

## The Limits of Power in an Islamic State<sup>1</sup>

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There exists a difference of perspective between Muslim scholars and their Western counterparts on the nature and characteristics of Islamic government. According to the former, Islam advocates a limited and responsible system of government, whereas the latter, on the whole, maintain that it is patently autocratic and totalitarian. This sharp difference of opinion can be partially explained by the different frames of reference with which each side tends to substantiate its views.

Muslim writers on constitutional law and government tend to look upon the early period of the first four caliphs, known as the rightly-guided caliphs (*Khulafa' Rashidun*) as a model and authoritative precedent. Western Islamicists, on the other hand, envisage the much longer period of the Umayyads and the 'Abbasids as their frame of reference which, in their view, represents the more established precedent; one that spanned not just a few decades, as was the case with the *Khulafa' Rashidun*, but a much larger part of the political history of Islam.

It is evident that while the first approach is predominantly juristic and normative, the other is distinctly historical; and there is little doubt that the two lead to different conclusions. Gibb is a typical representative of the historical approach when he writes, for example, of the historical caliphate that it places 'the subject in absolute obedience to its ordinances. The subjects can have no rights or claims against it'.<sup>2</sup> Rosenthal expresses a similar view when he writes: 'In theory Islam is absolute theocracy; in fact is an absolute monarchy, limited only by the Caliph's dependence on the decisions of the *'ulama'*'.<sup>3</sup> It is not my purpose in this essay to engage in polemics but merely to relate a point of view. No unanimity of views is expected to exist on either side, rather only a general trend which is quite clearly distinguishable.

The normative approach, adopted by Muslim jurists including the present writer, maintains that the locus of all political authority is the community of believers who elect the caliph and obey him provided that the latter does not violate the *Shari'ah*. According to this approach neither the caliph, nor even the people who elect him, possess unlimited sovereignty and the caliph exercises a limited authority which partakes in the nature of trust (*amanah*). Islam provides for a system of government accountable to the people. This accountability can be measured on the basis of a fairly well defined set of criteria.

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<sup>1</sup> A revised version of this article was published in *Islamic Studies* 28 (1989), 323-353.

<sup>2</sup> H. A. R. Gibb, 'Constitutional Organization', in eds. M. Khadduri and H. J. Liebesny, *Law in the Middle East* (Washington D.C.: the Middle East Institute, 1955), 14.

<sup>3</sup> E. I. J. Rosenthal, *Political Thought in Medieval Islam* (Cambridge: Cambridge University Press, 1962), 226.

With a view to ensure a just and responsible system of government, the *Shari'ah* sets limits, both practical and theoretical, on the powers of the government. The theoretical limits on the governmental power are reflected in the notion of limited sovereignty, the concept that the government is a trust (*amanah*), and the ensuing restrictions on the working of the government in the sphere of legislation. The government is bound to administer justice in accordance with the *Shari'ah*, to conduct its affairs under the rule of law, and to exert itself in the pursuit and realization of public interest (*maslahah*). The *Shari'ah* also requires the government to respect the rights and personal dignity of the citizens. No governmental agency has the power to interfere with the basic rights of the people. There are limitations on governmental power regarding taxation, private ownership and the determination of public interest. An exhaustive coverage of these would fall beyond the scope of this paper. I shall confine my inquiry to the broad outline of the limits imposed by the *Shari'ah* to ensure propriety in government. The information embodied in this chapter, however, has been so arranged as to expound some of the salient principles of Islamic constitutional law.

## 1. Executive Sovereignty

In the Islamic State absolute sovereignty belongs to God Most High who alone has the prerogative to determine structure of values that the Muslim community must uphold. These values and principles are expounded by the *Shari'ah*, which is grounded in divine revelation and an expression, therefore, of the sovereign will of God. Time and again the Qur'an reiterates that absolute sovereignty belongs to God, that He alone has the prerogative of command, that He is all-knowing and all powerful. Knowledge of good and evil, justice, rights and obligations to which the Muslim community must subscribe and aspire is determined, not by reference to the nature of things, nor by the dictate of human reason, but by the will and command of God.<sup>4</sup> God is the ultimate source of authority in the Muslim society. But since divine revelation has come to an end with the demise of the Prophet (peace be upon him), the sovereign will of God can only be ascertained and understood by reference to the Qur'an and the authentic *Sunnah*. This has led the '*ulama*' to the conclusion that right and wrong in an Islamic society are determined by reference to the *Shari'ah*, and that sovereignty for all intents and purposes, therefore, belongs to the *Shari'ah*.<sup>5</sup> Essentially this principle militates against the possibility of human dictatorship, despotism and autocracy. It also implies that legislative and political power in the Islamic state is largely administrative in character designed to implement the *Shari'ah*

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<sup>4</sup> Note, for example, the Qur'an, 5: 44; 6: 57 and 72; 9: 40; and 33: 66.

<sup>5</sup> Muhammad ibn 'Ali al-Shawkani, *Irshad al-Fuhul min Tahqiq al-Haqq ila 'Ilm al-Usul* (Cairo: Mustafa al-Babi al-Halabi, 1937), 8; Mahmud 'Abd al-Majid al-Khalidi, *Qawa'id Nizam al-hukm fi'l-Islam* (Kuwait: Dar al-Buhuth, 1400/1980), 34; Muhammad Faruq al-Nabhan, *Nizam al-hukm fi'l-Islam* (Kuwait: Matba'at Jam'at al-Kuwait, 1974), 166.

and to administer justice in accordance with its ordinances. Notwithstanding a measure of legislative authority vested in the state for the realization of public interest (*maslahah*), no individual or institution has the prerogative to make law as a matter of right. The state is vested with the prerogative of command in its capacity as the vicegerent of God and legitimate representative of the community. If the state law does not violate the Shari'ah and it is intended to promote the people's welfare, it will partake in *ijtihad*. But the state has no authority to change what God has decreed, it is not within the powers of the Islamic state, nor even of the *ummah* as a whole, to overrule and replace the *Shari'ah*, or to depart from its explicit injunctions.<sup>6</sup>

The foregoing represents the majority view regarding the locus of sovereignty in Islamic constitutional theory, but there is a minority view which maintains that sovereignty belongs to the community of Muslims. This view calls in the support the Qur'anic command (4: 58) which enjoins obedience to those who are in charge of affairs, namely the *Ulu'l-amr*. Similarly the Islamic constitutional principle which renders the government accountable to the community, and the power that the *Shari'ah* vests in the community to elect the head of the state, or to depose him when he transgresses the law—all point to the conclusion that sovereignty belongs to the people.<sup>7</sup> Also there exists evidence in the sources, although somewhat inconclusive, about the infallibility of the unanimous agreement (*ijma'*) of the Muslim community and its authority as a source of law next to the Qur'an and the *Sunnah*.<sup>8</sup> The doctrine of *ijma'* is thus based on the belief that the community has the authority to make law by its unanimous agreement. The *hadith* which proclaims 'My *ummah* shall never agree upon an error'<sup>9</sup> implies that 'whenever the *ummah* reaches a unanimous agreement, the truth is on its side and the opinion so arrived at becomes a binding law, for it originates in the will of the *ummah* which possesses sovereign authority as of right'.<sup>10</sup> The conclusion has, thus, been drawn that sovereignty in the Islamic state belongs to the community itself, being an integral part of the divine trust of vicegerency (*khilafah*) that God has bestowed upon the community of believers.<sup>11</sup>

The two views on sovereignty have in turn been combined in what Zaydan and others have termed as *al-sultan al-tanfidhi*, or executive sovereignty. In its capacity as

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<sup>6</sup> Cf. Mustafa Abu Zayd Fahmi, *Al-Nazariyyah al-'Ammah li'l-Dawlah fi'l-Dimuqratiyyah al-Gharbiyyah, wa'l-Dimuqratiyyah al-Marksiiyyah wa'l-Islam*, (Alexandria: Mansha'at al-Ma'arif, 1985), 312.

<sup>7</sup> Cf. 'Abd, al-Wahhab Khallaf, *Al-Siyasah al-Shariyyah*, 2nd ed. (Beirut: Mu'assisah al-Risalah, 1404/1984), 59-63.

<sup>8</sup> For details see M. H. Kamali, *Principles of Islamic Jurisprudence* (Kuala Lumpur: Pelanduk Publications, 1989), 220-27; 'Abd Allah 'Abd al-Ghani al-Basyuni, *Nazariyyah al-Dawlah fi'l-Islam* (Beirut: Al-Dar al-Jami'iyyah, 1986), 60-63.

