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SEMINAR

ENRICHING THE UNIVERSALITY OF HUMAN RIGHTS: ISLAMIC PERSPECTIVES ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS
(Geneva, 9 - 10 November 1998)

Note by the secretariat

On 9 and 10 November 1998, the Office of the High Commissioner for Human Rights, in cooperation with the Organization of the Islamic Conference (OIC), organized, at the United Office in Geneva, a seminar entitled "Enriching the Universality of Human Rights, Islamic Perspectives on the Universal Declaration of Human Rights".

This seminar, which forms part of a process for providing Islamic perspectives on the Universal Declaration, was organized during the 50th anniversary year of the Universal Declaration of Human Rights. It was designed to promote respect among peoples and a better understanding of the significance of cultural and religious backgrounds in the context of the Universal Declaration. Twenty experts in Islamic Law and human rights were selected by the High Commissioner, in consultation with OIC. Given the academic character of the seminar, no final conclusions were drawn nor was a final resolution adopted.

In her closing statement, the High Commissioner reflecting on the results of the seminar, said that it had opened a channel of communication and indicated her intention of publishing the proceedings of the seminar, which would include a summary of the discussions and the papers presented by the experts.

Owing to financial constraints and the lack of human resources, the Office of the High Commissioner for Human Rights was not in position to publish the final version of the publication for the fifty-fifth session of the Commission on Human Rights. The present document contains, the statements of the High Commissioner for Human Rights and the Secretary-general of the

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OIC, a draft summary of the discussions in three languages, the statement made by the Deputy Foreign Minister of the Islamic Republic of Iran, the closing statement of the High Commissioner, and the list of experts, as well as the papers presented by the experts in their original language. It is to be considered as a provisional version, pending its final publication in the three languages of the seminar (English, French and Arabic) in due course.

The attached document contains the papers submitted by the experts in their original languages, pending translation.

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بسم الله الرحمن الرحيم

الإسلام وحقوق المرأة

الدكتورة وسيلة بلعيد بن حمدة

الإسلام في جوهره يدعو إلى بناء المجتمع المتماسك الذي ينعم فيه كل أفراده رجالا ونساء كبارا وصغارا بالكرامة ، والسلامة ، والرفاه .

ومبادئ الإسلام وقيمه ذات منزع إنساني تتمثل خاصة في تقديسه للحياة الإنسانية ، واحترام الكرامة ، وتكريس الأخوة ، والحرية ، والعدل ، والإنصاف ، والمساواة ، والتضامن ، بين جنسي بني الإنسان كافة ، لأن الإسلام جعل الإنسان مقصده الأسمى ، فراعى فطرته ، وخاطب عقله ، وأيقظ وجدانه ، وفسح أمامه مجال الفعل والتفاعل ، ورسم له سبل التآلف والتعاون والتسامح . فالنصوص الإسلامية ـ كتابا وسنة صحيحة ـ تقوم على الاستجابة لما في الإنسان ، ذكرا كان أو انثى من مقوّمات جوهريّة هي الدافعة إلى اعتبار قدرته على التّطوردون خروج عن روح الدين ، ودون تعطيل لسيرورة التاريخ .

فريادة الإسلام تكمن في تعلّقه بالتّطور، إضافة إلى الثّبات على مرتكزاته وأسسه الجوهريّة في اعتماد الحرية والتّحرر الفكري ،اذ الإنسان حرّ ، وهو منظّم الحريّة ، باعتبار أنه لا

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وجود لإطلاق، ولا لمنع مطلق ، بل هناك وسطيّة فاعلة بين هذا وذاك .

لذلك كان الاجتهاد من أهمّ خصائص هذا الدين ، وهو بذل الجهد لإيجاد الحلول النّاجعة للإشكالات التي يطرحها الواقع المعيش للتّطور في مختلف المجالات الاجتماعيّة والثقافيّة والتربويّة وغيرها .

وللحديث عن حقوق المرأة في الإسلام ، تجدرالإشارة إلى ما كانت عليه المرأة العربية ، في الجاهلية ، حيث عاشت أوضاعا سيئة مليئة بالظلم والقهر والميز والإهانة وهضم الحقوق ، بما في ذلك حقها في الحياة والكرامة .

وعندما جاء الإسلام رفع عنها الضيم ، وبشرها بمساواتها للرجل في الحقوق والواجبات ، وأكّد لها أنهما شريكان في المسؤولية لتعمير الأرض ، منتهجا في ذلك منهج التدرج ، مراعاة للواقع واعتبارا للظرف ، دون أي تمييز أو مفاضلة ، فإنّ كل الآيات القرآنية الموجهة خطابا إلى المؤمنين والمسلمين بصيغ التذكير والإفراد أوالجمع ، في كل ما يخصّ التكاليف والحقوق والواجبات ، والشؤون العامة ، كالعبادات والمعاملات المالية والالتزامات المختلفة ، والمباحات والمحرّمات ، والأخلاق والسلوك ، كلّ ذلك يعتبر شاملا للمرأة إذا لم يكن مصحوبا بقرينة خاصة ، وهذا باتفاق جمهور العلماء والمفسرين .

ونجد في القرآن الكريم ما يزيد على ثلاثمائة آية بين مكية (161) ومدنية (148) وفي السنة النبوية الصحيحة أحاديث عديدة كلها تؤكد على حقوق المرأة في الإسلام وتتناول

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مواضيع متعددة تخصّها في مجالات العقيدة والعبادات والمعاملات والأسرة وغيرها ... تبيّن مكانتها الرفيعة ، وحقوقها بشكل واضح ، جلي ، فقد منح الله المرأة كل الحقوق التي ساوتها بالرجل وأخرجتها من الوضعية المتردية التي كانت فيها ، إلى مصافّ الإنسان العامل المسؤول ، قال عزّ وجلّ : (يا أيّها النّاس اتّقوا ربّكم الّذي خلقكم من نفس واحدة وخلق منها زوجها وبثّ منهما رجالا كثيرا ونساء.) (النساء ، 1) .

وقال الله سبحانه : (فاستجاب لهم ربّهم أنّي لا أضيع عمل عامل منكم من ذكر أو أنثى بعضكم من بعض) (آل عمران ، 195) .

فقد بيّن القرآن أن المرأة والرجل من أصل واحد وليس بينهما فرق في جوهر الطبيعة ، لذلك فهما متساويان في العمل والجزاء عليه ، ثوابا أو عقابا ، حيث قال سبحانه : (من عمل صالحا من ذكر أو أنثى وهو مؤمن فلنحيينّه حياة طيّبة ولنجزينّهم أجرهم بأحسن ما كانوا يعملون) (النحل ، 97) .

وقال تعالى : (للرّجال نصيب ممّا اكتسبوا وللنّساء نصيب ممّا اكتسبن) (النساء ، 32) .

وإضافة إلى ما تقدّم فإنّ الإسلام يقرّر الشراكة بين الرجل والمرأة ، في إرساء قواعد المجتمع والسهر على النهوض به ، وإحكام تسييره قال عزّ وجلّ : (والمؤمنون والمؤمنات بعضهم أولياء بعض يأمرون بالمعروف وينهون عن المنكر) (التوبة ، 71) .

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فقد أوجب على الرجل والمرأة ، الأمر بالمعروف بما تعنيه هذه الكلمة من خير وهداية وتوجيه إلى العمل الصالح ، لفائدة الوطن والأمة .

كما أوجب عليها مع الرجل كذلك النهي عن المنكر، وما يشمله من خطر وأضرار تهدد المجتمع ، وتعوق تقدمه وازدهاره، فالمرأة مسؤولة بهذا الأمر الوارد في الآية عن حماية المجتمع وتقدمه وسلامته .

كما أثبت لها الإسلام حقها في النشاط الاجتماعي بمختلف أشكاله وأنواعه ، كاكتساب المعارف والعلوم والخبرات ، وممارسة كلّ الأعمال ، وتحمّل المسؤوليات ، باعتبارها قد كلفت كالرجل بجميع التكاليف البدنية والمالية والتعبدية ، وحمّلت تبعاتها كاملة، مصداقا لقوله عزّ وجلّ (إنّ المسلمين والمسلمات والمؤمنين والمؤمنات والقانتين والقانتات والصّادقين والصّادقات والصّابرين والصّابرات والخاشعين والخاشعات والمتصدّقين والمتصدّقات والصّائمين والصّائمات والحافظين فروجهم والحافظات والذّاكرين الله كثيرا والذّاكرات أعدّ الله لهم مغفرة وأجرا عظيما) (الأحزاب ، 35) .

فكانت لها بذلك كلّ الحقوق المشروعة ، في مجال الحياة العامة والخاصة .

وعندما اعترضتها صعوبات أو موانع عملت على تجاوزها للوصول إلى حقوقها والدّفاع عنها وإيجاب الحماية لهذه الحقوق وإقرارها على الدولة والمجتمع ، تحقيقا لذاتيتها

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وإعرابا عن شخصيتها ومشاركتها في إقامة المجتمع المتوازن المتكامل .

هكذا ضمن الإسلام حقوق المرأة المدنية والاجتماعية والسياسية كما ضمنها للرجل ، وأوضح أن ليس هناك من فرق بينهما إلا بالتقوى ، قال تعالى : (ياأيّها الناس إنّا خلقناكم من ذكر وأنثى وجعلناكم شعوبا وقبائل لتعارفوا إن أكرمكم عند الله أتقاكم) (الحجرات ، 13) .

والإسلام وهو يؤسس للأخلاق الفاضلة والعدل والإنصاف ، نزلت أحكامه في القرآن بالتدريج ، وشمل هذا ما كان خاصا بالمرأة التي كانت عدما ، ذاتا قلّما تنعم بالحياة ، توءد ، لأنّها أنثى ، فأصبح لها وجود ، وكرامة ، وحقوق عديدة في الحياة ، كالتعلّم ، والإرث ، والصداق ، والزواج ، والتصرف في أموالها ، والمشاركة في تنمية المجتمع،وغير ذلك من الحقوق والواجبات .

