



# THE SPIRIT OF THE LAWS IN POLITICAL AND ISLAMIC LEGISLATION A COMPARATIVE STUDY

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**W**hen Islam was revealed to mankind, it set out the general principles for regulating the daily lives of individuals and communities in all circumstances, while enabling legislation to be updated in line with society's needs. It is in this context that we intend to answer the following questions:

**1** – Is the Islamic political legislation introduced during the early days of Islam and the subsequent periods binding on us today? And are we required to apply the *ijtihad* (interpretative judgement) initiatives of earlier *fuqaha'* (scholars of jurisprudence) to the modern age?

**2** – When a legislator in any Islamic state today wishes to introduce a *dustour* (constitution) for his country which is derived from the Shariah of Islam or compatible with its provisions, must he necessarily comply fully with everything in the Qur'an and the Sunnah? In other words, is there a binding political

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stipulation in the Noble Qur'an or the Sunnah which Muslims are obliged to follow under all circumstances and at all times?

**3** – Over the course of its political history the Islamic State has adopted certain specific procedures governing the appointment or accession of the head of state. Are those procedures the only ones that can be regarded as Islamic – i.e. would any other procedures be contrary to the teachings of Islam?

**4** – Islam's political history has witnessed numerous debates on the "*Ahl al Hall wa'l 'Aqd*" (literally "those who loosen and bind"; i.e. the people eligible to appoint or depose a ruler) and their functions. Must a Muslim community in the modern age include "*Ahl al Hall wa'l 'Aqd*" among its institutions?

**5** – If Muslims in the early days of Islam pledged allegiance to the Caliph or ruler in a specific way using specific terminology, do Muslims today need to follow them to the letter?

In our view this study is important because we believe that any initiative aimed at establishing a system of government based on Islam in an Islamic state must be both flexible and inspired by the spirit of the Shariah. It also needs to limit itself to the universal rules without entering into details which will lead to differences of opinion, particularly since such details will only apply to specific times and circumstances.

In carrying out this study our aim is to appeal to the governments of the Islamic states to ensure that their political institutions comply with Islamic values or Islam's general constitutional rules. When the majority of the population in a particular Islamic state agree that the rules of Islam should inspire the way in which their political life is regulated, there should never be a problem about the details; and if for some reason a problem should arise, it should be resolved on the basis of society's need for a practical solution.

## The Noble Qur'an and the spirit of the laws

When Montesquieu wrote his book *L'Esprit des Loix* (*The Spirit of the Laws*), he believed that laws should be compatible with the spirit of the age which gives rise to them; after all, how can we enforce a law if we do not understand the realities of the society to which it will apply or the circumstances that gave rise to a particular piece of legislation?<sup>1</sup>

In fact, the point made by Montesquieu seems to have been pre-empted in Islamic political legislation. When the Noble Qur'an set out the universal rules, it was part of its miraculous nature that those rules should be applicable to every time and place so that, when they became laws derived from the deductions of the *mujtahids* (scholars exercising interpretative judgement) aimed at serving the interests of the people, they were able to offer suitable solutions for all mankind's needs<sup>2</sup>.

Moreover, as the Qur'an was revealed, its revelation corresponded to specific circumstances and events, so each *ayat* (verse) responds to a particular situation. Indeed, it would be unthinkable for Allah to inspire His Prophet's heart with anything that was irrelevant to the needs of the moment – that is to say, the people's situation and circumstances<sup>3</sup>.

Although the Noble Qur'an does not prescribe a particular form of rule for an Islamic government to adopt (for example, it does not specify how the governing authorities should be structured), it establishes the general principles upon which an Islamic state should be based<sup>4</sup>. And as it does not deal with the organisational aspect of the state, this gives the human mind the freedom to choose the general form the state should assume, in

1 Montesquieu: *The Spirit of the Laws*, translated by Thomas Nugent, New York, Haffner, 1949, p. 20. This book was first published in 1748 and, according to Montesquieu, he spent all his life writing it. It had a major impact in political circles.

2 Mohammed Salam Madkur: *Al Wajiz fi'l Madkhal li'l Fiqhi'l Islami*, Cairo, Dar al Nahdhah al 'Arabiyyah, 1976, p. 254.

3 Tharwat Badawi: *Usul al Fikr al Siyasi wa'l Nadhariyat wa'l Madhahib al Siyasiyyah al Kubra*, Cairo, Dar al Nahdhah al 'Arabiyyah, 1970, p. 112.

4 Khairallah Talfaj: *Al Islam Din wa Dawlah*, Part 3, Beirut, Mu'assasat al Matbu'at al 'Arabiyyah, 1976, p. 213.

a manner that responds to the circumstances of the age in which it lives<sup>1</sup>. This means that Islam rejects any idealistic, Utopian vision of the sort championed by ancient and modern Western philosophers<sup>2</sup>.

While the Qur'an goes into some detail about various branches of the Law – as, for example the legal provisions governing personal status, as well as certain aspects of the Criminal Law, in which it prescribes specific punishments for certain crimes in what is referred to as the *Hudud* category, such as theft and adultery – we find that it provides no details on the Shariah rulings related to other laws<sup>3</sup>. Where Constitutional Law is concerned, it merely lays down the basic principles governing all constitutional matters<sup>4</sup>. While Islam endorses *shura* (consultation) as a general political principle, it leaves the manner in which it should be implemented open to interpretation, since the circumstances of every era are different from those of its predecessor and successor<sup>5</sup>.

If we compare *shura* with Western democracy, we will find that although “democracy” means “rule by the people”, in practice it had a very narrow application in – for example - Athenian democracy, which was basically aristocratic, not democratic.<sup>6</sup> Similarly, if we take a closer look at modern democracy, which is claimed to represent the sovereignty of the people, we will see that it comprises an electoral system in which the only successful candidates are the ones who excel in enticing people with money, cunning and fake propaganda. Subsequently, having won the people's vote they become their “gods”, legislating as they please and enacting laws that serve their own personal and class interests rather than

1 Mohammed Ahmed Khalafallah: *Al Qur'an wa'l Dawlah*, Beirut, Al Mu'assasat al 'Arabiyyah li'l Dirasat wa'l Nashr, 1981, p. 253.

