



## LEGITIMACY, LEGALITY AND RIGHTS IN THE UMMAH'S HISTORICAL EXPERIENCE

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### I

**N**ations and communities across the world have recognized the concept of a state since history began, though – unsurprisingly – it was only thought of in political terms after the first state was actually set up. When thinkers began to talk and write about it, they tended to approach the subject in one of three ways: either by praising or condemning the situation in their own countries, proposing specific alternatives and reforms, or describing the *status quo* without further comment. In their writings they coined new terminology such as “legality”, “justice”, “normality”, “emergency” or “abnormal situation”. However, it was only after several centuries that they began to differentiate between “*mashru‘iyyah*” (“legitimacy”) – or “*shar‘iyyah ta’sisiyyah*” (“constitutive legality”) - and the status of specific actions, interests and covenants in determining the “*shar‘iyyah*” (“legality”) underpinning the state and its political systems or regimes.

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There are two aspects to “*mashru‘iyyah*”, or “*shar‘iyyah ta’sisiyyah*”: firstly, the entity’s major “intangibles”, or the “myth” or concept behind it, and, secondly, its “essential components” such as the *Ummah* (Nation/Community) or people, the land or territory, and the authority that rules over it (or ought to rule over it). On the other hand, “*shar‘iyyah*” (the legality of actions or interests) is determined by the political systems and institutions that exist for the purpose of administering public affairs. This “narrow” concept of “legality” comprises several elements, including: the ability of those in charge of administration to persuade the populace that the principles upon which they operate are legitimate, the mechanism through which they have attained their administrative positions, and their competence, justice and respect for the public’s rights.

In the early decades of the 20<sup>th</sup> century two German intellectuals – Max Weber and Karl Schmitt - had a lasting impact on the way people think about legitimacy and legality. Max Weber described three models of legality: “traditional legality” (which in practice means the legality of the traditions and conventions on which the European monarchical systems are founded); “legal (or constitutional) legality” (derived from the new constitutions, elections and legal practices); and “charismatic legality” (acquired by a leader from the populace without reference to tradition or a constitution). It was clear from his writings that Weber favoured the second model, though he admired the British system, which was a blend of the first and second.

Karl Schmitt, on the other hand, speculated what could happen if tensions arose between the first and second models at a time of serious crisis. While he endorsed a form of the first model in the interests of the state and national stability, he really supported the third model – that is to say, Hitlerian charisma – because the first model (the German monarchy) had come to an end in 1918 with the Kaiser’s abdication and exile after his country’s defeat in the First World War.

## II

Islamic “*mashru‘iyyah*” (or “legitimacy”). After the death of the Messenger of Allah (PBUH), the Companions of the Prophet called their first leader - Abu Bakr al Siddiq - “*Khalifat Rasuli’llah*” (“The Caliph,

or Successor, of the Prophet of Allah”). According to the early Islamic narrations, in adopting this term they were applying Qur’anic terminology and aiming to avoid the models represented by the neighbouring Roman and Persian empires (which were ruled by Caesar in the former case and Chosroes in the latter).

However, there was a problem here. While it is true that the Arabs regarded Caesar and Chosroes as tyrants and were determined not to be like them, in the Qur’an the word “*khalifah*” is applied solely to Adam and David, both of whom were prophets. On the other hand, the first leader of the Muslims was not a prophet and, moreover, there was no way in which he could be described as the successor to the Messenger of Allah in his Prophetic Mission. This meant that the term was designed to define the “essential character of the new state”. That is to say, while it was not a “state of prophethood”, it was a “successor state to a prophethood”, and this meant that it was committed to the goals of the Prophet who had established the *Ummah* upon which the “successor structure” was founded. These goals included: appointing the *Ummah* as successor upon earth (to the Prophet’s state), empowering it and upholding the cause of freedom and virtue for all mankind.

Before the Battle of al Qadisiyyah Zuhrah bin Hawiyah said to Rustam: “We have come to lead mankind away from the worship of men to the worship of the Lord of men, and from the narrowness of the world to its spaciousness, and from the tyranny of [other] religions to the justice of Islam”.