<sup>9</sup> Ibn Majah, *Sunnan*: K. al-Fitn, B. al-Sawad al-A'zam, Hadith No. 1.

<sup>10</sup> Muhammad Yusuf Musa, *Nizam al-Hukm fi'l-Islam* (Cairo: Ma'had al-Dirasat al-'Arabiyyah, 1962), 125. This view is also held by 'Ali 'Abd al-Raziq, *Al-Islam wa Usul al-Hukm* (Cairo: Matba'ah Misr: 1343/1925), 9ff.

<sup>11</sup> Muhammad Kamil Laylah, *Al-Nuzum al-Siyasiyyah* (Cairo: Dr al-Fikr al-'Arabi, 1963), 434; 'Abd al-Karim Zaydan, *Al-Fard wa'l-Dawlah fi'l-Shari'ah al-Islamiyyah* (Gray (Indian): International Islamic Federation of Student Organizations, 1970), 25.

the vicegerent (*khalifah*) of God, the community of believers is vested with the authority to establish good government and to take all necessary measures, including legislation, for this purpose. But this authority is basically of an executive type which is designed to administer the *Shari'ah* and must not challenge the supremacy of the divine revelation.<sup>12</sup>

However, regardless of the individual merits or demerits of these views, they all hold in common the principle of accountability of the government, both to God and to the Muslim community. They would all deny the Islamic government as unfettered authority to make any law it pleases or introduce any order of values it may wish. Thus, on a comparative note, it is observed 'the ruler is not in any sense a legal sovereign of the same character as the United Kingdom Parliament, for instance, which has the power to make or unmake laws of any type or kind. There can indeed be no such legislative power in Islam'.<sup>13</sup> Hasan al-Turabi is right to observe that the state in Islam is not primordial and that the primary institution in Islam is the community itself. 'The state only represents the political dimension of the collective will and endeavour of the community'. Turabi maintains that it is partly because of this fact that the *Shari'ah* and the *ummah* have existed almost independently of the state. States come and go and even when the institution is very weak or non-existent, the *Shari'ah* continues to be practiced by the community.<sup>14</sup>

The *Shari'ah* has functioned basically as a protective shield in defence of the rights and liberties of the citizen against arbitrary power. But the role it has played 'as protection for the community against arbitrary rule and political oppression' has not been accorded due recognition by the modern writers. According to Seyyid Hossein Nasr 'Most modern students on the subject only view the external political institutions of the *Shari'ah* and not the personal relationships, family structure, individual rights, etc., which are integral to the *Shari'ah* and constitute a comprehensive defence mechanism against oppression'.<sup>15</sup> The *Shari'ah*, in other words, is often viewed as an instrument of authority which functions in the hands of the government in power. But this is no more than a plausible assertion which is not substantiated by the *Shari'ah* itself.

The Islamic state is distinguishable from the Western nation-state by the fact that sovereignty in the latter admits no formal restraints. The nation-state claims to possess unrestricted power to legislate. Since the Islamic state is not vested with unlimited sovereignty, it lacks the authority to enact law that subjugates the citizen to the exercise of arbitrary power, or a law that may be repugnant to the *Shari'ah*. Likewise since the *Shari'ah* exists independently of the will of the state, the citizen of

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<sup>12</sup> Zaydan, *Al-Fard*, 28.

<sup>13</sup> N. J. D. Anderson and N. J. Coulson, 'The Muslim Ruler and Contractual Obligation', *New York University Law Journal* 33 (1958), 929.

<sup>14</sup> Hasan Turabi, "Principles of Governance, Freedom and Responsibility in Islam", *The American Journal of Islamic Social Sciences*, vol. 4, No. 1 (1987), 3.

<sup>15</sup> Seyyed Hossein Nasr, *Islamic Life and Thought* (London: G. Allen & Unwin, 1981), 21.

the Islamic state is enabled thereby to judge the legality and propriety of government by a set of well-established principles enunciated in the Qur'an and *Sunnah*.

## II. Government as a Trust (*Amanah*)

Government is a trust in Islam and the state exercises its powers in the capacity of a trustee, of God and the community, in order to protect the faith and regulate the affairs of the community. God Most High has designated man as His vicegerent (*khalifah*) and entrusted him with the *amanah* to rule according to His will as is expounded in the *Shari'ah*. This is indicated in the Qur'anic address to the believers: 'God commands you to render back the trusts (*al-amanat*) to whom they belong, and when you rule among people, you rule with justice' (4: 59). The concept of 'trusts' in the first part of this verse has thus been given a concrete expression in the second part, namely to establish a government which would administer justice. Trusteeship in this sense is an integral part of vicegerency: no one can qualify as vicegerent unless he enjoys the trust of the principal party.

The origin of the principle of *khilafah* or vicegerency is also Qur'anic: God speaks to the Angels about appointing his vicegerent in the earth (24: 55). The reference here is unmistakably to mankind, not to angels, for the latter protested against this decision as the subsequent portion of the text conveys, and expressed doubt on the suitability of man for this role. It is significant that the vicegerency is collectively entrusted to the community of believers. The right to rule, therefore, belongs to the whole community without any reservation in favour of any particular individual, family, tribe or class. The doctrine of *khilafah* is based on the postulate that no individual or class can claim a monopoly of power over the community: every capable person is entitled to shoulder the responsibility of this trust. The community as a whole is the keeper whereas the head of the state (*Imam, khalifah*) acts as the agent or representative (*wakil*) of the community in fulfilling the requirements of this trust. *Amanah* implies responsibility and requires of its bearer to act in good faith, not just as a formal compliance to a set of rules but as a God-fearing individual aware of the sacred trust of *Khilafah*.

The detailed terms of this trust are spelled out in the *Shari'ah* with special emphasis on justice, consultation in public affairs, fulfilment of rights and obligations, and protection of the five values of life, faith, intellect, lineage and property. The head of the state, according to the Islamic theory of government is only one among the entire community of equals and he rules by virtue of the trust that the community has reposed in him.<sup>16</sup> 'This popular vicegerency', in Mawdudi's words, 'forms the basis of democracy in an Islamic State'. The practical implication of this popular vicegerency is that government can be formed only with the consent of the people and remain in

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<sup>16</sup> Khallaf, *Al-Siyasah*, p. 61; Diya al-Din al-Ris, *Al-Nazariyyah al-Siyasiyyah al-Islamiyyah*, 5th Ed. (Cairo: Dar al-Ma'arif, 1969), 293.

office only as long as it continues to enjoy their confidence. Provided the government honours the terms of its office, the citizen has the duty under the *Shari'ah* to assist it and obey. It is only when the government itself deviates and the leader, the *Imam* or Khalifah indulges in flagrant violation of the principles of Islam that the government loses its right to be supported and obeyed by the citizen, and only then is the community entitled to depose it.

The Qur'an and *Sunnah* do not provide specific procedures as to how the leader should be deposed nor have the Muslim jurists and political commentators reached a consensus over a workable procedure for deposing the head of state. But a formula may be approved and specified by the community itself, through consultation, and in conformity with the nature of *amanah* and considerations of public interest (*maslahah*). These and similar matters pertaining to the transfer of power are to be regulated by consultative methods. Some of the 20<sup>th</sup> century constitutions of Muslim countries have, in fact, addressed the subject and provided procedures for transfer of power both in the normal form of a new government taking office through elections, and in extraordinary situations which may call for impeachment of the head of state.

However, the secularist legacy of colonialism has dominated the terms of these constitutions which tend to weaken the Islamic identity of the constitution as a whole and its conformity with the basic notions of *amanah* and *khilafah*. Only a few of the current constitutions of the Muslims countries exhibit a deliberate effort to cast off secularist orientation of the nation-state in favour of establishment of an Islamic system of government. Provided that the constitution itself is in harmony with the principles of Islam and commits the state to the implementation of the Qur'anic concepts of *amanah* and *khilafah*, it should be possible to devise proper procedures for the transfer of power and impeachment. A constitution which seeks to operate within the perimeters of the doctrine of *khilafah* and in harmony with the principles of Islam, becomes the authoritative ordinance of the lawful leaders, the *Ulu'l-amr*, and obedience to it becomes the Islamic duty of the citizens.