2 W. Ebenstein: *Great Political Thinkers from Plato to the Present*, New York, Holt, Rinehart and Winston, 1921, p. 45.

3 Abdel Hamid Mitwalli: *Mabadi' Nidham al Hukm fi'l Islam*, Alexandria, Munsha'at al Ma'aref, 1978, p. 42.

4 Abdel Wahhab Khallaf: *Masadir al Tashri' al Islami Marinah*, Cairo, *Al Qanun wa'l Iqtisad Magazine*, April/May 1945, p. 254.

5 Mohammed 'Abdullah al 'Arabi: *Nidham al Hukm fi'l Islam*, Beirut, Dar al Fikr, 1968, p. 84.

6 See Plato: *Al Jumhuriyyah (The Republic)*, translated by Fu'ad Zakaria, Cairo, Al Mu'assasah al 'Aamah li'l Ta'lif wa'l Tarjumah wa'l Nashr, 1968.

the interests of the people. This is the disease which America, England and other so-called democratic countries are suffering from<sup>1</sup>.

At the same time, if compliance with the Law is the main reason why Western constitutional regimes function successfully,<sup>2</sup> this is confirmed – and indeed lauded - by the precepts of the Islamic Shariah, which enjoins justice: “And thus we have made you a just community that you will be witnesses over the people”.<sup>3</sup> A “just community” is one whose distinctive feature is its uprightness; such a community is a “witness over the people” to the fact that “its criteria are authentic and its traditional practices are right and proper”<sup>4</sup>.

Allah links justice with “*ihsan*”, as in the verse: “Allah enjoins “*adl*’ (justice) and ‘*ihsan*’ (beneficence)”<sup>5</sup>.

Sayyid Qutb stressed this point in *Al Dhilal*, when he wrote: “‘*Ihsan*’ is the neighbour of “*adl*’ and softens the intensity of “*adl*’. [Thus] it leaves the door open for anyone who is prepared to waive something to which he is entitled, out of a sense of altruism and goodwill and in order to heal the rancour of the breast”<sup>6</sup>.

‘*Adl*, or justice, is enforcement of the legal precepts as commanded by the Shariah, while *ihsan*, or beneficence, is enforcement of the moral element exhorted by religious faith in order to lighten ‘*adl*’s intensity; it calls upon us to “respond to goodness with greater than it and to evil with less than it”<sup>7</sup>. Some applications of ‘*adl*’ include punishment of the guilty, as in the *ayats*: “And if you punish, punish with an equivalent to that with which you were harmed,”<sup>8</sup> “And We ordained for them therein a life for a

1 Fathi Abdel Karim: *Al Dawlah wa'l Siyadah fi'l Fiqh al Islami*, Cairo, Maktabat Wahbah, 1984, p. 321.

2 Abdel Hamid Mitwalli: *Azmat al Andhimah al Dimuqratiyyah fi'l 'Asr al Hadith*, Alexandria, Dar al Ma'aref, 1963, p. 165.

3 Qur'an: *Surat al Baqarah*, 143.

4 Abdel Hamid Mitwalli: *Azmat al Fikr al Siyasi al Islami fi'l 'Asr al Hadith*, (*Madhahiruha, Asbabuha, 'Ilajuha*), Cairo, Al Hay'ah al Misriyyah al 'Aamah li'l Kitab, 1985, p. 136.

5 Qur'an: *Al Nahl*, 90.

6 Sayyid Qutb: *Fi Dhilal al Qur'an*, Beirut, Dar Ihyaa' al Turath al 'Arabi, 1967, p. 191.

7 Ibid. p. 191.

8 Qur'an: *Al Nahl*, 126.

life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution”<sup>1</sup> and “And the retribution for an evil act is an evil one like it”<sup>2</sup>

Meanwhile, on softening ‘*adl* with *ihsan* (i.e. pardoning the guilty and patience in the face of the injuries he causes), the Qur’an says: “But if you forgive and overlook their offences and pardon them, then surely Allah is Most Forgiving, Most Compassionate”<sup>3</sup> and “but whoever pardons and makes reconciliation - his reward is [due] from Allah”.<sup>4</sup> Another example of this combination of ‘*adl* and *ihsan* – which here applies specifically to the case of a debtor who finds himself in difficulties - is the following: “and if the debtor is in distress, then let there be postponement until he is at ease”<sup>5</sup>

From these *ayats* we can conclude that ‘*adl*, or justice, promotes equality between people, while ‘*adl* and *ihsan* together promote brotherly feelings, goodwill and mutual respect. Hence *ihsan* is able to achieve what ‘*adl* is incapable of achieving on its own, so it would be fair to say that *ihsan* is higher than ‘*adl*<sup>6</sup>. Islamic *fiqh* (jurisprudence) extrapolates the theory of *dharurah* (necessity) from the theory of *ihsan* and ‘*adl*. Essentially, what this theory says is that, while it is obligatory to enforce the Shariah, its enforcement must not cause harm to the individual or the community and its objective principles need to be understood and implemented within that framework (i.e. the context of the theory of *dharurah*). The application of justice is not limited by any specific conditions because its source is *ihsan*, and *ihsan* is Absolute Good<sup>7</sup>.

This concept of justice takes us on to another principle which is no less important – *ijtihad*. *Ijtihad* is inspired by the high ideal that puts the

1 Qur’an: *Al Ma’idah*, 45.

2 Qur’an: *Al Shura*, 40.

3 Qur’an: *Al Taghabun*, 14.

4 Qur’an: *Al Shura*, 40.

5 Qur’an: *Al Baqarah*, 280.

6 Sayyid Qutb: *Fi Dhilal al Qur’an*, p. 192.

7 Abdul Salam al Tarmanini: *Al ‘Adl wa’l ‘Adalah fi’l Islam*, Lectures during the 1972-73 Cultural Season, Abu Dhabi, Cultural Affairs, p. 360.

interest of the *Ummah* (Islamic community/nation) above the interest of the ruler and the welfare of society above the welfare of the individual<sup>1</sup>. This is quite different from the approach of the positivist schools, which give priority to the personal interest of a particular group – usually the dominant one that is in control of the public’s affairs<sup>2</sup>.