حقوق المرأة

قرّر الإسلام للمرأة حقوقا وألزمها بواجبات ، جاءت صريحة جلية في قوله تعالى : (ولهن مثل الذي عليهن بالمعروف) (البقرة ، 228) فقد بيّنت الآية حقوق المرأة على أساس متين وهو أساس العدل بين الناس كافة في إعطاء كل ذي حق حقه ، وفي المقابل قيام الجميع بواجباتهم . وإن المتتبع لتفسير هذه الآية 1) يلاحظ أنها قد اعتبرت عند العلماء قاعدة كلية في تأكيد المساواة بين الرجل والمرأة ، لذلك سأكتفي بالوقوف عند بعض هذه الحقوق في شيء من الإيجاز

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غير المخل ، مبتدئة بأوكدها شرعا وعقلا وأعني بذلك حق الحياة

الحقّ في الحياة

أكّد الإسلام الحقّ في الحياة للإنسان ، ذكرا وأنثى . وقد صاغ الإطار الملائم لذلك معتبرا إفساد الحياة على الناس أو حرمانهم منها من الكبائرالتي تحدث القرآن عن خطورتها .

قال الله تعالى : (من قتل نفسا بغير نفس أو فساد في الأرض فكأنما قتل الناس جميعا ، ومن أحياها فكأنما أحيا الناس جميعا) (المائدة ، 32) ، وقال سبحانه (ولا تقتلوا النفس التي حرّم الله إلا بالحق) (الأنعام ، 151) .

وفي هذا السياق ندّد الإسلام بما كان يحصل في الجاهلية من إزهاق للأرواح بغيرحق، مشنعا على وجه الخصوص بوأد البنات ، قال تعالى (وإذا الموءودة سئلت بأي ذنب قتلت) (التكوير ، 8 ـ 9) . فأوجب عدم تفضيل الذكر على البنت ، روي عن رسول الله صلى الله عليه وسلم ، قوله (من كانت له ابنة فلم يئدها ، ولم يهنها ، ولم يؤثر ولده عليها أدخله الله الجنّة) (أخرجه أبو داوود وأحمد). وذلك دفعا لما كان سائدا من الفزع والنفور والجزع عند ولادة البنات ، كما جاء في قوله تعالى (وإذا بشر أحدهم بالأنثى ظل وجهه مسودا وهو كظيم يتوارى من القوم من سوء ما بشر به أيمسكه على هون أم يدسه في التراب ألا ساء ما يحكمون) (النحل ، 58 ـ 59) .

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حق التعلّم

يعتبر التعلّم مبدأ أساسيا في الإسلام أوضحته الآيات الأولى التي نزلت من القرآن الكريم (اقرأ باسم ربك الذي خلق ، خلق الإنسان من علق ، اقرأ وربك الأكرم ، الذي علّم بالقلم ، علّم الإنسان ما لم يعلم) (العلق ، 1 ـ 5) أمرا بالقراءة وإشارة إلى التعليم والعلم ، وأكدته غيرها من الآيات كقوله عز وجل (قل هل يستوي الذين يعلمون والذين لا يعلمون) (الزمر ، 9) وقوله سبحانه (فاسألوا أهل الذكر إن كنتم لا تعلمون) (النحل ، 43) . كما ورد في الأحاديث الصحيحة وجوب التعلم و التعليم وطلب العلم ، قال صلى الله عليه وسلم (إن الله لم يبعثني متعنتا إنما بعثت معلما ومبشرا ، فمن أراد الدنيا فليتعلّم ، ومن أراد الآخرة فليتعلّم ، ومن أرادهما معا فليتعلم) (أخرجه البخاري) . وتجدر الإشارة إلى أن المعني بالخطاب في هذه الآيات والأحاديث الرجل والمرأة معا .

وروي عن الرسول صلى الله عليه وسلم قوله (طلب العلم فريضة على كل مسلم) (أخرجه ابن ماجة) وكلمة مسلم تعني الذكر والأنثى بإجماع العلماء .

كما جاء في كتب السيرة والتاريخ أن الرسول صلى الله عليه وسلم طلب من إحدى النساء الكاتبات ، وتسمى الشفاء العدوية ، أن تعلّم زوجه حفصة الكتابة وتحسين الخط وتزيينه، كما مدح صلى الله عليه وسلم نساء الأنصار اللواتي سعين إلى التفقه في الدين . روى البخاري عنه صلى الله عليه وسلم

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(نعم النساء نساء الأنصار لم يمنعهن الحياء من التفقه في الدين) . كحق في ذلك .

وبفضل هذا التشجيع من الرسول والخلفاء من بعده نبغ عدد كبير من النساء المسلمات في العلوم والأدب والشعر والسياسة ، وقد كان يجلس إليهن الرجال للتعلّم وسماع الحديث . وتجدر الملاحظة أن المرأة اشتهرت بالثقة والعدالة في رواية الحديث حيث لم ينقل عن أي واحد من علمائه اتهاما بالكذب أو تجريحا في رواية المحدثات . ذكر الذهبي (ت 748/ 1348) في كتابه : ميزان الاعتدال ما نصه : (وما علمت من النساء من اتهمت أو من تركوها) (1)وكان لبعضهن مجالس مشهودة في القيروان وتونس وقرطبة ، وفي مصر، والشام ، والبصرة ، والكوفة ...

وكتب التاريخ والتراجم حافلة بأخبارهن وأنشطتهن العلمية والأدبية المتميزة .

حق حرية الاعتقاد والتفكير والتعبير

المرأة في نظر الإسلام إنسان حرّ ، مكلّف ، مسؤول : أما حريتها فتبدو في اختيار معتقدها قال تعالى: (لا إكراه في الدين) (البقرة ، 156) ، وفي بناء نمط تفكيرها وتعبيرها ، وأما تكليفها فهو يؤكد بدوره حريتها فيما تكون عليه من التزام أو عدمه . وفي كلتا الحالتين هي متحملة لمسؤوليتها ، باعتبار تحمّلها تبعات اختيارها من ثواب أو عقاب .

فنحن حين ننظر للمرأة في عهد الرسول ، صلى الله عليه

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وسلم ، ثم في عهد الخلفاء الراشدين ، نجدها كالرجل ، سواء في التعلم ، أو في دخول المساجد للتعبّد ، أو في المساهمة في الغزوات . كما نجدها قد جادلت فيما أشكل عليها من مسائل ، كالظهار ، وأبدت رأيها في أمّهات القضايا المستجدّة على غرار ما كان من هند بنت عتبة عند مبايعته صلى الله عليه وسلّم ومحاورته في شروط المبايعة، وما كان من أمّ سلمة ومن بعض الصّحابيات في الميراث ، وتحديد المهر، ونحو ذلك من المساهمات التي كانت للمرأة المسلمة ، والتي أثبتت بها ما مكّنها منه الإسلام من حقوق في حرّية الرأي والتعبير ، وما كان لها من دور في ممارسة هذه الحقوق ، وأهلية للمساهمة في حياة المجتمع .

حقوق الرابطة الزوجية

قرّر الإسلام عدم التمييز بين البشر ، ورفض التفاضل بين الزوجين على أساس الفرق الجنسي ، قال تعالى : (هن لباس لكم وأنتم لباس لهن) (البقرة ، 187) وهذا يعني شدة الاتصال والقرب والمساواة ، وهو ما يفيد أن عقد الزواج عقد شراكة ، يعطي لطرفيه على حد السواء ، الحرية في إبرامه بعيدا عن ضروب الضغط أو الإكراه أو الإلزام . ذلك أن الإسلام قد حرّض على الزواج فجعله ميثاقا غليظا حيث قال سبحانه وتعالى : (ومن آياته أن خلق لكم من أنفسكم أزواجا لتسكنوا إليها وجعل بينكم مودة ورحمة) (الروم ، 21) . وقال سبحانه : (وأخذن منكم ميثاقا غليظا) (النساء ، 21) بحيث إن عقد الزواج بلغ ، في المنظور

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الإسلامي ، درجة الميثاق بين الزوجين ، و تولّدت بموجبه حقوق وواجبات مغلّظة بينهما ، وفي مقدمتها حقّ المرأة في المهر ، أو في التمتيع، إذا لم يدخل بها ، وفي النفقة .

كما أتاح الإسلام للمرأة حقّ الاستئذان عند الزواج ، وهوحقّ يوكل لها المسؤوليّة في الاختيار والمعاشرة . لذلك بنى الإسلام تسييرالأسرة على المسؤوليّة المشتركة ، وعلى التّعاضد في الاضطلاع بها ، وهذا ما لخّصه الحديث النّبوي (كلّكم راع وكلّكم مسؤول عن رعيّته) (أخرجه الشيخان) . والمسؤوليّة لاتناط إلاّ في ضوءالحقوق المتبادلة كالاحترام ، والمودّة ، وحسن المعاشرة ، وهذا ما لخّصه القرآن الكريم في عبارة (السكن) التي تدلّ على الأنس والطمأنينة ، قال تعالى : (هو الذي خلقكم من نفس واحدة وجعل منها زوجها ليسكن إليها) (الأعراف ، 189) .

والزواج ، في الإسلام ، لا يفقد المرأة اسمها ولايغيب شخصيتها المدنية ، كما أنه لا يلغي حقها في التملك واستقلالها بثروتها فلا يأخذ زوجها شيئا من مالها ولا ملكها إلا بإذنها ورضاها ولايقوم بأي اجراء قانوني نيابة عنها إلا إذا وافقت هي على ذلك ، حفظا لحقوقها وضمانا لها.

وقد ربط القرآن القوامة بالإنفاق ، قال تعالى : (الرجال قوامون على النساء بما فضّل الله بعضهم على بعض ، وبما أنفقوا من أموالهم) (النساء ، 36)

فقوامة الرجل على المرأة ، داخل الأسرة ، اقتضاها تكليفه بالإنفاق والحفاظ على مصالح الأسرة ، فهي مسؤولية يتحملها

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وهي رعاية إنفاق لا غير.

فالقوامة لا تمثل دونيّة المرأة ، وهي تنتفي بانتفاء الإنفاق ، الذي يعطي للمرأة حق فسخ عقد الزواج ، كما ذهب إلى ذلك القرطبي في تفسيره للآية .

