word has a meaning broader than the narrow definition understood by people generally. We believe that Islam is an all-embracing concept which regulates every aspect of life, adjudicating on every one its concerns and prescribing for it a solid and rigorous order. It does not stand helpless before life's problems, nor the steps one must take to improve mankind. Some people mistakenly understand by Islam something restricted to certain types of religious observances or spiritual exercises, and confine themselves and their understanding to these narrow areas determined by their limited grasp. But we understand Islam - as opposed to this view - very broadly and comprehensively as regulating the affairs of men in this world and the next.

(Five Tracts of Hassan al-Banna - Charles Wendell - p.46) University of California press Berkeley Los Angeles London.

On February 12, 1949 al-Imam Hasan al-Banna was shot down by assassins, who later turned out to be members of the secret police.

(46) In the course of talking about the Islamic conception of nationality, S. Ramadan said "Nationality" should neither involve a separating border between human beings, nor should it imply the narrow conception of nationalism that is based on alleged supremacy on linguistic or ethnological lines. In other words, the character or quality deriving from membership of a particular nation or state can only be determined by each member's basic allegiance to his conscience: a conscience which is free of all prejudices. Thus the political status and allegiance which arise from this membership are to be based upon two fundamentals (1) allegiance to one's own conscience, and (2) social allegiance to the society in which one lives. Any deviation from either of these fundamentals constitutes individual or social hypocrisy, for sound membership of a society can only result from conscientious reciprocity. Islamic law p.103. In this connection the Holy Qur'an concisely says:

"The Believers are but a single Brotherhood: so make peace and reconciliation between your two (contending) brothers; and fear Allah, that ye may receive mercy." (CH. XLIX v.10)

When the new Turks adopted the principle of secularism they simply rejected Islamic law (Shariah). A radical revolution against the principles of Islam has been vigorously carried out since the kamalists overthrew the "Sultanate". It was believed that when the new Turks had abolished the Sultanate (Caliphate), they wanted to get rid of the restrictions by Islam in order to encourage scientific development, the same development which had given the Europeans the power to be victorious over the Turks. If Islam was the only obstacle, has modern Turkey achieved any considerable development? It is true that the shariah has been exchanged for the swiss code so that Turkish women became as liberated as their European counterparts, but in so doing Muslim family law has been violated. (47) Also at the beginning, the prayer call (Azan) and igamat in Arabic in the mosques was not allowed, (48) and the Arabic alphabet was exchanged for the latinic. Although these changes have taken place in Turkey, it is still an underdeveloped country. When these changes were deliberately initiated in Turkey, similar changes also unintentionally occurred in the rest of the Arabic world.

Anyway the present stagnation of the whole Muslim world can not be blamed on Islam itself. Rather the Muslims themselves are responsible. The main reason for this is, in my opinion, their failure to observe Islam.

(47) Turkish woman can, for example, get married to non-Muslim.

(48) Later on the 16th June, 1950, the Turkish Grand National Assembly annulled the prohibition regarding the Azan (the call to prayers) and the igamat (the announcement that the devotees should be in position for congregational ovisons) in Arabic from the Turkish Criminal Code. The prohibition of the Azan and igamet was first introduced in 1932, but it was "legally" enforced as from 1941. (The Islamic Review - year 23 Feb. 1954 p.13).

Unlike secularized Turkey, Pakistan as above-mentioned, was carved out of the Indian sub-continent just after India's independence from the British in 1948. It is indeed the most important Islamic State with a secular back ground, to have appeared in this era. On the basis of "the self-determination" principle, it became separate from India. This was proudly achieved by its political leader, Jinnah and his colleagues, on the grounds that Indian Muslims, who form the major minority in India with cultural and traditional differences, had the right of an independent state.

In the annual session of the "All India Muslim league" in 1930 Sir Iqbal said: "The life of Islam as cultural force in this country very largely depends on its centralization in a specified territory. This centralisation of the more living portion of the Muslims of India ... (49) will eventually solve the problem of India as well as of Asia."

This was clearly stated by Jinnah during his talks with Gandhi: "We claim the right of self-determination as a nation and not as a territorial unit ...". (50)

Constitutionally, Pakistan is supposed to be today's ideal Islamic State. But because of the political circumstances through which she passed, Pakistan drifted away from the implementation of her Islamic constitution. As for this constitution, there are two main points that give Pakistan Islamic characteristics. First the proclamation that Sovereignty is to be vested in Allah and not in the people (see preamble). Second, the constitution states that public policy is to be based on the principles of Islam whereby all the institutions of the state are expected to provide the people with

(49) The Islamic law and constitution - A. Maududi p.13.

(50) Ibid p.14.

facilities, individually and collectively, to order their lives in accordance with the fundamental principles of Islam (principles of policy 1. 1A 12 et). Nonetheless, what F. Hassan pointed out about the constitution is quite true. He said: "the constitution provided a set of "directives of public policy", these were simply expectations that the agencies of the state would encourage the teaching of Islam and provide a proper atmosphere where Islamic teachings could flourish. The fundamental tenets were, however, not made "justicible". "Justicibility is a legal term connoting that the right which has been granted can be vindicated through a court of law if an aggrieved person (51) thinks that that right has been trespassed upon ...".

However, since her emergence, Pakistan has lived almost all the time under martial law. Only recently a general election was held by the general Zia al-Hag whose manifesto is based on the Holy Qur'an by which the country will hopefully be governed.

2 - The Shurah, or the democratic system in Islam, and the political and legal rights of the citizens in an Islamic State

After having initially given an outline of the Islamic State in its traditional and modern forms, as well as its decline and revival, the reader ought to know the main purpose of this chapter. The rest of the chapter shall be devoted to a discussion of the following rights:

(1) The right to participate in the affairs of the State. (2) Freedom of expression and association. (3) Equality before the law.

(51) The concept of state and law in Islam - F. Hassan p.129.

(4) Justice and the right to security of personal freedom. (5) The right to sanctification and security of privacy.

But let us before we go any further, give a brief introduction to the kind of democracy in Islam. Having often mentioned that the Islamic State is an ideological one, its kind of democracy must be special and different from the old and modern type of democracy which exists in various places in the world.

(52)
Nevertheless, some Muslim intellectuals call it "theo-democracy", joining theocracy with democracy and giving the impression of the existence of democracy in Islam. I would rather call it "Shurah" (as it is revealed in Holy Qur'an Ch. XLII v.38), thus avoiding bitter criticism from those who say that democracy does not work in Islam.

If we look at the definition of democracy (G. Synokpatia) in the English dictionary we shall find that it means "Government by the people; that form of government in which the sovereign power resides in the people as a whole, and is exercised either directly by them (as in the small republics of antiquity) or by officers elected by them. In modern use often more vaguely denoting a social state in which all have equal rights, without hereditary or arbitrary differences of rank or privilege."
(53)

(52) The Islamic law and constitution - A. Maududi p.133. Others like M. Khadduri call it "nomocracy". War and peace in the law of Islam - p16.

(53) The Oxford English Dictionary - Vol. III D-E p.183.

So the core of democracy, according to the above definition is that the government is to be of the people, and the people are the exclusive sovereign. In other words, the only recognizable ruler of the state is the people, whose competent representatives form a grand assembly by which the country is ruled. And who should be the law-maker as well as the executor.

Generally speaking, democracy, which has of course a secular basis seems to be partially if not wholly incompatible with Islam.

As it is clarified in the beginning of this chapter, the exclusive sovereignty belongs to Allah alone, exemplified in His law (the Qur'an and Sunnah). In the Shurah system, as we shall see later, the leader of the State and the people's representatives are only executors of the Shariah law and within its limits they rule. Apart from sovereignty, modern day democracy is exercised through parliaments (British type) or congresses (U.S.A. type).

Both systems consist of many parties. Every party has a different ideology and ideas which are usually completely incompatible with the others e.g. conservatism and communism etc. Because the ruling elite of the Islamic State must adhere only to Islam, parties with different ideologies can not be tolerated. If a political party is absolutely necessary (as distinct from a ruling elite) then this party must adhere
(54)
to the Islamic law.

(54) Usually, parties carry different ideologies and ideas. When the ideologies and ideas became one it would be useless to be called as such.

However, if the Islamic style of democracy "Shurah" comes into conflict with certain postulates of today's western democracy it is because of the following facts. Firstly, by virtue of being a religion, Islam will occasionally clash with existing secular systems, because it is a system of beliefs based on a minimum of immutable and unquestionable tenets, held on the strength of received conventions and traditional authority, whereas democracy through ceaseless debate and questioning unavoidable involves a challenge to many a sacred axiom. Secondly, there is no exact meaning of democracy as a political system, which can ever be taken as a reference point for our study. Thirdly, ideal democracy does not exist in the world. Thus no government, whatever its ideological underpinning or its social and economic configuration is entitled to the epithet "democratic". Once again, no government can be called democratic unless it is predicted on a number of principles either implicit in its attitudes and social values of its subjects, or explicitly formalized in its laws. Islam by its Shariah (the Holy Qur'an and Sunnah) presents, in my opinion, the best feasible democratic system.

A - The Shurah, and the right to participate
in the affairs of the State

"Those who hearken to their Lord, and establish regular prayer; who (conduct) their affairs by mutual consultation ...". (CH. XLII v.38.)

Literally, Shurah is derived from the verb "Shawarah" which means
(55)
"consulted"; to seek someone's opinion concerning a matter.

Its juridical meaning is "consultation and exchange of views by elders before major decisions affecting general interests are taken, laying down the broad basis and the high and practical principles which suited all parts of the world."⁽⁵⁶⁾ This can be based on the following

Qur'anic injunction which provides:

"... so pass over (their faults), and ask for (Allah's) forgiveness for them; and consult them in affairs (of moment). Then when thou hast taken a decision, put thy trust in Allah."⁽⁵⁷⁾

However, all Muslim jurists have agreed that the Shurah is only admissible in matters which are not explicitly clarified by the Shariah. In other words, no discretionary decisions can be taken whenever there is a revealed text. But they have disagreed about the range of the Shurah. Some of them such as al-Tabari the great interpreter, and Ibn al-Arabi, suggested that the Shurah is admissible only in worldly matters such as wars ... etc." Others like al-Alousi and al-Jasas think that it can also be applied to religious matters of which there is no revelation in the Shariah.⁽⁵⁸⁾

In modern times, interpreting the above verse, al-Imam Muhammad Abduh said: "Consult them (the Muslims) means consultation in all general affairs which form the political life of the nation (Ummah) such as war and peace ... etc., and other worldly matters. And the term "affair" (as revealed in the verse) means worldly affairs and not matter related to the faith which is simply dependent upon the revelation. Had the

(56) See for example The Shurah - M. Fazullah p.53.

(57) CH. III v.159.

(58) The Shurah (Tabiaat al-Hakimia Fi al-Islam) - M. Fazullah p.54.

matters of the dogma such as lawful, and unlawful things been prescribed by the Shurah, then the religion would have been man's creation."⁽⁵⁹⁾

I am therefore of the opinion that the Shurah's field must be confined to worldly affairs. Other religious matters must be left solely to the knowledgeable jurists of the nation (Um-mah).