In the Islamic Shariah, and consequently in Islamic political thought, justice extends to every area of human life. This means that the Islamic view of justice is superior to other views on this social value, whether ancient or modern<sup>3</sup>.

While the Athenians attached great importance to the principle of equal rights, it was limited to the class of free men to the exclusion of all the other social classes.<sup>4</sup> And when the Romans propagated the principle of equality,<sup>5</sup> their social classes included a free class and a slave class.<sup>6</sup> The notion of equal rights has gained wide popularity in modern times and been adopted by philosophers like Locke and Rousseau. Rousseau understood it to mean ethical/moral equality<sup>7</sup>.

Islam sees the principle of equality as being fundamental to the existence of an Islamic state, though it does not deny differences between individuals and their status if such differences are due to differences in their actions and levels of piety. The Qur’an states: “We have raised some of them above others in degrees”,<sup>8</sup> while other Qur’anic *ayats* also make

1 Abdul Rahman Khalifah: *Fi ‘Ilm al Siyasiyyah al Islami*, Alexandria, Dar al Ma’rifah al Jami’iyyah, 1990, p. 185.

2 See Fathi Abdel Karim: *Al Dawlah wa’l Siyadah fi’l Fiqh al Islami*, p. 322.

3 Ibrahim Dessuqi Abaza and ‘Abdul ‘Aziz al Ghannam: *Tarikh al Fikr al Siyasi*, Beirut, Dar al Najah, 1973, p. 218.

4 Harmon M. Judd: *Political Thought from Plato to the Present*, New York, McGraw Hill Book Co. 1964, p. 21.

5 See R.G Gettell and L. C. Wanlass: *Gettell’s History of Political Thought*, George Allen and Unwin, 1956, p. 57, and Houriyah Mujahid: *Al Fikr al Siyasi min Aflatun ila Muhammad ‘Abduh*, Cairo, Maktabat al Anglo-Misriyyah, 1986, and George Sababin: *Tatawwur al Fikr al Siyasi*, Part 1, translated by Jalal al ‘Arusi, Cairo, Dar al Ma’aref, 1971.

6 M. Custis: *The Great Political Theories*, Vol. 1, New York, Avon Books, 1973, p. 113.

7 Rousseau: *The Social Contract*, OUP, 1948, p. 60.

8 Qur’an: *Al Zukhruf*, 32.

it clear that Islam does not reject those differences in rank or degree; e.g.: “And for all are degrees from what they have done”<sup>1</sup> and “Say, ‘Are those who know equal to those who do not know?’ Only they will remember [who are] people of understanding”<sup>2</sup>.

The West’s leading philosophers divided society into classes, assigning specific functions to each class<sup>3</sup>. Islam, on the other hand, makes competence and fitness for the job the basic condition for eligibility for a position. If the candidate fails to fulfil this condition he will not be appointed, whatever his relationship or status with the ruler<sup>4</sup>.

While Islam endorses the right to own property, unlike the Western systems it does not consider such ownership to be absolute and it guarantees rights for the poor in the interests of social cohesion. This is why Allah has ordained that Muslims must pay *zakat* on their money and property. In addition, He also grants the ruler the right to expropriate additional funds if this should prove necessary for the needs and interests of the Muslim community<sup>5</sup>.

It would therefore be true to say that, in establishing these principles, Islam’s aim was to enable people to enjoy a decent life while ensuring that society followed the path of uprightness and virtue. However, since the process of achieving those goals required some adjustments to the situation on the ground, the details were left flexible while leaving the essentials intact<sup>6</sup>.

The Islamic scholar Yusuf al Qaradawi states that anyone who examines the Book of Allah closely will find that its message is both flexible

1 Qur’an: *Al An’am*, 132.

2 Qur’an: *Al Zumar*, 9.

3 Aristotle: *Al Siyasa* (*Politics*), translated by Ahmed Lutfi al Sayyid, Cairo, Al Hay’ah al Misriyyah al ‘Aamah li’l Kitab, 1979, from p. 23, and Amirah Hilmi Matar: *Al Falsafah al Siyasiyyah min Aflatun ila Marx*, Cairo, Dar al Ma’aref, 1986, from p. 160.

4 See Fu’ad ‘Abdel Mun’im Ahmed: *Mabda’ al Musawah fi’l Islam*, doctoral thesis, 1972, from p. 160, and ‘Abdel Hakim Hussain al ‘Aili: *Al Hurriyat al ‘Aamah fi’l Fikr wa’l Nidham al Siyasi fi’l Islam*, Cairo, Dar al Fikr al ‘Arabi, 1983, from p. 338.

5 Sayyid Qutb: *Al ‘Adalah al Ijtima’iyyah fi; l Islam*, Beirut, Dar al Shuruq, 1978, from p. 101.

6 Mohammed Farouq al Nabhan: *Nidham al Hukm fi’l Islam*, Kuwait University, 1974, p. 186.



and progressive. This is true of a number of *ayats* including those classed by many exegetes as “*nasikh*” (“abrogating”) or “*mansukh*” (“abrogated”)<sup>1</sup>.