وحرصا من الإسلام على تماسك الأسرة ، كفل للمرأة الحق في معاشرتها بالمعروف وعدم مضارتها وعضلها ـ إمساكها من قبل وليها لكي لا تعود إلى زوجها ـ وتمكينها مما يحقق توازن حياتها المادية والمعنوية . كما أكد بصريح النص القرآني أن إمكانية تعدد الزوجات مرتبطة بالعدل بينهن ، ماديا ومعنويا ، وهو أمر غير ممكن لأحد مهما كان الحرص عليه . حيث قال سبحانه وتعالى : (ولن تستطيعوا أن تعدلوا بين النساء ولو حرصتم) (النساء، 129) .

وهنا تجدر الملاحظة أن مسألة تعدد الزوجات هي ظاهرة قديمة فشت في أمم كثيرة ، ووجدها الإسلام ، فقدّر أخطارها الاجتماعية بالخصوص ،لذلك عالجها بالتحديد ، والإحاطة بشرط العدل المادي والمعنوي الذي لا يمكن بلوغه من أحد مهما كان الحرص عليه والسعي إليه ، ولذا أشار القرآن إلى الاكتفاء بزوجة واحدة إذا خيف عدم توفر العدل بين الزوجات ، وهو ما يستفاد من قوله تعالى : (وإن خفتم ألاّ تقسطوا في اليتامى فانكحوا ما طاب لكم من النّساء مثنى وثلاث ورباع فإن خفتم ألاّ تعدلوا فواحدة) (النساء 3) .

فالإسلام برهن على أن الأصل في الزواج يكون بواحدة ، بما نصّ عليه من تعذر العدل بين الزوجات .

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فالايتان الثالثة والتاسعة والعشرون بعد المائة من سورة النساء ، توضحان رأي الإسلام في التعدد .

أما عن نشوب الخلافات بين الزوجين فقد ضمن الإسلام للمرأة حقوقها في الدفاع عن مصالحها على قدم المساواة مع الرجل كما جاء في قوله تعالى : (وإن خفتم شقاق بينهما فابعثوا حكما من أهله وحكما من أهلها إن يريدا إصلاحا يوفق الله بينهما) (النساء ، 3) ، فإذا استحال استمرار هذه العشرة كان لها أن تطالب بالطلاق للضرر (2) إذا لم تصل إليه عن طريق التراضي ، المستفاد من قوله تعالى : (فإمساك بمعروف أو تسريح بإحسان) (البقرة ، 229) ، كما خول لها أن تطالب بالخلع ، وهو أن تقدم تعويضا ماليا للزوج ، عند مفارقته : قال تعالى : (فلا جناح عليهما فيما افتدت به) (البقرة ، 229) .

أما بخصوص الحق في الحضانة والنفقة فإن الإسلام يلزم الزوجين المطلقين بالاتفاق على طريقة تنشئة أطفالهما القصر دون مضارة بينهما بل بالتعاون والتشاور في ذلك ، قال تعالى : (لا تضار والدة بولدها ولا مولود له بولده) (البقرة ، 233) وقال سبحانه في نفس الآية (فإن أرادا فصالا عن تراض منهما وتشاورفلا جناح عليهما) .

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الحق في العمل

أسهمت المرأة منذ صدر الإسلام في العمل ، داخل المجتمع ، بكل مستوياته ، سياسيا واجتماعيا وعلميا واقتصاديا ... بموجب ما تقررلها من أهلية التملك ، والتكسب والتعاقد ، والتصرّف في كل ما يتعلق بشؤونها الخاصة دون أي وصاية أبوية ، أو زوجية أوغيرها .

لذلك نراها قد تولت بعض الخطط كالحسبة التي ترتبط بالقضاء وغيرها ... وأشرفت على أعمالها الخاصة . وذلك استنادا إلى نصوص صريحة مكنتها من هذا الحق كقوله تعالى : (من عمل صالحا من ذكر أوأنثى) (النحل ، 97) وقوله تعالى : (للرجال نصيب مما اكتسبوا وللنساءنصيب مما اكتسبن) (النساء ، 32) .

وهي ، أي المرأة اليوم ، تسهم في التنمية الشاملة بكل كفاءة واقتدار بعد أن حصلت على مؤهلات علمية في مختلف الاختصاصات .

الحقّ في الضمانات القضائيّة

لا يجوز أن يعاقب مذنب أو مذنبة في الإسلام إلاّ بعد المحاكمة العادلة ، ذلك أن الآيات صريحة في وجوب إقامة العدل .(إنّ اللّه يأمر بالعدل) (النحل ، 90) (وإذا حكمتكم بين الناس أن تحكموا بالعدل) (النساء ، 58) .

فالأصل في التقاضي أن يكون على أساس العدل ، وهو يستوجب الضمانات الّتي منها حسن الظنّ (لولا إذ سمعتموه ظنّ المؤمنون والمؤمنات بأنفسهم خيرا) (النور ، 12) . وعدم

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الاتهام إلا بثبوت الجريرة، وتحميلها لمن ثبتت عليه دون سواه ، (ولاتزر وازرة وزر أخرى) (الأنعام ، 164) والسعي بقدر الإمكان إلى التبرئة ، وذلك أنها الأصل ، عملا بما جاء في الحديث (ادرؤوا الحدود عن المسلمين ما استطعتم) (أخرجه الترمذي) (وباب الستر على المؤمن ودفع الحدود بالشّبهات) (سنن ابن ماجة في باب الحدود) .

الحق في الإرث

منح الإسلام المرأة الحق في الإرث ، بعد أن كانت محرومة منه ، بل هي ذاتها كانت إرثا لغيرها من الرجال الأقربين ، فلأهل زوجها الهالك أن يزوجوها بأحدهم ، أو بمن شاؤوا ، أو يعضلوها حتى لاتأخذ شيئا من تركة زوجها ، فيستأثرون بها . وفي هذا الوضع الذي انعدم فيه أي حق في الارث للمرأة جاء القرآن الكريم محرما إرث النساء أو عضلهن قال تعالى : (يا أيّها الّذين آمنوا لا يحلّ لكم أن ترثوا النّساء كرها ولا تعضلوهنّ لتذهبوا ببعض ما آتيتموهنّ) (النساء ، 19) . وتمّ القضاء على هذا الحيف ، وتقرّر للمرأة الحق في الميراث نصيبا مفروضا ، قال عزّ وجلّ : (للرّجال نصيب ممّا ترك الوالدان والأقربون وللنّساء نصيب ممّا ترك الوالدان والأقربون ممّا قلّ منه أو كثر نصيبا مفروضا) (النساء ، 7) .

بمعنى أن نصيبها يقلّ ويكثرتبعا لوضعها في الأسرة ، فهي ترث نصف ما يرثه الرجل قال تعالى : (يوصيكم الله في أولادكم للذكر مثل حظ الأنثيين) (النساء ، 11) . وهي ترث أحيانا نفس ميراث الرجل ، قال الله تعالى : (ولأبويه لكل

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واحد منهما السدس مما ترك إن كان له ولد) (النساء ، 11) ، فالأبوان هما الجد والجدة . ونفس الشيء في الميراث كلالة ـ من ليس له والد ولا ولد ـ من قبل الأخوين : الذكر والأنثى ، قال عزّ وجلّ (وإن كان رجل يورث كلالة أو امرأة وله أخ أو أخت فلكل واحد منها السدس) (النساء ، 12) . فقاعدة النصف ليست مضطردة ، إذ ترث المرأة أحيانا أكثر من الرجل ، وهو ما بيّنه قوله تعالى : (ولأبويه لكل واحد منهما السدس مما ترك إن كان له ولد فإن لم يكن له ولد وورثه أبواه فلأمه الثلث) (النساء ، 11) والحكمة من كل ذلك أن الرجل ملزم بالإنفاق في حين أن ما ترثه المرأة يستثمر فينمو أو يدخر .

الحق في الرعاية الصحية

حرص الإسلام على إيلاء المرأة رعاية شاملة في مقدمتها الرعاية الصحية بدءا بتنشئتها الأولى كغيرها من الذكور وانتهاء إلى اهتمام خاص بأحوالها أثناء الحمل والوضع والرضاع ، فقد أتاح لها المشاركة في اتخاذ قرارالإنجاب وتسمية المولود ، ونمط تنشئته ، وراعى أحوالها الجسدية والنفسية فأباح لها الحفاظ على كل ما يضمن صحتها وقوتها ، من مثل المباعدة بين الولادات•وأشار القرآن إلى صعوبات الحمل والولادة ، قال الله تعالى : (ووصينا الإنسان بوالديه حملته أمه وهنا على وهن) (لقمان ، 14) وقال سبحانه : (ووصينا الإنسان بوالديه إحسانا حملته أمه كرها ووضعته كرها) (الأحقاف ، 15) .

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فهذا الوضع الخاص اقتضى أن يكون للمرأة حق الرعايةالصحية ، حفظا ووقاية وعلاجا ، ذلك أنها تصبح في أحوال الحمل والوضع والرضاع ، في حاجة إلى عناية صحية خاصة ، غذاء ودواء ، وقد خففت عنها العبادة فرخّص لها في الإفطار، في حالات الحمل والنفاس والرضاع محافظة عليها وعلى مولودها .

الحق في تولّي القضاء

إن ما ذهب إليه بعض الفقهاء بخصوص جواز انتصاب المرأة للقضاء قياسا على حقها في الشهادة وفي تولّي الإفتاء ، بقطع النظر عن الاختلافات المذهبية التي برزت في هذا الصدد ، أمر جدير بالاعتبار، حيث يقوم دليلا آخر على المكانة المتميزة التي يبّوئها الإسلام للمرأة ، وعلى الدور الهام الذي عليها أن تضطلع به في المجتمع .

الحقّ في التكافل الاجتماعي

يتبوأ التكافل في الإسلام مكانة متميزة في تنظيم الحياة المجتمعية بصريح النصوص القرآنية ، كما في قوله تعالى في سورة التوبة (الآية ، 71) (المؤمنون والمؤمنات بعضهم أولياء بعض) ، وكذلك النصوص الحديثية التي أكدت على أن المؤمن للمؤمن كالبنيان المرصوص يشد بعضه بعضا .. ولقد جاءت الزكاة ـ الركن الثالث من أركان الإسلام ـ تكريسا لهذا المبدأ الذي يحقق العدالة الاجتماعية ، ويجسّم الأخوة ويجذّر قيم التراحم ، والتآلف ، والتعاون ، وإشاعة الأمن ، والسلم بين الجميع ، ذكورا وإناثا ، كبارا وصغارا ، أغنياء

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وفقراء . قال عزّ وجلّ (وفي أموالهم حق للسائل والمحروم) (الذاريات ، 19) : (والذين في أموالهم حق معلوم للسائل والمحروم) (المعارج ، 24 ـ 25) .