This is an example of the “mythical” aspect of the state - as it has been called by European historians. Indeed, we find precisely the same thing in Plato’s *Laws* and the first two chapters of Aristotle’s *Politics*. It is equally true of the great powers of the past including the empires of Ancient Egypt, Mesopotamia, Greece and Rome, and even the Holy Roman Empire in Christian Europe. The differences between them reflect the differences between their cultures. The Greeks and Romans saw their states as embodiments of freedom and the Law, the Greeks, Iranians and Babylonians (and also the Chinese), saw theirs as embodying the



power that enforces universal peace, while the Muslims regarded theirs as representing virtue, truth and justice for themselves and the rest of humanity.

These “embodiments” – or “ultimate purposes” - are enormously important in shaping the way elites and the general population see themselves and their states, and their consequences – some positive, others negative – are also highly significant. Some of the negative examples can be found in the tendency for rulers of the Umayyad and Abbasid states to style themselves “*Khalifat Allah*” (“Allah’s Caliph”) on their coins and in their court letters, as if Allah had appointed them to the Caliphate, whereas in fact their appointment came from the *Ummah*. Moreover, the title was not an accolade accorded to the ruler in his personal capacity, but a job description of his function as the person who administered the *Ummah*. Meanwhile, in his capacity as the head of state the leader was responsible for domestic affairs and the defence of the homeland.

One positive example can be seen in these words of ‘Umar bin ‘Abdul ‘Aziz: “Allah sent Muhammad as a guide and He did not send him as a tax-collector”. By this he meant that the ruling authority in *Dar al Islam* (The “House of Islam”) is not entrusted with the religious function of spreading and propagating the Faith, because the continued survival of the Faith and its propagation are based upon “*da‘wah*” (missionary work); this is not something the ruling authority is capable of doing, because its *modus operandi* is based upon force, coercion and conquest while, to quote the Qur’an, “[there is no compulsion in religion](#)” (“*la ikrah fi’l din*”, *al Baqarah*, verse 256).

The second aspect of “*mashru‘iyyah*” - the state’s “essential components” – is embodied in the *Ummah* and the “*Jama‘ah*” (Muslim Community), the land or territory, and the ruling authority (specifically its role in ruling and managing the affairs of the community). In our historical experience these components were - as they say - “shaped by history”. We know that after his emigration to Yathrib in 622 CE the Prophet (PBUH) produced a covenant, or written agreement, “between the believers and

Muslims of Quraish and the People of Yathrib, and those who followed them and joined them and fought jihad with them...They are one Community separated from all others..."

There were three direct consequences of this. Firstly, the name "Yathrib" was changed to "Al Madinah". ("*Madinah*" is an old Semitic word with the connotations of settling in a community and stability, as well as a ruling authority and governance.) Secondly, the Prophet (PBUH) approved a call from the people of al Madinah for "*mu'akhat*" ("brotherhood") between the *Muhajirun* (Emigrants) and the *Ansar* (Helpers), with the aim of establishing a *Jama'ah* or "chosen" group at the heart of the *Ummah*. Thirdly, the Muslims in Makkah and elsewhere were called upon to migrate to al Madinah or "*Dar al Islam*". This meant that the three essential elements for any political entity – territory, land and capital; *Ummah* and *Jama'ah*; and an authority established as part of a pact "between Quraish and the people of Yathrib..." - were on the way to being achieved. I say they were "on the way to being achieved", because the process did not become complete until after the obligation to emigrate was annulled following the conquest of Makkah. That was because its basis was no longer just the occupation of a particular piece of territory; instead, it relied upon another fundamental condition of legitimacy (also found in the European nation-state from the 18<sup>th</sup> century CE) – the *Ummah*.

If we consider the term "*Ummah*" in the context of the close relationship between its religious and political dimensions, we will find that its basic nature has not evolved much since the time of the Prophet (PBUH). Some scholars claim that a comparison between the *Ummah* and the state (or the people who comprise the state) will reveal that there is a "perfect match" between the "people" ("*al sha'b*") and the "Islamic Community" ("*al Jama'ah*"). The "people" of a *de facto* Islamic state are the very self-same "*Jama'ah*" which takes part in choosing the *Ummah's Amir al Mu'minin* (Commander of the Faithful) and pledging allegiance to him. Others regard the state as well as the *Ummah* as being "entities without borders". In their view the *Ummah* is in fact two *Ummahs* – the *Ummah* comprising the territory of the existing state and the *Ummah* which is, or will be, the recipient of the Islamic mission - that is to say, the



whole world, which the state should seek to annexe bit by bit as the Islamic Faith spreads across it, which of course is impossible. This whole approach is in fact flawed – both the concept of the *Ummah*, which has no prospect of extending its sway across the globe since there is “no compulsion in religion”, and the concept of the state, which could not conceivably conquer the entire world.