Juridically, the head of state is the representative (*wakil*) of the community as the latter elects him for the management of its affairs. The *wakil* derives his authority from the principle (*muwakkil*) and exercises it in the name of the community. Both parties to this contract have certain rights and duties toward each other. Although the head of the state enjoys wide powers, they are not despotic in character as he is subject to the laws and principles of Islam.<sup>17</sup> One of these principles, for example, requires that the state affairs must be conducted in consultation with the community. In this case, since consultation is prescribed in the Qur'an, even the community is not entitled to relieve the ruler of this restriction.<sup>18</sup> The community, being the principal party to the contract, is entitled to monitor the proper fulfilment of that contract, and

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<sup>17</sup> Sa'di Abu Habib, *Dirasah fi Minhaj al-Islam al-Siyasi* (Beirut: Mu'assasat al-Risalah, 1406/1985), 88.

<sup>18</sup> Fathi 'Uthman, *Al-Fikr al-Qanuni al-Islami* (Cairo: Matba'at Mukhaymar, n. d.), 119.

also to relieve the representative of his responsibility when he is no longer capable of discharging it, or when he indulges in oppression and shows no regard for law.<sup>19</sup>

The essential requirements of this contract, like any other, are the offer (*ijab*), acceptance (*qabul*), and the pledge of allegiance (*bay'ah*) by the electorate. The general purpose of electing an Imam is to protect the faith and administer the affairs of this world (*hirasat al-din wa siyasat al-dunya*). The ultimate goal of this contract is cooperation (*ta'awun*) in the pursuit of excellence and good deeds. If the *Imam* applies himself towards these objectives, he has fulfilled the trust and is entitled to the obedience and support of the community.<sup>20</sup> The *Imam* may be elected by the people either directly or through their representatives, the *ahl al-hall wa'l-'aqd*, that is, persons of influence who enjoy the confidence of the community. The *Imam*, thus, does not come to power because of his religious piety, or family or class. As an elected leader, he has no authority to control the hearts and minds of the people. He is a party to the contract and it is his responsibility to work for the benefit of all.<sup>21</sup>

### III. Administration of Justice

Justice is the cardinal duty, indeed the *raison d'être*, of the government not only in its retributive sense of adjudicating grievances but also in the sense of distributive justice, of establishing equilibrium of benefits and advantages in the community. The demand for providing justice at every level of society features very prominently in the Qur'an. In all spheres, be it personal or public, in dealing with friends and foes, Muslims and non-Muslims, both in words and deeds, the Muslims are urged to be fair and just. Justice is an integral part of the faith and upholding the principle of justice is not confined to the courtroom environment nor to a set of formal injunctions but commands a high priority in the order of Islamic moral and spiritual values. This is the purport of the following Qur'anic verse which declares justice to be the ultimate goal of religion: "We sent Our Messengers and We revealed to them the Book and the balance so as to establish justice among people (57: 25).

The phrase 'Our Messengers' in the plural suggests that justice has always been the goal of the Religion revealed by God throughout human history; that it has been of central importance to the prophetic missions; and that it comprises, within its scope, all people regardless of their religious denominations.<sup>22</sup>

The Qur'anic standards of justice are objective in that they are not tainted by racial, tribal, national or religious affiliation. Justice is a major theme of the Qur'an,

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<sup>19</sup> Baqir Sharif al-Qurashi, *Nizam al-Hukm wa'l-Idarah fi'l-Islam* (Najaf: Matba'ah al-Adab, 1386/1966), 131ff.

<sup>20</sup> Abu'l-Hasan al-Mawardi, *Kitab al-Ahkam al-Sultaniyyah* (Cairo: Matba'at al-Sa'adah, 1327/1959), 14.

<sup>21</sup> Laylah, *Al-Nuzum al-Siyasiyyah*, 433 ff.

<sup>22</sup> Cf. Abu Habib, *Dirasah*, 90.

which is referred to on at least fifty-three instances where the believer is urged to be just in his dealings with others.<sup>23</sup> To quote but a few such injunctions:

O believers! Stand out firmly for justice as witnesses to God, even if it be against yourselves, your parents and relatives and whether it be against the rich or poor. (4: 135)

And let not the hatred of a people swerve you from the path of justice. Be just as it is closest to piety (*taqwa*). (5: 8)

And when you speak, speak with justice. (6: 152)

Elsewhere the Qur'an addresses the believers: "God commands justice and benevolence (*ihsan*)." (16: 90) The juxtaposition of justice and *ihsan* in this verse opens the scope of justice to considerations of equity and fairness, especially where the linguistic confines and technicality of a legal text might lead to rigidity in the administration of justice. Justice must be attempted in the spirit of *ihsan*, that is even when it is not demanded by anyone; that the attempt should be in equity and good faith which would gain the good pleasure of God. Ibn Qayyim al-Jawziyyah grasps the essence of justice in the Qur'an when he observes that justice must be followed and upheld wherever it is found, within or outside the declared provision of the law: 'Justice is the supreme goal and objective of Islam. God has sent scriptures and Messengers in order to establish justice among people. When there are signs which indicate the path to justice, it is in accord with the law of God to aim toward it. Hence any path that leads to justice and fairness is an integral part of the religion and never contrary to it.'<sup>24</sup> What Ibn Qayyim is saying is that even if nothing could be found in the *Shari'ah* to show the direction towards justice, it should still be attempted and that the result of such effort would always be in harmony with *Shari'ah*.

In their relations with non-Muslims, the Muslims are directed to be benevolent and just:

God forbids you not to do good and be just to those who have not fought you over your faith nor have evicted you from your homes. God loves those who establish justice. (60: 8)

According to Qur'an commentators, the ruling of this verse extends to all nations and followers of all faiths, indeed to the whole of mankind. While quoting this and other Qur'anic injunctions on the subject, Sayyid Qutb draws the conclusion that justice is an inherent right of all human beings under the *Shari'ah*.<sup>25</sup>

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<sup>23</sup> Ibid., 750.

<sup>24</sup> Ibn Qayyim al-Jawziyyah, *Al-Turuq al-Hukmiyyah fi'l-Siyasah al-Shari'yyah* (Cairo: Mu'assisat al-'Arabiyyah li'l-Taba'ah, 1386/1961), 16.

<sup>25</sup> Sayyid Qutb, *Fi Zilal al-Qur'an*, 5th ed. (Berut: Dar al-Shuruq, 1397/1977), II, 689.

An independent judiciary is absolutely essential for the administration of justice and government under the rule of law. Historical practice in this area is inconsistent and, on the whole, uninspiring in that often in Islamic history the atmosphere was not congenial for the judges to work fully independently. There are reports, as al-Tamawi points out, that under the Umayyads, judges enjoyed considerable freedom and were unhindered in the exercise of independent *ijtihad*. They consulted the caliph only when they faced difficulties in the fulfilment of their duties. However, the emergence and gradual crystallisation of the four schools of law during the early period of the 'Abbasids led to limitations on the independence of judges. Judges were then expected to follow the views of the established schools, hence their freedom to exercise independent *ijtihad* was restricted. There were also instances of executive interference in the affairs of judiciary, which were, on the whole, accountable for the fact that Imam Abu Hanifah, his disciple Zufar ibn Hudhayl, and Imam Ahmad ibn Hanbal had all refused to serve as judges under the 'Abbasids.<sup>26</sup> However, al-Mawardi expounded the doctrine accurately when he wrote that the judge must exercise his own *ijtihad* and in doing so he is not bound to adhere to the ruling of the school to which he subscribes: 'Should he be a follower of the Shafi'i school, he is not bound by the rulings of this school unless his own *ijtihad* leads him to it: should his *ijtihad* favours the opinion of Abu Hanifah, he should act upon it accordingly'.<sup>27</sup> The organization of the judiciary and its various jurisdictions have developed over a period of time. The office of *Qadi al-Qudah* (Chief Justice) did not emerge until the early 'Abbasid period. Harun al-Rashid was the first caliph to establish a centralised judiciary to which he appointed Abu Yusuf as *Qadi al-Qudah*, and the latter in turn appointed judges and exercised judicial authority (*wilyah al-qadi'*) in the capacity of *hakim* (ruler) not a *muwazzaf* (task officer). The difference between the two being that the former is vested with general authority whereas the latter has no general powers. In his capacity as head of the judiciary, *Qadi al-Qudah* was not a deputy (*mu'awin*) to the caliph in judicial matters, but an officer of state who was in charge of its judicial affairs.<sup>28</sup> A department of the judiciary, known as *Diwan al-Mazalim*, which was concerned mainly with complaints against the state officials, on the whole exercised a greater degree of independence. It is not my purpose here to trace the history of the *Mazalim* but merely to say that the very development of this jurisdiction at an early stage (its origin is traceable to the time of the Prophet) is reflective of the consciousness of the need for the judiciary to operate independently.