والذي نخلص إليه من كل ما تقدم أن ما جاء في النصوص الدينية ـ قرآنا وسنة ـ بخصوص حقوق المرأة يؤكد منزلتها الرفيعة ، ويدعم حضورها الفاعل ، وإسهامها الإيجابي في مسيرة المجتمع الذي تمثل نصفه ، وتقوم على تربية نصفه الآخر.

قال الشاعر :

الأم مدرسة إذا أعددتها أعددت شعبا طيب الأعراق

ومما يجدر التأكيد عليه في هذا الصدد أن التعامل مع هذه النصوص ينبغي أن يكون على أساس اعتبارها ذات مستويين : مستوى ثابت لا يمكن أن يقع الاجتهاد فيه ، لأن الاجتهاد لا يكون في القطعيات كالنصوص المتعلقة بالعبادات ، ومستوى ثان تتعدد فيه الاحتمالات نظرا إلى أن النص اللغوي بنية غير منغلقة نتعامل معها بالضرورة من منطلق خلفياتنا الثقافية وأفكارنا وأوضاعنا الاجتماعية مما عدّد التفاسير حتى بلغت نحو عشرة آلاف تفسير وحاشية على التفسير بالرغم من أن النص المفسر واحد . ومن ثم وجب أن تكون قراءاتنا لهذا النص واعية بهذا البعد اللغوي (من جهة) ومستحضرة للمقاصد الشرعية من تنزيله والتي هي تحقيق المصلحة التي وضعها الشارع في الاعتبارالأول (من جهة أخرى) .

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HR/P/... WP 5

SEMINAR
ENRICHING THE UNIVERSALITY OF HUMAN RIGHTS:
ISLAMIC PERSPECTIVES ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

Islam – civil and political rights and the Universal Declaration of Human Rights

(Geneva, 9-10 November, 1998)

by
dr. Mustafa Ceric
Raisu-l-ulama and the Grand Mufti of Bosnia

Dear brothers and sisters,
Ladies and gentlemen,
Madam Commissioner,

I was pleased by your call to participate in this Seminar on *Islamic Perspectives on the Universal Declaration of Human Rights*, and I was delighted to hear that the Seminar was initiated by His Excellency Dr. Kamal Kharazi, Minister of Foreign Affairs of the Islamic Republic of Iran with the full support of the Organization of the Islamic Conference as well as the personal interest and support of such significant figures as His Royal Highness, Hassan II, King of Marocco and His Highness, the Aga Khan.

I have accepted the invitation, but told you that I would rather speak about Muslim perspectives than Islamic perspectives of the Human Rights. Why? It is because of the fact that when someone speaks nowadays in the name of Islam, he/she is tempted either to be accused of attempting a conversion or to offer an apology for Islam. I have no power to influence the conversion, nor do I have the intention to offer an apology for my Islam. If I have any power, it would be the power of my experience as a Muslim in Europe and the power of my deep concern about the future of the world in which we all live with or without the blessings of the Universal Declaration of Human Rights.

This paper is a humble attempt to offer some reflections on the fact that man advances in the way of enriching himself as a human being with an awareness that he cannot be like god, nor should he be like an animal.

1. The moment Adam had tasted the apple, the human story of disobedience and courage had begun. His disobedience has been condemned and his courage glorified. Those who see Adam's disobedience only, increase human guilt; and those who see his courage only, increase human arrogance. Adam is guilty because he had broken the law; he is arrogant because he had tasted the knowledge.

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2. Adam had to leave the peaceful garden and come to the turbulent earth full of his enemies. Now he realized the significance of the law and the risk of the knowledge. His repentance for disobedience has been accepted; and his adventure of courage has been inherited. It became too late for him to go back to the garden by his knowledge alone. He had been told that he had to earn the garden back by faith in God and by observing the law.

3. The Adam-man has been constantly reminded by Nuh (Noah), Ibrahim (Abraham), Musa (Moses), Isa (Jesus), and by Muhammad (a.s.) that God is with him as long as he listens to God's guidance. He was told not to listen to the whispering of Iblis (Satan) because he is among his worst enemies.

4. By Noah man has learnt the necessity to build the Ark for human salvation. By Abraham man has been taught how to distinguish true God from false gods. By Moses man has realized the power of law in face of injustice. By Jesus man has discovered the love in suffering. And by Muhammad (a.s.) man has been told to appreciate the whole truth and the full justice.

5. Man has never entirely denied God's guidance. Yet he has never fully accepted it. He often wanted to lead his life alone as if there is no God. Yet again he thought to be like God. He liked the idea of him being an image of God. As if there had been no other creatures beautiful like him, if God needs any image.

6. It is man's desire to be an image of God or to deny God altogether that led him to break the law once again. This time his falling from the heat of the image of God to the cold of the reality of animal was, indeed, a big event. He was happy by his new knowledge of his origin. He thought that he has finally freed himself from the heavy lightening of the image of God to the Enlightenment of the image of his own mind. He has celebrated his new time and looked to his bright future on his own. He felt no need to apologize to any one for taking the image of an animal.

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7. However, the more he stayed in the cold reality of animal the sooner he realized how difficult it is to be like an animal. Why? Simply because man is neither like God nor is he like an animal. Man is simply like man. He is comparable with himself only. God is not comparable with anything, the least with man who likes to be like an animal.

8. Why man cannot be an image of God? He cannot be an image of God because he cannot be God to judge the man as God's creature. Man is too ignorant to be allowed to carry out God's final inquisition; he is too weak to hold God's whole power; he is too selfish to maintain God's full justice.

9. Why man cannot be an image of an animal? He cannot be an image of an animal because he has his heart and mind. Man is too precious to God to be an object of Holocaust; he is too proud to be ethnically cleansed; he is too intelligent to allow that the law of jungle prevails.

10. Man is a human being comparable only with himself. He is what he is because God wanted him to be so. He wanted him to build the Ark for human salvation as a whole. He wanted him to know how to distinguish true God from false god. He wanted him to hold the power of law in face of injustice. He wanted him to discover the love in suffering. He wanted him to appreciate the whole truth and the full justice.

11. Noah had anticipated the flood so he had built the Ark. One Ark for the whole humanity. The humanity had been saved with its plentiful diversity. Had the world anticipated the blood of World War it would have built the Ark. One Ark for whole humanity. The humanity would have been saved from the Homocausta.

Madam Commissioner, I have this question to ask:

12. Was December 10, 1948 (The Universal Declaration of Human Rights) too little and too late for One Ark to be the salvation for the whole today's humanity with its plentiful diversity? For my fellow Bosnians and my fellow Albanians it is too little and too late. It seems that this Ark of the Universal Declaration of

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Human Rights is not enough spacious for certain species of humanity. The blueprint of it has been drawn on the paper in New York, but not built on the mountain of Balkan or Europe. The pictures of it such as: *equality before the law; protection against arbitrary arrest; the right to a fair trial; freedom from ex post facto criminal laws; the right to own the property; freedom of thought, conscience, and religion; freedom of opinion and expression; and freedom of peaceful assembly and association* - are really colorful images but very corrupted wooden pieces out of which hardly can be built the strong universal Ark for human salvation. For the Ark of the salvation of our world we need the new iron pieces that will withstand both the flood and the blood that might be awaiting our children.

13. The difference between Adam and Abraham, in their unity of the message, is the Adam's courage to disobey and Abraham's courage to obey God. For his disobedience Adam had been expelled from his garden, while Abraham for his obedience had been expelled from his community. Adam had survived by his repentance and God's forgiveness, while Abraham had survived by his patience and his readiness to sacrifice for the sake of truth. This is what we need today: our patience and readiness to sacrifice for truth and decency of human life. The issue of Human Rights today is the issue of courage to obey the truth and to observe the rules of human dignity.

14. Pharaoh has never been ready to face the truth nor to observe the rules of human dignity. He thought that his Might is the Right. Moses had demonstrated to him that he was wrong. The Right of people was Moses' Might that Pharaoh could not understand. What Moses has achieved by the law in promoting the human dignity, Jesus has bestowed upon by his love for humanity.

15. It is not known who was the first to use the term Jahiliyyat (Ignorance). However, it is certain that it became a common term to differentiate world of Islam from the world prior to Islam. The difference between these two worlds has been described by Jaafar b. Abi Talib to the Ethiopian prince in this way:

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> Previously we were a people, men of Jahiliyyat; we prayed to idols, ate carrion and committed shameful deeds; we disrespected the ties of kinship and violated the duty of faithfulness: the strong among us oppressed (ate up) the weaker ones. Thus we were, until God sent a Messenger from our midst, whose descent and justice, righteousness and virtue are known, to us. He called us to God so that we might recognize His unity and pray to Him and cast aside what our parents adored: stones and idols; he commended us to speak the truth, be faithful and respect ties of blood, fulfill our duties of protection and keep away from forbidden things and bloodshed. He forbade evil vices and unjust talk, squandering the goods of orphans, slandering innocent people, etc. (Ibn Hisham, p. 219).

16. The condition to enter into Islam, was more moral than ritual. For example, the conditions for twelve newcomers into Islam at al-Aqaba were put in this way:

> That they will put no one on a level with God, will not steal, commit adultery or infanticide or be arrogant. (Tab., I, p. 1213).

Dear brothers and sisters,
Ladies and gentlemen,
Madam Commissioner,

17. Islam has designated the Jahiliyyat as its opposite. It is not the West as such in opposition to Islam. Nor it is Islam as such in opposition to the West. Of course, Islam and the West are not in full agreement. The opposition is there as much as there is a Jahiliyyat in the West as an opposite of Islam. Not only in the West, but also in the East. Islam is in agreement with the East as much as the East is in agreement with Islam as an opposite to the Jahiliyyat.

