



Shari'a Law  
and the  
Modern Nation-State

A Malaysian Symposium

Editor  
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Sisters In Islam

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## The Islamic State and its Constitution

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### Introduction

Despite the absence of a clear mandate in the sources of Islam concerning the definition and attributes of an Islamic state, the view has prevailed among the *ulama* that Islam does propose a certain political order, that Islam is both a religion and state, and that these two aspects of Islam cannot be meaningfully separated from one another.

Some of the evidence that is given in support of this view is indirect and perhaps inconclusive, but it is not devoid of force. It is recognised that the Prophet s.a.w. neither appointed nor nominated a successor to lead the community after him, nor did he give any clear instruction as to the formation of a state. Nevertheless, he was himself a head of state and left behind, in his capacity as political leader, a legacy of verbal and practical instruction which the *ulama* have relied upon in expounding the basic attributes of political authority in Islam. The precedent of his first successors, the four rightly-guided caliphs, in state affairs has facilitated further elaboration of the same theme.

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\* Professor Hashim Kamali's analysis in this chapter was presented as the second of two main papers in the symposium's session dealing with "Islam and the Modern Nation-State".

This essay does not propose discussing the polemics of whether Islam is a religion only or both a religion and state, but investigates, in broad outline, some of the basic attributes of an Islamic polity. This is not to deny, however, the controversial nature of the continuing debate concerning the Islamic state. Ever since the proposed establishment of such a state in Pakistan and elsewhere, scholars have continued to differ on the nature and attributes of this proposition. But many have envisaged the Islamic state as a logical extension of Islam and as an instrument with which to facilitate implementation of its *shari'a*.

This is in fact the centre-piece of the whole argument in favour of establishing an Islamic state. Since Islam brought with it a legal system, the *shari'a*, it seems only logical to infer that Islam also proposes a government to enforce the *shari'a*. Any government that is committed to enforcing the law of Islam, as this discussion will elaborate, may be termed Islamic. Supportive arguments for this theme are also found in the Qur'anic concepts of *umma* and of human vicegerency or *khilafah*, in its injunction commanding good and forbidding evil, and in the Qur'anic requirement of administering justice. The concept of *khilafah*, or the vicegerency of man, is by its nature rooted in the concept of trust (*amanah*) which is also a Qur'anic principle and an attribute of political leadership in Islam. The basic unity of religion and state in Islam also represents a logical extension of *tauhid*, the oneness of Allah, which is a cardinal principle of the faith and a main feature of Islam's unitarian outlook on life.

The constitutional theory of Islam revolves around these concepts, namely *umma*, *shari'a*, *khilafah*, *shura* (consultation) and *bay'ah* (pledge of allegiance). This essay discusses some of these concepts as the basis for offering an attempted general characterisation of an Islamic polity. On that conceptual basis, the Islamic state is accordingly characterised as an egalitarian order which advocates simplicity and closeness to the populace; it is a welfare state with a centralised structure and authority, but one whose powers are, however, limited by reference to the *shari'a*. It is also a representative government which is accountable to the people. The Islamic state is not a theocracy; it is a civilian state which is neither sacred nor divinely ordained. These are some of the themes to be elaborated in this exposition, though this attempt at characterising the Islamic state is in no way exhaustive.<sup>(1)</sup>

## Umma and state

The Arabic word for community, *umma*, is a derivative of *umm*, meaning "mother". *Umma* in Islam signifies more than the motherland. *Ummat al-Islam* comprises the entire collectivity of Muslims living anywhere regardless of their geographical location or the political boundaries separating them. *Umma* is a Qur'anic concept which was initially applied to the Islamic community of Medina.

The *Qur'an* highlights some of the attributes of *umma* as including belief in the truth of Islam, dedication to righteousness (by commanding good and forbidding evil), moderation and justice, and a single fraternity of equals.<sup>12</sup> Pre-Islamic Arabia did not know or use the concept of *umma*; the only form of social organisation that it knew was the tribe. Afflicted with moral, social and economic bankruptcy, pre-Islamic Arabia was therefore impressed with the morally appealing and egalitarian call of the new *umma*.<sup>13</sup>

With the emergence of the state of Medina, the term *umma* came to signify both religious and political unity under the leadership of the Prophet. *Umma* differed from any other preceding or succeeding community in one sense: it was an open-ended community under one universal God. This simply meant the creation for the first time in human history of a universal community based on complete equality, regardless of considerations of race, colour and ancestry.<sup>14</sup> Islam became not only a religion but a unifying social bond. The Prophet's declaration "that there is no merit of an Arab over a non-Arab or of a red over a black except through piety" highlighted Islam's single-minded commitment to equality.<sup>15</sup>