The Shurah council (in its legislative capacity) is what in the old terminology of Figh was known as "the body which looses and binds" (Ahl al-Hal wa al-Aqd). In an ideological state such as the Islamic one established on the basis of Allah's de jure sovereignty, the said council (even in its worldly affairs capacity) can not make any laws which contradict the Holy Qur'an and Sunnah, even if the consensus of opinion of its people demands it. The Holy Qur'an states:

"It is not fitting for a believer, man or woman, when a matter has been decided by Allah and His Apostle, to have any option about their decision: if any one disobeys Allah and His Apostle, he is indeed on a clearly wrong Path ..."⁽⁶⁰⁾

Nevertheless, the form by which the Shurah can fully work and perform its function is not illustrated by the Holy Qur'an or Sunnah. So Muslims can create or adopt any structure for their "Shurah's Majlas (council)". "It was therefore admissible for Muslims to have a parliament side by side with the head of the State. It is also permissible to have in addition to the house of disputes, other organizations which supervise the work of the latter and examine its

(59) Ibid p.55 and see also al'Qur'an wa al-Dawla - M. Khalafallah p55

(60) CH. XXXIII v.36.

decisions, so that these may be made consistent and free from defects
(61)
and inaccuracies.:

Therefore, under no circumstances can an individual or group deprive the majority of the people their rights to participate in ruling their state. Nor can a rigged election of the head of State or of the Shurah members be accepted by Islam. Such behaviour is considered as treachery against the people whose rights are illegally violated, and against Allah the creator.

Thus the principles which should be embraced by the Shurah Council
(62)
are summed up by the Scholar al-Mawdudi when he states:

- The executive head of the government and members of the (Shurah) Council should be elected by free and independent choice of the people.

- The people and their representatives should have the right to criticize and freely express their opinion, (freedom of expression shall be considered later).

- The real conditions of the country should be brought before the people without suppression of fact so that they are in a position to judge whether the government is working properly or not.

- There should be adequate guarantee that only those people who have the support of the masses should rule over the country

As regards the religious minorities and their right to participation in the State's affairs, generally speaking every citizen of the Islamic State has the right to do so. In other words, Muslims

(61) Islamic Review year 23 February 1954 p.11 Art. by M.A. Allouba.

(62) Human Rights in Islam - A. al-Mawdudi p.34.

and non-Muslims alike have the same right to take part in making the general policy of the country, irrespective of their ideological status, non-Muslims, for instance, can share with their Muslim countrymen administration and civil services of the State.

Also it is needless to point out, they have the full right of voting and taking part in the elections for the Shurah Council i.e. (the worldly affairs capacity). In other words, they, together with Muslims can choose the country's head.

Nonetheless, for being an ideological state, the office of the head of the state must be confined to Muslims only. (63) Non-Muslims therefore, do not have the chance to be the State's leader. That is because of the ideological nature of the Islamic State, the responsibility of running the country should rest primarily with those who believe in the ideology. Also the people's respect can only be gained by a Muslim leader. Muslims therefore, should only submit to righteous Muslim authorities (Uli-l-amr) (64). As the Holy Qur'an says:

"O ye who believe! Obey Allah, and obey the Apostle, and those charged with authority among you. If ye differ in anything among yourselves, refer it to Allah and His Apostle, (65) if ye do believe in Allah and the last Day..."

(63) In the Tafsir by al-Naysaburi it is stated: "The Ulemas (scholars) have laid down the following attributes for the general Imamate: Islam, wisdom, maturity, ... etc." (Original views on religious matters) see Islamic Review - Vol. 53 - May 1965 - p.27.

(64) "Ui-al-amar" means those charged with authority or responsibility or decision, or the settlement of affairs, such as the leader, judges, and scholars ... etc.

(65) CH. IV v.59.

Accordingly, the authorities would not be obeyed unless they show considerable obedience to Allah and His Apostle. In other words, the obedience of the people to the Imam (leader) is strongly dependent on how much he respects the Shariah (Islamic law).

This attitude was stressed, in modern times in some constitutions of Muslim countries. Here Ar. 10 of the Pakistani constitution says:

"A person shall not be elected as president unless
(a) he is a Muslim ...".

Again chapter IV (the Imam) Arti. 24, on the Model of an Islamic constitution stressed the same attitude:

"A person qualified for election to the office of Imam shall be:
(a) a Muslim not under ... years of age.

Moreover, some constitutions restricted the nomination of the leader particularly to the religious elite of the country. Preamble of the Irani Const. under Sanctity of justice - seeking theologians states:

"... the constitution shall prepare the ground for the realization of leaderships of qualified theologians who are recognized as leaders
(66)
by the people ...".

Nevertheless, when the final decision of the general policy of the State is at the hands of Muslims, the non-Muslim candidates I think, can still be presented to the High Shurah Council, where they can participate in the affairs of their state and look after their sect - people. This would be closer to a real democratic system.

(66) The constitution of the Islamic republic of Iran p.13.

B - The right to freedom of expression
and association

"Whosoever of you sees an evil action, let him change it with his hand (force); and if he is not able to do so, then with his tongue; and if he is not able to do so, then with his heart - and that is the weakest of faith."

(Prophetic hadith. As related by Muslim.)

No doubt, the Islamic concept of freedom of expression is not comparable with any other concept of freedom. According to the above stated hadith (saying), freedom of expression, in order to propagate virtue and uprightness, is not only a right, but an obligation in Islamic society. There is therefore a responsibility which rests upon the individual as well as the group to combat evil and wrongdoings whether these are perpetrated by an individual, group of people or government.

However, condemnation of wrong doing should be open and go hand in hand with the appropriate moral reform. This was descriptively emphasized in the Holy Qur'an when Allah says:

"(They are) those who, if we established them in the land, establish regular prayer and give regular charity, enjoin the right and forbid wrong:..."
(67)

Moreover, the Holy Prophet goes on to stress the Qur'anic meaning when he says:

"The most excellent jihad is the uttering of truth in the
(68)
presence of unjust ruler."

Islam has also given its people the right to freely express their opinions in any matter whatsoever. In one of the legal matters it is reported that Umar; the second Caliph was once about to take a decision to limit "the marriage dowry" which he considered to have been exaggerated by the people. A woman got up and said "O son of al-Khatib, what Allah gives us you want to take away, then she recited the following verse:

"But if ye decide to take one wife in place of another, even if ye had given the latter a whole treasure for dower, take not the least bit of it back: would you take it slander and a
(69)
manifest wrong."

Then Umar (R.A.A.) changed his mind and said "All people surely know
(70)
better than you O Umar."

Regarding freedom of association, people are absolutely free to any association or organization or whatever they like. Here the Holy Qur'an states:

"Ye are the best of people, evolved for mankind enjoining what is right, forbidding what is wrong, and believing in
(71)
Allah ..."

That is to say: whatever is a good deed, action etc. which benefits society, the whole community, is an obligation. If the Muslim

(68) (Related by Tr-M.Sh.) See a Manual of Hadith - M.Ali p.398.

(69) CH. IV v.20.

(70) See Safuat al-Tafasir - M. Sabuni vol. I p.268.

(71) CH. II v.110.

community as a whole does not perform its duties, a group of it should do. The Holy Qur'an says:

"Let there arise out of you a band of people inviting to all that is good, enjoining what is right, and forbidding what is wrong: they are the ones to attain felicity ..."⁽⁷²⁾

But this right is, in the Islamic state, subjected to certain general rules, it should be exercised in a way to denounce the "Fasad" (corruption). Therefore, associations, parties, or organizations should not be held in secret which could later prejudice the Muslim community. As in all times, secret meetings have been a constant source of political and social unrest. Here is what the Holy Qur'an says:

"O ye who believe! When ye hold secret counsel, do it not for iniquity and hostility, and disobedience ..."⁽⁷³⁾

On the level of universal declarations, the foregoing rights were emphasized by the UDHR when it stated in Art. XII:

"Every person has the right to express his thoughts and beliefs so long as he remains within the limits prescribed by the law. No one, however, is entitled to disseminate falsehood or to circulate reports which may outrage public decency, or to indulge in slander, innuendo or to cast defamatory aspersions on other persons ...".

(72) CH. III v. 104.

(73) CH. LVIII v.9.

C - Equality before the law and
the right to security of personal
freedom.

In theory as well as in practice, the principle of equality in general or of "equality before the law" forms the most integral part of the Shariah (Islamic law).

Fourteen centuries ago, in the most divided society Islam emerged to wipe out such inhumane behaviour, and make all people equal. To stress this point, the Holy Qur'an provides in the chapter "al-Hujurat" the following verse:

"O mankind! We created you from a single (pair) of a male and a female, and made you into Nations and tribes, that ye may know each other (not that ye may despise each other). Verily the most honoured of you in the sight of Allah is (he
 (74)
 who is) the most righteous of you ..."

This was emphatically declared by the Holy Prophet (s.a.w.) in his farewell address, after he had recited the above-mentioned verse, when he said: "All mankind is the progeny of Adam and Adam was fashioned out of clay ..."

It is therefore very clear that there should be no privilege or superiority for one person over another as all human beings were originally created from one material (clay). If social stratification

in the past or present existed or exists in Muslim society, contrary to the above statement, it should never weaken the principle of "equality before the law".

Before the Shariah, Islam has never differentiated between people because of their social status. Nobles or plebeins, whites or blacks are considered absolutely equal before Islamic law. In one of the significant incidents which took place in the time of the Prophet (s.a.w.) this equality is clearly stressed. It is reported by al-Bukhari that "the Quraish people became very worried about an al-Makhzumiya lady who had stolen. They (the Quraish) said, No body can speak (in favour of the lady) to Allah's Apostle, and no body dares do that except Usama who is the favourite of Allah's Apostle." When Usama spoke to Allah's Apostle about that matter, Allah's Apostle said: "Do you try (with me) to violate one of the legal punishments of Allah?" Then he got up and addressed the people saying: "O people! The nations before you went astray because if a noble person committed theft, they would leave him, but if a poor (plebein) person among them committed theft, they used to inflict the legal punishment on him. By Allah if Fatima the daughter of Muhammad committed theft, Muhammad would have cut off her hand:" (75) Another similar incident shows us that the principle's application was fully recognized in the Islamic State. Thus in the reign of Umar the great Caliphe (R.A.A.), a legal punishment was inflicted on his own son, who had drunk alcohol by Umar himself. (76)

(75) Sahih al-Bukhari (Arabic-English) - Kazi publications - (Translation) vol.iv p.453.

(76) See al-Farooq 'Umar - Muhammad Heikal p.197.

Once again, without any distinction the principle is fully applied to all citizens of the State. In particular non-Muslims; Christians, Jews and Muslims are equal before the law.

Non-Muslims are therefore granted (as we have seen) judicial autonomy. The Shariah fully believes that the sole goal of the application of the principle of the equality is the realization of justice. So the Shariah did not subject non-Muslims to the Islamic law concerning alcoholic drink, pork, and other matters unique to Islam. Having stated that crimes recognized by all humanity as such apply to all mankind regardless of their religions.

Moreover, unlike positive laws, Islam does not give rulers, governors, or diplomats any special treatment. All such people are equal in the face of the law. (77) Holding the highest positions in Islam does not make any difference. This can be clearly shown by an authentic incident which occurred in the reign of Umar (R.A.A.). Jabala, king of the Ghassanides, having embraced the Islamic faith, proceeded to Madina to pay his homage to the Commander of the faithful. He had entered the city with great pomp and ceremony, and had been received with much respect. Whilst performing the circumambulation of the Kaaba, a humble pilgrim engaged in the same sacred duties accidentally dropped a piece of his pilgrim's dress over the royal shoulders. Jabala turned round furiously and struck him, knocking out the poor man's teeth. The man came to Umar and prayed for justice. Umar sent for Jabala, and when he came before him, Umar asked him why

(77) Al-Tashria al-Jinaai al-Islami - A. Awda vol.I p.323.

he had ill treated a brother Muslim. Jabala answered that the man had insulted him, and that were it not for the sanctity of the place he would have killed him on the spot. Umar. answered that his words added to the gravity of his offence, and that unless he obtained the pardon of the injured man he would have to submit to the usual penalty of the law. Jabala replied "I am a king, and the other is only a common man". King or no king, both of you are Muslims, and both of you are equal in the eye of the law" said Umar (R.A.A.). On the consent of the injured, the penalty was delayed. In the night Jabala escaped, and joined the
(78)
Christians among whom he later died.