In reality, such *ayats* are neither “*nasikh*” nor “*mansukh*”; rather, each one is relevant in a particular situation. One might be for a time of steadfastness and another might be permissive, while others could contain pronouncements on courses of action that are “binding”, “recommended” or applicable to a state of weakness or a state of strength<sup>2</sup>. Some of the examples he cites include: “O Prophet, urge the believers to battle. If there are among you twenty [who are] steadfast, they will overcome two hundred. And if there are among you one hundred [who are] steadfast, they will overcome a thousand of those who have disbelieved because they are a people who do not understand”. This *ayat* is followed by “Now, Allah has lightened [the hardship] for you, and He knows that among you is weakness. So if there are from you one hundred [who are] steadfast, they will overcome two hundred. And if there are among you a thousand, they will overcome two thousand by permission of Allah. And Allah is with the steadfast”<sup>3</sup>. This means – to quote Sheikh Muhammad Abduh – that: “When the Believers are at their lowest point in fighting the Unbelievers, one hundred of their number will prevail over two hundred of the enemy’s, and one thousand [Believers] over two thousand [Unbelievers]. This is a special concession for the state of weakness in which the Believers found themselves at the time these *ayats* were revealed – that is to say, the time of the Battle of Badr. [At that time] they had insufficient forces including only one or two horses. They set out with the intention of meeting the caravan and were not prepared for war; moreover, their numbers were less than a third that of the Unbelievers, who were fully armed and prepared”<sup>4</sup>.

When the Believers were strong, they fought ten times their number of enemies, or even more, and were victorious over them. In this way they were able to conquer the empires of Byzantium, Persia and other powerful

1 Yusuf al Qaradawi: *‘Awamil al Si’ah wa’l Murunah fi’l Shari’ah al Islamiyyah*, Cairo, Maktabat Wahbah, 2004, p. 73.

2 Ibid.

3 Qur’an: *Al Anfal*, 65 and 66.

4 Muhammad ‘Abduh: *Tafsir al Manar*, Part 10, Cairo, Matba’at al Manar, 1325 AH, p. 71.

kingdoms. The finest examples of this were the *Sahabah* (Companions) of the Messenger of Allah (PBUH) during the time of the Prophet and the years that followed<sup>1</sup>.

Some exegetes maintain that the *ayat* on “steadfastness” is abrogated by the “permissive” *ayat* that follows it, on the ground that it states: “Now, Allah has lightened [the hardship] for you”. However, “permissiveness” does not preclude “steadfastness”, particularly since the “permissiveness” should be understood as applying to a time of weakness. Moreover, if something is abrogated, this does not mean that only the new abrogated situation applies, and in any case it would appear that the two *ayats* were revealed at the same time<sup>2</sup>.

Al Bukhari narrates that Ibn ‘Abbas (may Allah be pleased with them both) reported: “When the declaration of Allah the Most High was revealed (‘If there are among you twenty [who are] steadfast, they will overcome two hundred. And if there are among you one hundred [who are] steadfast, they will overcome a thousand of those who have disbelieved because they are a people who do not understand’), this was hard for the Muslims - when the command was given that one man must not flee from ten – so ‘permission’ came in the Most High’s declaration: ‘Now, Allah has lightened [the hardship] for you, and He knows that among you is weakness. So if there are from you one hundred [who are] steadfast, they will overcome two hundred. And if there are among you a thousand, they will overcome two thousand by permission of Allah. And Allah is with the steadfast’”<sup>3</sup>.

The fact that the ruling contained in the first *ayat* has been lifted does not mean that it has been abrogated and will be invalid for all time. What it shows is that the first *ayat* is applicable to a state of strength, while the second is applicable to a state of weakness.<sup>4</sup> This means that the second *ayat* is a ruling that applies to a specific circumstance which is different from the circumstance in which the first *ayat* applies.

1 Ibid.

2 Yusuf al Qaradawi: *‘Awamil al Si’ah wa’l Murunah fi’l Shari’ah al Islamiyyah*, op. cit. p. 75.

3 Qur’an: *Al Anfal*, 66.

4 Yusuf al Qaradawi: *‘Awamil al Si’ah wa’l Murunah fi’l Shari’ah al Islamiyyah*, op. cit. p. 75.

Islam's flexibility can also be seen in the way it encourages initiative and inventiveness in worldly matters, such as transport and communications when the Qur'an refers to horses, mules and donkeys: "And He creates that which you do not know",<sup>1</sup> as well as instruments of war: "And prepare against them whatever power you are capable of",<sup>2</sup> the construction of great dams, as mentioned in the story of Dhu'l Qarnain in Surat al Kahf,<sup>3</sup> and other military and civil crafts and industries: "And We sent down iron, wherein there is great military might and benefits for the people"<sup>4</sup>.

### The spirit of the laws during the time of the Messenger (PBUH)

The Prophet (PBUH) made it clear that everything related to the transmission of Divine Revelation, as well as anything connected to the Faith in general, including its values and the foundations of its creed and morality, is established and immutable and may not be abandoned or neglected. On the other hand, he showed that there is great flexibility in other areas such as politics and the approach to confrontation with Islam's enemies, which are determined by the situation on the ground and allow no place for bigotry or obduracy<sup>5</sup>. There are numerous examples of this, including the occasion when the Messenger of Allah (PBUH) accepted the terms of the Treaty of al Hudaibiyah with Quraysh, despite its apparently unfavourable terms<sup>6</sup>.

If we examine what Ibn Hisham narrated from Ibn Ishaq's description of the Prophet (PBUH)'s attitude when this treaty was agreed and during its implementation, we will see how flexible he was and how he followed the spirit of the Law out of a desire to promote

<sup>1</sup> Qur'an: *Al Nahl*, 48.

<sup>2</sup> Qur'an: *Al Anfal*, 60.

<sup>3</sup> Qur'an: *Al Kahf*, 93-97.

<sup>4</sup> Qur'an: *Al Hadid*, 25.

<sup>5</sup> Yusuf al Qaradawi: *Al Khasa'is al 'Aammah li'l Islam*, Cairo, Maktabat Wahbah, 2003, pp. 209-211.