The unity that Islam proposed was meant to be for all, that is the whole of mankind. Lacking the claim or notion of a chosen people, the community kept its door open to welcome all varieties of ethnic and cultural groups. Furthermore until the onset of rapid decline under Turkish rule, Muslims throughout their territorial expansion dealt with the people of the new territories not as subjects but as citizens. This was changed, however, under the Ottoman Turks who, by exploiting and degrading their citizens, made them second-class subjects. This marked the first phase of the decline of the Islamic polity. The second phase came with European colonialism which eventually dismembered the Muslim community. Only in recent decades has there emerged a renewed

awareness among Muslims who envisage their strength through unity. The ideal of the *umma* offers that potential and continues to inspire Muslims to strive toward ultimate unity.

The *umma al-Islam* may be distinguished from *dar al-Islam*. The first is centred on unity in faith, the second contemplates the legal and political aspects of a sovereign state with its territorial boundaries, population and government. A Muslim may consider himself a member of the *umma* even if he does not reside in *dar al-Islam*. This division between *dar al-Islam* and *dar al-kufr*, and the subdivision of the latter into *dar al-harb* (abode of war) and *dar al-ahd* (abode of treaty) is politically conceived and has become the focus of juristic writings, despite the absence of any mention of such divisions in the *Qur'an* or *sunna* (although there is recognition in these sources of other religions and their followers, the *ahl al-kitab*). In theory, *dar al-Islam*—which is a parallel concept to *dawlat al-Islam* (Islamic state)—comprises all territories that are totally or predominantly inhabited by Muslims and are governed by Muslim authorities. Another view, which is preferred here, maintains that it includes all territories where the *shari'a* is implemented, regardless of the religious following of their inhabitants.<sup>(6)</sup>

*Umma* is a Qur'anic concept but state, or *dawlah*, is not. The word *dawlah* occurs in the *Qur'an* only in the sense of material wealth. The nearest equivalent words with its political connotation that are found in the holy Book are *amr* and *hukm* which signify a "command", or a "network of command".<sup>(7)</sup> The nation-state is, of course, a Western concept representing a European phenomenon that developed between the sixteenth and seventeenth centuries C.E. It is natural therefore not to find such a concept in early Islamic political thought. Muslim jurists had much to say, however, about the body politic and the conduct of rulers and governors. If the concept of state in Europe cannot be understood in isolation from law, liberty and individualism, the Islamic concept of state cannot be understood in isolation from *umma* and *shari'a*.<sup>(8)</sup> It thus appears that the state in Islam is neither normative nor the original locus of political authority. It is perceived as a vehicle of achieving order and security in the *umma* and implementing the basic mission of Islam, that is *amr bi'l ma'ruf wa nahy 'an al-munkar* (commanding good and forbidding evil). It is the *umma*, not the state, which is the locus of political authority and the principal bearer of the Qur'anic trust of vicegerency.<sup>(9)</sup>

The population of *dawlah Islamiyyah* may include both Muslims and non-Muslims. Muslims who do not reside in the Islamic state are not necessarily or automatically citizens of that state, but residence is not a requirement of membership in the *umma*.<sup>110</sup>

The norm in the constitutional theory of caliphate is unity, not pluralism. This is stated in the writings of al-Mawardi (d.450/1059) and others who maintained it to be unlawful to elect more than one *imam* at the same time.<sup>111</sup> Only al-Baghdadi (d.403/1012) has gone on record to say that electing more than one *imam* is permissible, but only if the localities in which they are elected are divided by sea. According to the classical doctrine of caliphate, any plurality of states in the Muslim lands is necessarily anomalous and contrary to the unitarian foundation of the *umma*, which should always be the ultimate goal.<sup>112</sup>

The realities of contemporary world are, however, such that proposing political unity under a unified leadership and state is impractical. But if *umma* is meant to embody a religious fraternity of all Muslims that transcends the political boundaries of national states, then this has always commanded support and continues to be a reality. Despite the plurality of states and nationalities among them, Muslims are still a single *umma*. An Egyptian Muslim is Egyptian by nationality as well as a member of the Muslim *umma*. That also applies to an American Muslim who is American by nationality but relates to the *umma* as a member of Muslim fraternity.<sup>113</sup> Political unity is not a reality at present, but the historical model of the caliphate may perhaps be revived in a modified form, either as a federation or else in looser unity as a commonwealth of nations.<sup>114</sup>