On the level of judicial proceedings, Ali the fourth Caliph (R.A.A.), also had occasion to appear in Court as any ordinary claimant against a Jew. In addition to his own statement and in support of his claim, he presented his son al-Hasan as a witness in whose presence the incident had taken place. The judge held that because of the close relationship between the plaintiff and the witness, the testimony of the witness was not admissible and he eventually dismissed the claim. The defendant was so impressed that immediately upon emerging from the
(79)
court room he acknowledged the claim and discharged it.

However, the above mentioned incidents which indicate man's absolute equality before Islamic law represent a fraction of such cases, occupying throughout Muslim history. With no comparison, those incidents show that the teachings of the Holy Qur'an and Sunnah were at least once put into practice.

(78) This historical incident taken from Spirit of Islam - Ameer Ali p.413.

(79) For a different narration, see al-Bidaia wa al-Nihaia - lbn Kathir - Maktabit al-Maareef, Beirut 1974 - Part 8 p.45.

- Maktabit al-Maareef, Beirut 1974 - Part 8 p.45.

Accordingly, following the way of UDHRs Art. (7) came UIDHRs which in Art. 3 stressed this point when it stated:

"All persons are equal before the law and are entitled to equal opportunities, and the protection of the law."

D Justice and the right to the
security of personal freedom

"And when ye judge between man and man, that ye judge with justice: verily how excellent is the teaching which He giveth you." (CH. IV v.58).

Historically, three out of four Orthodox Caliphs were victims of abuse and threats. Umar the second Caliph, after many threats, was killed by a christian while praying.⁽⁸⁰⁾ Ali the fourth Caliph was also killed by one of the kharijites who for a long time had been threatening him.

(80) The story of 'Umar's murder as reported by al-Tabari, i, pp.27, 26, "Umar ibn al-Khattab went out one day to stroll in the market place, and he met Abu Lu'lu'a, a slave of al-Mughira ibn Shu'ba, and he was a Christian. Abu Lu'lu'a said, "O Commander of the Faithful, help me against al-Mughira ibn Shu'ba, for a great tax has been imposed on me". How much is your tax?" asked Umar. "Two dirhams every day" he replied. "And what is your trade?" "A carpenter, a painter, a blacksmith." "I do not consider your tax great," said Umar, "for the crafts which you practice. I have heard that you say that if you wished, you could build a mill that would grind by the wind." "Yes," he answered. "Make me a mill" said 'Umar. "If I am spared," said Abu Lu'lu'a, "I shall make you such a mill that men shall talk of it in the east and the west." Then he left him, and Umar, may God be pleased with him, said "Indeed, this slave has just dared to threaten me!" ...Three days later ... "And when dawn came 'Umar went forth to prayer, and he used to appoint men to dress the people in ranks. And when they were straight, he went forward and recited "Allahu akbar". And Abu Lu'lu'a entered among the people, and in his hand was a dagger with two blades and the grip in the middle, and he smote Umar six blows, one of them under the navel, and it was this one that killed him." Translation - Islam - politics and war - B. Lewis p.6.

Uthman met the same fate at the hands of Muslims themselves when they believed that he had drifted away from the true path of ruling the state.

However, the Caliphs, being the leaders of the state were not lacking in the power to protect themselves against such threats. But they never did so or even thought of doing so, so long as the threats did not affect the general public order. They knew that suspicion or baseless claims could never give them any chance to take any action (i.e. imprisonment).

The principle in Islam is that no citizen whatsoever may be imprisoned unless his guilt has been proved in an open court. Therefore, it is not permissible under Shariah (Islamic law) to arrest a man on the basis of suspicion. The Holy Qur'an clearly says:

"But most of them (idolaters) follow nothing but fancy: truly fancy can be of no avail against Truth. Verily Allah is well aware of all that they do."
(81)

Nor can a man be thrown into prison with no proper court proceedings or without having been given a reasonable opportunity to defend himself. Beside the above-mentioned verse, the Holy Qur'an stresses the theme of justice again and again. For example it says in the same chapter:

"O ye who believe! stand out firmly for Allah, as witness to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to Piety..."
(82)

This was emphasised by the Holy Prophet (s.a.w.) when he said: "I have been ordered by Allah to dispense amongst you..."

(81) CH. X v.36.

(82) CH. V v.9.

In the traditions, it was reported that the Prophet was once delivering a lesson in the Mosque, when one of the attendants asked "O Prophet of Allah, for what crime have my neighbours been arrested?" The Prophet appeared not to hear the question and continued his lesson. The man repeated the question again. After the third time the Prophet ordered the man's neighbours to be released.

The scholar Maududi said: "the reason why the Prophet had ignored the first two questions was that the police officer who had carried out the arrest was present in the Mosque; if there had been valid reasons for the arrest, he would have got up to give them. Since the police officer did not, the Prophet ordered that the arrested persons should be released ..."⁽⁸³⁾

This was obviously the reason which made Umar (R.A.A.) say: "In Islam no one can be imprisoned except in pursuance of justice." The pursuance of justice here means the due process of law in open court.⁽⁸⁴⁾

Politically, there is a famous incident which took place in the lifetime of the Prophet. It was reported by Ibn Ishaq that when the Apostle decided to go to Meccah, Hatib b.Abi Baltaa wrote a letter to Quraish telling them about the Apostle's intention. When the Apostle heard about it, he got the letter back from the woman with whom it had been entrusted. The Apostle summoned Hatib and asked him what induced him to act thus. He replied that he believed in Allah and in His Apostle and had never ceased to, but that he was not a man of standing

(83) Human Rights in Islam - A. al-Maududi p.26.

(84) Ibid p.26.

among Quraish (the Prophet's people) and that he had a son and a family there and so he had to act prudently for their sakes. He was forgiven by the Prophet. In this connection A. Maududi commented that "it was clear case of treachery and betrayal of military secrets. But the Prophet acquitted Hatib on two counts: First because his past record was clean in that he had fought at the Battle of Badr ... secondly, his family was in fact in danger in Meccah. In such circumstances it was sufficient punishment that his secret offence became public and that he was disgraced and humiliated in the eyes of the Muslims."⁽⁸⁵⁾

Later in the reign of the fourth Caliph ALI (R.A.A.), when some kharejites used to abuse the Caliph and threaten him, some of the leaders thought that they should be punished or even expelled. Ali is recorded to have said: "As long as they do not set out on armed rebellion, the Caliph of the faithful will not interfere with them."⁽⁸⁶⁾

Having shown that, in Islam mere suspicion is not enough to arrest a man or a group without a proper reason verified before a court. Also suspicion must be confined to the suspected person and should not extend to any of his relatives for instance. For the Holy Qur'an clearly says:

**"...Every soul draws the meed of its acts on none but itself:
no bearer of burdens can bear the burden of another ..."**⁽⁸⁷⁾

This is very brief account about the foregoing rights in Islam. However, what is going on concerning this, in all Muslim countries, is obviously contrary to the Shariah (Islamic law).

(85) Ibid p.27.

(86) "They (the Kharejites) are free citizens of Kufa (a city), and so long as their hostility is solely personal and directed merely against myself, they have full freedom of action, unless they proceed to do something which is contrary to the public interest and security" said Ali (R.A.A.). See, A Muslim commentary on the UDHRs - S. Tabandeh of Gunabad: Iran p.35.

(87) CH. VI v.164.

E - The right to sanctification and
security of privacy

"Woe to every (kind of) scandal-monger and backbiter ..."

(CH. CIV v.1).

Nothing in Arti 12 of UDHRs as well as Art. 17 of CCPRs (which were internationally brought about) is inconsistent with the Islamic doctrine of the individual's right to privacy. Therefore, the term (privacy) can, under the Shariah (Islamic law) be defined to contain all the meanings interpreted say, by the Nordic Conference of (88) Jurists. The individual, in the Islamic State, has the right to full protection against the following maltreatments and attacks from other people or officials of the State: (a) attacks on honour and reputation and similar torts; (b) being spied upon, watched, and besitted; (c) the use of name, identity, or likeness; (d) the disclosure of information protected by the duty of professional secrecy; (e) attacks on physical or mental integrity or moral or intellectual freedom.

A glance at the Holy Qur'ah and the Sunnah of the Prophet and also the practice of the Orthodox Caliphs relating to privacy is enough to show that Islam not only made the right to life sacred (its liberty and security) but also gave to the values of privacy and honour the same status. The Shariah indeed has sometimes subjected the violater of these rights to heavy punishments.

(88) Privacy and human rights - Ed. by A.H. Robertson p.273.

In his farewell address the Holy Prophet (s.a.w.) declared:

"O people, verily your blood, your property and your honour are sacred and inviolable until you appear before your Lord, as the sacred inviolability of this day of yours, this month of yours and this very town (of yours), verily you will soon meet your Lord and you will be held answerable for your action." Broadly speaking this historical declaration has made privacy in general sacred.

Among individuals the following injunction of the Holy Qur'an even prohibited laughing at each other:

"O ye who believe! Let not some men among you laugh at others: it may be that the (latter) are better than the (former): nor let some women laugh at others: it may be that the (latter) are better than the (former): nor defame nor be sarcastic to each other, nor call each other by (offensive) nicknames: ill-seeming is a name connoting wickedness, (to be used of one) after he has believed: and those who do not
(89)
desist are (indeed) doing wrong."

Therefore, all acts such as sarcasm, defamation, etc. (which characterize the time of ignorance) are entirely negative to the spirit of Islam. It was related by al-Bukhari that the Holy Prophet had said to one of his companions called Abu Dharr: "O Abu Dharr! Didst thou call him by a bad name on account of his mother; indeed thou has in
(90)
thee ignorance."

Again the Quranic verses go on to ask its followers to avoid

(89) CH.XLIX v.11.

(90) (It was related by al-Bukhari) see A manual of Hadith. M. Ali p28

suspicion, spying and backbiting because of the negative social effects such manners have. Here the Holy Qur'an provides:

"O ye who believe! avoid suspicion as much (as possible): for suspicion in some cases is a sin: and spy not on each other, nor speak ill of each other, behind their backs. Would any of you like to eat the flesh of his dead brother? Nay, ye
(91)
would abhor it ..."

In the lifetime of the Prophet, a political incident took place which was recorded by the Holy Qur'an. This can be taken as a precedent as the same incidents might happen again. One of the Arab tribes embraced Islam. Later after a year the Prophet sent one of his companions to collect al-Zakat (alms) as they were due from them. Once the people knew that the Prophet's envoy was coming, they went outside to welcome him. The Prophet's envoy having (vendetta) with them in the time of ignorance, thought that they had forsaken Islam and were coming to kill him. So he returned to the Prophet telling him that the tribe had become unbelievers. The Prophet, before taking any action, sent Khalid b.al-Walid to make sure, who turned to the Prophet with an opposite tale. So the Holy Qur'an says:

"O ye who believe! if a wicked person comes to you with any news, ascertain the truth, lest ye harm people unwittingly, and afterwards become full of repentance for what ye have
(92)
done."

By the same token, for man was created with honour (CH. XVij v.70)

(91) CH. XLIX v.12.

(92) CH. XLIX v.6. See Mafatih al-Ghaib (Tafsir) - Razi Vol. 7 p.589, and also Jami al-Basyan (Tafsir) Tabari Vol. 8 part 26 p.72.