<sup>6</sup> Sabir Ta'aymah: *Al Islam wa'l Thawrah al Ijtima'iyyah*, Cairo, Maktabat al Qahirah al Hadithah, 1970, p. 303.

peace.<sup>1</sup> This is particularly reflected in his statement: “By Allah, if Quraysh demand from me today something which strengthens ties of kinship I will give it to them”<sup>2</sup>.

The essence of Islam’s political spirit can be seen in the pact the Prophet (PBUH) made with the Jews after his arrival in al Madinah. This was an unprecedented example of progressive thinking and humanitarian interrelations that is as modern and comprehensive in its contents as present-day international treaties. Let us look at a few of the provisions of this historic document,<sup>3</sup> which begins:

“In the Name of Allah, the Most Compassionate, the Most Merciful. This is a document from Muhammad the Prophet (PBUH) between the Believers and Muslims of Quraysh and Yathrib and those who follow them, join them and engage in *jihad* alongside them.....”

For the first time in history the text endorses the principle allowing additional parties to join treaties after they have been signed,<sup>4</sup> so that consequently it offers other tribes – other than the tribes that originally signed or underwrote the treaty - the opportunity to join the new state. This demonstrates two vital points:

**One:** The element of continuity and permanence in the new state.

**Two:** The fact that membership of the new state was not based upon factors that were outside the province of the human will, such as being born in a particular region or tribe; rather, it was a membership freely entered into.<sup>5</sup>

1 Ibn Hisham: *Al Sirah al Nabawiyyah*, Part 3, edited by Mustafa al Saqa and ‘Abdel Hafidh Shalabi, Cairo, Maktabat al Halabi, 1969, p. 331.

2 Yusuf al Qaradawi: *Al Khasa’is al ‘Aammah li’l Islam*, op. cit. p. 212.

3 The text of this document is recorded in Ibn Hisham: *Al Sirah al Nabawiyyah*, Part 1, edited by Mustafa al Saqa and ‘Abdel Hafidh Shalabi, Cairo, Maktabat al Halabi, 1969, pp. 501-504.

4 Mohammed Saleem al ‘Awa: *Fi’l Nidham al Siyasi li’l Dawlah al Islamiyyah*, Cairo, Al Maktab al Misri al Hadith, 1983, p. 62.

5 Fathi Abdel Karim: *Al Dawlah wa’l Siyadah fi’l Fiqh al Islami*, op. cit. p. 136.

The treaty, or charter, also affirms “that the Jews are to have their religion and the Muslims their religion”,<sup>1</sup> thus endorsing and implementing the principle of religious freedom – a principle claimed to be a product of the modern age<sup>2</sup>.

The document also states that anyone who leaves will enjoy security, while anybody who stays will enjoy security in al Madinah,<sup>3</sup> thus endorsing the principle of personal freedom at least ten centuries before it was proposed by the philosophers of the Social Contract. In essence, personal freedom is nothing more or less than the right to security – the individual’s right to be safe from attack on his person, his honour, his property or his home, and the freedom for him to come and go as he wishes.<sup>4</sup>

With this sagacious piece of legislation Islam added a moral dimension to relations with other communities, and indeed countries; the way Muslims treated non-Muslims was the same as their treatment of their fellow Muslims. All were subject to the same moral law which regulated relations both within and between communities<sup>5</sup>.

In fact, it would be true to say that Islamic international law is Islamic constitutional law. However, its approach is rejected by Western political thinkers like Machiavelli and Hegel, who believe there can only be social morality within a single nation and that it cannot exist beyond that nation’s borders. In their view, freedom from any restrictions whatsoever other than the national interest should be the logic guiding the conduct of international affairs; hence treaties are only binding insofar as the state sees them as serving its interests.<sup>6</sup> This intellectual and political selfishness has had a highly destructive effect on international relations and has led to two world wars as well as the situation in the world today.

<sup>1</sup> Clause 25.

<sup>2</sup> Mohammed Saleem al ‘Awa: *Fi’l Nidham al Siyasi li’l Dawlah al Islamiyyah*, op. cit. p. 63.

<sup>3</sup> Clause 47.

<sup>4</sup> Fathi Abdel Karim: *Al Dawlah wa’l Siyadah fi’l Fiqh al Islami*, op. cit. p. 138.

<sup>5</sup> Mohammed ‘Abdel Mu’izz Nasr: *Fi’l Fikr al Siyasi al ‘Arabi wa’l Mujtama’*, Cairo, Matabi’ al Ahram al Tijariyyah, 1969, p. 88.

<sup>6</sup> Ibid. p. 89.

There are numerous Hadiths that demonstrate the Prophet (PBUH)'s flexibility, including the practical implementation of the message conveyed by the Prophet (PBUH) when he said: "O Allah, if anyone assumes command of any [section] of my *Ummah* (Nation/Community) and is harsh in his treatment of them, I shall treat him harshly; and if anyone assumes command of any [portion] of my *Ummah* and is gentle with them, I shall be gentle with him".<sup>1</sup> And according to a *mashhur* Hadith ("well-known" Hadith; transmitted by three or more transmitters at each stage), the Prophet (PBUH) said: "Repelling harm or mischief, then, is a kind of *maslahah* (interest); therefore Shariah rulings must be adapted to suit the public interest and be subject to change when [that interest] changes"<sup>2</sup>.

Such was the Prophet (PBUH)'s political flexibility that he was prepared to accept the views of his Companions even if they were different from his own. For example, he (PBUH) accepted them on going out to meet the enemy for the Battle of Badr, and on the place where he should take up residence.<sup>3</sup> He (PBUH) also accepted Salman al Farsi's idea about digging the Trench as well as the proposal to reach a compromise between some parties on a third of the produce of al Madinah.<sup>4</sup> And on another occasion he (PBUH) said: "If a ruler exercises *ijtihad* and he is right, he will get two rewards, and if he exercises *ijtihad* and he is wrong, he will get one reward" – a statement which supports the principle of *ijtihad* based upon either the Scripture or *qiyas* (analogy)<sup>5</sup> as a means of deducing the Shariah ruling for every eventuality.