## Shari'a

*Shari'a* consists of a set of principles on morality, or dogma, as well as practical legal rules which are contained in the *Qur'an* and *sunna*. The clear injunctions, or *nusus*, of the *Qur'an* and *sunna* represent the binding corpus of the *shari'a* and it is the cardinal duty of the state in Islam to enforce them.<sup>115</sup> The state is a necessity in Islam if only for this purpose. Muhammad Asad observed that "the real eternal *shari'a*" consists of commands and prohibitions expressed in self-evident terms in the *Qur'an* and *sunna*. It is concise, clearly conveyed and relatively small in volume, and hence does not

provide, nor was it ever intended to, detailed legislation for every contingency of life.<sup>(16)</sup> We should add to this that the *Qur'an* and *sunna* also provide a set of broad and general principles which constitute the substance of what is described as the *maqasid al-shari'a*: that is, the philosophy and objectives of *shari'a*, which are timeless and comprehensive. The concrete injunctions and the broad principles of the *Qur'an* and *sunna* embody the real eternal *shari'a*. The detailed, supplementary and additional legislation is provided through the exercise of *ijtihad*: that is, through independent reasoning which is in consonance with the spirit and principles of Islam and which aims at the realisation of *maslahah* (benefit) of the people.

Protecting the faith and implementing the law of Islam is a *raison d'être* of the *umma*. The *Qur'an* declares to this effect:

You are the best *umma* created for mankind. You command good and you forbid evil and you believe in Allah (*al-Imran* 3: 110).

"Commanding good and forbidding evil" here means in the first place implementing the *shari'a*, although the scope of this Qur'anic concept, also known as *hisbah*, is wider than the *shari'a*. The latter part of the text explains the earlier, that is, why Allah intends it as the best *umma*.<sup>(17)</sup>

In response to a question as to the position of Islamic law in Egypt, the Egyptian scholar Muhammad Yusuf Musa writing in the early 1950s affirmed our entitlement to demand that the *shari'a* be the principal source of legislation. The Egyptian nation and its legal order, he maintained, have suffered intellectual colonialism and domination, especially from the French. But it is now time to reject such influences and return to our own heritage. We ought to encourage, Musa continued, specialised studies of *shari'a* and *fiqh* in our universities. We also need to adapt the *fiqh* to changing conditions. For it is unrealistic to expect solutions to new issues to be found in the works of the *ulama* of the past who were not faced with these questions. To support his views Musa refers to Abd al-Razzaq al-Sanhuri, who offered a positive appraisal of the value and resourcefulness of the legal heritage of Islam and its capacity for adaptation.<sup>(18)</sup>

As the main source of *shari'a*, the *Qur'an* does not embody a constitution since it does not address constitutional themes on the



devolution and transfer of power or provide direction concerning other matters of state. It is rather a source whose guidance needs to be reflected and given expression in evolving state activity and legislation.<sup>(20)</sup> In that sense, Yusuf Musa is right to suggest that the *shari'a* should be designated as a principal source of legislation. The Egyptian constitution of 1973 in fact includes a provision to that effect. Similar provisions are also found in the applied constitutions of many Islamic countries.

### Khilafah: The trust of vicegerency

*Khilafah* has two meanings, one of which is Qur'anic and refers to the vicegerency of man as the trustee of Allah on earth. *Khilafah* also refers to the institution of caliphate which was established under the four rightly-guided caliphs (*khulafa rashidun*) and continued down the centuries until its abolition by Attatürk in Turkey in early 1924. Initially, Abu Bakar and Umar, the first two caliphs of Islam, laid emphasis on the legitimacy of their leadership by resorting to *shura* (consultation), *uqud* (the contract between ruler and ruled), and *bay'ah* (an oath of allegiance).<sup>(21)</sup>

This same method was used in the appointment of their successor Othman, and the juristic elaboration of the caliphate continued to emphasise *bay'ah* and *shura*, notwithstanding the fact that in actual practice these principles were largely overlooked with the onset of a hereditary monarchy under the Umayyads. The classical writings of al-Mawardi, Abu Yala al-Farra and Ibn Hazm are mainly concerned with the election, qualifications and duties of the caliph. The theory of caliphate also discusses the rights of the caliph and the citizen's duty of obedience to him. It speaks little of public or political rights, and discussion of the basic rights of individuals is scanty and incidental. None of these works contains a separate chapter, for example, on the fundamental rights of the citizen.<sup>(21)</sup>

The vast majority of *ulama* have held that electing an *imam* is *wajib* (obligatory) by virtue of the *ijma* (general consensus) of Prophet's companions (*sahaba*) and of succeeding generations of Muslims across the centuries. Upon the death of the Prophet the companions considered electing a successor to him as leader as a matter of urgency, even greater than attending to his burial.<sup>(22)</sup> But to say that there must be a leader and that this is an Islamic



obligation is not the same, of course, as saying that political leadership must be in conformity with any particular model.