Islam, by the Holy Qur'an, never omits to punish anyone who has violated another's honour, chastity, or respect. According to the Shariah (Islamic law), if a chaste Muslim or non-Muslim woman is slandered, the offender must face an infliction of not less than eighty stripes and also shall be considered as a wicked person not to be relied upon or trusted in any other matters (i.e. as a witness). The Holy Qur'an in chapter (Nur) provides:

"And those who launch a charge against chaste women, and produce not four witnesses (to support their allegation), - flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors."⁽⁹³⁾

In this case, the Shariah is perhaps different from some other laws. The victim does not have to prove any honour, chastity, or respect enjoyed, when the attack was proved to have taken place. In one of the Holy Prophet's hadiths, slander is emphasized as one of the greatest sins that can be committed: "Avoid the seven great destructive sins ... one of them he mentioned: to accuse, chaste women, who never even think of anything touching chastity are good believers."⁽⁹⁴⁾

Islam, however, has gone even further to ensure that an individual's private life will not be violated. The Muslims for example are taught how to behave before entering an other's house. Here the Holy Qur'an explicitly provides:

O ye who believe! enter not houses other than your own, until ye have asked permission and saluted those in them: that is

(93) CH. XXIV v.4.

(94) Sahih al-Bukhari - Kazi publications - vol. iv - Book of Wasaya - p.23.

best for you, in order that ye may head (what is seemly. If find no one in the house, enter not until permission is given to you: if ye are asked to go back, go back: that makes for greater purity for yourselves, and Allah knows well all that
(95)
ye do ..."

The following incident, which took place with Umar (R.A.A.) himself acting as a policeman in the city of the Prophet (Madina), illustrates practically as a precedent that the foregoing rights and right to privacy in particular are inviolable and sacred. It is recorded that Umar was wondering one night in Madina, looking after the Muslims as usual, when he heard sounds of debauchery coming from inside a house. He angrily tried to get in through the door but no one answered him. So he climbed onto the roof, and from there shouted down to the owner saying: "you are guilty of breaking the law and allowing such a debauchery in your house. The owner replied saying: "well no Muslim has the right to speak to another like that. I might have committed one sin, but think how many you have committed and he started numerating them: (a) despite Allah's command: "And spy not on each other" (CH. XLIX v.12) you spy. (b) despite the order of Allah: "Enter houses through the proper doors (CH. II v.189) - you came in through the roof. (c) entering without the owner's permission - in defiance of Allah's order: "Enter not houses other than your own until ye have asked permission." (CH. XXIV v.27) (d) Omitting the salute (al-salaam) - though Allah commands "and saluted those in them ...", (CH. XXIV v.27). The Caliph then said "well I must forgive you your sin".
(96)

(95) CH. XXIV v.27

(96) A Muslim commentary on UDHRs - S. Tabandeh of Gunabad: Iran p.31.

Stressing the foregoing rights and following the international community's way in its UDHRs, the IUDHRs appears to have the same statement. When it states in Article 8 :

"Every person has the right to protect his honour and reputation against calumies, groundless charges or deliberate attempts at defamation and blackmail." This was more generally backed up by the proposed Islamic model of constitution when it explicitly states in Article (6):

- (a) Every person is entitled to the protection of his privacy.
- (b) the right to privacy of home, correspondence and communication is guaranteed and cannot be violated except through the judicial process ...".

Having stated all that, the right to privacy, under the Shariah (Islamic law) is not, however, absolute. The said rights can lawfully be violated for the benefit of public order only. Thus I think the IUDHRs is more consistent with ECHRs and ICCPRs which both insert the words "or lawful" before any "interference or attacks" than UDHRs which appears without saying so. In time of war for instance lawful interference can strictly take place when there is a reason under certain circumstances. But Islam prohibits any interference in the other's affairs or privacy in ordinary circumstances even when there is a strong probability that something wrong is happening. This can be clearly understood from the above mentioned story with Umar (R.A.A.).

The conclusion which may be clearly drawn is that Islam is fully consistent with international opinion in the matter concerned. The

ridiculous behaviour of the Muslim world today, should not be considered as Islamic. Its violations of such rights without giving any real reason (except political interest) is quite well known among the international community, though most of the Muslim countries accepted the Universal Declaration of Human Rights.

CHAPTER FOUR

The Islamic Humanitarian law:
treatment of civilians and prisoners
of war in time of conflict.

This chapter shall be devoted to examining the Islamic humanitarian law with respect to two important issues in any conflict. One of these issues is the treatment of civilians, the other is the treatment of prisoners of war. Firstly, we shall see to what extent the Islamic law is effective in protecting the lives of civilians, non-combatants in the time of war, and also the scope of legitimate military targets. Secondly, we shall see how the said law treats prisoners of war during and after conflict. I shall also compare, with respect to both issues, Islamic humanitarian law on the one hand and International law on the other.

Before the heart of the subject is touched, the reader ought to be given a brief idea about the law of war in Islam.

Islam and the law of War

"To those against whom war is made, permission is given (to fight), because they are wronged; - and verily, Allah is most Powerful for their aid; -" (CH. XXII v.39)

In pre-Islamic Arabia, and elsewhere there were wars between the tribes. With the emergence of Islam, however, feuds and raids or as such were absolutely forbidden by Islam, ⁽¹⁾ Muslims were only permitted to wage war against their enemy. This is what is known as "al-Jihad", it is for self-defence and to remove obstacles preventing the spread of

the Islamic religion. The former (self-defence) is what is meant by the above verse of the Holy Qur'an. The latter sense of "al-Jihad" means fighting only force which stands in the way of the light of Islam and its teachings. In other words, it could mean that that war should be waged against whoever arrogantly prevents Allah's Law prevail.

Literally, al-Jihad is a term derived from the verb "jahada" which means 'exerted'.⁽²⁾ Its technical meaning is exertion of one's power in Allah's path, that is to disseminate the belief in Him and in making His word supreme over this world. The Holy Qur'an says:

"O ye who believe! Shall I lead you to a bargain that will save you from a grievous Penalty:- That ye believe in Allah and His Apostle, and ye strive (your utmost) in the cause of Allah, with your property and your persons: that will be best for you, if ye but know! ..."⁽³⁾

As a religious duty, "al-Jihad" is not to be carried out only by fighting. As is specified in the following verse, the salvation of the soul is the ultimate aim of Jihad:

"... And if any strive (with might and main), they do so for their own souls: for Allah is free of all needs from all

(1) Today's Iranian-Iraqi war can be considered as one of the above mentioned kinds of wars. Although taking place between two different countries, it is still regarded by Islam as an internal war between Muslims which should promptly be stopped by the whole Muslim world. The Holy Qur'an says:

"If two parties among the Believers fall into a quarrel, make ye peace between them: but if one of them transgresses beyond bounds against the other, then fight ye (all) against the one that transgresses until it complies with the commands of Allah; but if it complies, then make peace between them with justice, and be fair: for Allah loves those who fair (and just). (CH. XLIX v.9).

(2) Ibn Manzur - Lisan al-Arab al-Muhit p.521.

(3) CH. LXI VS. 10 & 11.

(4)
creation."

In tradition the Holy Prophet upon his return from one of the campaigns said: "We have just fulfilled the lesser jihad; it is now our duty to embark on the greater jihad."⁽⁵⁾

Thus al-Jihad is the only war recognized as legitimate by Islam,⁽⁶⁾
the Holy Qur'an justifies it as follows:

"(They are) those who have been expelled from their homes in defiance of right, - (for no cause) except that they say, "Our Lord is Allah" Did not Allah check one set of people by means of another, there would surely have been pulled down monasteries, churches, synagogues, and mosques, in which the name of Allah is commemorated in abundant measure..."⁽⁷⁾

Accordingly, al-Jihad - in Islam - can never take the form of aggression, oppression, looting, plunder, unnecessary shedding of blood, savagery or inhumaneness. It is simply an act intended to repel injustice and evil. The Holy Qur'an states:

"... And fight them on until there is no more tumult or oppression, and there prevail justice and faith in Allah altogether and everywhere; but if they cease, verily Allah doth see all that they do ..." ⁽⁸⁾

nor can "al-Jihad" be used to impose Islamic faith upon unbelievers. Ibn Taymiyyah clearly distinguished between offensive and defensive

(4) CH. XXIX v.6.

(5) This hadith is not strong, see Majmua'at Rasa'l al-Imam Hassan al-Banna - Al-Mu'asasa al-Islamiah - Beirut, 1981 - p.436.

(6) Afghani Muslims struggle against the communists (Soviet Union) can be taken as a good example on the real Islamic Jihad.

(7) CH. XXII v.40.

(8) CH. VIII v.39.

warfare, when he argued, "if a non-Muslim were to be killed because he preferred to become a Muslim, such an action would constitute the greatest compulsion in religion", (9) which would run contrary to the Holy Qur'anic injunction that forbids forceful conversion:

"Let there be no compulsion in religion: Truth stands out clear from Error ..." (10)

Having permitted this type of war, fourteen centuries ago, Islam then produced the oldest (11) and probably the most reasonable legal system containing detailed rules for warfare. However, the Islamic rules of warfare are just a branch of the Islamic legal theory of homicide in the Shariah, which are simply based on the Holy Qur'an and Sunnah. Within the Muslim law of nations, which is merely an extension of the law designed to govern the relations of Muslims with non-Muslims whether inside or outside the world of Islam, the conduct of foreign relations in the general law body was dealt with under such headings as "Jihad", the "spoils" of war, and the "Aman" or in certain special studies such as al-kharaj. Later on, the broad subject of foreign relations assumed a special significance and was discussed under the technical term al-Jiyar.

Broadly speaking, the Jihad or the Islamic law of warfare has explicitly laid down instructions and regulations which must be fully recognized by the jihadists (Muslim combatants) in time of conflict.

(9) See Islamic Review - vol. 56 - year 1968 July p.16.

(10) CH. II v.256.

(11) G. Adler recognized that saying: "... the first systematic code of war, that of Saracens was based on the Holy Qur'an and was supplemented by decisions of Muhammad and his followers ..." The Vietnam war and International law vol. 3 (1972) p.288.

(12)

For example, it lists the duties of the combatants and also clarifies the duties and rights of non-combatants (civilians) alike, as well as paying great attention to the treatment of prisoners of war. (This shall be broadly dealt with in the following pages).

Before going any further, some of the foregoing law's characteristics shall be considered.

Being a branch of the Shariah (Islamic law) of homicide, the law of war is governed by the same penalties. Thus its provisions are enforced by the authority of the government of the Islamic state.

While the contemporary International law of war or other branches is based on the "customary law" as well as on treaties or international conventions related to war, and its effectiveness is absolutely dependent on the "reciprocity" principle, the Islamic law of war is neither customary nor dependent on treaties. However, a treaty may impose restrictions on the conduct of the Islamic state in its affairs with the international community, over and above the Islamic law of nations including the law of war which the Muslims are bound to observe. Therefore, the body of Islamic international law remains intact even if a treaty is broken or denounced. This is because Islam as a whole has, as one of its fundamental principles, respect for the

(12) Muslims are committed: 1 - not to fight non-combatants, 2 - not to plunder or destroy any property unless involved in the battle, 3 - to respect the principles of humanity and virtue during the war (CH. VIII v.58) 4 - to grant safety if asked for and appealed to by the enemy in order to stop the fighting - partly or entirely, 5 - to grant good treatment to the prisoners of war and acting for their release, 6 - to respect civilian establishments - religions, agricultural, industrial, etc., 7 - to apply these rules and restrictions to all forms of armed conflicts. See First Arabic Middle East Seminar on

rights of non-Muslims in general and people of the scripture (e.g. Jews and Christians) in particular.