A most cogent argument advanced in favour of the independence of the judiciary is that the judge can accept a suit against the very person of the head of the state without any prior permission, and can try him in an open court. 'This feature of Islamic Judiciary', as one observer puts it, 'is an index of its independent status'.<sup>29</sup>

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<sup>26</sup> Sulayman Muhammad al-Tamawi, *Al-Sultat al-Thalath fi'l-Dasatir al-'Arabiyyah wa fi'l-Fikr al-Siyasi al-Islami*, 2nd ed. (Cairo: Dar al-Fikr al-'Arabi, 1973), 478.

<sup>27</sup> Al-Mawardi, *Kitab al-Ahkam*, 64.

<sup>28</sup> Muhammad Taqi al-Din al-Nabhani, *Muqaddimat al-Dustur* (Beirut: 1964), 206.

<sup>29</sup> Farooq Hasan, *The Concept of State and Law in Islam* (New York: University Press of America, 1981), 48.

Since the basic function of the judge is to settle disputes and establish justice in accordance with the *Shari'ah*, he is subject, in discharge of his duty, only to the law; and no one is entitled, not even the head of the state, to interfere with the due enforcement of *Shari'ah*.

Furthermore, a look at the Qur'anic text, which envisages the possibility of disputes arising between the ruler and the ruled, would confirm the necessity of an independent judiciary in the Islamic state. The text referred to enjoins the believers to 'Obey God and obey the Messenger, and those who are in charge of affairs among you. Should you dispute over something, then refer it to God and to the Messenger.' (4: 58) This text is clear on the citizen's duty of obedience to the legitimate rulers. It is also implied in this verse that the people have a right to take issue with their rulers. In the event of a disagreement, the final arbiter between them is, as the text provides, the law of God and the ruling of His Messenger. To facilitate proper implementation of this text, there must be, as al-Khalidi points out, an independent judiciary with full powers to adjudicate between the citizen and the state. This may be, as the same writer observes, in the form of the historical *Mazalim* with power to adjudicate cases involving high officials of state, or it may take a different form. In either case 'it is essential that the head of state should have no powers to dismiss or replace the leading judicial officers of the State.'<sup>30</sup> Furthermore, the Islamic constitutional theory is explicit on the point that the community may depose the head of the state in the event of manifest aberration or loss of capacity on his part which hinders fulfilment of his duties. The judiciary may thus be called upon to discharge the most sensitive task of having to disqualify the head of the state from continuing in office. This would be a task almost impossible to perform unless the judiciary is independent of executive control and enjoys total security of office.

#### IV. Freedom to Criticise

Under the *Shari'ah*, the citizen is granted the freedom to criticise and monitor government activity within the framework of *hurriyyah al-mu'aradah*, (also known as *hurriyyah naqd al-hakim*) by means of sincere advice, constructive criticism and ultimately by refusal to obey the government which transgresses the law. This is a corollary of the Qur'anic principle of *amr bi'l ma'ruf wa nahy 'an al-munkar* (commanding good and forbidding evil) which entitles, nay requires, the individual to criticise and strive to change or rectify transgression and evil when he witnesses or anticipates their occurrence. *Mu'aradah* is a fundamental principle of the Islamic system of government, writes 'Afifi, which entitles the individual to tell the truth and

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<sup>30</sup> Mahmud 'Abd al-Majid al-Khalidi, *Qawa'id Nizam al-Hukm fi'l-Islam* (Kuwait: Dar al-Buhuth, 1400/1980), 211.

expose transgression even when this entails opposing the ruling authorities.<sup>31</sup> The textual authority for this right is the same, in the Qur'an and the *Sunnah*, as can be quoted in support of *amr bi'l ma'ruf wa nahy 'an al-munkar*, also known as the principle of *hisbah*.<sup>32</sup> The Qur'an is most emphatic on the value of this principle, so much so, that it is made an integral part and a requirement of the faith. It is the central theme of a number of verses in the Qur'an; the *Sunnah* elaborates it and regulates its detailed implementation. To quote only one such verse 'the believers, men and women, are friends of one another, they command good and they forbid evil...' (9: 71; see also 3: 104 and 110: and 22: 41).

The Qur'an thus places men and women on an equal footing in regards to both *hisbah* and *mu'aradah*. Each and every citizen is entitled, as the following *hadith* confirms, to disapprove transgression, be it on the part of a government leader or a fellow citizen, or indeed, anyone who is engaged in evil and criminal activity. 'When any of you sees an evil, let him change it by his hand; but if he is unable to do so, then let him change it by his tongue; but if he is still unable to do that, then let him (denounce) it in his heart, and this is the weakest form of faith'.<sup>33</sup>

The general terms of this *hadith* have been qualified with regard to its application to one's parents, and also the Head of the State in that they may only be verbally criticised and not humiliated in such a way that might give rise to provocation and greater evil. The verbal reminder should be in the form of sincere counsel (*nasihah*), or criticism which does not instigate a more harmful transgression than the one which was meant to be prevented.<sup>34</sup>

*Mu'aradah* is validated by the *Sunnah* of the Prophet and by clear precedent of the leading Companions and the Rightly Guided Caliphs. It is thus reported that on the eve of signing the peace treaty of Hudabiyah with the Quraysh of Makkah, 'Umar ibn al-Khattab was critical of some of its provisions which he felt were unfavourable to the Muslims. 'Umar is on record to have consulted the more senior Companion, Abu Bakr, on the matter but was still dissatisfied and went on expressing his sharply critical view of the treaty to the Prophet, who listened to 'Umar's views and provided an answer to his criticism.<sup>35</sup> Elsewhere we read in a *hadith* that the Prophet (peace be

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<sup>31</sup> Muhammad al-Sadiq 'Afifi, *Al-Mujtama' al-Islami wa Usul al-Hukm* (Cairo: Dar al-I'tisam, 1400/1980), 93; Mustafa al-Siba'i, *Ishtirakiyyat al-Islam*, 2nd ed. (Damascus: Dar al-Qawmiyyah li'l-Taba'at wa'l-Nashr, 1379/1960), 50.

<sup>32</sup> Zafir al-Qasimi, *Nizam al-Hukm fi'l-Shari'ah wa'l-Tarikh*, 2nd ed. (Beirut: Dar al-Nafa'is, 1977), 101.

<sup>33</sup> Muslim, *Sahih*: K. al-Iman, B-Bayan kawnih al-nahyi 'an al-munkar min al-Iman, Hadith No. 78.

<sup>34</sup> For detail see Abu Hamid Muhammad al-Ghazzali, *Ihya' 'Ulum al-Din*, 2nd. (Beirut: Dar al-Fikr, 1400/1980), v, 183.

<sup>35</sup> The clause which 'Umar protested against was: If a member of the Quraysh tribe went to Muhammad without the permission of his (guardian) he was to be turned to his tribe. But if a member of the Quraysh from the side of Muhammad went to his tribe, it was not obligatory for the Quraysh to return him to Muhammad. The conversation between 'Umar and the Prophet is recorded as follows: 'Are you not the Messenger of God?' 'I am', said the Prophet. 'Are we not Muslim?' 'We are,' said the Prophet. 'Are they not those who associate others in the divinity of God?' 'They are', said the Prophet.

upon him) declared: 'the best form of *jihad* is to utter a word of truth to a tyrannical ruler'.<sup>36</sup>

In his inaugural speech, following his election to office, the first caliph, Abu Bakr said: 'O people! I have been entrusted with authority over you, but I am not the best of you. Help me if I am right and correct me when I go astray.'<sup>37</sup> This is understood to be an open invitation to constructive criticism of the government and an encouragement whereby the people should remain vigilant about the activities of their leaders. The attitude which Abu Bakr maintained in this speech, as Abu Habib has observed, was that self-criticism was not only beneficial for healthy growth but also a necessary attribute of responsible government'.<sup>38</sup>