The idea has prevailed among Muslims that there could be but one form of Islamic state, namely the form manifested under the rightly-guided caliphs. This is a common error or misconception. The truth is that Islam does not require conformity to any particular form of political structure. The Islamic state has existed historically not only in one form but many, and it is for the Muslims of every period to discover the form most suitable for their needs.<sup>23</sup> There is nothing in the *shari'a* to specify any particular type of political organisation. *Khilafah* and *imamah* have developed certain characteristic attributes which are generally regarded as being manifested in the Islamic concept of political leadership. However, this association is not intrinsic but historical, arising mainly as a result of the interplay of juristic doctrine and historical precedents. The political ideas and practices to which this historical association gave rise do not constitute an obligation under the *shari'a*.<sup>24</sup>

## Government under the constitution

Neither the *shari'a* nor the juristic doctrine of Muslim scholars provides a specific pattern for the constitution of an Islamic state. Since there is no consensus on the essential features of such a state, the matter has remained open to initiative and *ijtihad*. In recent decades statesmen and scholars have produced a body of opinion from which a certain pattern seems to be emerging. But whether the emerging model of Islamic political organisation that they offer will prove persuasive throughout the *umma* remains to be seen.

The lack of any definitive paradigm of political organisation is also attributable to the absence in formative Islam of any clear source or precedent for the idea of a written constitution as the supreme law of the state. The Charter of Medina, also known as the constitution of Medina, that was enacted after the the Prophet's *hijra* to Medina may be considered as providing Muslims of later times with validating authority for the introduction of written constitutions. The question of the harmony or otherwise of any such document with the principles of Islam is of course another matter.

But despite the enactment by the Prophet of the Charter of Medina, in their own time his successors among the companions

did not promulgate a written constitution, perhaps because they saw no need for one.<sup>(25)</sup> This pattern prevailed and Muslim rulers did not introduce written constitutions or a bill of rights. Apart from the ordinances of the *ulu al-amr* which addressed issues of constitutional law, constitutional matters were often regulated by reference to custom. Customary rules are naturally slow to materialise and, as one would expect, a certain degree of resistance to anomalous practices is often detectable. The founder of the Umayyad dynasty, Muawiyah was, for example, the first to appoint an heir apparent (*wali al-ahd*) and thereby validate hereditary succession. Notwithstanding the initial protest and the resistance with which it was met, a precedent was nevertheless set which was to become, by the end of the Umayyad period, a generally accepted custom. Custom thus operated as a substitute for a written constitution.<sup>(26)</sup>

To a question whether constitution-making is acceptable in Islam, Rashid Rida issued a *fatwa* answering the question in the affirmative. Since the cardinal duty of government in Islam is to implement the laws of *shari'a*, he maintained, the idea of a limited government whose powers are defined by the constitution, and of a consultative government which is committed to the ideals of justice and equality, is acceptable to Islam. If, however, the constitution contains rules which may be repugnant to the teachings of Islam, he continued, then it may be said to be misguided only with regard to its controversial elements. To substantiate this position, Rida observed that in the history of Islamic jurisprudence numerous instances are to be found where jurists have made errors in their *ijtihad* and in the books they have authored. But in such cases, we should only reject the views that are erroneous, not their endeavour in its entirety. What is not defective remains acceptable, so long as the error is corrected at an early opportunity to protect the community from deviation.<sup>(27)</sup> Mahmud Hilmy concurs with this view, commenting that there is nothing in the *shari'a* against enacting a written constitution.<sup>(28)</sup>

## Commitment to equality

The Prophet and the rightly-guided caliphs left behind a legacy which was distinctly egalitarian. They had remained close to the grass roots and avoided the pomp and ceremony practised by the

Romans and Persians. The Prophet chose simplicity and preferred to be treated as one among equals. In doing so the Prophet merely exemplified the teachings of the *Qur'an*, which insists emphatically on the equality of all believers. There is no recognition in the holy Book of any grounds of superiority of individuals or nations over one another except on the basis of moral rectitude and *taqwa*.<sup>(29)</sup>