In a few words, the rules of the Islamic law of war, therefore apply regardless of whether the enemy observes them or not. The Holy Qur'an states:

"O ye who believe! stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from Justice - Be just: that
(13)
is next to Piety:..."

In Islamic law, every individual is held responsible for his illegal actions. Thus the commander of the Muslim army, for example, in the war territory, cannot be held responsible except if he ordered his troops to do an illegal act. Nor can the ordinary soldier escape responsibility for his own illegal actions, even he was ordered to do
(14)
so. Here are the words of the Holy Qur'an:

"...Every soul draws the meed of its acts on none but itself:
(15)
no bearer of burdens can bear the burden of another ..."

However, in the sense of collective responsibility which initiated from either natural obligation or acceptance of a higher position, it could be said: peoples such as leaders or commanders (e.g. of armies) are at least partially responsible for the deeds done by those of whom they
(16)
are in charge.

(13) CH. V v.9.

(14) For the saying of the Prophet (s.a.w.): "To hear and obey (the authorities) is binding, so long as one is not commanded to disobey (Allah) when one is commanded to disobey ("Allah"), he shall not hear or obey. (related by al-Blikhari).

(15) CH. VI v.164.

(16) Said the Prophet (s.a.w.): "Every one of you is a ruler and every one of you shall be questioned about those under his rule; the Imam (leader) is a ruler and he shall be questioned about his subjects..."

In Islam, al-jihad (the Islamic war) must not be initiated unless a full declaration of war reached those against whom the war will be waged. In the Holy Qur'an, Allah says:

"... nor would we visit with our wrath until we had sent an
(17)
Apostle (to give warning)..."

At the advent of Islam, the Prophet (s.a.w.) and his caliphs acted accordingly. The Prophet himself used to invite all nations, including his own nation (the Arabs), to accept Islam and its law, and only failure to be tolerant with it, would precipitate war with them. Such as the form (an invitation to Islam) which was traditionally taken as a war declaration. Later, Muslim jurists like al-Imam Malik and al-Imam al-Shafai (18) agreed on the general principle that the enemy should be invited to Islam before the fighting begins. Nonetheless, al-Imam Abu Hanifa (19) was of the opinion that Muslims do not have to notify the enemy so long as they already heard of Islam. With the thought of al-Jihad as a defensive measure, though Islam has largely become known to the world, al-Jihad should be either implicitly or explicitly declared as any secular war.

Above all, Muslims also should never hesitate, even in the midst of the fighting, to be ready for peace whenever there is any inclination towards peace on the other side. Having exhorted the Muslims to be ready to face their enemy, the Holy Qur'an came to say clearly:

"But if the enemy incline towards peace, do thou (also
incline towards peace, and trust in Allah: for He is the one
(20)
that heareth and knoweth (All things)).

(17) CH. XVII v.15.

(18) Kitab lkhtilaf al-Fugaha - Ibn Jarir al-Tabari ed. J. Schact-LEIDEN P.2,3.

(19) Ibid p.3.

(20) CH. VIII v.16.

A - The doctrine of civilians' immunity
in the time of conflict

"Fight in the cause of Allah those who fight you, but do not transgress limits; for Allah loveth not transgressors." (CH. II v.190).

Muslims must not transgress the "jus in bello" (shown below) in their wars against others; the war which is supposed to be justly waged in the cause of Allah. According to the above verse of the Holy Qur'an, war in Islam should have two characteristics: first, it should only be directed to those who are actually involved in such a serious matter e.g. combatants, second, it should be also conducted as carefully as possible; it is essential that no more killings or destruction take place than the occasion necessitates.

Innocent people, such as non-combatants "civilians" i.e. women, children, elders, and whoever does not participate in the conflict, (21) should not be molested, not civilian installations or trees and corps be destroyed. This general rule was explicitly stressed in the following instructions made by the Holy Prophet (s.a.w.) and his caliph Abu Bakr (R.A.A.).

The Prophet's commandments runs as follows: "Fight with the name of God and in the path of God. Combat those who disbelieve in God. Fight yet do not cheat, do not break trust, do not mutilate, do not kill minors."

(21) See Jami al-Bayan fi Tafsir al-Qur'an - al-Tabari vol. 2 p.107.

"If thou encounterest an enemy from among the Associators (infidels), then offer them three alternatives. Whichever of these (22) they may accept, agree to it and withhold thyself from them:..."

And on his part Abu Bakr, the first caliph stood up before the Muslim army saying: "O People! stop I enjoin upon you ten commandments. Remember them: Do not embezzle, do not cheat, do not break trust, do not mutilate, do not kill a minor child or an old man of advanced age or a woman, do not hew down a date-palm nor burn it, do not cut down a fruit-tree, do not slaughter a goat or cow or camel except for food. Maybe you will pass near people who have secluded themselves in convents; leave them and their seclusion. And it may be that you pass near people who will bring to you dishes of different foods. If you eat one after the other, then utter the name of God over them. And you will meet people the dressing of whose hair looks as if the devil has made a nest on the top around which they have something like turbans. So pierce them with swords.

March, with the name of God. May God reward you by lance and (23) plague."

Therefore, the following categories of persons should be mercifully treated whenever Muslims come into conflict with others:

1) Women and children are not to be killed in any case. Thus (24) when al-Imam Malik was asked whether Muslims should kill enemy

(22) See the Muslim Conduct of State - M. Hamidullah - LAHORE (Pakistan) Appendix A p.299.

(23) Translated from Tabariy, History pp. 1849-50. See the Muslim conduct of the State - M. Hamidullah p.301.

(24) Kitab Ikhtilaf al-Fugaha - Ibn Jarir al-Tabari - ed. J. Schacht - LEIDEN - p.8.

women and children who are somehow taking part in fighting, as if they stand on the ramparts and throw stones at the Muslims, and cause confusion in their ranks, he answered: "The Prophet has forbidden the slaying of women and children."⁽²⁵⁾ However, some other jurists such as Abu Hanifa and al-Awzai⁽²⁶⁾ are of an opinion similar to the rule adopted by Humanitarian International law, that immunity of women and children is conditional upon their taking no part in military action.⁽²⁷⁾

2) Elderly men and men suffering from an incapacitating chronic disease are also immune. Upon their immunity most jurists are agreed, unless they involved themselves in the matter of war by giving useful advice or counsel, then they became leaders of unbelievers,⁽²⁸⁾ about whom the Holy Qur'an says:

"But if they violate their oaths after their covenants, and taunt you for your faith, - fight ye the chiefs of unfaith,⁽²⁹⁾ for their oaths are nothing to them:..."

3) Monks, including all non-Muslims who devoted their lives in cells. Al-Rakshi - in general - says in this connection: "killing is permitted by reason of fighting, but if they "non-combatants" stay behind closed doors, they cause no direct or indirect harm."⁽³⁰⁾ Al-Awzai was asked whether it is permitted to kill ... monks by whom the

(25) This hadith (saying), was mentioned also in Al-lmam Malik's Muwatta - p.200.

(26) Kitab lkhtilaf al-Fugaha - lbn Jarir al-Tabari - p.9.

(27) First Egyptian seminar on International Humanitarian Law 1982 - Art. written by Prof. al-Ghunaimi p.76.

(28) Ibid P.76.

(29) CH. IX v.2.

(30) Ibid p.76.

enemy could be guided. He said they shall not be killed on the account of suspicion, but only if they actually acted as guides..."⁽³¹⁾ Thus al-Shafii came to the same conclusion, when he said: "monks whether they are of cells or of deserts and all whoever devoted their lives to monastism should not be killed..., and this was with reference to Abu Bakr's commandments ..."⁽³²⁾

4) People such as craftsmen, wage earners and farmers are not to be killed as long as they do not take part in the battle and also those who accompany the army without any involvement in the hostilities, such as merchants. "These people are given immunity because they are builders of prosperity and devote their efforts to civic matters; and Islamic law does not have for object the destruction or undermining of civilisation and prosperity."⁽³³⁾

However, the categories of persons shown above are not restrictive, in other words, any other kind of people recognized by Modern International Law as civilians e.g. medical missions can simply be regarded as such by the Islamic law of war.

Now let us examine the situations of the battle-field itself and how Islamic law tackles it, in order to avoid killings of civilians and unnecessary destruction.

When it was quite obvious for the parties of conflict in past times to distinguish between civilians and non-civilians, or in modern

(31) Kitab lkhtilaf al-Fugaha - lbn Jarir al-Tabari p.10.

(32) lbid p.11.

(33) First Egyptian seminar on International Humanitarian Law 1981 - al-Ghunaimi p.76.

times, when the battle-field took place far away from civilian inhabitants, and no military installations were situated nearby, what would be the situations when the civilian areas would be the target of the military action in order to destroy enemy groups or military installations in it. This is what we are going to see in the next pages of the present study:

As it has been previously indicated that killing of non-combatants in all cases is a transgression of Allah's limits (CH. II v.190), therefore, non-combatants "civilians" should not be killed in action suspiciously or unsuspectingly taken against an individual or group of combatants. The verse which is the next to the Qur'anic verse (stated at the head of this section) is running as follows:

"And slay them wherever ye "tagiftumohom" catch them, and
(34)
turn them out from where they have turned you..."

Also in another chapter, the Holy Qur'an says:

"... But if they turn renegades, seize them and slay them
(35)
wherever ye (wajadtumohom) find them..."

The two English verbs (catch and find) are translated from the two Arabic verbs (tagifa and wajada) and the former in particular is used in the mentioned Qur'anic verses to mean the actual seizure of someone or taking hold of someone or a group of people. (35)R But meaning in this context should not be understood as saying that the enemy combatants must actually be taken into custody. Rather, they were clearly distinguished from the non-combatants (civilians) who should not be targets in war. Otherwise they will be prisoners of war, who should have a different treatment (which shall be seen later).

(34) CH. II v.191.

(35) CH. IV v.89.

(35R) LISAN al-Arab al-Muhit - lbn Manzur p.364.

Therefore, there is no justification whatsoever according to the Holy Qur'an, as well as the commandments of the Holy Prophet and his caliph (indicated above) for any kind of attack against defenceless civilian areas when there is no chance to locate the enemy in distinguished places, so that civilians can be avoided and not killed. Theoretically, this can, however, be the argument, but when we came to practice, things look different. Under the peculiar circumstances and especially in modern times, where technology has developed remarkably, civilians and civilian objects are badly hit. This lead us to see how Muslim jurists would deal with the situation when the battle is on, and how much they paid attention to civilians. Here is a quotation from al-Imam al-Shafai:" "The Muslims must attack them (the enemy) night and day and if they should unknowingly kill one of the women or children there is no retaliation and reparation is due. If there are in the fortifications of the idolaters Muslim women or children, there is no harm if the Manjug (catapult) is set up against the fortress, with the exception of inhabited houses with living quarters. I do not approve of bombarding inhabited houses unless the Muslims are getting close to the fortress and then there is no harm in bombarding its houses and walls and if there are in fortress armed fighters they can bombard the houses and the fortress. And if they (the idolaters) shield themselves with children, Muslim or non-Muslim are together in one place of combat there is no harm if they go ahead and fight away from the Muslims and children. But if they stand apart I would prefer that they desist until it is possible for them to fight without being shielded. This also applies if they (the idolaters) expose them (the children) and say: "if you fight us we will ..."