18. If democracy is the political rule of a state, people have right to vote in a free and fair election. The state has no right to council the legitimate votes of the majority of people. Ex post fact criminal laws are not compatible with democracy. These laws belong to terrorocracy, i.e. to the world of Jahiliyyat. Why the results of the democratic election in the East are not legitimate? Why the results of the democratic election in Germany are

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legitimate? Does one dare even to ask about the legitimacy of the election in the West? Of course not.

19. The Muslim critique of the West is justified, if it is a critique of the Jahiliyyat. It is not justified, if it shows egoism. The Western critique of Muslims is justified, if it is a critique of the Jahiliyyat. It is not justified, if it demonstrates malignancy. We talk here about Islam as a victim of egoism and malignancy. The egoism is strangulating its spirit; the malignancy is killing its soul. The guilt of the state of the victim is equal. Neither Muslims nor Westerners are prepared to accept this guilt. Former because they think that they have an exclusive right to the past, and the latter because they believe that they have an exclusive right to the future.

20. Egoism is not necessarily negative attribute. It is sometimes positive. In creating new cultural and civilizational processes, it is even desirable as a motivation for personal recognition that produces common good. However, the egoism we mean here is such that does not open new processes for new achievements, but even closes the processes of old achievements. Such egoism is a result of a cultural insecurity rooted in human weaknesses rather than religious beliefs. The malignancy, on the other hand, if detected, is always negative because it does not allow the process of trust building between Muslims and the rest of the world.

21. Islam is in opposition to the Jahiliyyat because of its opposition to mythology as a false knowledge, to slavery as a state of human indignation, and to might as a way of compulsion. Islam is on the side of Science, Freedom, and Right. Indeed, of such science that equally discovers the truth and falsehood, of such freedom that gives man and woman the equal chance for better not for worse choice, and of such a rule of right that provides a decent human life.

22. The opposition to the worldview of Jahiliyyat is not a matter of one time. It is a matter of a continuous relation between two opposites that should be recognized by each and every

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generation. The Jahiliyyat (Ignorance) is not an effect, but a cause for covering the lie. Then, the Kufr, which means the covering the truth, is not an effect, but the cause for a falsehood (shirk). The truth cannot be seen unless the falsehood is discovered. The lie cannot be recognized unless the truth is indicated. Islam is in opposition to the world of Jahiliyyat because it courageously uncovers the lie (kufr), it clearly indicates to the falsehood (shirk), and it decisively rejects the compulsion: (La ikrahe fi el-din) "There shall be no compulsion in religion," but we should read also: "There shall be no compulsion in atheization or secularization". There is no difference between a compulsive islamization and an arbitrary atheization or secularization. Those who are born as Muslims have an inalienable right to refuse the deislamization of the Muslim society by a compulsive secularization. Therefore, the state that compels the people to secularization is not a democratic state. It violates the basic principle of the Universal Declaration of the Human Rights, i.e. the principle of freedom of thought, conscience, and religion.

23. It is in the state of Jahiliyyat (Ignorance) that people tend to produce Myths that cover the true knowledge; it is in the state of Jahiliyyat that the people's will for Freedom is killed and slavery justified; and it is in the state of Jahiliyyat that the rule of Might may dominate the lives of people. The issue here is not believing or disbelieving, but rather knowing or ignoring the consequences of Jahliyyat (Ignorance) about the truth and lie, the fact and falsehood, and the right and wrong. Therefore, a comprehensive education is our salvation.

24. We know that all revealed religions have come from the East to the West including Islam. Therefore, none of the religions has a priority, but all of them should have the equal opportunity to prove their merit. Islam is everywhere, in the East and in the West, in the North and in the South. The position of **between** is not sustainable anymore. An Islamic experience in the location and the position of the Western world is obvious. It is a unique experience , and it should be because it enriches the legacy of the whole Islam.

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25. I do not want to tell the people in the West whether to insist on perceiving Islam as a threat or otherwise. They have right to their own perceptions or deceptions. But I do want to tell the Muslims that it would be a great mistake to perceive the West as an evil and to confront Islam with it. Of course, it is easier to put Islam in front than to be in the front of moral and intellectual demands. Muslims should be honest to recognize that they need Islam to defend them rather than Islam needs their defense. Islam needs a genuine and sincere comprehension not apologetic cry.

26. It is the Message of Islam that brought the universal principle of enjoying the good and condemning the evil (*al-amru bi-l-ma'rūfi wa al-nahyu 'ani-l-munkari*). It does not matter where it comes from. If good comes from the West, Islam approves it. If an evil comes from the East, Islam disapproves it. This is the criterion by way of which Islam transcends geographical, national, cultural and political boundaries. This is the spirit that carried out the spread of Islamic Message to the whole world. It would be, therefore, a crime to hold this universal idea in a prison of one geographical campus or one national color, or one political window.

27. Don't we know that it was the overall Islamic spirit that saved the very substance of the today's western civilization? Don't we remember that the road for ideas of Mythology to Science, of Slavery to Freedom, of Might to Right, of the Theory of State to the Legitimacy of State, had been opened in Baghdad, Cairo, Kayrewan, Cordoba, and elsewhere? Don't we recognize that the freedom loving individuals from the West had been seeking the intellectual shelter in the Muslim East?

28. Now, this has been changed. Baghdad is not anymore what it used to be, and Cordoba is not there where it should be. Today the freedom loving individuals from the Muslim East are seeking the intellectual shelter at Oxford, Sorbonne, Harvard etc. The books that used to be studied in Baghdad and Cordoba are studied now in London and Paris.

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29. If by chance the great scholar of jurisprudence al-Shafi'i (767-820) would have come back and if he would have liked to advance his knowledge in constitutional law, he would be, I suppose, very much interested to read Magna Carta (1215) and what followed by it. He would find in it something that is acceptable to his own system of thought, something that is not acceptable, and something he would modify to bring it into the letter and the soul of his identity. More importantly, he would enrich this historic legal document with his own thoughts. I am sure that al-Shafi'i would participate in the writing of the Universal Declaration of Human Rights and other International Conventions.

30. Imagine how it would be like to have a discussion between al-Farābī (870 - 950) and Immanuel Kant (1724 -1804) about God, Soul and Freedom. Suppose a meeting between al-Ṭabarī (839-923) and Edward Gibbon (1737-1794) and their discussion about the history and the Rise and Fall of civilizations; between al-Bīrūnī (973-1050) and Sir Isaac Newton (1642-1727), as well as between al-Jahiz (c.776-868-9) and Darwine (1809-1882) about fundamental physics and the origin of man.

31. I am sure that all of us would be happy to see Ibn Khaldun (1332-1406), Max Weber (1864-1920) and Arnold Toynbee (1889-1975) sitting together and talking about 'umranun, the types of social organizations and new challenges.

32. Would it be a threat or an evil for Ibn Sina (980-1037) to meet with Goethe (1749-1832; for René Descartes (1596-1650) to learn from al-Ghāzalī (1058-1111); for al-Shahirstānī (1076-1153) to listen to Mircea Eliade (1907-); for Ibn Rushd (1126-1198) to walk on a London street with Alfred Whitehead (1861-1947); for Ibn Taymijah (1263 - 1328) to reflect on the idea of the Social Contract of Jean-Jacuqe Rouseau (172-1778).

Madam Commissioner,

33. The threat is not in Islam but in our spiritual disability to meet the universal moral demands; the evil is not in the West, but in our cultural insecurity to open our eyes and minds to see

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intellectual challenges that are every day bigger and bigger. It is time that Islam be seen as a spiritual blessing in the West and that the West be seen as a call for an intellectual awakening in the Muslim East.

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NATIONS UNIES

OFFICE DU HAUT COMMISSARIAT AUX DROITS DE L'HOMME - GENEVE

SEMINAIRE DU 9 AU 10 NOVEMBRE 1998

«L'ISLAM ET LES DROITS DE LA FEMME»

COMMUNICATION DE MONSIEUR MAMADOU BOBO DIALLO, CONSEILLER JURIDIQUE DELEGUE DE LA REPUBLIQUE DE GUINEE

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- Bismillaye Rahmâni Rahîmi
- Madame le Haut Commissaire aux Droits de l'Homme,
- Monsieur le Secrétaire Général de l'Organisation de la Conférence Islamique,
- Mesdames, Messieurs les Experts,
- Mesdames, Messieurs,

Je tiens, au nom de mon pays, la République de Guinée, à vous remercier vivement de nous avoir invité à participer aux travaux de ce séminaire qui facilite le dialogue des cultures.

C'est pour moi un honneur fort agréable que de faire un exposé devant cet aréopage de juristes éminents et intellectuels reconnus.

« Enrichir l'universalité des droits de l'homme : Perspectives Islamiques sur la Déclaration Universelle des Droits de l'Homme », tel est le thème général retenu pour nos travaux.

Au titre de notre contribution, nous avons choisi de présenter le sous-thème intitulé : « L'Islam et les Droits de la Femme ».

Ce séminaire, convient-il de le rappeler se tient à la veille du cinquantenaire de la Déclaration Universelle des Droits de l'Homme. Pour cela, il vient à point nommé : que ses travaux soient consacrés à la perception des Droits de l'Homme du point de vue islamique est une initiative fort heureuse du Haut Commissariat aux Droits du même nom.

La promotion et la protection des Droits de l'Homme sont devenues de nos jours une préoccupation prioritaire des gouvernements, de l'Organisation des Nations Unies et des Organisations Non Gouvernementales de défense des droits de l'Homme.

La tenue de ce séminaire en est bien une illustration éloquente.

Je voudrais après cette brève introduction faire quelques réflexions sur les droits de la femme en Islam. L'exposé qui vous est soumis est structuré ainsi qu'il suit :

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A) Bref rappel de la condition de la femme dans les sociétés préislamiques ;
B) Statut juridique de la femme en Islam.

C) Perspectives islamiques sur la Déclaration Universelle des Droits de l'Homme.

A)- Rappel de la condition de la femme dans les sociétés préislamiques.

Le problème de la femme se pose encore aujourd'hui avec une certaine acuité surtout en matière de droits dans un monde où malgré des acquis remarquables, les sequelles de sa domination par l'homme demeurent vivaces.