The Prophet encouraged simplicity in both personal and public affairs. He is on record as having stated, for example, that "I am neither a king nor a tyrant",<sup>(30)</sup> and he advised his companions not to glorify anyone except Allah. In this spirit, the Prophet requested that no one should rise to stand for him upon his arrival. To the same effect, a *hadith* warns with punishment in the hereafter "those who love to be glorified by other men."<sup>(31)</sup> Again, during his last sermon in the Farewell Pilgrimage, the Prophet invited the people to claim from him any right of theirs that he might have fallen short of fulfilling, and to seek restitution for any excess in punishment or use of words by which he might have offended anyone.<sup>(32)</sup>

The companions, especially the *khulafa rashidun*, followed the Prophet's example. They, too, are known for their simplicity of style, their accessibility and for not expecting their audience to stand in ceremony for them.<sup>(33)</sup> One of caliph Umar's statements, which he is said to have made upon the conquest of Iraq—that "I am not a king but a servant of Allah who is entrusted with an *amanah*"—is reminiscent of the Prophet's own insistence to the same effect.<sup>(34)</sup> Umar refused to indulge in luxury and, despite the unprecedented wealth that was accumulating during his time from conquest, he took from the *bayt al-mal* (public treasury) only what he needed for basic necessities for himself and his family. On one of his inspection tours to Sham, Umar noted signs of pomp and ceremony on the part of his governor, Muawiyah, whereupon the caliph asked, "Is this an empire that you are building [*akisrawiyyah ya Mu'wiyah*]?" Muawiyah explained that, being a neighbour to the Roman Empire, he encountered a certain level of demand for court ceremony, but the caliph was not impressed with his explanation.<sup>(35)</sup> Umar's statement concerning the *bayt al-mal* is again indicative of his principled view of the leader's relation to his community and its resources:

My position *vis-à-vis* the public treasury is like that of a guardian in charge of the assets of orphans. I may not take anything if I am in no need, but if I am in need I may take what I need for my sustenance.<sup>(36)</sup>

## Commitment to welfare

Mercy (*rahmah*), according to the Qur'anic designation, was the purpose of the Prophetic mission, and alleviation of hardship the purpose of the *shari'a*. It is therefore only befitting that the Islamic state should strive toward the realisation of mercy through *shari'a* principles. Islam proposes a welfare state as is evident from the overall emphasis in the *Qur'an* and *sunna* on helping the helpless, the needy and the poor. As a pillar of the faith *zakah* is prescribed in the *Qur'an* with the specific purpose of ensuring necessary social assistance.<sup>(37)</sup> Satisfaction of the basic requirements of those who are in need, Muslims or others, is one of the main purposes for which state revenues, whether from *zakat* or other taxes and charities, are to be expended. The Prophet himself as head of state clearly indicated that the state is committed to this purpose.

It is reported that, when the Prophet's daughter, who was married to Ali, asked her father if she could be provided with a servant for home help, the Prophet declined her request, stating

By Allah, I shall not grant this while the ahl al-Suffah (a group of indigent *muhajirun* [recent emigrants from Mecca] who for lack of shelter had to sleep in the mosque) suffer from hunger and I do not find enough to feed them.<sup>(38)</sup>

Other *hadith* can be quoted endorsing the Prophet's support for the welfare functions of the state:

He whom God has made an administrator over the affairs of Muslims but remains indifferent to their needs and their poverty, God will also be indifferent to his needs and poverty.<sup>(39)</sup>

The dependents whom a man leaves behind him are our responsibility.<sup>(40)</sup>

The ruler is the supporter of him who has no supporter.<sup>(41)</sup>

Similar evidence is provided by the precedent of caliph Umar, who is reported to have met an elderly Jew begging in the market place

of Medina. After enquiring into the man's condition, the caliph assigned him an allowance from the public treasury. It was unfair, the caliph remarked in explaining his action, that the man had paid the *jizyah* (a tax or levy paid by non-Muslims in lieu of military service) while he was able but should be a left destitute and neglected in his old age.<sup>(42)</sup>

The caliph Umar obviously saw it as his duty to attain distributive justice in the community. He affirmed this when he said, in a public address, that everyone had an equal right in the wealth of the community; that none, not even himself, enjoyed a greater right to it than anyone else; and that if he were to live long enough, he would see to it that even a shepherd on Mount Sinai received his share from the public wealth.<sup>(43)</sup> Caliph Ali was likewise merely reiterating the *Qur'an* when he stated that "God has made it obligatory on the rich to provide the poor with what is adequate for them"<sup>(44)</sup> (cf. *al-Dhariyat* 51: 19).