(36)

In the same context, the following quotation is taken from al-lmam al-Awzai:" If the unbelievers shield themselves with Muslim children, the Muslims must stop bombarding them. When one of them (the unbelievers) appeared they can bombard them. Concerning Meccah's idolaters Allah says to his Prophet:

"... Had there not been believing men and believing women whom ye did not know that ye were trampling down and those account a crime would have occurred to you without (your) knowledge..."⁽³⁷⁾

How Muslims bombard whom they do not see from the idolaters and they know that if they do so, they would hit Muslim children." And he (al-Awzai) was asked about a band of Muslims who found one of the enemy's warships in which Muslim prisoners are, if whether the Muslims burn it. Al-Awzai said: "the Muslims must refrain from burning it with fire as long as the Muslim prisoners are in it ..."⁽³⁸⁾

From the juristic passages above shown we understand that Muslim jurists, under very complicated circumstances, care too much for innocent human life. In the first passage - for instance - for al-lmam al-shafai, avoidance of inhabited houses is essential and no approval of bombarding civilian areas unless the Muslim are getting close to where the enemy combatants are. In the second passage al-lmam al-Awzai suggested that the Muslim army should refrain from shelling the enemy when they uncertainly know whom they are shelling. For that particular case he only mentioned the innocent Muslims with whom the enemy shielded themselves, but in fact he, I think, would mean all innocent people who might be enforcely involved in a similar case.

(37) CH. XLVIII v.25

(38) *ibid* p.4.

Also in Islam civilians and civilian population should not be deprived of necessary food and water with the intention of starving them or forcing them to leave. According to Abu Bakr's (R.A.A.) commandments (quoted above), slaughtering animals or burning them with fire is prohibited in Islam. But the animals can be slaughtered and killed or hamstringed in the following cases: a) when there is necessity of food, the Muslim army can slaughter animals to meet their need. b) when the animals can be used in a way to strengthen the enemy. However, where the water is sometimes ordered to be cut off from the enemy or polluted for example by blood, filth or poison is permitted in Islam, if it is aimed at combatants only and not civilians and is limited by the necessity justifying it.

Finally, a word in connection with destruction - in general - may be said. Regardless of the differences between the Muslim jurists in the concerned matter, they are agreed - in principle upon the doctrine of unnecessary destruction. In view of the following Qur'anic verse:

"Whether ye cut down (O ye Muslims!) the tender palm-trees or ye left them standing on their roots, it was by leave of Allah in order that He might cover with shame the rebellious transgressors ..."⁽³⁹⁾

and on the basis of some practices took place in the life-time of the Holy Prophet such as Muslims' striking the dwelling of Bani al-Nadir ... etc., many Muslim jurists, however, permit the destruction of

(39) CH. LIX v.5. Said A. Yusuf Ali interpreting this verse: "The unnecessary cutting down of the fruit trees or destruction of crops, or any wanton destruction whatever in war, is forbidden by the law and practice of Islam. But some destruction may be necessary for putting pressure on the enemy, and to that extent is allowed." The Holy Qur'an (Text, Translation and commentary).

buildings and cutting down of trees, though Abu Bakr's commandments expressly prohibited such actions. For his part, al-Imam M. Abu Zahrah in refuting the above mentioned arguments said "A first glance at these reports shows us that they do not allow destruction in an absolute manner, because a "tender palm-tree" did not mean a "palm tree", but the fruit. The Holy Qur'anic text:

"Whether ye cut down (O ye Muslims!) the tender palm-trees or left them standing on their roots it was by leave of Allah.."

can not mean the trunk (roots) of the palm-tree but only the fruit standing on such trunk (roots), and cutting fruit does not constitute
(40)
destruction."

Abu Zahrah then dealt with destruction of the houses of Bani al-Nadir as follows: "This was done because they had used them as forts in which they took shelter and caused injury to the Muslims, so it was imperative to destroy those houses or to try to do so to protect the Muslims against injury. The companions of the Prophet did only what was necessary, but when the Jews realized that they would hand over
(41)
their houses to Muslims and leave, they destroyed them completely."

Commenting on this, Prof. al-Ghunaimi said: "It seems to me that those who followed the words of Abu Bakr on the subject and those who permitted the acts prohibited by him, both agreed on the intent. Those who upheld the prohibition laid down the general rule while those who permitted (those acts) took into consideration the military necessity and the interest of Muslims, and there is no doubt that necessity knows
(42)
no law."

(40) First Egyptian seminar on IHL p.78.

(41) Ibid p.79.

(42) Ibid p.79.

B - Treatment of war prisoners

"Therefore, when ye meet the Unbelievers (in fight), smite at their necks; at length, when ye have thoroughly subdued them, bind a bond firmly (on them): thereafter (is the time fore) either generosity or ransom: until the war lays down its burdens ..." (CH. XLVII v.4)

For the great importance of the above Qur'anic verse which obviously lay down the rules of treatment of war prisoners in Islam, let us before going any further make it clear in the sense of its interpretation as well as its value. The said Qur'anic verse is absolutely valid and was not repeated by Baraat's verse which says:

"But when the forbidden months are past, then fight and slay
(43)
the Pagans wherever ye find them, and seize them..."

as some Muslim jurists thought. Thus it is reported that al-Hajjaj brought a prisoner to Abdullah Ibn Umar in order to kill him, but Ibn Umar said: This is not what we were commanded to do by Allah Almighty who says:

"... bind a bond firmly (on them) thereafter (is the time for) either generosity or ransom ..." (44)

Nonetheless, after all opinions of those who defended "repeal" and those who did not were cited, al-Tabari - the great interpreter - in "Jami al-Bayan", reached the conclusion that the verse in question is valid and was not repealed as the conditions of "repeal" are not

(43) CH.IX v.5.

(44) See Jami al-Bayan Fi Tafsir al-Qur'an - Ibn Jarir al-Tabari Vol.8 p.24.

available in this case and the Imam (leader) has been given discretionary power whenever he deals with prisoners' matters. In other words, goes to the Imam (leader) the choice of either freeing them with or without ransom or even killing them if he thinks that will be better for Muslims.⁽⁴⁵⁾

There are, however, two Qur'anic verses which explicitly concern treatment of prisoners of war. For the temporary stage the first was revealed just after the great incident of Bader which took place between Muslims and Quraish idolaters at the beginning of the advent of Islam, and before it was safely established. Thus the Holy Prophet was blamed for being so lenient and had prisoners of war released, both with and without payment of ransom. The Holy Qur'an says:

"It is not fitting for an Apostle that he should have prisoners of war until he hath thoroughly subdued the land. Ye look for the temporal goods of this world; but Allah looketh to the Hereafter:..."⁽⁴⁶⁾

the second verse was that quoted above, which later came with a different verdict to give the appropriate legal treatment to prisoners of war; those who by no means should be killed, except if they previously committed any war crimes. In this connection Prof. al-Ghunaimi said: "... But fighting is not a crime as long as it is done within the rules and limits set for it, and captivity is not a penal procedure, but is a means of detaining a combatant so that he may not be able to continue fighting. Allah did not permit that a combatant be killed except in battle and for no other reason."⁽⁴⁷⁾ He also carried on to say: "The Holy verse says: "... But if they fight you, slay them

(45) Ibid p.24.

(46) CH. VIII v.67.

(47) First Egyptian Seminar on IHL p.84.

(48)
 ... " The penalty her was not prescribed as a punishment that can be inflicted upon a prisoner, but as a punishment for an act committed by such prisoner prior to captivity, the latter being just the occasion which placed the criminal in the hands of the Islamic State and made him subject to its sovereign power."⁽⁴⁹⁾

Having stated all that, the Qur'anic verse in question is the core of the subject under examination. And by its proper interpretation it would obviously be the corner-stone of the Islamic law of war with regard to prisoners of war. In interpreting it al-Tabari said: "Allah says to the believers whenever you meet the idolators in battle smite their necks until they are fairly beaten then in order not to escape from you, bind a bond firmly on them. Once they are brought under control, generosity (i.e. the release of prisoners without ransom) or ransom is recommended." Therefore, in my opinion, the law governing prisoners of war should be merely based upon the examined verse. In other words, the only treatment to which prisoners of war should be subjected is freedom, either with or without ransom.

Let us now see the various treatments to which prisoners of war should be liable before the Muslim jurists of the different schools of law. The Imam (leader) is advised to follow one of four courses: First, execution of some or all of the captives. Thus this was the opinion of most Muslim jurists. Nevertheless, al-Shafai insists that this should not be done unless dictated by certain reasons, such as the need to weaken the enemy, or the requirement of high Muslim interest.⁽⁵⁰⁾

(48) CH. II v.191.

(49) Ibid p.84.

(50) Kitab Ikhtilaf al-Fugaha lbn Jarir al-Tabari p.143.

The prisoners, however, should be given the opportunity of embracing Islam as an alternative to death before the execution takes place, this (51) was the opinion of al-Awzai. Second, releasing prisoners of war against ransom (fida) or setting them free without compensation, as provided in the Qur'anic injunction. This was, however, the opinion (52) only of the two Imams Ata and al-Hasan (R.A.A.) Third, the prisoners can also be exchanged for Muslim prisoners. Al-Imam Malik (R.A.A.) for example, was of the opinion that they should be restricted (53) either to execution or exchange with Muslim prisoners. Fourth, they may be condemned to slavery. This treatment is one of the alternatives given to the Imam (leader) by some jurists such as al- (54) Awzai, alThawri, and Abu-Thawr (R.A.A.).

Upon the preceding alternatives, some comments, however, would be worthwhile, and through which the proper legal treatment of prisoners of war in Islam may be drawn. However, it is true that the practice related to prisoners of war in the lifetime of the Holy Prophet can be used as evidence for the jurists on which their arguments are based. But giving the Imam (leader) such a wide discretionary power to decide the prisoners fate (e.g. to the extent of execution and enslavement) is quite debatable:

- In history there were rare and limited precedents where the Holy Prophet (s.a.w.) ordered that a captive had to be killed. If we therefore, take these precedents individually, they show that the death penalty was not executed upon the captive as such, or exercise of the

(51) Ibid p.142.

(52) Ibid p.145.

(53) Ibid p.141.

(54) Ibid p.142 and after.

Imam's discretionary power to decide the captive's fate, but as a penalty for acts committed by those prisoners prior to captivity and outside the scope of the battle during which they were taken prisoners. It was in fact a punishment for a crime committed against Islam, and (55) not because they were captives.

- Also as it has already been stated (in the second chapter, and the beginning of the present chapter) that war (al-Jihad) should not be but a defensive rather than for dissemination of the Islamic faith. The Holy Qur'anic verse (often quoted) provides:

"Let there be no compulsion in religion: Truth stands out
(56)
clear from Error ..."

therefore, the death penalty cannot be an alternative (as some jurists suggested) to not embracing the Islamic faith.

- Moreover, the afore-mentioned Qur'anic verse did not mention "execution" as a punishment for the captive. The only treatments has it mentioned are generosity (release without ransom) or ransom as a second alternative. This is, however, after the prisoners have been brought into custody. The Holy Qur'an just after the word "thereafter" goes on to state:

"... thereafter (is the time for) either generosity or
ransom:..."

Concerning the other alternative (i.e. enslavement) Islam, as has already been shown in Chapter One, does not in principle recognize institutional slavery; rather, Islam, both legally and doctrinally,

(55) To this effect Article 85 of the Geneva of 1949 (Treatment of prisoners of war) stated: "Prisoners of war prosecuted under the law of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefit of the present Convention."

(56) CH. II v.256.

endeavoured to raise the moral standard of emancipation, as well as affording the possibility of it for those who were inevitably enslaved prior to its emergence. Yet in the matter of prisoners of war only, the Shariah (Islamic law) allowed the Imam (leader) to take such an abhorrent action and condemn some or all of them to bondage. This can only be understood from the terms "your right hands possess" which were repeatedly revealed in some Qur'anic verses, and mean "female captives of war". The Holy Qur'an in chapter "The women" says:

"... But if ye fear that ye shall not be able to deal justly
(with them), then only one or (a captive) that your right
(57)
hands possess ..."