Nevertheless, a degree of evolution has taken place in the two other aspects, or factors – the land or territory and the governing authority. There is evidence that the concept of territory and the notion of “*Dar al Islam*” (“The House of Islam”) and “*Dar al Harb*” (“The House of War”) – i.e. the Muslim and non-Muslim territories – first emerged in the early 2<sup>nd</sup> century AH, when the theologians and *fuqaha’* (scholars of jurisprudence) were of the view that “*Dar al Islam*” comprised the territories under the Muslims’ control in which they established their state, so that consequently their sovereignty and rule was limited to that land and did not extend beyond it into other territories, even territories with Muslim inhabitants.

However, differences arose over this question. For example, al Shafi’i continued to describe those territories as “*Dar al Islam*” and “*Dar al Kufr*” (“The House of Unbelief”), while the vast majority of *fuqaha’* and theologians insisted that *Dar al Islam* (the territory comprising the Islamic state) was the land subject to Islamic rule and the Islamic justice system and had no authority beyond its borders, regardless of whether or not there were Muslims living there. They based their view on the Qur’anic verse about the Muslims of Makkah before the conquest of that city: “As to those who believed but did not emigrate, ye owe no duty of protection to them until they emigrate” (Qur’an, *al Anfal*, verse 72). The theory of sovereignty is also dealt with in books on *jihad* which refer to numerous other “*Dar*” classifications in addition to “*Dar al Harb*”, including “*Dar al Muhadanah*” (“House of Truce”), “*Dar al Mu’ahadah*” (“House of Treaty”) and “*Dar al Muwada’ah*” (“House of Reconciliation”). These terms define the relationships between the Islamic state and the other entities beyond its borders.

Finally, we come to the last essential condition of legitimacy – a single governing authority in a single territory. The question of a single ruling

power in or on the land of the state arose during Abu Bakr's struggle against the insurgents who – according to the poet al Hutay'ah – refused to submit to his (Abu Bakr's) authority, despite the fact that they lived in the territory over which the state exercised its rule and sovereignty.

They criticised Abu Bakr's resolve to fight the people known as the “*murtaddin*” (“apostates”), claiming there was no proof that they had abandoned Islam. (This may in fact have been true.) However, it is known that at that time even the *zakat* – which is a religious obligation – was paid to the legal authority, which then distributed it directly from its treasuries or charged its representatives or employees outside the capital to distribute it. These men (i.e. the “apostates”) refused to pay the *zakat* on the grounds that the ruling power after the Prophet (PBUH) had no legal authority. This situation occurred repeatedly during the time of the Rightly-Guided Caliphs, when opposition groups complained that they were being fought against despite the fact that they were Muslims. The response to them was that they had “deserted obedience” – that is to say, they had tried to set up an alternative government in the regions where they had revolted or which they had conquered.

Thus from the early days of Islam the “mission of the rightly-guided *Ummah*” was to establish the state on three essential principles, or “unities”: one *Ummah*, one territory and one authority. A host of problems were to arise from this model of the “Final Nation”, because the ruling authority understood it to mean that the *Ummah* assumed full responsibility for spreading the faith. The “single territory and single government” principle also led to problems. From the 5<sup>th</sup> century AH various other powers began to exercise their rule over some parts of *Dar al Islam* and this led to a debate – *fiqh*-related as well as political - over how to define the territory's identity and allegiance. Are they determined by its submission to the authority of the Muslim ruler or by the number of Muslims living within its borders? Serious differences emerged over these questions and the fundamental principles of legitimacy; many *fuqaha'* insisted that it was mandatory to emigrate from territories occupied by non-Muslim ruling authorities, while a minority ruled that it was permissible to remain in those territories, though in such circumstances *jihad* would be



obligatory whenever possible. On the question of allegiance a conflict over whether it should be to the *Jama'ah* or the governing authority continued until the collapse of *Dar al Islam*'s structure with the abolition of the Caliphate in 1924 (although by then the Caliphate had long ceased to be an effective power in the land, despite the fact that it continued to live on in the minds of the people).