Islam's emphasis on distributive justice found vivid expression in the view advocated by Abu Dharr al-Ghaffari, a prominent companion, who maintained that Islam did not permit a Muslim to accumulate wealth beyond his needs, and that surplus wealth should be expended on community welfare and assisting the poor. This was, however, an unusually outspoken view; for despite their consensus on the welfare obligation of the state, Muslim jurists have also held that acquisition of wealth through lawful means is not against the teachings of Islam.<sup>(45)</sup>

## Administrative centralism

Authority in the Islamic state is vested in the office of the *imam*. He is the central figure in the state who is entrusted by the community with general authority (*wilayah*) by virtue of the contract of representation (*wakalah*) made through his election. The *imam* then delegates his power to other officers of state, ministers, governors and judges, all of whom represent him in their various capacities.<sup>(46)</sup>

With the exception of judges whose position in enforcing the *shari'a* was parallel to that of the *imam* himself, all other officials acted, in effect, by exercising a delegated authority as assistants to the head of state.<sup>(47)</sup> Both political authority and administrative power in the state were modeled after the pattern that operated during the lifetime of the Prophet and the period of the *khulafa rashidun*. They all exercised their authority directly or delegated it

to others at their discretion and convenience. The officials concerned exercised their delegated authority in their capacity either as leading executive officers of state who partook in *hukm*, that is political authority, or in their capacity as assistants. The leading executive officers were in turn assisted by deputies and assistants who acted as administrative officers but who did not partake in *hukm*. The prerogative of unrestricted political and executive authority thus belonged exclusively to the *imam*, who was vested with it by virtue of the community's pledge of allegiance (*bay'ah*). This theory of government did not recognise autonomous individuals and organs requiring no authorisation from the head of state.<sup>140</sup>

It remains to be added that the centralised pattern of administration is founded primarily upon custom, which was in turn reflected in the writings of jurists on the subject of *khalifah*. But there is nothing in the *shari'a* sources which imposes any mandate or restriction concerning the administrative pattern of the state. The matter thus remains open to considerations of public interest (*maslahah*). The head of state is required as the *Qur'an* provides (*al-Imran* 3: 159; *al-Shura* 42: 38) to conduct the affairs of state through consultation (*shura*) with the community. It is through this method that necessary adaptation and adjustment in the administrative structure of the state may be implemented.

### Limited government

Islam advocates only a limited government whose power is restricted in a variety of ways. With reference to sovereignty, we note that the Islamic state is not a sovereign state in the strict sense of the word; its powers regarding legislation are limited by the terms of the *shari'a*. Politically, this rules out all forms of absolutism; legally, it paves the way for development of constitutional norms and standards by which to limit state powers. The Islamic state is a consultative state. It is bound, as already noted, by the requirement of consultation and must have due regard for the wishes of the community. The powers of the head of state are also limited by reference to *khalifah*, which means that he acts in the capacity of a trustee: of both Allah s.w.t. and of the community of which he is an employee and representative. The community is entitled to depose the head of state in the event of a serious breach of trust, flagrant deviation from *shari'a*, or loss of

capacity to discharge his duties. Furthermore, the individual in an Islamic state enjoys considerable autonomy, since many aspects of his life in the community remain outside the domain of law and government.<sup>(49)</sup>

The jurists have thus drawn a distinction between religious and juridical obligations. Only the latter are enforceable through formal objective sanctions, but most of the religious aspects of the individual's life in society are private and non-justiciable. Even some of the religious duties such as *salah*, fasting, the pilgrimage (*hajj*) and much of what is classified as recommendable (*mandub*) and reprehensible (*makruh*) are not legally enforceable.

Government, moreover, has no authority to waive or to grant discretionary changes in the private rights of the individual, which are generally known as *huq al-abd*. The head of state and judges do, on the other hand, enjoy limited powers to grant a pardon or require repentance in certain cases, as well as to order discretionary punishments for violations of public rights (*huq Allah*).

Government officials, we may further note, including the head of state, are subject to the rule of law in precisely the same way as are other members of the community. They are accountable for their conduct and enjoy no special immunity or privilege before any court of justice.<sup>(50)</sup> The *shari'a* provides for no special tribunals or jurisdictions for government officials, nor indeed for any group or class of individuals.