Though it seems, according to the Holy verse shown above, that enslavement by way of war is permitted in Islam, Islam's attitude towards this matter should not be misunderstood. Muslims, under certain circumstances, may, however, be forced to wage war against their enemy some of whom might be consequently taken as prisoners of war and with whom Muslims shall deal. For the two following reasons only, did Islam, in my opinion, allow its followers to treat their prisoners of war as slaves: firstly, slavery was at that time customarily a current practice amongst nations from which Muslims themselves in their wars had suffered a lot. Exchanging prisoners of war was seldom practiced. Therefore, Islam reciprocally allowed such a practice once it is surrounded with a protective fence of humanity and tenderness that raises the slave to the level of his master. The Holy Qur'an plainly provides:

"The prohibited month for the prohibited month, - and so for
all things prohibited, - there is the law of equality. If then

any one transgresses the prohibition against you, transgress
(58)
ye likewise against him ..."

secondly, due to the non-existence of a proper system at that time, by which prisoners of war could be easily kept and controlled, it could be the only solution to distribute them among Muslims as slaves.

Now, as slavery is absolutely condemned by the international community today, and exchange of prisoners has become a recognized matter among today's nations, there is no doubt that slavery is no longer an option open to the Imam (leader) in dealing with prisoners of war. Muslims are therefore not allowed to condemn their prisoners into bondage, because doing so would be transgressing the rules of their own religion.

Having stated that, the discretionary power of the Imam (leader) must be restricted and confined to choice in which "execution and enslavement" are excluded whenever he deals with prisoners of war. By saying that, I am not only bearing in mind the Holy verse (CH. XLVII v.4), I am also supported by some Muslim jurists, such as Mujahid and Muhammad Ibn Sirin (59) besides Ata and al-Hassan who, by following the Prophet's example in some incidents such as prisoners of Badr, consider killing prisoners as prohibited, and hold that the option is to set them free out of generosity or for ransom.

Therefore, prisoners of war before the Imam (leader) are - in Islam - subject to one of two methods of release either free generously, or against ransom.

(58) CH. II v.194.

(59) First Egyptian Seminar on IHL (English part) p.82, 83.

As for generosity, it may or may not be conditional. If it is conditional, the prisoner will have to abide by the condition set forth in his case. It is reported by Ibn Ishaq that at the Battle of Badr, the Prophet (s.a.w.) freed an unbeliever poet called Abu Azzah once the latter had promised the former not to join whoever would fight the Muslims. But Abu Azzah broke his promise by joining the polytheists in the Battle of Uhud, where he was taken prisoner by the Muslims. He asked the Prophet for an amnesty, who refused, saying: "By Allah that you will not wipe your cheeks in Meccah saying that you had mocked Muhammad twice: A believer is never stung twice in the same burrow." (60) Then the Prophet ordered that he be executed by the sword. However, the conditional release is envisaged by the Geneva Convention of 1949. Article 21 states: "... Prisoners of war may be partially or wholly released on parole or promise, in so far as is allowed by the laws of the power on which they depend ... Prisoners of war who are paroled or who have given their promise in conforming with the laws and regulations so notified, are bound on their personal honour scrupulously to fulfil, both towards the Power on which they depend and towards the Power which has captured them, the engagements of their parole promises ..."

Some of the Arabic states, such as Egypt, have, accordingly, taken such a step. Article 125 of Egypt military law punishes any prisoner of war recaptured after he had given his promise not to fight against Egypt again. (61)

(60) Das Leben Muhammed's - Ibn Hisham vol. 1 p.591.

(61) First Egyptian Seminar on IHL (Arabic part) p.87.

Concerning releasing prisoners of war against ransom, ransom might take many ways. It could be of material or immaterial things. At Battle of Badr, for instance, the ransom was that every prisoner should undertake to teach ten Muslim children. Ransom can also be to release Muslim prisoners (this is one of al-lmam Malik's alternatives), this what is called today an exchange of prisoners. Here, according to Islamic law, the exchange need not involve equal numbers of prisoners in both sides, it could be hundreds against one or a woman against men or vise versa.

Unless, however, the interest of Muslims dictated otherwise, such as Muslim prisoners in particular kept by the otherside requiring to be exchanged, the lmam (leader), in my opinion, should give the first consideration to freeing prisoners out of generosity. In other words, as the Holy verse (CH. XLVII v.4) indicated generosity as the first choice, the lmam (leader) should not voluntarily turn away from it.

Conclusion:

From the foregoing survey, which has been the intent of examining Human rights in Islam, both eminent legal and political rights in particular, we shall draw up some conclusions which are highly needed for the accomplishment of this work.

Islam is the religion which, with no less doubt, comprises the existing world's affairs as well as that of the life to come, whereas in its divine law, the Shariah (Islamic law), all rights, in the widest sense of the word, are highly inspired and unequivocally instructed. It is unfair to judge Islam by the contemporary political systems which by one way or another deny Islam any kind of rule or by even the arbitrary reigns prevailed in the Muslim history. It rather ought to be judged by the general principles which are derived from its chief sources: the Holy Qur'an and the Sunnah. In other words, Islam is not responsible for all the cruel behaviour found in the Muslim world.

Thus, the study has - in principle - made it crystal clear that neither preambles or objectives of Universal declarations or conventions with all their aspects, nor a single article in the text of the Universal bill of HR have promulgated anything that was new or seems unfamiliar to Islam. All rights, legal or political rights, with no distinction, were, fourteen centuries ago, fully recognized and put into practice. Once again, "under a creed which places man next to God, and brushes aside all distinctions of race, colour and birth and calls upon all mankind to live together as a family of God, or as a fold, every member of which shall be a shepherd or keeper unto every other and be accountable for its welfare", the "Universal Declaration of Human Rights" must follow as a basic corollary, or an extension of

(1)

the Qur'anic programme".

Islam, therefore, recognises, beside all the basic and fundamental rights such as right of life, property and right to social security, and right to individual's freedom, all rights and sets up guarantees in order to secure them.

Islam, the Shariah (Islamic law), has fully granted the woman all her rights and also laid down rules by which her equality with men as well as her rights can be absolutely guaranteed.

At the political level, the Holy Qur'an has unequivocally laid down general principles upon which the only adequate kind of government can be established. Upon the Shurah (Islamic democracy) and this alone, Muslims are exhorted to constitute their way of government. Thus the structural form by which this sort of Shurah (Islamic democracy) should be carried out is, however, left for the Muslims to decide as it is not specifically designated either in the Holy Qur'an or the Sunnah. Of course, all the political rights are fully recognised and without affecting the state's public order. In other words, freedoms - in Islam - are a relative matter comparable with the interest of the whole community.

With others, Islam has undoubtedly constituted its relations upon "principle of peace" whereby all together could peacefully exist in this world. In an emergency matter such as war, al-Jihad, if due, would take place as a defensive war whereby Muslims could, with no

(1) Human rights in Islam report of Seminar held in Kuwait, December 1980, Geneva 1982 p.54.

agression, counter-attack against their enemy. Under the Islamic law of war civilians are immune and prisoners of war are to be freed either by exchange or voluntarily or by ransom.

However, having - in principle - conceived all the articles of the universal bill of human rights, Islam has generally reserved itself the right of its own interpretation and understanding of all the articles and articles 18 and 16 in particular. Being the ideology of the state (i.e. Islamic state), Islam is the only source for all the socio-political issues. It, therefore, on one hand interprets Article 18 in a way that would not harm its ideological structure and on the other guarantees the full right of free practice of religion to all people. Like Article 18 Islam, furthermore, gives its citizens other than Muslims, the right to change their religion. Again, Article 16 is also somehow restricted in order that it not be inconsistent with the Islamic family law. When a couple is fully guaranteed to choose each other, marriages as between Muslims and atheists (e.g. females) or between Muslims (e.g. females) and non-Muslims are - in Islam - not allowed. In short, the family structure in Islam is so essential that it cannot be neglected.

Thus, speaking of the essentiality of Islam, the religion according to which all the traditional values and ideological assumptions, in the Muslim community, are moulded, the existing universal bill of human rights cannot be fully accepted. One of the major parts of this world is the Muslim within which there are Muslims who believe in Islam as strongly as they reject secularism. In other words, if the world community should modify the existing bill of rights, they should pay great attention to the Muslim region and its values. In short, "A bill of rights for all the nations cannot be

based solely upon the traditional values and ideological assumptions of any one of the nations. If it is to capture the aspirations and ideals of all the peoples of the world, it must be rooted in at least some of the accepted institutions and social doctrines of each and every people."⁽²⁾

Finally, when we should regrettably admit that all our troubles are due to our disobedience to Allah's Sharian (i.e. the Holy Quran and the Sunnah), we should, in the last word of this work supplicate Allah the almighty to summon Muslims upon His law and guide them to the straight Path.

"And Praise be to Allah, the Lord and Cherisher of the Worlds"⁽³⁾

(2) Human Rights "comments and interpretations - Maritain J.I. UNESCO - London, 1949 p.82.

(3) CH. XXXVII v.182.

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APPENDIX

**UNIVERSAL ISLAMIC DECLARATION
OF
HUMAN RIGHTS**

19 September 1981

21 Dhul Qaidah 1401

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

يَا أَيُّهَا النَّاسُ إِنَّا خَلَقْنَاكُمْ مِنْ ذَكَرٍ وَأُنْثَىٰ وَجَعَلْنَاكُمْ شُعُوبًا
وَقَبَائِلَ لِتَعَارَفُوا إِنَّ أَكْرَمَكُمْ عِنْدَ اللَّهِ أَتْقَاهُمْ إِنَّ اللَّهَ عَلِيمٌ خَبِيرٌ

O MEN! Behold, We have created you all out of a male and a female, and have made 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.