There was also serious conflict over the third "unity" – a single governing authority. Even before the 5<sup>th</sup> century AH governments arose in some parts of *Dar al Islam* that refused to submit to the authority of the Caliphate. The Fatimids in the Maghreb and Egypt and the Umayyads in al Andalus went ahead and established rival Caliphates, while in the Levant, Central Asia, India and Iran the situation remained volatile until the *fuqaha'* devised a solution to the situation in which the Caliph became the Supreme Commander and the rulers and emirs of the regions were subject to his nominal authority. Later, – due to the power of the Ottoman Sultanate – the single governing authority was resurrected as a *de facto* reality, though a creedal schism was added to the political schism in the Muslim world when the Ottomans became the strongest power of Sunni Islam, while the Ilkhans, Safavids and Qajars in Iran (a suitable territory for independent governments) embraced Shi'ism.

### III

*Shar 'iyyah*, or "legality" issues. So far we have focused extensively on examples of *mashru'iyah*, or "legitimacy", because it is this aspect of the *Ummah*'s existence that has been most significant in determining the way it sees itself, its relationship with Allah and its role in the world. However, the three main *shar'iyah* factors played an even greater part in the history of the Middle Ages. They are: the "relationships to the example", the "means of assuming power" and the "manner in which the institutions conduct themselves in the administration of public affairs".

The "relationships to the example" are of major importance and begin with the example of the Prophethood, followed by the example of the Rightly-Guided Caliphate. They show that from the moment of his accession



the legal power in the land – i.e. the ruler – was strongly influenced by the models of the Prophethood (in safeguarding the Faith) and the Rightly-Guided Caliphate (with regard to matters of *shura*, or “consultation”, justice and the protection of *Dar al Islam*). The model of the Prophethood continued to act as a guide, even after the Muslims split into sects.

According to the *Kitab al Madinah* (the al Madinah Constitution) and the meeting at Saqifah Bani Sa'idah following the death of the Prophet (PBUH), the political authority is based upon a contract between the ruler, or commander, and the people who have pledged him their allegiance. The Companions of the Prophet met at Saqifah Bani Sa'idah and consulted each other (or vied or disputed with each other) over who should assume responsibility for the state's political affairs after the Prophet (PBUH), following which the majority chose Abu Bakr. Others preferred Sa'd bin 'Ubadah or 'Ali bin Abi Talib, while still others proposed that there should be two ruling emirs – one from Quraish and the other from the *Ansar*. However, nobody disputed the people's right to choose their ruler; that is to say, not a single one of the Companions opposed the idea that the political authority was a contractual one and not a Divine Appointment. It was recognized that there is an agreement between Allah and the *Ummah* that the latter should embrace the True Faith and convey it to the rest of mankind. At the same time, there is also a defined contract between the people and the person responsible for running their political affairs. However, a number of points remained ambiguous and led to debate and conflict for around a century.

In the view of the *fuqaha'* and historians, the correct “means of assuming power” is the *shura* –or consultation process - referred to in the Qur'an. But who are the people who should take part in that *shura*? The early Companions understood *shura* (i.e. discussion about the choice of ruler before he is put before the public so that they can pledge allegiance to him) as being “*haqq ahl al sabiqah*” (“the right of the early people”), or the early Muslims – specifically the leading Emigrants. And although the *Ansar*, or most of them, finally agreed to this and pledged their allegiance, it was understood that many of them (and others too) believed that they also had the right to take part in the *shura* process. In fact,



some maintained that *shura* was the right of all Muslims, as we see in the opposition of some of ‘Abdullah bin al Zubair’s army (including *mawlas*) when he called upon them to pledge their allegiance to him after the death of Yazid bin Mu ‘awiyah in the year 64 AH without consulting them or asking their leave.

The “People of *Shura*” were later reduced to six on ‘Umar’s recommendation. Of this number, four chose ‘Uthman. ‘Umar himself was appointed Caliph solely by Abu Bakr, following which the others pledged their allegiance to him. Abu Bakr was acknowledged as leader following the discussions at Saqifah Bani Sa‘idah and ‘Ali was accepted as the fourth Caliph without discussion at the Prophet’s Mosque after ‘Uthman’s assassination.