Numerous instances of *mu'aradah* during the reign of the second caliph, 'Umar ibn al-Khattab have been recorded. Following the precedent of the first caliph, Abu Bakr, 'Umar, too, asked the people in his inaugural speech, to rectify any aberration they might see in him. A man from the audience said to the caliph 'If we see deviation on your part, we shall rectify it by our swords.' Upon hearing this, the caliph praised God that there was someone who would set 'Umar right with sword in the cause of righteousness.<sup>39</sup> Another report concerning the subject of dower (*mahr*) has it that the caliph 'Umar in a public speech warned the people against exaggerated sums being given in dower, a woman, Fatimah bint Qays, disagreed and quoted the Qur'anic text (4: 20) in support of her argument, upon which 'Umar remarked 'a woman is right whereas 'Umar was in error'.<sup>40</sup>

According to another report, a man came to 'Umar and addressed him somewhat impudently: 'Fear God. O 'Umar!' Someone who was present on the occasion reminded the man that he was exceeding the limits of propriety in the presence of the caliph. To this 'Umar responded by saying 'It will be no good if they (the people) did not remind us so and it will be no good if we did not listen to them'.<sup>41</sup>

Based to on these and other instances of *mu'aradah* which took place during the period of *Khulafa' Rashidun*, it is concluded that 'Islam entitles the citizen to monitor the activities of the head of state and the state officials in what they do and what they neglect doing'.<sup>42</sup> Muhammad Khidr al-Husayn is even more emphatic when he observes that Islam has made it an obligation of the community to monitor the conduct of the head of state and his officials with a view to set the deviators right and

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'Then why are we being insulted in our faith?' The Prophet said 'I am the servant and Messenger of God, I shall not disobey Him and He shall not let me be the loser'. Abu Muhammad 'Abd al-Malik ibn Hisham, *Al-Sirat al-Nabawiyyah* (Cairo: Maktabat al-Kulliyat al-Azhariyyah, 1392/1972), III, 331.

<sup>36</sup> Ibn Majah, *Sunnan*; K. al-fitan, B. al-amr bi'l ma'ruf wa nahy 'an al-munkar, Hadith No. 4011.

<sup>37</sup> Ibn Hisham, *Sirah* iv, 262; Abu Habib, *Dirasah*, p. 725; Al-Qasimi, *Nizam al-Hukm*, 106.

<sup>38</sup> Abu Habib, *Dirasah*, 727.

<sup>39</sup> Abu Zahrah, *Al-Jarimah*, p. 160; Al-Siba'i, *Ishtirakiyyah*, p. 50; al-Nabhan, *Nizam al-Hukm*, 240.

<sup>40</sup> Muhammad al-Khudari, *Muhadarat fi Ta'rikh al-Umam al-Islamiyyah* (Cairo: Al-Babi al-Halabi, 1349 A.H.), II, 17-18; al-Nabhan, *Nizam al-Hukm*, p. 240; Abu Habib, *Dirasah*, 733.

<sup>41</sup> Abu Yusuf, *Al-Kharaj*, 13.

<sup>42</sup> Abu Habib *Dirasah*, 743.

to alert those who might be neglecting their duties.<sup>43</sup>

The right to criticise must not be confused, however, with opposition for the sake of opposition, nor should it be taken so far as to institutionalise opposition in the form, for example, of present-day political parties. An opposition party is often committed to opposition in order to replace the ruling party and capture power; a reality of contemporary politics which tends to encourage criticism for the sake of opposition in a way that lacks moderation. This form of opposition is discouraged in Islam on the authority of the *hadith* which instructs the Muslims as follows: 'Let no one of you be turned into a tail (*imm'ah*) that is a person who does good work or embarks upon evil only when he sees others doing the same.'<sup>44</sup> Participation in good work is normally encouraged, be it at one's own initiative or in following others; Even so, if a good deed is the result of merely the desire to conform, it does not refine the personality and is of little educative value. Consequently, a heightened sense of individual responsibility is of central importance to the proper exercise of *mu'aradah*. According to the clear instruction of another *hadith*, 'Every one of you is a shepherd (*ra'i*) who is responsible for that which is in his custody....'<sup>45</sup> Everyone is accountable and no one is above criticism and all criticism should be made in the spirit of *nasihah* (sincere advice).

## V. Government by Consultation

The Islamic state must run its affairs through consultation (*shura*) with the community. Consultation is as mandatory by virtue of it being the subject of a Qur'anic command (42: 38) as are obligatory prayers (*salah*) and legal alms (*zakah*) as all the three occur next to one another in this verse. Al-Tabari characterises *shura* as one of the '*aza'im al-ahkam*, that is a fundamental principle of *Shari'ah*, which is essential to the substance and identity of the Islamic system of government.<sup>46</sup> Ibn Taymiyyah observes that God has commanded the Prophet Muhammad to consult the community despite the fact that he was recipient of divine guidance through revelation. This Qur'anic command is, therefore, all the more emphatic with regard to the subsequent generations of Muslims who no longer have the Prophet among them nor do they have direct access to revelation.<sup>47</sup> The machinery of institutional form in which consultation must take place is not prescribed either in the Qur'an or *Sunnah*, a fact which implies that the community must devise its own methods to facilitate

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<sup>43</sup> Muhammad Khidr Husayn, *Naqd Kitab al-Islam wa Usul al-Hukm* (Cairo: Al-Matba'at al-Salafiyyah, 1344), 89.

<sup>44</sup> Hadith reported by Tirmidhi in Al-Tabrizi, *Mishkat* III, 1418, Hadith No. 5129.

<sup>45</sup> Bukhari, *Sahih*, K. al-Jum'ah, B. al-Jum'ah fi'l Qur'an wa'l mudun.

<sup>46</sup> Muhammad ibn Jarir al-Tabari, *Tafsir al-Tabari*, 3rd ed. (Cairo: Mustafa al-Babi al-Halabi, 1968), IV, 152.

<sup>47</sup> Ibn Taymiyyah, *Al-Siyasah*, p. 169; see also Abu Habib, *Dirasah*, 642 who quotes Muhammad 'Abduh, Muhammad Rashid Rida, Abu'l-A'la Mawdudi and 'Abd al-Qadir 'Awdah to the effect that *shura* is a Qur'anic obligation.

consultation in public affairs in accordance with its needs and interests.

As for the subject matter of *shura* and whether it should be applied on a selective basis, the jurists have held that *shura* is applicable to both religious and temporal affairs on which the revelation does not offer the necessary guidance. Should the guidance be available in the Qur'an and *Sunnah* on a particular issue, consultation is redundant and it must not be allowed to override the definitive rulings of the Qur'an and *Sunnah*. Although the substance of this principle is generally agreed upon by the '*ulama*', it would be inaccurate to say that *shura* has no role to play in matters laid down in the Qur'an and *Sunnah*. For in such cases, *shura* could still operate to determine the correct interpretation and understanding of the textual ordinances (*ahkam*) and proper methods of enforcing them. In this sense, it may be said that *shura* has a role to play in all matters of public concern both within and outside the textual rulings of the *Shari'ah*.<sup>48</sup>

Some '*ulama*' have attempted to single out certain areas such as warfare etc., as the proper or even the exclusive subject matter of *shura*, which would suggest that *shura* is not a requirement in other areas of government. The correct response to such views and the proper approach regarding the subject-matter of *shura* can be ascertained in the Qur'an itself. The Qur'anic text, which is embodied in the form of a general command addressing the Prophet to consult the Companions (3: 159) has not been qualified in any way. A general and absolute command according to the rules of *usul al-fiqh* must remain as such unless there is evidence to warrant qualification or specification (*takhsis*) of the original command.<sup>49</sup> There is no compelling reason to specify the subject-matter of *shura* in any way other than what has already been stated that *shura* must not conflict with the definitive injunctions of the *Shari'ah*.

Muslim jurists have also differed in their opinion regarding the issue whether the decision of the state consultative assembly (*Majlis al-Shura*) binds the head of the state or whether the latter enjoys the liberty to differ with, or even veto, the decisions arrived at through *shura*. A measure of flexibility would seem to be available to the head of the state bearing in mind the fact that the Prophet (peace be on him), in his capacity as head of state, had, at times, acted on the consultative opinion of the majority whereas on other occasions, he differed with the view of the majority and decided independently of the *shura*. This would imply that a choice is available which could be determined by the *shura* itself by means, for example, of a constitutional provision, so as to make the decisions of the *shura* in certain areas binding on the head of the state and also to give the latter power of veto in other areas. Having said this, a direct parallel to the precedent of the Prophet (peace be on him) on this issue would seem less than justified bearing in mind that in his unique Prophetic capacity he was recipient of divine revelation, which is why he is known to have occasionally

<sup>48</sup> Cf. Al-Khalidi, *Qawa'id*, p. 55, Mohamed S. El-Awa, *The Political System of the Islamic State*, (Indianapolis, Indiana: American Trust Publications, 1980), 90.