Even at the very end of his life the Prophet (PBUH) showed flexibility in not appointing anyone to succeed him, the reason being that he (PBUH) wanted the Muslims to understand that it was their responsibility to choose a suitable Caliph, or Successor,<sup>6</sup> to look after their interests over the future years and centuries<sup>7</sup>.

1 Narrated by Muslim in his *Sahih* from A'isha (May Allah be pleased with her).

2 Abdel Hamid Mitwalli: *Azmat al Fikr al Siyasi al Islami fi'l 'Asr al Hadith*, op. cit. p. 119.

3 Ibn 'Abd al Barr: *Al Dawr fi Ikhtisar al Ghazi wa'l Siyar*, Cairo, 1966, p. 113.

4 Abdel Hamid Mitwalli: *Mabadi' Nidham al Hukm fi'l Islam*, op. cit. p. 242.

5 Umar Sharif: *Nidham al Hukm wa'l Idarah fi'l Dawlah al Islamiyyah*, Cairo, Dar al Ittihad al 'Arabi li'l Tiba'ah. 1985, p. 76.

6 Mohammed al Khudhr Hasan: *Naqdh Kitab al Islam wa Usul al Hukm*, Tunis, Dar al Maghreb al 'Arabi, 1925, p. 205.

7 Mohammed Saleem al 'Awa: *Fi'l Nidham al Siyasi li'l Dawlah al Islamiyyah*, op. cit. p. 71.

## The spirit of the laws at the time of the Companions and *Tabi'in* (Followers)

Both before and after the death of their Leader and Teacher (PBUH), the Companions learnt from him how to follow the spirit of the laws in managing the affairs of government. There are numerous practical examples of this, including the debate between the *Muhajirun* (Emigrants) and *Ansar* (Helpers) at Saqifah Bani Sa'idah prior to the appointment of Abu Bakr (may Allah be pleased with him) to the Caliphate<sup>1</sup>.

Abu Bakr (may Allah be pleased with him) demonstrated this spirit when he was appointed and mounted the *minbar* (pulpit) and – after praising Allah - addressed the people with these words: “I have been appointed over you, though I am not the best among you. If I do well, then help me; and if I act wrongly, then correct me... Obey me so long as I obey Allah and His Messenger. And if I disobey Allah and His Messenger, then I have no right to your obedience.”<sup>2</sup>

In this address the Successor to the Messenger of Allah (PBUH) established that the Ruler, or Caliph, is not an absolute ruler, but rather that the *Ummah* has a claim to his trusteeship because it appointed him. The *Ummah* is duty bound to support him if he does well and hold him to account, criticise him and guide him if he acts wrongly.<sup>3</sup> Hence the *Ummah* is the source of authority and Abu Bakr asked its members to participate with him in exercising it. Like any *mujtahid* (person qualified to exercise *ijtihad*) the ruler exercises *ijtihad* and in doing so he either reaches the right decision or the wrong decision. If he does not accept his subjects' rectification of his mistakes, they have the right to dismiss

<sup>1</sup> See al Tabari: *Tarikh al Rusul wa'l Muluk*, edited by Mohammed Abu'l Fadhl Ibrahim, Part 3, Cairo, Dar al Ma'aref, 1962, p. 218; Ibn Khaldun: *Al Muqaddimah*, edited with commentary by 'Ali 'Abdel Wahid Wafi, Cairo, Lajnat al Bayan al 'Arabi, 1966, p. 162; Mohammed Fathi 'Uthman: *Min Usul al Fikr al Siyasi fi'l Islam*, Beirut, Mu'assasat al Risalah, 1979, p. 345; Mohammed Hussein Haikal: *Al Siddiq Abu Bakr*, 2<sup>nd</sup> impression, Cairo, Maktabat al Nahda al Misriyyah, 1360 AH, pp. 70-71; Ibn Hisham: *Al Sirah al Nabawiyah*, op. cit. Part 4, p. 661.

<sup>2</sup> Ibid.

<sup>3</sup> Mohammed Dhiya' al Din al Rayyis: *Al Nadhariyat al Siyasiyyah al Islamiyyah*, Cairo, Maktabat Dar al Turath, 1979, p. 177.

him for precisely the same reason that they had the right to appoint him in the first place.

‘Umar bin al Khattab – the Companion who was most committed to following the spirit of the laws – did not limit himself to the exercise of *ijtihad* or *ra’i* (“opinion” - the application of scholarly judgement and reason) when there was no evidence available from the text of the Book or the Sunnah. Indeed, he went further than that and even applied *ijtihad* and *ra’i* when there was scriptural evidence; in such cases he did not interpret the scripture literally according to the wording and line-for-line meaning of the text, but according to its intended meaning – a practice described by Dr. ‘Abdel Hamid Mitwalli as “*ruh al tashri*” (“the spirit of legislation”) – even if this led to the text itself not being applied.<sup>1</sup> For example, ‘Umar did not only refrain from applying the *hudud* punishment for theft in time of war, as indeed was the practice of the Messenger of Allah (PBUH); he also suspended cutting off the hand of a thief during the Year of Famine, despite the fact that the text applies in all situations and makes no distinction between times of prosperity and ease and times of drought and famine. The Qur’an says: “[As for] the thief, the male and the female, amputate their hands”.<sup>2</sup> Similarly, in time of war he did not punish those who drank alcohol<sup>3</sup>.

The agreement ‘Umar bin al Khattab signed with “the people of Aelia” (Jerusalem) was an excellent example of Islamic tolerance and the lofty spirit of Islam and followed a long but bloodless siege of Jerusalem by the Muslims which ended with its citizens suing for peace on condition that the pact with them was signed by the Caliph ‘Umar bin al Khattab himself<sup>4</sup>.