Finally in this regard, the *shari'a* limits the authority of government regarding taxation in at least five ways: (1) tax must be just and proportionate to the ability of the taxpayer; (2) it must apply to all without discrimination or favour; (3) taxation must aim at the minimum of what is deemed necessary; (4) the well-being of the taxpayer must be observed in determining the quantity and method of collection; and (5) taxation must observe the time limit of one calendar year for the yield upon which tax may be levied to materialise.<sup>(51)</sup> Abu Yusuf and al-Mawardi both emphasised fiscal moderation by insisting that taxation must in no case deprive the taxpayer of the necessities of life.<sup>(52)</sup>

## Government by representation

An Islamic state is not, strictly speaking, a form of direct government of the people by the people. It is a government of the *shari'a*. But in a substantial sense, it is a popular government since



the *shari'a* validates the will and endorses consensus of the people.<sup>(53)</sup> The head of state is elected by the community through consultation, nomination, and *bay'ah* (pledge of allegiance). *Bay'ah* is, to all intents and purposes, equivalent to a vote. Hereditary succession, which was developed under the Umayyads, is anomalous and contrary to the precedent of the *khulafa rashidun*.

The head of state is only one among an entire community of equals, and he rules by virtue of the trust which the community has reposed in him. This popular vicegerency, which forms the basis of democracy in an Islamic state, means that government can be formed only with the consent of the people and that it may remain in office only so long as it continues to enjoy their confidence.<sup>(54)</sup>

The Islamic state has features in common with democracy and is, in many ways, committed to the democratic ideals of justice, equality and basic liberties. The separation of powers, which is a pillar of western democracy, is also upheld in the Islamic state. Legislative authority through the modality of *ijma* is a prerogative of the *umma*, not of the state. The head of state must implement the rulings of *ijma*, and is himself bound by it.<sup>(55)</sup> The state is also under a duty to conduct its affairs through consultation with the community. The decisions of the consultative assembly of the state are, according to one view, binding on the head of state and recommendable (*mandub*) for implementation according to another.<sup>(56)</sup>

The judiciary is also independent in the sense that it does not adjudicate in accordance with the wishes or dictates of the head of state but in accordance with the *shari'a*. Here the head of state and the judge are both under the same duty, and the judge needs no authorisation from any superior authority in the implementation of *shari'a*. The office of the head of state is basically executive in character, designed to regulate and to administer rather than legislate and originate.<sup>(57)</sup>

The main difference between the Islamic state and democracy lies in the ultimate or sovereign authority which, under democracy, inheres in the will of the people. This is not so in Islam where the basic structure of values is determined by divine revelation. But within that framework, the community is the locus of all authority. It is the *umma*, as previously noted, whose authority the government represents. The government is accountable to it and the *umma* is entitled to depose a leader who is in serious violation of the terms of his office.

Despite allegations that Islam does not recognise majority rule as it is recognised in the West, there is evidence to show the weakness of such a claim. Majority decision or ruling, often referred to as *jumhur*, enjoys uncontested recognition in the works of Muslim jurists, who often refer to the rules of *fiqh* as being the ruling of the *jumhur*. We may also note here al-Mawardi's illustration of the application of majority rule in the selection of the *imam* in *salah*, where he states: "It is the right of the congregation (*ahl al-masjid*) to elect the *imam*. But if they disagree among themselves, the majority choice prevails."<sup>60</sup> Consensus of opinion (*ijma*) is normally concluded by unanimous agreement of the community, or the scholars and *ulama* who act in their capacity as representatives of the *umma*; but in the absence of unanimity, a majority decision or ruling still constitutes a proof (*wa al-kathrah hujjah*) next to *ijma*. It is even suggested by leading scholars that most of what we know as *ijma* consists in fact of majority opinion.

Furthermore, the *sunna* of the Prophet is replete with emphasis on adherence to the *jama'ah* (lit., "multitude" or "majority"), which is another word for majority rule. Although the people are entitled to exercise their personal liberties, the *sunna* takes a very serious stance towards disloyalty and dissension against the *jama'ah*.<sup>61</sup> This outlook is reflected in the juristic views of the *fuqaha*, the legal maxims of *fiqh* (*qawai'd kulliyah al-fiqhiyyah*) and in legal doctrines such as *maslahah* (consideration of public interest)<sup>62</sup> and *siyasah sher'iyyah*,<sup>63</sup> whose clear orientation is towards the benefit and interest of the majority. The *shari'a* as a whole, as well as the *juris corpus* of *fiqh*, may rightly be characterised as pro-majority, pro-*umma* and pro-*jama'ah*. The government and *ulama* are under a duty to act in pursuit of the public interest. In the event of a conflict arising between private and public interests, the latter must prevail. Finally, the constitutional theory of *khilafah* is clear on the point that the head of state is elected on the basis of majority vote. Where more than one candidate for leadership emerges, the candidate who has been given *bay'ah* by the majority becomes the *imam*.<sup>64</sup>

## Theocracy or nomocracy?

Some observers have commented that the Islamic state is a theocracy. The evidence we have reviewed, however, suggests that Islam does not advocate theocracy. If theocracy is understood to

mean government by religious leaders who command holiness and spiritual authority (such as that of the Pope in the middle ages), this is definitely not the case in Islam. In a theocracy the leaders claim to represent God's authority and will, including the exercise of such powers as the pardoning of sins.