<sup>49</sup> See for detail Kamali, *Principles of Islamic Jurisprudence*, 132, 141, 144; Abu Habib, *Dirasah*, 644.

acted according to divine instruction in preference to the counsel of his Companions.<sup>50</sup>

## VI. Legislative Authority

Islam advocates a limited government in that not every aspect of its law—the *Shari'ah*—is enforceable by government. Muslim jurists have thus drawn a distinction between religious and juridical obligations. Only the latter are enforceable through formal sanctions in the courts of justice. The religious obligations, as well as the moral recommendations of Islam, are primarily addressed to the individual and fall outside the jurisdiction of the courts.

From a historical perspective, the '*ulama*' have persistently questioned the legitimacy of governments in power because of aberrations that have occurred in the designation of the head of the state. They have thus called into question, and refused to acknowledge the legitimacy of many a dynastic ruler and autocrat. They were criticised for failure to implement the Qur'anic requirement of consultation into an effective method of government. Furthermore, 'the Islamic government', as Turabi points out, 'has historically, for the most part, been illegitimate as far as the election of the head of the state is concerned.'<sup>51</sup> The '*ulama*' have, consequently, been critical of the government and saw these anomalies as a threat not only to the true objectives and integrity of the *Shari'ah* but also to the rights and liberties of the citizen. This anti-government stance that the '*ulama*' adopted throughout the ages was possible, partly, because of the independent status of the *Shari'ah* which 'remained as a protective code whose bounds even the most ruthless ruler could not transgress.' This meant, as Nasr further points out, that there remained within the Islamic society a continuous tension between the political authority of the caliph, *sultan* or *amir*, and the '*ulama*' who played a major role in protecting the *Shari'ah* and therefore the freedoms of the individual guaranteed by the *Shari'ah*.<sup>52</sup> Consequently, the '*ulama*' have deliberately restricted the authority of government in religious and juridical spheres. In their formulations of the principles of jurisprudence (*usul al-fiqh*), for example, the '*ulama*' have hardly acknowledged any governmental authority to legislate. This important area of government was actually assumed by the jurists themselves; they interpreted and defined the law, and the judges who were appointed by the government also followed the opinions of the jurists in applying the law. It is not surprising, therefore, to find that the juristic manuals and legal codes of *Shari'ah* in the Muslim territories have emanated, not from the state organization and assemblies, but from individual jurists like Malik, al-Shafi'i, Abu Hanifah and Ibn Hanbal.<sup>53</sup>

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<sup>50</sup> Cf. Al-Khalidi, *Qawa'id*, pp. 172-3; Abu Habib, *Dirasah*, 641 ff.

<sup>51</sup> Hasan Turabi, "Principles of Governance", 6.

<sup>52</sup> Nasr, *Islamic Life*, 21.

<sup>53</sup> Hasan Turabi, "The Islamic State", in ed. L. J. Esposito, *Voices of Resurgent Islam* (New York: Oxford University Press, 1983), 247.

The legal theory of *usul al-fiqh* which defines the sources and methodology of the law recognises, in addition to the Qur'an and *Sunnah*, a number of other proofs such as personal reasoning (*ijtihad*) and consensus of opinion (*ijma'*). It is significant that neither of these doctrines acknowledges or defines a specific role for the government in the formulation and development of the law. *Ijtihad* may be exercised by any competent scholar who is capable of deducing a new rule of law from the source materials of the *Shari'ah* in response to a new problem. In doing so, the jurist is acting in a private capacity and his findings in the form of *ijtihad* need not be approved by government authorities. This is true also of *ijma'* which is a binding proof and a source of law next, in order of authority, to the Qur'an and *Sunnah* and consists of the unanimous agreement of the competent scholars of the community on a particular ruling. Once a consensus has been properly reached, it becomes a binding rule of the *Shari'ah* which must be enforced by the government and the courts of justice. Once again, in reaching a consensus of this type, the '*ulama*' are not required to cooperate with the government. The legal theory of *ijtihad* and *ijma'* is thus particularly oblivious of government participation in the legislative affairs of the community. This would partly explain why Islamic law has often been characterised, though somewhat inaccurately, as the "jurists' law" which has largely been formulated by private individuals away from government intervention and involvement.<sup>54</sup> Thus according to the legal theory, the legislative authority of the government is limited and bound by the *ijtihad* and consensus of the '*ulama*'. While the '*ulama*' owe the duty of obedience to lawful government no more than any other of its citizens, the government on its part is bound by the rulings of the *ijma'*.

## VII. Considerations of Public Interest (*Maslahah*)

One of the basic objectives of government, Islamic or otherwise, is the realisation of public interest. This is the purport of the Islamic legal maxim which proclaims that 'The authority of the head of state in regard to affairs of the citizens is bound by considerations of *maslahah*.'<sup>55</sup> The doctrine of *maslahah* authorises the government to take necessary measures, including legislation, to attain the well-being of its citizens. Despite a measure of flexibility that this doctrine affords the government with regard to the choice of measures it might take in *maslahah*, its powers are on the whole limited by a set of principles to which the precise identification of public interest must conform.<sup>56</sup> Whereas the secular state, in its sovereign capacity, has the power to define public interest by reference to public opinion, and its own order of priorities, *maslahah* in Islamic law is not determined by the free will of either the political authority or the opinion of the masses.

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<sup>54</sup> Cf. H. Liebesney, *Law in the Near and Middle East* (Albany: New York University Press, 1975), 9. The epithet "Jurists' Law" is inaccurate as it tends to ignore the more fundamental feature, namely the divine origin, of Islamic law.

<sup>55</sup> For the Arabic version of the maxim and further detail see al-Sabuni, *Al-Madkhal*, 412; Muhammad Salim Madkur, *Madkhal al-Fiqh al-Islami* (Cairo: Dar al-Qawmiyyah 1384/1964, p. 122.

<sup>56</sup> For details see M. H. Kamali, 'Have We Neglected the Shari'ah Law Doctrine of *Maslahah Islamic Studies*, XXVII (1988), 294-96.

As elaborated in a previous chapter of this book, the theory of *maslahah* identifies three categories of interests, namely the accredited interest (*maslahah mu'tabarah*), the discredited interest (*maslahah mulgha*), and the unrestricted interest (*maslahah mursalah*). The first two take their lead from textual authority in the Qur'an and *Sunnah* and are, by and large, regulated by the established rules of *Shari'ah*. The five values of life, faith, intellect, lineage and property head the list of the accredited interests which are protected by the *Shari'ah* and must be upheld. The discredited interests are those which the *Shari'ah* has clearly proscribed and no legislative or judicial action may be taken to validate or protect them. No amount of public opinion or government support would, for example, validate usury (*riba*) or transfer it from the proscribed to the accredited category of *masalih*. Similarly, the sanctity of the five essential interests and the government commitment to protect them is not alterable by virtue of changes in government policy or the dictates of public opinion. The unrestricted public interest (*maslahah mursalah*) falls between the foregoing two categories in that they have neither been upheld nor proscribed by the *Shari'ah* itself. It is in this area where the Islamic government enjoys greater freedom to take policy initiatives, introduce laws, and adopt measures in pursuit and realisation of public interest at its own discretion. But it is also the most controversial of the three types of *maslahah* in that it has given rise to wide difference of opinion among the '*ulama*'. The basic issue which lies at the centre of the controversy over *maslahah mursalah* is that there is no room for undefined power and unlimited discretion in the Islamic system of government. The opponents of *maslahah mursalah*, namely the Zahiriyah, some Shafi'ites like al-Amidi, and the Maliki jurist, Ibn al-Hajib maintain that the subject of *maslahah* is regulated by the *Shari'ah* and that there is no *maslahah* outside the *Shari'ah*. It is the express duty of the Islamic State to apply the *Shari'ah* and when this is achieved, the *masalih* automatically materialise. They subscribe to the view that the *masalih* are all exclusively contained in the *nusus*. When the *Shari'ah* is silent on a matter, it is most likely that the *maslahah* in question is no more than a specious *maslahah* (*maslahah wahmiyyah*) which offers no ground for legislation.<sup>57</sup> The government, according to this view, must at all times take its lead from the recognised *masalih* on which the *Shari'ah* provides both specific and general guidelines, and avoid arrogating to itself unrestricted authority in the name of *maslahah*. The dividing line between government under the rule of law and arbitrary government, writes Abu Zahrah, is that governance (*hukm*) in the former is in harmony with the *Shari'ah* whereas in the latter it is motivated by arbitrary and self-seeking desire (*hawa*). When the *hukm* follows the genuine *maslahah*, validated by the *Shari'ah*, the *hukm* that accrues is *hukm Shar'i* and commands obedience. The principal criteria of distinguishing genuine *maslahah* from arbitrary desire (*hawa*), Abu Zahrah adds, are the Book of God, the *Sunnah* of His Prophet (peace be on him) and the precedents of the Rightly-Guided Caliphs.<sup>58</sup> The determination of *maslahah mursalah* is thus subservient to the textual authority of the law and cannot be left

<sup>57</sup> For detail see Khallaf, *Ilm Usul al-Fiqh*, p. 88; Abu'l-'Aynayn Badran, *Usul al-Fiqh al-Islami*, (Alexandria: Mu'assisah Shabab al-Jami'ah, 1404/1984), 213.