Avant la Révélation du Message divin au Prophète Mohamed (PSL), la femme était traitée en paria de la société, un être sans droit. A sa naissance déjà, on lui reservait un accueil mitigé pour ne pas dire froid. Les hommes souhaitaient beaucoup de garçons et peu ou pas de filles. Reçue au sein de la famille comme une fatalité, cette opinion défavorable la marquera pour toujours. Elle est comme subie mais non admise. On commence à penser à son mariage dès son jeune âge.

Une fois épouse, elle cherchera à ne pas rendre cette fatalité insupportable pour son mari. En tant que mère, elle vit comme une pénible infirmité le fait de n'avoir que des filles ; un sort redoutable pour sa condition sociale.

Qu'on en juge plutôt. A l'époque préislamique on n'hésitait pas à éliminer les filles dès leur naissance en les enterrant vivantes, parfois. A l'époque, la femme ne jouissait d'aucune capacité juridique. Elle était sous tutelle « ad vitam aeternam » et constituait ainsi une charge soit pour son père soit pour son mari.

Souvent pour des raisons économiques, ceux qui en avaient la charge, s'en débarrassaient comme au temps de la commune primitive où on éliminait les esclaves, faute de revenus suffisants pour leur nourriture.

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Au sein de la famille, la femme ne commence à jouir d'une vraie considération que lorsque ses enfants mâles auront atteint la

maturité. C'est en effet, à partir de ce moment que l'attitude du mari à l'égard de son épouse commence à changer.

Cette perception de la femme sans âme humaine, considérée comme un objet pur et simple va changer sous l'action éclairée du Prophète Mohamed (PSL). Cela nous amène à aborder le second sous-chapitre qui s'intitule :

B – Statut Juridique de la Femme en Islam

Pour apprécier à juste titre les droits de la femme en Islam, il semble judicieux, comme l'ont fait remarquer certains islamologues de distinguer l'Islam comme doctrine et l'Islam comme expression du Message divin.

Des islamologues soulignent qu'il est inexact de prétendre que la doctrine musulmane affirme une égalité des droits de l'homme et de la femme. Des restrictions existent, affirment-ils : la femme, ne peut pas être Imam, ni juge ; inégalité des deux sexes quant à l'administration de la preuve testimoniale ; en matière successorale, la femme recueille la moitié de la part de l'homme. Ces cas ne sont qu'illustratifs au regard des thèses défendues par la doctrine.

Pourtant, la doctrine devrait être là aussi, l'ensemble des avis et opinions sur le droit, partagés par les praticiens du droit eux-mêmes inspirés par la loi coranique. Mais l'on ne saurait affirmer qu'elle est l'interprétation du Coran et par conséquent du Prophète. Ici, on fait jouer à la femme un rôle effacé, son avis est ignoré au point où le droit musulman jugerait que son silence est synonyme de consentement en matière de mariage ; que son témoignage n'est requis qu'en cas de force majeure.

Pourtant, la femme peut, et c'est vérifié, jouer le rôle de conseillère écoutée, à l'image de Kadidja qui a eu une influence remarquable sur son illustre époux, le prophète Mohammed (PSL).

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En revanche, l'Islam, en tant qu'expression du Message divin proclame l'égalité en droit de l'homme et de la femme.

La dignité inhérente à la personne humaine est proclamée par le Coran qui dit : « Nous avons donné de la noblesse aux fils d'Adam ». Le Coran ne fait aucune distinction fondée ni sur la race ou le sexe, ni sur l'origine sociale ou la fortune.

Le Prophète Mohammed (PSL) a dit : « Dieu embrasse dans sa sollicitude la création toute entière et le plus aimé des hommes est celui qui assure les meilleurs services à la famille humaine dont Dieu a la charge ». Ici, « le plus aimé des hommes » s'entend de l'espèce humaine sans distinction de sexe. Dieu n'a de préférence que pour qui est serviable, donc généreux envers l'humanité.

Mieux, le Prophète (PSL) a dit : « les femmes sont les sœurs des hommes ». Il s'ensuit que les hommes et les femmes procèdent « du même souffle divin », tel que c'est dit dans le Coran, aucune inégalité juridique en raison du sexe n'est admise. L'Islam admet l'homme et la femme au bénéfice de droits égaux.

Le professeur Mr. Edouard Montet alors à l'Université de Genève dans son introduction à la traduction du Coran écrivait : « Des progrès d'une portée infinie ont été accomplis par les réformes de Mohammed (PSL) à tel point que Mohammed peut être compté au nombre des plus grands bienfaiteurs de l'humanité... La seule réforme de l'interdiction absolue du meurtre des filles à leur naissance aurait suffi pour assurer à Mohammed un nom inoubliable dans l'histoire de son temps. »

Toutefois, des exceptions qui confirment la règle de l'égalité font place à des inégalités apparentes.

1. Le Coran a prescrit qu'en matière successorale, la part de la femme est équivalente à la moitié de celle de son frère. Cette inégalité apparente serait en rapport avec la répartition des tâches sur le plan économique. C'est à l'homme qu'incombe la plus grande partie des tâches les plus difficiles à exécuter. L'homme prendra à sa charge toutes les dépenses nécessaires aux survivants de la famille du défunt. Et c'est l'homme qui doit

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assumer les dépenses nécessaires à l'entretien de la femme. Sur la question une règle juridique tranche nettement qui dit : « Le

profit doit être équivalent aux charges et les charges équivalentes au profit ».

Il s'agit en clair non pas d'inégalité, mais de différence naturelle dans l'aptitude à exécuter les tâches.

La doctrine islamique n'a pas tenu compte de cette considération. Elle a freiné l'émancipation de la femme que le Prophète (PSL) a favorisée par l'interdiction d'abord de l'enterrement des filles à leur naissance, et la proclamation ensuite de tous les droits de la femme.

2. Certains observent de même que la polygamie telle qu'elle existe dans la société musulmane consacre l'inégalité de l'homme et de la femme.

Il convient de préciser à ce niveau que ce n'est pas l'Islam qui a introduit la polygamie ; celle-ci est anté-islamique. Par contre l'Islam, lui, l'a limité et reglementé.

Du point de vue islamique, la polygamie qui a été limitée à quatre épouses protège la femme contre les abus. L'Islam prescrit que toutes les épouses soient traitées également par leur mari, faute de quoi celle qui se sent frustrée est admise à demander soit une juste réparation, soit le divorce.

Et l'Islam fait du mariage un véritable Contrat passé entre l'homme et la femme ; contrat au terme duquel la femme doit exprimer librement son consentement ou non au mariage.

Passons maintenant à l'examen du dernier sous-chapitre.

C)- Perspectives Islamiques sur la Déclaration Universelle des Droits de l'Homme.

L'approche thématique de la Déclaration Universelle des Droits de l'Homme, sous une perspective islamique est fort opportune.

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Nous venons de constater que l'Islam et le Messager de Dieu, le Prophète Mohammed (PSL) ont apporté en leur temps des mesures au demeurant fort révolutionnaires qui consacrent l"galité des êtres humains. C"tait à une époque où même la civilisation judéo-chrétienne qui est antérieure, n'avait pas proclamé cette égalité.

Au regard de la Déclaration Universelle, le Droit islamique n'est pas en opposition avec les chapitres qui y sont développés.

Le Coran dit : « Nous avons donné de la noblesse aux fils d'Adam ». Et le Prophète Mohammed (PSL) d'ajouter : « L'Arabe n'a aucun mérite sur le non-Arabe, ni le Blanc sur le Noir, si ce n'est que par la piété. » « Les biens et le sang des autres sont sacrés ».

Ici, dans la citation du passage du Coran, il est proclamé l'égale dignité des êtres humains et le Prophète d'ajouter sans distinction aucune, notamment de race ou de couleur.

La protection de la vie, de la sûreté de la personne et de la propriété privée est consacrée en Islam.

Ces chapitres sont développés dans la Déclaration Universelle des Droits de l'Homme.

Des chapitres pertinents de la Déclaration traitent respectivement de l'interdiction de l'arrestation, de la détention et de l'exil arbitraire d'une personne; de l'égalité devant la loi et de l'indépendance des tribunaux; de la présomption d'innocence jusqu'à ce que la culpabilité ait été légalement établie.

Pour l'application des peines prévues aux cas d'actes délictuels, il est dit en Islam comme dans la Déclaration Universelle que les peines légales sont antérieures aux délits qu'elles atteignent, sauf cas d'interprétation des principes généraux en droit islamique.

De même que la Déclaration Universelle des Droits de l'Homme développe sur la justice et la paix, le Coran proclame : « O vous qui croyez en Dieu, entrez tous dans la paix ». Le Prophète de poursuivre : « Le vrai Musulman est celui qui ne fait du tort à son

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prochain ni par la parole ni par les actes ». L'Islam prescrit la justice et la charité. « Dieu ne vous empêche pas, à l'égard de ceux qui ne vous ont pas combattus pour la religion et ne vous ont pas chassés de vos demeures, de leur faire du bien et de leur rendre justice. Dieu aime la justice. »

Il est aisé de noter ainsi, une parfaite concordance entre l'Islam et la Déclaration Universelle sur le contenu à donner aux mots « Paix », « Justice » et « Charité ».

Toujours au titre des droits de l'homme, le Coran ordonne de développer la sécurité sociale par la solidarité. Il prescrit aux hommes d'assurer à chacun une existence digne et de le libérer du besoin et de la pauvreté. Ceci est bien repris aux articles 22 à 25 de la Déclaration Universelle sur les droits économiques et sociaux.

Aux articles 26 et 27 de la Déclaration Universelle il est fortement question du droit à l'éducation gratuite à laquelle peut prétendre chaque être humain.

Il est dit et écrit au paragraphe (2) de l'article 26 que : « Elle (l'éducation) doit favoriser la compréhension, la tolérance et l'amitié entre toutes les nations.... «

Au paragraphe (3) du même article, il est dit et écrit : « Les parents ont, par priorité, le droit de choisir le genre d'éducation à donner à leurs enfants ».