Islam does not propose such a government, nor does it vest any particular group of people, be it the *ulama* or religious leaders, with any monopoly over power. An Islamic government acquires its authority from the people and is bound by their mandate.<sup>603</sup> The head of state, in his capacity as representative (*wakil*) of the community, is elected through popular vote or general *bay'ah*. He represents and exercises the authority of the people and has no special claim to holiness. The *umma* is also entitled to depose the head of state when circumstances so require. When it does, the government is bound by the general consensus, or *ijma* of the community.

The claim that Islam is a theocracy is substantially unjustified. It would be more accurate to say that Islamic government is a government of the people (*hukumah sha'biyyah*), with the proviso that the popular will must not conflict with the basic principles of divine revelation.<sup>604</sup> For Syed Qutb the basic requirement of the Islamicity of a state is its commitment to enforce the *shari'a*. By contrast, the form that the state might take, whether or not it calls itself an Islamic state and whether it is led by religious leaders (*ulama*) are all immaterial.<sup>605</sup> Accordingly, the Islamic state may be best and rightly characterised as a nomocracy (rule under the supremacy of law), in which it is the *shari'a* which is supreme—with the proviso, perhaps, as al-Ris points out, that the *shari'a* is not exclusively textual in its determination or form. The *shari'a* permits new legislation through *ijtihad*. The *nusus* of *shari'a* are limited and do not provide for all eventualities. Rather, the *shari'a* contains, as noted earlier, general guidelines which are capable of adaptability and allow for change.<sup>606</sup>

To identify ultimate sovereignty in Allah or to recognise Him as the origin and source of vicegerency (*khilafah*) does not necessarily entail the conclusion that Islam proposes a theocratic government or any clerical dominance within it. Islam recognises no church or clerical order of the kind that is found in other major religions. Islamic political leadership is civilian in all of its attributes. The state is undoubtedly required to observe and protect the values and principles of Islam. Yet a state may be committed to these objectives and values without necessarily becoming a theocracy.

Al-Turabi is representative of the prevailing view among Muslim scholars when he writes, "It should be clearly understood that an Islamic state is not a theocracy".<sup>87</sup>

An Islamic state, Turabi adds, is not a government of the *ulama*, nor is it a government by men alone. Women played a prominent role in public life during the Prophetic era and took part in the election of the third caliph, Othman. Only after that period were women denied their rightful place in public life, but here history was departing from normative principle.<sup>88</sup>

## Conclusion

There seems to be general agreement that the Islamic character of a state is to be judged by its commitment to the enforcement of the *shari'a*. Often the words *fiqh* and *shari'a* are used interchangeably, but the two differ in that *fiqh* consists largely of juristic opinion and *ijtihad* and therefore does not command the same authority as the *shari'a*. The *shari'a* is not altogether a static set of commands and prohibitions, but consists of principles and doctrines which are dynamic, broad and comprehensive.

The *Qur'an* is emphatic, for example, on the implementation of justice, both retributive and distributive, but it does not specify the details, manner and procedures by which justice is to be achieved. The *Qur'an* and *sunna* also emphasise alleviation of hardship to the people (*raf' al-haraj*) as one of the basic objectives of legislation (*tashri'*). Other major themes and principles of *shari'a* include commitment to the *masalih*, or benefits, of the people. The jurists have specified under five headings the broad outlines and scope of *masalih*: life, faith, intellect, property and lineage. All measures—whether legislative, judicial or executive—that are aimed at the protection and advancement of these values are an extension of the *shari'a* and therefore partake in its principles and objectives.

The *sunna* of the Prophet validates *ijtihad* which is designed to both extend the rules, philosophy and objectives of *shari'a* to their logical conclusions and thereby also to facilitate a closer rapport between law and social reality. A broad, comprehensive and correct understanding of the *shari'a* must always favour justice, compassion, and a sound and robust commitment to truth, to equality, to tolerance and to the realisation of the legitimate interests of the people. Any state that is committed to these values and to the basic rights of the people, which facilitates an effective