<sup>58</sup> Abu Zahrah, *Al-Jarimah*, 300.

solely to the dictates of discretionary power. For as history reveals, ever so often, the *maslahah* can easily be subjugated to the personal whims of rulers, and partisan prejudice has often been promoted under the guise of *maslahah*.<sup>59</sup>

## VIII. Taxation

The *Shari'ah* entitles the taxpayer to government protection and assistance in the legitimate use and growth of his property and the income from tax is used to help the poor and the needy. According to the Qur'an 'take alms out of their property to cleanse and to purify them thereby;' (9: 103) 'And the poor and the needy have a right in their wealth'. (51: 19)

The jurists of all schools have held that the state is entitled to levy taxes in addition to *zakah* in the wider interests of the community provided that they do not exceed the limits of moderation.<sup>60</sup> The *Shari'ah* limits the government authority in regard to taxation in at least the following four ways. Firstly, the requirements of the general principles of equity and justice in that tax must be proportionate to the financial ability of the taxpayer and it must apply equally to all without discrimination. Only a just and lenient system of taxation is considered to be in harmony with the *Shari'ah*. An oppressive system which burdens the taxpayer has been unanimously condemned.<sup>61</sup> Secondly, the quantitative limits of taxation must aim at the minimum of what is deemed to be necessary. The power to levy tax, basically, originates in the necessity to maintain public interest, and the general rule regarding taxation for this purpose is that it must be limited to what is essential.<sup>62</sup> Thirdly, the state must enact clear legislation to define the amount of the taxpayer's liability, the time and the method of its payment. Fourthly, the well-being of the taxpayer must be given highest consideration while determining the nature and quantity of tax and the method of collection. Fair methods of collection and consideration for the circumstances of the taxpayer are some of the policy points that are known from the precedent of the orthodox caliphs.

The law further restricts the power of the state in levying periodical taxation in that it must observe the time limit of one calendar year which is generally required for the yield to materialise. Similarly, the *Sunnah* lays down a certain tariff for various types of taxes on property and livestock etc., in which the yield or profit below the stated amount in each category is not liable to tax.<sup>63</sup> Abu Yusuf and al-Mawardi are both of the view that a just system of taxation leads to increase in the state revenue and brings benefit to the community at large. Therefore, tax should not be so

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<sup>59</sup> Cf. Muhammad Abu Zahrah, *Usul al-Fiqh* (Cairo: Dar al-Fikr al-'Arabi, 1377/1953), 224.

<sup>60</sup> Abu Yusuf, *Al-Kharaj*, 85.

<sup>61</sup> *Ibid.*, p. 14.

<sup>62</sup> Khallaf, *Al-Siyasah*, 108.

<sup>63</sup> For details see *Ibid.*, 108-111; Umar Chapra. *The Economic System of Islam* (Karachi: University of Karachi Press, 1971), 63.

exorbitant as to deprive the taxpayer of necessities of life.<sup>64</sup>

## IX. Private Property

Every citizen—man, woman, Muslim and non-Muslim—is entitled, under the *Shari'ah*, to the ownership, possession, enjoyment and transfer of property, a right which must be respected and safeguarded by his fellow citizens and the state. The *Shari'ah* recognises three types of property, namely private property; public property which belongs to the community as a whole such as water and mineral wealth; and state property such as tax revenues and spoils of war. The law provides guidelines on the protection and proper utilization of each. In regard to private property, no one, be it the individual or the state, is entitled to interfere with or to expropriate a citizen's property on any grounds which are not recognised by the law.<sup>65</sup> The *Shari'ah* recognises certain grounds for valid transfer of property such as sale, gift and inheritance, etc.—grounds which do not comprise considerations of public interest or *maslahah*. The state may, therefore, neither expropriate nor interfere with private property in the name of public interest. The reason underlying it is that protection of private property is one of the five basic values and one of the recognised *masalih* which takes priority over the lower categories thereof. The lawful means for acquisition and transfer of ownership which the *Shari'ah* has recognised apply equally to all and the state is no exception.<sup>66</sup> The Qur'an clearly forbids the believers from encroaching upon one another's properties 'in defiance of the law unless it be through lawful trade and agreement by consent.' (4: 29) There is also a *hadith* to this effect.<sup>67</sup> According to another *hadith*: 'Everything which belongs to a Muslim is forbidden to his fellow Muslims—his property, his life, and his honour.'<sup>68</sup>

The general guidelines of the Qur'an and *Sunnah* on the sanctity of private property are upheld in the detailed rules of *Fiqh* which specify the proper use of the right of ownership and the limits within which it must operate in order to meet the social objectives and interests. Should the government or an individual for that matter, exceed these limits and violate the rights of the owner, the latter may take action and seek remedy in the court. The transgressor is, broadly speaking, liable to return the property or redress any losses that might have been inflicted. The only means by which the state can acquire ownership of private property for public use is to purchase it by paying the owners its market price.<sup>69</sup>

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<sup>64</sup> Abu Yusuf, *Al-Kharaj*, 14, 111; al-Mawardi, *al-Ahkam*, 194, 209.

<sup>65</sup> For details see Subhi Mahmassani, *Muqaddimah fi Ihya' 'Ulum al-Shar'iyyah* (Beirut: Dar al-'Alm li'l-Malayin, 1962), 196 ff.

<sup>66</sup> Shaykh Muhammad Taqi al-Din al-Nabhani, *Muqaddimat al-Dustur* (Beirut: 1964), 286, 329-30; Laylah, *Al-Nuzum*, 1127.

<sup>67</sup> This is confirmed by the hadith which declares that 'what belongs to a Muslim is forbidden to others except by virtue of his consent' (see Abu Bakr Ahmad al-Bayhaqi, *Al-Sunnan al-Kubra*, 10 vols. (Beirut: Dar al-Fikr, n. d., III, 10).

<sup>68</sup> Ibn Majah, *Sunnan*: K. al-Fitn, B. Hurmat al-Mu'min wa'l mal. hadith No. 3933.

<sup>69</sup> See for detail Shaykh Taqi al-Din al-Nabhani, *Muqaddimat al-Dustur*, 330.

## X. Private Rights and Public Rights

Further limitations on governmental powers under Islamic law are to be found in the case of the private and public rights expounded in the clear provisions of Qur'an and *Sunnah*. The state has the basic duty to protect them and has little authority to interfere with the general scheme of rights that the *Shari'ah* has established. A distinction has thus been drawn by the jurists between the two categories of rights, namely the Right of God (*Haqq Allah*) and the Right of man (*Haqq al-'Abd*), the former representing the community or public right and the latter personal or private right. There are also rights which partake of both, in which case the jurists have ascertained the preponderance or otherwise of one or the other of these rights in each category. The basic purpose of this distinction is to facilitate the administration of justice in each area according to its relevant set of priorities.<sup>70</sup> *Haqq Allah* is a collective right which belongs to the community as a whole and is the privilege of no one in particular; it must be fulfilled and the head of the state as the representative of the community has the duty to see to its proper fulfilment. But minor exceptions apart, no one, even the head of state, or the Attorney General, has the authority to waive or pardon the right of God on behalf of the community. Similarly, the state has no authority to accept intercession or bargaining regarding the *Haqq Allah* from any party whatsoever. Every individual is entitled to demand the fulfilment of *Haqq Allah* and report any breach or violation thereof to the authorities.<sup>71</sup> In devotional matters, for example, observing the ritual prayers and fasting in Ramadan fall under the Right of God; in the area of public law, payment of charities and taxes; and in the sphere of criminal law ensuring the safety of public thoroughfares, enforcing the prescribed penalties (*hudud*), and the making of expiations (*kaffarat*) fall under the category of *Haqq Allah*. These are distinguished from private rights, such as the right to just retaliation (*qisas*), the owner's right to his property, the creditor's right over the debtor, the vendor's right to the agreed price, and the right of the legal heir to inheritance etc., all of which fall under the category of *haqq al-'Abd*. Only the rightful bearer in every one of these has the privilege to pardon, to waive or to disclaim his private right. Neither the head of the state nor his officials and judges have the authority to waive them; or to validate any adjustment, increase or decrease, in the fulfilment of private rights. Every civil transaction, proceeding, or adjudication concerning private rights must be authorised by the rightful bearer or his representative.<sup>72</sup>