So historically there has not been merely one form of *shura*; it has ranged (when the range of options was limited) from a one-person process, as in the case of Abu Bakr, to a group, as in the case of ‘Umar. Modern interpreters have tried to present it as a nomination, or candidacy, system, despite the fact that not one of the Companions or the Muslim public opposed that “candidacy” or “nominated” himself for the post. This state of affairs was exploited by the Umayyads and Abbasids, who tended to appoint their sons during the father’s lifetime by demanding that allegiance be pledged to the son. The *faqih* (scholar of jurisprudence) Sa‘id bin al Musayyib (d. 94 AH) objected to ‘Abdul Malik bin Marwan on the grounds that the single governing authority and the pledge of allegiance granting the authority should be in the hands of one man – either ‘Abdul Malik or his son, but not both at the same time. However, nobody listened to him and they all agreed on deferred allegiance to one or two sons or an heir apparent.

One thing which supports the view that the existing Caliph at the time of the Rightly-Guided Caliphs had the authority to appoint his successor is a statement attributed to ‘Umar bin al Khattab which asserts that the pledge of allegiance to Abu Bakr “was an error [and] Allah protected against its evil”. This would appear to mean that Abu Bakr ought to have been nominated by a qualified person, though the Prophet (PBUH) died

without naming a successor. If we accept this statement at face value we must concede that it is strange, to say the least, because the people gathered at Saqifah, whose numbers were in the hundreds, witnessed debates that may well have gone on for hours and were extremely frank and open until after Abu Bakr had been acknowledged as Caliph. In fact, he had not been confident of obtaining the allegiance of “the majority” were it not for the prompt support he received from the Emigrants who were not from Quraish, as well as from people in al Madinah and the surrounding areas.

According to a report about ‘Umar from Abu Mikhnaf, recorded in al Tabari’s *History* (1:1843), the Aslam tribe “came to pledge their allegiance in such large numbers that the roads were congested, and I (i.e. ‘Umar) said: ‘When I saw Aslam I was certain we had won the day’.” This meant that ‘Umar bin al Khattab himself was seeking the support of the majority on Abu Bakr’s behalf, because that would confer legality on the ruler (rather than someone in authority or an influential person acknowledging a man who had nominated himself as Caliph – as if, for example, Abu Bakr had nominated himself or ‘Umar had nominated him and he had accepted). It was clear that ‘Umar had influence at least with the *Ansar*, while the Emigrants from Quraish were a minority compared with Sa’d bin ‘Ubadah’s supporters from the *Ansar* Khazraj tribe. Moreover, the Emigrants were divided, though some of their leading men fervently championed Abu Bakr.

Against this background, we can conclude that ‘Umar’s comments meant his greatest fear was anarchy because there was more than one candidate and because some sensitivities had begun to re-emerge between the Emigrants and the *Ansar*. It was probably these factors that led him to conclude his remarks with the following observation: “...so if a person pledges allegiance to a man without consulting the Muslims, neither he nor the person to whom he has pledged allegiance shall be given allegiance. Rather, they should both be killed...” If this report is true, it could be understood to mean that *shura* (consultation) on the choice of the leader should be public and open, as opposed to a person with tribal influence or wealth pledging allegiance to himself or another and then calling upon the rest to support his choice because of his ability to influence them.



This shows us that political authority is to be based upon a contract, and that the contract (i.e. the pledge of allegiance) is to be concluded after mutual consultation leading to agreement on the nominee. In fact, authority based upon a contract freely entered into through the choice of all the parties concerned is virtually the same as an election. The ambiguous element is the process leading up to it; that is to say, the consultation and identity of the people who should be engaged in it (whom al Mawardi calls “*Ahl al Ikhtiyar*” – “the People of Choice”). If the Companions were the “*Ahl al Sabiqah*” (and thus the “people of choice”) during the era of the Rightly-Guided Caliphs, what about the later period? How should the nominating body be determined and what should its specifications be?

In my view, it was a new and untried process and therefore it took on various different forms due to the fact that it was subjected to pressures from every direction. The most significant of these was the insurgency against ‘Uthman. Although historians maintain that the Companions in al Madinah included a number who opposed ‘Uthman and sought to take power themselves after removing him, all the rebels – as we know – were neither members of Quraish nor *Ansar* but came to al Madinah, fully armed, from Egypt, Basra and Kufa.