Another example of ‘Umar’s flexibility was when he postponed collecting the obligatory *zakat* from the camel, cow and sheep rearers

1 Abdel Hamid Mitwalli: *Azmat al Fikr al Siyasi al Islami fi’l ‘Asr al Hadith*, op. cit. p. 121.

2 Qur’an: *Al Ma’idah*, 38.

3 Ahmed Amin: *Fajr al Islam*, Cairo, Maktabat al Nahda al Misriyyah, 1959, p. 237.

4 See the Agreement in Mohammed Hamid Allah: *Majmu’at al Watha’iq al Siyasiyyah fi’l ‘Ahd al Nabawi wa’l Khilafah al Rashidah*, 2<sup>nd</sup> impression, Cairo, Matba’at Lajnat al Ta’lif wa’l Tarjuma wa’l Nashr, 1956, p. 302, and Mohammed ‘Abdel Mu’izz Nasr: *Fi’l Fikr al Siyasi al ‘Arabi wa’l Mujtama’*, Cairo, Matabi’ al Ahram al Tijariyyah, 1969, p. 302.



in the Year of Drought until such time as their circumstances should improve<sup>1</sup>.

Further instances include his response to the Bani Taghlib Christians who asked that if an additional alms tax was to be collected from them, that it should not be classified as *jizyah* (poll tax on non-Muslim subjects). To begin with, ‘Umar (may Allah be pleased with him) refused, but later he agreed on the grounds that it would serve the public interest and prevent mischief. He is reported to have said: “These people are stupid. They are content [to accept] the meaning but reject the name”<sup>2</sup>.

Right up to the end of his life ‘Umar tried to keep to the spirit of the laws. After he had been stabbed some of the Companions rushed up to him and demanded that he should appoint a successor, but to begin with he refused, saying: “I do not bear your worries alive or dead”<sup>3</sup>.

The third Caliph, ‘Uthman bin al ‘Affan (may Allah be pleased with him), also kept to the spirit of the laws when ‘Umar (may Allah be pleased with him) was killed and his son, ‘Ubaidallah – enraged by the murder of his father – searched for his killer, Abu Lu’lu’ah the Magian, but did not find him in his house. However, he found his young daughter and killed her. He also killed Hurmuzan after it was rumoured that he was in league with Abu Lu’lu’ah<sup>4</sup>.

Although the Islamic Shariah prescribed *qisas* (retaliation in kind) in such cases, the Caliph ‘Uthman exercised *ijtihad* in this particular instance because he understood the circumstances that had driven the late Caliph’s son to exact vengeance for his father and Islam in the way that he did. Moreover, he did not wish to see a second disaster inflicted upon the al Khattab family along with the first one – the first being the treacherous slaying of ‘Umar and the second the possible execution of his son in retaliation for his act. At the same time, ‘Uthman did not allow ‘Ubaidallah

<sup>1</sup> Yusuf al Qaradawi: *Al Khasa’is al ‘Aammah li’l Islam*, op. cit. p. 211.

<sup>2</sup> *Al Mughni*, Part 9, p. 236, and quoted by Yusuf al Qaradawi: *Al Khasa’is al ‘Aammah li’l Islam*, op. cit. p. 211.

<sup>3</sup> Mustafa Abu Zaid Fahmi: *Fi’l Hukm fi’l Islam*, Cairo, Al Maktab al Misri al Hadith, undated, p. 128.

<sup>4</sup> Khalid Mohammed Khalid: *Wida’an ‘Uthman*, Cairo, Dar al Ma’aref, 1967, p. 141.

to get off scot free so that the blood he had shed went unpunished; instead, he prescribed *diyah* (blood-money) in place of *qisas* and paid generous compensation to the heirs of the dead people out of his own wealth<sup>1</sup>.

The third caliph also collated all the Qur’anic texts into one volume and collected all the existing Qur’ans and burnt their pages when he realised that a new situation had arisen requiring a new *ijtihad* initiative in order to protect the Muslims from the evils of division and dissent<sup>2</sup>.

‘Ali bin Abi Talib (may Allah be pleased with him and honour him) also followed the spirit of the laws in numerous instances<sup>3</sup>. One example was the letter he sent to al Ashtar al Nakh’i urging him to accept the peace agreement, in which he wrote:-

“Bear in mind that you do not throw away the offer of peace which your enemy may himself make. Accept it, for, that will please Allah. Peace is a source of comfort to the army; it reduces your worries and promotes order in the State. But Beware! Be on your guard when the peace is signed; for, certain types of enemies propose terms of peace just to lull you into a sense of security only to attack you again when you are off your guard. So you should exercise the utmost vigilance on your part, and place no undue faith in their protestations. But, if under the peace treaty you have accepted any obligations, discharge those obligations scrupulously. It is a trust and must be faithfully upheld and whenever you have promised anything, keep it with all the strength that you command, for whatever differences of opinion might exist on other matters, there is nothing so noble as the fulfillment of a promise. This is recognized even among non-Muslims, for they know the dire consequences which follow from the breaking of covenants. So never make excuses in discharging your responsibilities and never break

1 Ibid, p. 143.

2 Although Abu Bakr (may Allah be pleased with him) collected the Qur’an into one volume, fearing that the reciters who memorised it might die out, particularly after the Wars of Apostasy.

3 Like the cases of the lion trap and drinking alcohol in which he revised his opinion, similar to ‘Umar in earlier situations, when he imposed a lighter penalty. See:-

– Mohammed Ahmed Sarraj: *Al Fiqh al Islami bain al Nadhariyah wa’l Tatbiq*, Alexandria, Dar al Matbu’at al Jami’iyah, 1997, from p. 101.

– Subhi Abduh Sa’id: *Al Islam wa Huquq al Insan*, Cairo, Dar al Nahda al ‘Arabiyyah, 2000, from p. 61.

a promise, nor cheat your enemy. For, breach of promise is an act against God, and none except the positively wicked acts against Allah”<sup>1</sup>.

The letter, which epitomises the candid spirit of Islam, shows ‘Ali asking Ashtar al Nakh‘i to accept what is on offer and is in marked contrast to the deviousness and trickery we see today in the implementation of International Law and its provisions when one of the parties to a conflict seeks to reach agreement on a peace treaty.