Whereas, in cases of violation of the Right of God, the head of the state and the judge enjoy limited powers to accept repentance and apology from the offender

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<sup>70</sup> See for detail Muhammad Yusuf Musa, *Al-Fiqh al-Islami, Madkhal li-dirasatihi, Nizam al-Mu'amalat fihi* (Cairo: Dar al-Kutub al-hadithah, 1374/1954), 212.

<sup>71</sup> Shaltut, *Al-Islam*, 405; al-Nabhan, *Nizam al-hukm*, 128.

<sup>72</sup> Shaltut, *Al-Islam*, 406.

before the legal process of prosecution and proof begin, there is little latitude of this kind available to governmental authorities where Right of Man is involved. In a similar vein, the judge enjoys some discretionary powers in ordering *ta'zir* penalties in cases of marginal doubt in the proof of offences which involve violation of the Right of God, and may take into consideration mitigating factors as the case may be. No such discretionary powers are available to the courts and governmental agencies in regard to the violation of private rights. No discretionary changes can be authorised in the fulfilment of private rights except by the express consent of the rightful bearer. The position is, however, different in the case of public rights where the consent of the individual or of the parties concerned is generally of little consequence. Enforcement of the prescribed penalty for theft, for example, is a Right of God and the court is under duty to enforce it upon the establishment of the proof even if the victim relieves the offender of his liability. The element of consent in this case must not interfere with the right of the community to punish the offender.<sup>73</sup> And finally in the event of clash between private and public rights, the former takes priority over the latter. To give an example if a person dies while owing debts which exhaust his entire property, and he also owes unpaid *zakah*, the debts must be cleared first, for the Right of Man takes priority over the Right of God.<sup>74</sup>

## Conclusion

While the *Shari'ah* imposes limits to prevent abuse of power by government, it also recognises the need for flexibility and allows discretionary power to meet the requirements of unexpected situations. No law can foresee all eventualities in specific terms and government must be able to respond adequately to situations for which no guidelines are provided for in the text and yet require urgent and effective response. This flexibility is to be found under the doctrine of *al-siyasah al-Shar'iyyah*, or *Shari'ah*-oriented policy, which enables the government to take all discretionary measures which it deems to be in the interest of good government and in harmony with the general objectives of the *Shari'ah* (*maqasid al-Shari'ah*). The objectives of the *Shari'ah* may be summarised under three main headings, namely educating the individual (*tahdhib al-fard*), establishing justice (*iqamat al-'adl*), and realisation of public interests (*tahqiq masalih al-nas*). These must guide government policy at all times, and they command greater authority than literalist conformity to legal detail, especially when this is likely to frustrate the broad objectives of the law.<sup>75</sup> Should there be such a conflict, the head of the state and the judge are authorised, under the terms of *al-siyasah al-shar'iyyah*, to take discretionary measures in pursuit of the general objectives of the law even at the expense of suspending a specific ruling.<sup>76</sup> The '*ulama*' have thus reached the conclusion that in case a situation arises where

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<sup>73</sup> Shihab al-Din al-Qarafi, *Kitab Al-Furuq* (Cairo: 'Isa al-Babi al-Halabi, 1344 A.H.), 141.

<sup>74</sup> Madkur, *Madkhal*, 123.

<sup>75</sup> For a brief account of the objective of Shari'ah see Abu Zahrah, *Usul*, 289 ff.

<sup>76</sup> For detail see my article '*Siyasah Shar'iyyah* or the Policies of Islamic Governments', *American Journal of Islamic Social Sciences*, Vol. 6, (1989), 59-18.

enforcing a legal injunction (*nass*) is likely to lead to civil strife and sedition (*fitnah*) then the *nass* must be suspended so as to prevent the *fitnah*.<sup>77</sup> The precedent of Rightly-Guided Caliphs, especially that of ‘Umar ibn al-Kattab, is most informative of the attitude and initiative that the head of state may exercise in pursuit of the well-being of the people and the fulfilment of their legitimate needs. It is, to a large measure, due to his enterprising spirit and bold reforms that ‘Umar has made a lasting impact on the character and development of the *Shari‘ah*.<sup>78</sup> In their juristic formulations, the ‘*ulama*’ have tended to play down the discretionary powers of the Islamic state. This was perhaps due partly to the persistently anomalous state of the history of government and its failure to integrate the consultative and democratic aspects of Islamic constitutional theory. The ‘*ulama*’ have, in turn, shown reluctance to acknowledge the governmental authority in legislation. The constitutional theory has thus been influenced by the vicissitudes of a somewhat less than workable pattern of relations between the government and the ‘*ulama*’. The issue is not merely one of historical concern but one that has persisted and continues to give rise to mistrust and over-reaction on both sides. The present day constitutions of Muslim countries hardly contain a single reference to the ‘*ulama*’, to their juristic opinion (*ijtihād*) or their consensus (*ijma*’); just as the ‘*ulama*’ themselves ignored the government in their formulations of these doctrines.<sup>79</sup> This pattern of relations is particularly unhelpful and can hardly be in harmony with the spirit of fraternity and cooperation in good work. Although the juridical doctrines impose a variety of limits on governmental power, these have not been translated into workable formulas. The limited government that the *Shari‘ah* has envisaged is clearly not functioning in most of contemporary Muslim societies. Perhaps the same can be said to be true of some of the modern western-style constitutions hastily adopted by Muslim countries, which despite their apparent democratic complexions have not come to terms with the Islamic heritage and culture of their societies.

If the lessons of history are to be taken into account in charting the path for the future, then the message would seem to be clear—a government can hardly achieve its declared goals in the absence of a workable consensus and the involvement of all sections of society in its policies and decisions. It is also necessary for the future of government in Muslim societies not to break away from their own heritage. A total discard of that heritage, as exhibited in the adoption of Western constitutional models, has proved unsatisfactory.<sup>80</sup> In view of the strength of religious sentiment among Muslims and the desire on their part to see a healthy balance of continuity and change in their lives, the choice would appear to be in favour of a system of

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<sup>77</sup> For detail see ‘Abd al-Hamid Mutawalli, *Mabadi Nizam al-hukm fi’l-Islam* (Alexandria: Mansha’at al-Ma‘arif, 1974), 404.

<sup>78</sup> For details on the precedent of Caliph ‘Umar see S. Mahmassani, *The Philosophy of Jurisprudence in Islam*, Eng. Trans. F. Ziadeh (Leiden: Brill, 1961), 111 ff.

<sup>79</sup> For detail on the pattern of government-‘*ulama*’ relations in the case of Afghanistan see M. H. Kamali, *Law in Afghanistan, A Study of the Constitutions, Matrimonial Law and the Judiciary* (Leiden: Brill, 1985), 58, 110, 137.

<sup>80</sup> For detail see J. O. Voll, *Islam, Continuity and Change in the Modern World* (Boulder [Colorado]: Westview Press, 1982), 277 ff.

government that is committed to the values of Islam, a government under the rule of law which would operate within the limits of its authority and yet show willingness to make the *Shari'ah* a living force in society. The principles of the *Shari'ah*, in some areas such as the rights and liberties of the individual, may have to be developed to reflect the needs and legitimate aspirations of the people in their respective communities. This could be promoted through the instrumentality of *ijtihad*<sup>81</sup> in its widest sense which would seek to bring the *Shari'ah* closer to the day to day realities of contemporary life.

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<sup>81</sup> For details on the potential of *ijtihad*, its relevance to modern society, and how it could be utilised in modern times see Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam* (Lahore: Sh. Muhammad Ashraf, Reprint 1982), 146 ff.