So they clearly saw themselves as having the same rights and entitlements as the people of al Madinah or the Emigrants and *Ansar* who lived in that city. However, the murder of ‘Uthman brought this promising process to a tragic end; this was summed up by the observation by an Umayyad poet that the murder of ‘Uthman ended the “People of al Madinah’s” right of consultation over the choice of Imam, and indeed the incident had a seriously negative impact on the very notion of consultation; ‘Ali received allegiance from the rebels and they were followed by the people of al Madinah, who feared a power vacuum, after which no-one demanded the right of consultation unless he was in the opposition and sought to use it as a weapon against the existing authority.

So if this was the fate of consultation during the era of the Rightly-Guided Caliphs, then how could that period (during which three of them were killed) be regarded as an ideal model for Muslims over the

subsequent years? It could be because consultation was later aborted – the very consultation which that promising era had “carried in its womb”. We should also remember that the Companions enjoyed a high reputation because of their personal association with the Messenger of Allah (PBUH), and that the public (or most of them) saw them as being endowed with a supreme sense of duty, sacrifice and responsibility. Moreover, the “*shar‘iyyah ta’sisiyyah*”, or “constitutive legality” (the “example”, or “model”, and the three “unities”: *Jama‘ah*, territory and authority) had become a reality – at least in the minds of the subsequent generations and in comparison with the situation during the Umayyad and Abbasid periods.

So the question of consultation is one of the conditions – or defining principles – of the legality of practice and interests. Although many aspects of it were ambiguous, it is considered to have been achieved during the time of the Rightly-Guided Caliphs and this is why it has always been so important. Throughout the history of the *Ummah* it has been seen as both an ideal and a goal, because it means the *Ummah* has the right to choose its ruler, and during those periods in history when it failed or ceased totally to function, the opponents of the ruling regimes promoted it as an ideal and a moral value higher than the mundane world of politics, and an attribute of a Believing *Ummah* as described in the Qur’an: “...who [conduct] their affairs by mutual consultation” (Qur’an, *al Shura*, verse 38).

When we come to the third basic principle of legality (after the “example” of the Prophethood and consultation during the era of the Rightly-Guided Caliphs) the term we prefer to use for it is “*shar‘iyyat al masalih*” (“legality of interests”). In all nations and states “*masalih*”, or interests, belong to the general class of “rights”, though they are more closely related to the functions of the ruling authority. In traditional Islamic political thought these included “*‘adl*” (justice), “*kifayah*” (competence) and “*shawkah*” (naked power) (there was extensive debate among scholars on these qualities), and historically justice was accorded a high status at three levels: general, administrative and judicial. It was regarded as one of the most important of all values (“the Scales of Allah upon earth”) and included supervising the production and distribution of resources, as well as appointments to administrative positions and dealings with



social groups and individuals. Indeed, these “functional legalities” played a significant part in conferring legality upon an official (or withdrawing it from him). Historians regard one of ‘Umar bin ‘Abdul ‘Aziz’s most important qualities as being his commitment to “‘*adl*”, or “justice”, at all three levels, while politically Abu Ja‘far al Mansur is recognized for his competence in administration and setting up institutions, including the authority responsible for managing the state’s revenues. On the other hand, nobody would have described him as “just” – not because he trampled on the rights of individuals and social groups, but because of his reputation for cruelty towards his opponents; compared with ‘Umar bin ‘Abdul ‘Aziz – or even his grandson Harun al Rashid - he lacked the kind of temperament that endeared him to his subjects. Hence his two attributes were “*kifayah*”, or “competence”, and “*shawkah*”, or “naked power”, both at home and abroad. Many people forget his “*kifayah*” while remembering his “*shawkah*”. Several uprisings took place during his reign and he used competence or cruelty to restore order.

If we look to the historians and *fuqaha’* for definitions of “*shar‘iyyat al masalih*” (legality of interests) or “legality of action”, we will find that al Mansur lacked an important feature of successful rule; this is because – to quote ‘Umar bin ‘Abdul ‘Aziz, Harun al Rashid and al Ma‘mun – success is not the ability to suppress uprisings, but rather the application of justice and equity to prevent such uprisings from occurring in the first place.