Le Coran dit que pour qui veut renforcer sa foi en Islam, et faire œuvre de piété, doit apprendre, se former et se former toujours. Car celui qui ne connaît pas le Coran et ses prescriptions ne peut se dévouer ni à Dieu ni à plus forte raison à la société.

En islam, les droits culturels et à l'éducation ont un caractère obligatoire qui pèse à la fois sur l'individu et sur la collectivité.

Si au plan des droits de l'Homme, l'Islam et la Déclaration Universelle des Droits du même nom ont beaucoup de points communs, il faut noter cependant les différences et parfois même les divergences qui

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procèdent, pensons-nous, de circonstances historiques et sociologiques :

a)- Les Droits de l'Homme tels qu'ils sont conçus et élaborés dans la Déclaration Universelle résultent de la double et funeste expérience tirée des deux guerres mondiales. En effet, la gravité des violations massives de ces droits a pesé si lourdement sur la conscience des peuples,
qu'il fallait prévenir de tels manquements. Le tribunal militaire international de NURENBERG avait jugé les crimes les plus odieux.

Dans les pays de civilisation judéo-chrétienne, le régime de la laïcité avait séparé l'Eglise du pouvoir temporel.

Le Droit islamique, en revanche, procède à la fois du Livre Saint et de la SUNNA tels qu'ils ont été diffusés par le prophète. Les sociétés islamiques, elles, n'ont pas subi directement ces bouleversements. Dans bien des pays musulmans modernes, la Charya est en vigueur et l'Islam la religion de l'Etat.

D'ailleurs, l'on est tenté de se demander si à un moment ou à un autre de son histoire, l'Islam n'a pas connu une hybernation intellectuelle qui a constitué un handicap à l'éclosion et au développement de la Science et de la Technologie. Surtout losqu'on sait que c'est précisément grâce à la Science et à la Technologie que l'Occident a acquis la puissance dont il s'est servi pour imposer sa culture, et donc sa civilisation aux autres peuples.

b)- En fait de Droits de l'Homme, il convient de constater que même dans les pays chrétiens, tous les droits, notamment ceux de la femme ont connu un accouchement difficile. A preuve, les mouvements féministes des 19è et 20è siècles en Europe et en Amérique étaient une réaction à l'Inégalité.

C'est dire que, en islam comme dans la Déclaration Universelle des Droits de l'Homme ainsi que dans les législations nationales, les règles formelles sont souvent en opposition avec les réalités.

Mais l'évolution amorcée depuis une dizaine d'années tend vers une agrégation des Etats en groupements sous-régionaux voire régionaux. Ces groupements passent nécessairement par

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l'harmonisation du droit, et donc des législations nationales sur plusieurs matières.

L'interdépendance très prononcée aujourd'hui des Etats les conduira inexorablement vers l'universalité des Droits de l'Homme.

Il est à regretter toutefois l'inexistence sur le plan institutionnel international d'organes chargés de réprimer les violations de ces droits. Une évolution récente laisse cependant à penser que les peuples ne tolèrent plus l'impunité de ces crimes.

L'adoption récemment du statut de la Cour Criminelle Internationale en témoigne, même si au demeurant sa compétence reste limitée et la procédure de sa saisine sujette à bien des controverses.

Je vous remercie.

Assalamou Alaykoun Warahmatoulaye Taala wabarakâtouhou.

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"Human Rights in contemporary Muslim thought"

By:

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Contemporary Muslim Thought and Human Rights

By Ridwan Al-Sayyid*

In 1977 , and in collaboration with my colleague Prof Ma'an Ziadeh , I undertook the translation into Arabic Franz Rosenthal's book , The Muslim Concept of Freedom (1960) who is a well-known orientalist In fact , it was my colleague , Prof. Ziadeh , who deemed it appropriate to translate the abovementioned book and I thought it proper to seize this opportunity to improve my command of the English language However , the first chapter of the book disturbed me to the extent that I seriously considered to terminate my participation in this undertaking because Prof. Rosenthal maintained from the outset that Muslims in the Muslim Middle Ages did not possess a concept of human freedom comparable to the concept possessed by the ancient Greeks ; rather , they maintained that the free individual is the one who is not a slave ; as a result , and contrary to what I had intended , I completed the translation with my colleague. Moreover , I attempted to correct the writer in the introduction to the translation where I said that it is idle talk and lack of vision not to see the extent of human freedom in a world civilization like the Muslim civilization - praised by Rosenthal himself in several books written by him - except in following the linguistic meanings of the term " freedom " and its derivations only When the translation was published in 1978 , our sole consolation was that those who reviewed it in the various periodicals wrote that the ideas appearing in the first chapter of the book were those of an orientalist fanatically apposed to Islam

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(it is a well-known fact that it is extremely easy for contemporary Arabs and Muslims to discredit all opinions that they dislike by attributing them to orientalists or their agents and collaborators in our societies and universities) . However , Mrs . Ann Elizabeth Mayer in Islam and Human Rights , Tradition and Politics , 1991) does not limit her criticism to ancient Islam but strongly condemns modern and contemporary Muslim thought ; she prefers the classical to the contemporary period . Muslim critics if her book were not satisfied to accuse her of being an orientalist only but went beyond that to accuse her of Western arrogance that harbors strong enmity to Islam and Muslims .

To highlight the general disputational and contesting atmosphere prevailing during the period of the discussion of basic human freedoms int the Arab , and perhaps the Muslim world , I will quote at length from a lecture entitled : (1) " Islam and Human Rights , Controversy and Agreement " . The author of this article is a nationalist and not an Islamist . He is the well-known Egyptian thinker and legitist 'Ismat Sayf-ad-Dawla . The lecture begins as follows : " I must admit that I am not a supporter of the Universal Declaration of Human Rights that the United Nations Organization issued on December 10,1948 . Our history of civilizations has taught us to be wary of big and noble words as the reality of our history has taught us how big words could be transformed into atrocious crimes . We cannot forget that the initiators of the Declaration of Human Rights and the plain French citizens are the same people who shortly afterwards , and before the ink of the Declaration has dried up organized a compaign and sent their forces under the leadership of their favorite general , Napoleon , to Egypt . And we do not forget that the United Nations Organization issued the Universal Declaration of Human Rights in the same year that it recognized the Zionist state that usurped Palestine and robbed its people of every right stipulated in the Declaration including the right of life . " Sayf-ad-Dawla also said other thirgs related to the Camp David Accord

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and now the Egyptian , and consequently the Arab , people were compelled to behave those who conquered and occupied their land and who refused to recognize the Palestinian people's right of self-determination . Sayf-ad-Dawla's uneasiness stems , therefore , from the contradiction between word and deed among westerners despite the beauty and truth of the word. Furthermore, he is not disturbed and rejects the Universal Declaration of Human Rights for the above reason only , but also for a more fundamental reason , namely , that the declaration is based on Natural Law . The Muslim does not feel committed to this Law nor does he feel its importance , necessity or authority . The Muslim cannot secure the aspiration , necessity and commitment unless these rights are based on Sharia as a source and authority . However , Sharia includes provisions and possesses a history that creates differences and causes distinctions between men and women , Muslims and non-Muslims , and relations of Muslim states with other states . But Sayf-ad-Dawla admits one difference that the Muslim states objected to which is stated in Article 16 of the Declaration : " A man and a woman , having reached the age of marriage , have the right to marry and form a family unrestricted by race or religion . And they have equal rights at marriage , during marriage and upon its dissolution "(2) One last phase of the criticism of the philosophy of the Universal Declaration of Human Rights is , according to Sayf-ad-Dawla , the following : it is the individualistic tendency or philosophy on which the Declaration is based . The individual , every individual , is placed in the position of a confrontation with the group , any group .

What'Ismat Sayf-ad-Dawla said in the above-mentioned lecture points to the existence of a prevailing view among the educated in the Arab world that goes beyond the Islamists to include a broad segment of the nationalists and perhaps it goes even beyond to include those who are not classified in either group . This opinion or impression signifies deep suspicion in all the West and what originates from the West because of its hegemony of the world and its double standards and criteria . That is not all that is for it . The lecture points out the depth and

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extent of the Muslim Awakening. For after a century and a half of Western penetration of the Muslim world on all levels (3), the ultimate authority reverts to Islam and Sharia. Hence, the idea of Natural Law, the basic mentor of liberalism, becomes subject to suspicion and condemnation. Furthermore, the Universal Declaration of Human Rights is accused of excessive individualism despite the fact that the United Nations itself, the organization that issued the Declaration, is an institution for group work in which nations, states and peoples are represented and not individuals.

This does not, however, mean that the leaders of the movements of political Islam are not concerned with human rights issues. On the contrary, they costitute the main opposition to the majority of regimes in the Muslim world. From among their ranks come the majority of prisoners, the victims or confrontations with governments and their political and civil rights have been grossly violated. For a while, the scene appeared frivolous and horrifying. For at the time that the popular majority supported them, many of their leaders were busy debating against democracy. And at the time that peaceful transfer of political power was in their favor, they were - and some still, advocating change by force. Moreover, at the time that the masses were waiting for a signal from them to stand behind them in the process of change, they resorted to actions that terrified the masses and alienated them. However, once they realized that they have become an authentic political party in the social and political arena, the principal groups occupied themeselves with the issues of liberties, human rights and political liberties. They have learned to discuss with the other parties in the arena by using the same " language " without forgetting their particular thesis : The ultimate authority or marji'ya and implementation of shari'a and the Islamic state. They fell back in that endeavor on the legacy of the 1930s by attempting to present an Islamic one-to-one correspondence of every issue the Muslims considered to be a positive contribution of the West. Disappointment of the West marked this stage thus intensifying the disputational nature of the theme and making

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the Muslim options preferred. When the rift happened in the 1960s, the matter became purely discutational and one of complete rejection. In the 1980s, matters reverted to relative tranquility which ushered in a discourse of everything related to rights and liberties with purports similar to those rejected earlier. This discourse was expressed in Muslim vocabulary and terminology while insisting on the right to be different or at least distinctive. Instead of the natural law was God's deputyship, instead of human rights was the legitimate rights stipulated by shari'a, instead of democracy was shura or consultativeness and instead of parliament was the body of influential people or ahl al-hall wal-'aqd. Leaders of the Muslim awakening gained this cultural battle, i.e., the battle of terminology and forced their opponents to deal with the issues that they raised. These leaders are also still struggling to score a breakthrough of the political arena in many contries. In this discourse, I will survey the gist of the theology of human rights as formulated by the thinkers and advocates of the Muslim awakening though not all of them are partisans. The survey includes three sections. First, God's deputyship by man; Second, human rights extracted from shari'a; Third, compare two Muslim declarations of human rights issued in 1981 and 1992.