(Al Qur'an, Al-Hujurat 49:13)

Preamble

WHEREAS the age-old human aspiration for a just world order wherein people could live, develop and prosper in an environment free from fear, oppression, exploitation and deprivation, remains largely unfulfilled;

WHEREAS the Divine Mercy unto mankind reflected in its having been endowed with super-abundant economic sustenance is being wasted or unfairly or unjustly withheld from the inhabitants of the earth;

WHEREAS Allah (God) has given mankind through His revelations in the Holy Qur'an and the Sunnah of His Blessed Prophet Muhammad an abiding legal and moral framework within which to establish and regulate human institutions and relationships;

WHEREAS the human rights decreed by the Divine Law aim at conferring dignity and honour on mankind and are designed to eliminate oppression and injustice;

WHEREAS by virtue of their Divine source and sanction these rights can neither be curtailed, abrogated or disregarded by authorities, assemblies or other institutions, nor can they be surrendered or alienated;

Therefore we, as Muslims, who believe

a) in God, the Beneficent and Merciful, the Creator, the Sustainer,

- the Sovereign, the sole Guide of Mankind and the Source of all Law;
- b) in the Vicegerency (Khilafah) of man who has been created to fulfil the Will of God on earth;
 - c) in the wisdom of Divine guidance brought by the Prophets, whose mission found its culmination in the final Divine message that was conveyed by the Prophet Muhammad (Peace be upon him) to all mankind;
 - d) that rationality by itself without the light of revelation from God can neither be a sure guide in the affairs of mankind nor provide spiritual nourishment to the human soul, and, knowing that the teachings of Islam represent the quintessence of Divine guidance in its final and perfect form, feel duty-bound to remind man of the high status and dignity bestowed on him by God;
 - e) in inviting all mankind to the message of Islam;
 - f) that by the terms of our primeval covenant with God our duties and obligations have priority over our rights, and that each one of us is under a bounden duty to spread the teachings of Islam by word, deed, and indeed in all gentle ways, and to make them effective not only in our individual lives but also in the society around us;
 - g) in our obligation to establish an Islamic order:
 - i) wherein all human beings shall be equal and none shall enjoy a privilege or suffer a disadvantage or discrimination by reason of race, colour, sex, origin or language;
 - ii) wherein all human beings are born free;
 - iii) wherein slavery and forced labour are abhorred;
 - iv) wherein conditions shall be established such that the institution of family shall be preserved, protected and honoured as the basis of all social life;
 - v) wherein the rulers and the ruled alike are subject to and equal before the Law;
 - vi) wherein obedience shall be rendered only to those commands that

are in consonance with the Law;

vii) wherein all worldly power shall be considered as a sacred trust, to be exercised within the limits prescribed by the Law and in a manner approved by it, and with due regard for the priorities fixed by it;

viii) wherein all economic resources shall be treated as Divine blessings bestowed upon mankind, to be enjoyed by all in accordance with the rules and the values set out in the Qur'an and the Sunnah;

ix) wherein all public affairs shall be determined and conducted, and the authority to administer them shall be exercised, after mutual consultation (Shura) between the believers qualified to contribute to a decision which would accord well with the Law and the public good;

x) wherein everyone shall undertake obligations proportionate to his capacity and shall be held responsible pro rata for his deeds;

xi) wherein everyone shall, in case of an infringement of his rights, be assured of appropriate remedial measures in accordance with the Law;

xii) wherein no one shall be deprived of the rights assured to him by the Law except by its authority and to the extent permitted by it;

xiii) wherein every individual shall have the right to bring legal action against anyone who commits a crime against society as a whole or against any of its members;

xiv) wherein every effort shall be made to

(a) secure unto mankind deliverance from every type of exploitation, injustice and oppression,

(b) ensure to everyone security, dignity and liberty in terms set out and by methods approved and within the limits set by the Law;

Do hereby, as servants of Allah and as members of the Universal Brotherhood of Islam, at the beginning of the Fifteenth Century of the Islamic Era, affirm our commitment to uphold the following inviolable and inalienable human rights that we consider are enjoined by Islam.

I Right to Life

- a) Human life is sacred and inviolable and every effort shall be made to protect it. In particular no one shall be exposed to injury or death, except under the authority of the Law.
- b) Just as in life, so also after death, the sanctity of a person's body shall be inviolable. It is the obligation of believers to see that a deceased person's body is handled with due solemnity.

II Right to Freedom

- a) Man is born free. No inroads shall be made on his right to liberty except under the authority and in due process of the Law.
- b) Every individual and every people has the inalienable right to freedom in all its forms - physical, cultural, economic and political - and shall be entitled to struggle by all available means against any infringement or abrogation of this right; and every oppressed individual or people has a legitimate claim to the support of other individuals and/or peoples in such a struggle.

III Right to Equality and Prohibition Against Impermissible Discrimination

- a) All persons are equal before the Law and are entitled to equal opportunities and protection of the Law.

- b) All persons shall be entitled to equal wage for equal work.
- c) No person shall be denied the opportunity to work or be discriminated against in any manner or exposed to greater physical risk by reason of religious belief, colour, race, origin, sex or language.

IV Right to Justice

- a) Every person has the right to be treated in accordance with the Law, and only in accordance with the Law.
- b) Every person has not only the right but also the obligation to protest against injustice; to recourse to remedies provided by the Law in respect of any unwarranted personal injury or loss; to self-defence against any charges that are preferred against him and to obtain fair adjudication before an independent judicial tribunal in any dispute with public authorities or any other person.
- (c) It is the right and duty of every person to defend the rights of any other person and the community in general (Hisbah).
- d) No person shall be discriminated against while seeking to defend private and public rights.
- e) It is the right and duty of every Muslim to refuse to obey any command which is contrary to the Law, no matter by whom it may be issued.

V Right to Fair Trial

- a) No person shall be adjudged guilty of an offence and made liable to punishment except after proof of his guilt before an independent judicial tribunal.
- b) No person shall be adjudged guilty except after a fair trial and

- after reasonable opportunity for defence has been provided to him.
- c) Punishment shall be awarded in accordance with the Law, in proportion to the seriousness of the offence and with due consideration of the circumstances under which it was committed.
 - d) No act shall be considered a crime unless it is stipulated as such in the clear wording of the Law.
 - e) Every individual is responsible for his actions. Responsibility for a crime cannot be vicariously extended to other members of his family or group, who are not otherwise directly or indirectly involved in the commission of the crime in question.

VI Right to Protection Against Abuse of Power

Every person has the right to protection against harassment by official agencies. He is not liable to account for himself except for making a defence to the charges made against him or where he is found in a situation wherein a question regarding suspicion of his involvement in a crime could be reasonably raised.

VII Right to Protection Against Torture

No person shall be subjected to torture in mind or body, or degraded, or threatened with injury either to himself or to anyone related to or held dear by him or forcibly made to confess to the commission of a crime, or forced to consent to act which is injurious to his interests.

VIII Right to Protection of Honour and Reputation

Every person has the right to protect his honour and reputation against calumnies, groundless charges or deliberate attempts at defamation and blackmail.

IX Right to Asylum

- a) Every persecuted or oppressed person has the right to seek refuge and asylum. This right is guaranteed to every human being irrespective of race, religion, colour and sex.
- b) Al Masjid Al Haram (the sacred house of Allah) in Mecca is a sanctuary for all Muslims.

X Rights of Minorities

- a) The Quar'anic principle "There is no compulsion in religion" shall govern the religious rights of non-Muslim minorities.
- b) In a Muslim country religious minorities shall have the choice to be governed in respect of their civil and personal matters by Islamic Law, or by their own laws.

XI Right and Obligation to Participate in the Conduct and Management of Public Affairs

- a) Subject to the Law, every individual in the community (Ummah) is entitled to assume public office.
- b) Process of free consultation (Shura) is the basis of the administrative relationship between the government and the people. People also have the right to choose and remove their rulers in accordance with this principle.

XII Right to Freedom of Belief, Thought and Speech

- a) Every person has the right to express his thoughts and beliefs so long as he remains within the limits prescribed by the Law. No one, however, is entitled to disseminate falsehood or to circulate reports which may outrage public decency, or to indulge in slander, innuendo or to cast defamatory aspersions on other

persons.

- b) Pursuit of knowledge and search after truth is not only a right but a duty of every Muslim.
- c) It is the right and duty of every Muslim to protest and strive (within the limits set out by the Law) against oppression even if it involves challenging the highest authority in the State.
- d) There shall be no bar on the dissemination of information provided it does not endanger the security of the society or the state and is confined within the limits imposed by the Law.
- e) No one shall hold in contempt or ridicule the religious beliefs or others or incite public hostility against them; respect for the religious feelings of others is obligatory on all Muslims.

XIII Right to Freedom of Religion

Every person has the right to freedom of conscience and worship in accordance with his religious beliefs.

XIV Right to Free Association

- a) Every person is entitled to participate individually and collectively in the religious, social, cultural and political life of his community and to establish institutions and agencies meant to enjoin what is right (ma'roof) and to prevent what is wrong (munkar).
- b) Every person is entitled to strive for the establishment of institutions whereunder an enjoyment of these rights would be made possible. Collectively, the community is obliged to establish conditions so as to allow its members full development of their personalities.

XV The Economic Order and the Rights Evolving Therefrom

- a) In their economic pursuits, all persons are entitled to the full benefits of nature and all its resources. These are blessings bestowed by God for the benefit of mankind as a whole.
- b) All human beings are entitled to earn their living according to the Law.
- c) Every person is entitled to own property individually or in association with others. State ownership of certain economic resources in the public interest is legitimate.
- d) The poor have the right to a prescribed share in the wealth of the rich, as fixed by Zakah, levied and collected in accordance with the law.
- e) All means of production shall be utilised in the interest of the community (Ummah) as a whole, and may not be neglected or misused.
- f) In order to promote the development of a balanced economy and to protect society from exploitation, Islamic Law forbids monopolies, unreasonable restrictive trade practices, usury, the use of coercion in the making of contracts and the publication of misleading advertisements.
- g) All economic activities are permitted provided they are not detrimental to the interests of the community (Ummah) and do not violate Islamic laws and values.

XVI Right to Protection of Property

No property may be expropriated except in the public interest and on payment of fair and adequate compensation.

XVII Status and Dignity of Workers

Islam honours work and the worker and enjoins Muslims not only to treat

the worker justly but also generously. He is not only to be paid his earned wages promptly, but is also entitled to adequate rest and leisure.

XVIII Right to Social Security

Every person has the right to food, shelter, clothing, education and medical care consistent with the resources of the community. This obligation of the community extends in particular to all individuals who cannot take care of themselves due to some temporary or permanent disability.

XIX Right to Found a Family and Related Matters

- a) Every person is entitled to marry, to found a family and to bring up children in conformity with his religion, traditions and culture. Every spouse is entitled to such rights and privileges and carries such obligations as are stipulated by the Law.
- b) Each of the partners in a marriage is entitled to respect and consideration from the other.
- c) Every husband is obligated to maintain his wife and children according to his means.
- d) Every child has the right to be maintained and properly brought up by its parents, it being forbidden that children are made to work at an early age or that any burden is put on them which would arrest or harm their natural development.
- e) If parents are for some reason unable to discharge their obligations towards a child it becomes the responsibility of the community to fulfil these obligations at public expense.
- f) Every person is entitled to material support, as well as care and protection, from his family during his childhood, old age or incapacity. Parents are entitled to material support as well as

care and protection from their children.

- g) Motherhood is entitled to special respect, care and assistance on the part of the family and the public organs of the community (Ummah).
- h) Within the family, men and women are to share in their obligations and responsibilities according to their sex, their natural endowments, talents and inclinations, bearing in mind their common responsibilities toward their progeny and their relatives.
- i) No person may be married against his or her will, or lose or suffer diminution of legal personality on account of marriage.

XX Rights of Married Women

Every married woman is entitled to:

- a) live in the house in which her husband lives;
- b) receive the means necessary for maintaining a standard of living which is not inferior to that of her spouse, and, in the event of divorce, receive during the statutory period of waiting (Iddah) means of maintenance commensurate with her husband's resources, for herself as well as for the children she nurses or keeps, irrespective of her own financial status, earnings, or property that she may hold in her own right;
- c) seek and obtain dissolution of marriage (Khul'a) in accordance with the terms of the Law. This right is in addition to her right to seek divorce through the courts.
- d) inherit from her husband, her parents, her children and other relatives according to the Law;
- e) strict confidentiality from her spouse, or ex-spouse if divorced, with regard to any information that he may have obtained about her, the disclosure of which could prove detrimental to her

interests. A similar responsibility rests upon her in respect of her spouse or ex-spouse.

XXI Right to Education

- a) Every person is entitled to receive education in accordance with his natural capabilities.
- b) Every person is entitled to a free choice of profession and career and to the opportunity for the full development of his natural endowments.

XXII Right to Privacy

Every person is entitled to the protection of his privacy.

XXIII Right to Freedom of Movement and Residence

- a) In view of the fact that the World of Islam is veritably Ummah Islamia, every Muslim shall have the right to freely move in and out of any Muslim country.
- b) No one shall be forced to leave the country of his residence, or be arbitrarily deported therefrom, without recourse to due process of Law.