One significant long-term tool for ensuring “legality of interests” is the justice system. The judicial institution is based upon legislation or the Law. In both mediaeval and modern times the Islamic jurisprudential or legal system was unique in being independent; that is to say, legislation was not enacted by the state or the political regime but by the scholars of the schools of *fiqh*, who enjoyed considerable latitude in their freedom to operate without interference from the political establishment. ‘Umar bin ‘Abdul ‘Aziz, al Mansur, Harun al Rashid (and others) tried to engage with the legislative or judicial process with the aim of standardisation or harmonisation. However, they failed because legislation had to be based upon the sources defined by al Shafi‘i (d. 204 AH) during the early period of Islam – i.e. the Qur’an, the Sunnah, “*ijma’*” (consensus) and “*qiyas*”

(deduction by analogy). There were also subsidiary sources such as “*urf*” (traditional practice) and “*masalih mursalah*” (considerations of public interest). From the 2<sup>nd</sup> century AH the *fuqaha*’, including the judges, were responsible for deriving rulings, applying “*ijtihad*” (interpretative judgement) and enacting legislation on the basis of those sources and in line with the rules of their respective schools. Accordingly, from a relatively early era the state was happy to remain outside the legislative process and leave its implementation to the “*Qadi al Qudat*” (Chief Judge).

Of course, the fact that the legislative authority was separated from the state did not mean there were no hiccups in the relationship between the legislative and political powers. The recurrent problem was that any intervention on the grounds of political necessity tended to incur the accusation that it was in contravention of Allah’s Law and the Shariah.

Historically, though, the judicial process generally served the interests of both ruler and people. At the same time, the state usually avoided interfering in the justice system and indeed tried – or appeared to try – to uphold it for the sake of public order and to demonstrate its compliance with Allah’s Law. So that aspect of “*shar’iyyah*”, or “legality”, was upheld relatively successfully, even during times when other aspects of it were violated.

However, there were occasions in the life of the people and the state when (at least in society’s view) there was a decline in all the “*shar’iyyah*” factors apart from “competence” and “naked power”, or “competence through the exercise of naked power”. Here I am referring to the periods of internal strife and foreign invasion which occurred after the 5<sup>th</sup> century AH when the Turkic peoples and their armies, who had recently embraced Islam, penetrated to the heart of the state; that period also marked the start of the Crusader, Mongol and Tatar invasions. Those tragic events formed the backdrop for Imam al Haramain al Juwayni (d. 478 AH)’s book *Ghiyath al Umam fi’l Tiyath al Dhulam*, in which he presented a vision of calamity engulfing the *Ummah* at a time when it lacked a “competent” authority or a body of scholars capable of exercising *ijtihad*. The message it conveyed was the need for security to be imposed within the state’s borders, along with the protection of the *Ummah* and its territory from external invasions.



Because of these exceptional circumstances, the military powers were able to seize political control (by force), as well as economic control (through the military feudal structure). No serious questions were asked about the legality of such actions, because they were seen as essential for protecting the interests of “constitutive legality” – i.e. the Faith, the *Ummah* and the homeland. One indicator of this was that the preferred title of the Ottoman Sultans was “*Ghazi*” (“Conqueror”) – i.e. “the one who is constantly on the attack against the enemies”. In this respect Sultan Suleiman (1522-1566 CE) was unique in that he was given the title “*Qanuni*” (“Lawgiver”) along with his other honorifics because of the legal reforms he carried out on the state’s administrative and justice systems.

For at least half a century numerous Muslim and Orientalist writers – secular as well as religious – have been discussing the system of government in Islam. Islam is indeed one of the world’s major religions, cultures and civilizations with a hugely distinguished history, but it is in this context – rather than as a religion stipulating a particular type of political regime – that we can discuss a system, or systems, of government. Historically, the distinctive thing about the Muslim world has been its Caliphate, followed by its Sultanates, during which the Caliphate state evolved into a series of empires based upon two basic characteristics: the model of the *Ummah*, the Faith and the Public Good; and a spirit of mutual consultation, social cohesion and co-operation, which dated from the era of the Rightly-Guided Caliphs and continued to form part of the *Ummah*’s consciousness over the years that followed. These two characteristics underwent a decline and changed significantly during the process of transformation from Caliphate state to Sultanates and empires. And while the “non-functional *shar‘iyyah* models” declined, “*mashru‘iyyah*” remained very much alive in people’s consciousness.

So is our *Ummah*’s political history one of respect for individual and communal rights? That is a question to which we cannot give a definitive answer, even though rights have always been at the forefront of the public’s religious and moral consciousness. That is why they are still alive today, and why they will remain alive throughout the ages.