The Caliph ‘Umar bin ‘Abdul ‘Aziz used to amend *fatwas* in response to changing times and circumstances and made a significant contribution to international laws when he prohibited the imposition of customs charges “on trade in the Islamic seas”<sup>2</sup>.

We also find many examples of rulers following the “spirit of legislation” during the era of the Followers, such as the fact that they permitted price controls on goods with the aim of alleviating the suffering of the general public due to the deterioration in their conditions compared with the way they were at the time of the Messenger of Allah (PBUH), who prohibited price fixing.<sup>3</sup> Women were also allowed to issue judicial rulings in cases other than *hudud* or the shedding of blood. (This was based on *qiyas* derived from the ruling on women’s testimony.)<sup>4</sup>

## The spirit of the laws as seen by Islamic thinkers

While Ibn Taymiyyah maintained that the state needed to have a political leadership in order to uphold good and prevent evil, he also stressed that the *fuqaha’*, the ‘*ulama’* (religious scholars) and those with expertise in Shariah affairs should be consulted when the rulers were unable to decide on the proper course of action<sup>5</sup>.

<sup>1</sup> For the full text of the letter see Sabir Ta’miyah: *Al Islam wa’l Thawrah al Ijtima’iyyah*, Cairo, Maktabat al Qahirah al Hadithah, 1970, from p. 303.

<sup>2</sup> Ibid. p. 298.

<sup>3</sup> Ibn al Qayyim: *A’lam al Mawqi’ ‘an Rabbi’l ‘Alamin*, Part 3, Beirut, Dar al Kutub al ‘Ilmiyyah, 1991, p. 11. Ibid. p. 18.

<sup>4</sup> Ibn Taymiyyah: *Al Siyasa al Shar’iyyah fi Islah al Ra’i wa’l Ra’iyah*, edited with commentary by Mohammed Ibrahim al Banna and Mohammed Ahmed ‘Ashur, Cairo, Dar al Sha’b, 1971, p. 185.

<sup>5</sup> Ibn Khaldun: *Al Muqaddimah*, Part 1, p. 340.

Ibn Taymiyyah also believed that a person who was appointed to a post or a position of authority in the Islamic State needed to fulfil two conditions: strength and honesty. The degree and type of strength would depend upon the nature of the position. In the case of a war leader it would require physical courage, experience in warfare and an ability to engage in different types of combat. On the other hand, where the exercise of rule was concerned the strength required was an ability to administer rulings justly. Honesty demanded that the ruler should fear Allah and not fear the people.

However, was a strong, honest person always available?

Here Ibn Taymiyyah was prepared to be realistic and waive his conditions, since he recognized that it was rare to find the qualities of strength and honesty combined in one man. Hence every position of authority should be occupied by the most suitable candidate. In cases where there were two candidates – the former more honest than the latter, and the latter stronger than the former – the most competent and least potentially harmful should be chosen. For a war commander a strong, courageous man should be preferred, even if he had moral failings, to a weak, incapable man, even if the latter was more honest.

Ibn Khaldun was ahead of his time – and ahead of Montesquieu – when he wrote of the effects of geographical factors on politics. As well as describing the role and nature of human society in general, he also considered the differences between human societies in the different regions of the world and examined how their moral behaviour and situations were influenced by factors such as climate. He concluded from these observations that a system of government could only be fit if it functioned in accordance with the appropriate rules and principles that enabled it to exercise its authority effectively in the public interest<sup>1</sup>.

In his discourse on the factors on which Law is based, Muhammad Abduh noted that it is essential to take the realities of society into account. In his view it is wrong to take specific laws from one society and apply

<sup>1</sup> Muhammad 'Abdu: *Tafsir al Manar*, Part 5, Cairo, Matba'at al Manar, 1325 AH, p. 189.

them to another society whose material and non-material circumstances are different,<sup>1</sup> because it is a nation's condition and social situation that must provide the criteria upon which the Law is formulated and based.<sup>2</sup> Laws, which are designed to regulate behaviour for the benefit of society, begin as theories and ideas and the laws of every nation reflect the level of its culture and understanding, so they are bound to vary from one nation to another.<sup>3</sup>

Here Muhammad Abduh generally agrees with Montesquieu, though he differs from him in stressing the importance of ideas, as well as natural circumstances, being fundamental to the spirit of the laws.

Abduh was critical of the *'ulama'* of his time whose learning and understanding was limited to the works of their predecessors, and he held them responsible for causing the rulers and the general public to abandon the provisions of the Islamic Shariah. In this connection, he wrote: "The people should be addressed in terms of the times and realities [in which they live] which are not covered in the books of those who lived in earlier eras. Are we to stop the world from moving forward for the sake of the books [of our forefathers]? That is not possible and it is this [factor] that has forced the general public and the rulers to abandon the provisions of the Shariah in favour of other [rulings and systems]. The *fuqaha'* are responsible before Allah for this and for all the people's [guilt] in contravening the Shariah, because it is their responsibility to be aware of the circumstances of [their] age and times and apply the provisions [of the Shariah] in a way that the people are able to follow - such as the *dharurah* rulings. They should not merely safeguard the words and pictures in those books and make them everything, while abandoning everything [else] for the sake of them".<sup>4</sup>

1 Abdel 'Aati Mohammed Ahmed: *Al Fikr al Siyasi li'l Imam Muhammad 'Abduh*, Cairo, Al Hay'ah al Misriyyah al 'Aamah li'l Kitab, 1978, p. 198.

2 Mohammed 'Amarah: *Al A'mal al Kamilah li'Imam Muhammad 'Abduh*, Part 1, Beirut, Al Mu'assasah al 'Arabiyyah li'l Dirasat wa'l Nashr, 1972, p. 310.

3 Muhammad 'Abduh: *Tafsir al Manar*, op. cit. p. 186.

4 Muhammad 'Abduh: *Tafsir al Manar*, op. cit. p. 186.