II

God's deputyship of man on Earth is based on the Coranic verses stating that came in Surat Al-Baqara, verse 30: "And when thy lord said unto the angels: Lo! I am about to place a viceroy in the earth, they said: Wilt Thou place therein one who will do harm therein and will shed blood, while we, we hymn Thy praise and sanctify thee? He said surely I know that which ye know not." Also what came in Surat Al-An'aam, verse 165: "He it is who hath placed you as viceroys of the earth." And also Fatir, verse 39: "He it is who hath made you regents in the earth; so he who disbelieveth, his disbelief be on his ownhead." There was no disagreement among ancient interpreters of God's

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deputyship in itself , but they disagreed as to its meaning . Some said that it means that the existing human species succeeded earlier creatures on earth . It inhabited and built the earth . This is based on hints in other Qoranic verses addressed to the prophets' communities as successors to those who preceded them(4) . Others said that deputyship was there from the very beginnig as it is clear from the verse stated in Surat Al-Baqara(5) . Modern interpreters cite both points of view . But the majority of them tend to support the second point of view especially the interpreters of the Muslim awakening age (6) . However , the difference between the interpreters of the first half of the twentieth century and the interpreters of the Awakening is not confined to favoring the second point of view to the first point of view ; rather , there is disagreement on how to approach the issue as well as the context . In addition there is disagreement as to the position of the idea of deputyship in the general arrangement of things on what each party builds upon this idea or vision . Muslim reformists as well as thinkers of the Awakening consider God's deputyship of man evidence of what God has bestowed on him in the way of care , respect and glorification. Muhammad 'Abdallah Draz - an untraditional reformist -gives a detailed description of the issue of dignity . For him , dignity is of three types (7) : First , dignity that originates from the humanity of man as stated in the koranic verse from the Al-Isra' surah , verse 70," Verily we have honoured the Children of Adam . We carry them on the land and the sea , and have made provision of good things for them , and have preferred them above many of those whom We created with a marked preferment " . Second , dignity derived from man's faith in divine revelation as stated in the Qoranic verse from Surat Al-Munafiqun , number 8 , " When might belongeth to Allah and to his messenger and to the believers ; but the hypocrites know not " . Third , dignity derived from the performance of good and useful deeds by man who has understood the requirements of God's deputyship as stated in the Qoranic surah , Al-Tawba , verse 105, " And say (unto them) : Act! Allah will behold your actions , and (so will) his messenger and the believers " . Hence , the two viewpoints separate after having agreed before that deputyship is

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dignity and honoring of man . The reformers would say that the mentioned honors in which God preferred man to all other creatures are based on two distinctive attributes : Reason and freedom (8) Deputyship means the building and the reforming of the universe and this task can only be achieved by the wise and free who act and are capable , by the requirement of free action , to be responsible for their actions But the thinkers of the Awakening consider reason and freedom are the purpose though in another context that is related in its general concept to the worship of God . The Qoran states in surat ad - dariyat verses 56-58, " I created the jinn and humankind only that they worship Me I seek no livelihood from them , nor do I ask that they should feed Me . Lo! Allah I He it is that giveth livelihood , the lord of unbreakable might " . The concept of God's worship includes the building of the universe in accordance with deputyship . Because God is the object of worship , he is the one who defines the manner of his worship . That is the significance of the sending of messengers , the holy scriptures and divine law. They are all intended to show the way to faith , worship and obedience for humankind . Divine laws are not intended to compel human beings to believe for this means the absence of responsibility ; The purpose is to urge the rational and free man to realize that his interest in this world and the hereafter relies on understanding the requirements of creation and man's responsibility toward his creater who created him and to whom he will return (9) Here we find the beginning of the concept of Hakimiya or God's governance in the thought of the fundamentalists of the thinkers of the Awakening . Sharia is God's program that was revealed through his messenger to mankind for " Whoso judgeth not by that which Allah hath revealed ,such are disbelievers " . (Al- Ma'ida , Verse 44) . For whoever does not follow God's divine law , he will be ignoring the main goal of the creation of the universe and the deputyship of man (10) The concept of Hakimiya or God's governance was advocated by Abu-Al-A'la Al-Mawdudi (d.1981) , the well-known Pakistani thinker and propagated among Islamists in the Arab world by the Egyptian thinker Sayyid Qutb (d.1966) who was executed in Egypt after his accusation of being the leader of a secret organization whose aim was to topple the

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governmentally . But members of the principal trend of the Egyptian Muslim Brotherhood answered his book , Milestones Maalim fi At-Tariq in a book entitled , Dular La Qu-dar , in which they argued that there is a big difference between Hakimiya or governance as manifest or ultimate legitimacy of the state and society , and tadbir (government) or people exerting individual judgement with their minds and freedom in the management of the affairs of their daily life . Sharia is intended as an ultimate authority and not control of all the details of human life thus denying men the freedom and ability to move and act . People are to follow the requirements of the divine text whose meanings are infinite , consequently the course of sharia and its ordinances can be transformed in the course of time , because its intention to giude the People , not to Punish them when suspected of error and deviation (12) .

However , men of the Awakening , whether fundamentalists or not , agree on the next step in man's vision and his rights in confronting the reformists' vision . I mean by the next step the concept of amana or trust as stated in the Qoran . The Qoran states (The Ahzab surah; verse 72) . " Lo! We offered the trust unto the heavens and the earth and the hills , but they shrank from hearing it and were afraid of it . And man assumed it . Lo! he hath proved a tyrant and a fool " . Ancient interpreters of the Qoran were used to interpret this term as meaning Islam , faith , Sharia or God's obligation (Taklif) which is based on reason (13) . They were followed by the reformists who concentrated their attention on Taklif or obligation(14) . in fact , the interpreters of the Muslim awakening advocated full and special understanding of this concept and they considered the trust of God's obligation or amanat-at-Taklif the implementation of God's divine law on earth (15) . On the other hand , the new reformists considered trust or amana as the responsibility that must be shouldered by the Muslim vis-a-vis himself , his society and his world (16) . Some of these reformists cite verse 143 from Surat al-Baqara in support of their view point . The verse is "Thus We have appointed you a middle nation , that ye be witnesses against mankind , and that the messenger may be a

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witness against you " . The " middle community " views itself as shouldering a moral responsibility towards mankind and that is the significance of its witness against people . As a matter of fact and a consequence of this responsibility is witnessing for and not against mankind . Some say that the concept of witnessing approaches in significance the concept of witnessing in modern Christian thought (17).

Therefore , the concentration of the Muslim awakening movement on sharia and the authorization for man to implement it has led to the discussion of maqasid ash-shari'a or intentions of sharia and , consequently to the discussion of human rights or legitimate rights . The subject of the intentions of sharia is not a discovery of the thinkers of the Awakening or of the Muslim Brotherhood . The Muslim reformists in the Arab world , East and West , beat them to it . Muhammad 'Abdu (d.1905) was familiar with Al-Muwafaqat , a book by the Maliki jurist of the eighth century H . Ash-Shatibi , which contains a long discussion of the intentions of sharia or the goals of basic divine laws . Soon enough', the word spread out about maslaha or interest , and the intentions of the sharia in the Maghrib , keep in mind that the Maghribis are Malikis and believe in principle of common interests and it is one of the sources of their school of law (18) . However , they all intended the discussion of the intentions of shari'a " to mean that our duty is to show deference to the " spirit of sharia " and its great goals and not to the text and wording only . As for Islamists , they employed the jurists'discussion about intentions of the Sharia to erect a Muslim edifice for human rights that is distinct from the Western edifice and the Universal Declaration of Human rights . Ash-shatibi said (19) , " We have concluded from sharia that it was revealed for the welfare of people " . Originally welfare (Masalih) is a term that denotes the bringing of a benefit or the avoidance of harm . Therefore , the intentions of sharia or its ultimate goals are five : To preserve their religion (the right of religion) , their selves (the right of life) , their minds (the right of reasoning), their offspring (the right of family) and their wealth (the right of property) . Jurists do not call these five points rights (huqug) but welfare

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of people (masalin al-ibad) that must be observed if they are necessary. These five points are necessary in their basic fundamentals but not in their branches and details. Ash-shatibi calls these unnecessary details hajiyyat (needs) or tahsiniyyat (embellishments)(20) depending upon its degree of importance to man's well-being.

It is observed that Islamists did not use this juristic interpretation in this form except in the past few years. As observed earlier , the jurists did not call these five principles rights but called them intentions or purposes . It is the Islamists who called them rights when used in this context. Furthermore , these intentions in the opinion of jurists are a legal capacity or authorization from God to people and not natural or semi-natural rights although Ash-shatibi says about them (21) : " They have said that they are at observance or mura'at in every religion". That is , their observance and realization are general , total and necessary for human welfare and not confined to the Muslim religion .

In line with highlighting the particularity of Islam and the distinctiveness of its intellectual system from Western systems , efforts during the Muslim Awakening multiplied to codify the principles of sharia either by formulating a Muslim constitution or by issuing a Muslim declaration of human rights. I will survey two Muslim declarations of human rights in an attempt to understand the chracteristics of the peculiarity and codification tendencies in the field of human rights in particular.

The first attempt carries the title : " The Muslim Universal Manifesto for Human Rights" (22) . The manifesto was fromulated by fifty Muslim thinkers and personalities under the auspices of the Muslim Council in London and it was declared in a meeting held at UNESCO headquarters in paris on September 19,1981. In the introduction to the manifesto , the writers assert that it is derived from the Holy Qoran and immaculate Sunnah. Therefore , the principles cited in it do not allow omission , modification , substitution or interpretation . They are eternal

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rights . After a preamble of twelve articles , the Manifesto is stated with a special concentration on rights which appear in twenty-three paragraphs . They are : The right of life , the right of freedom , the right of equality , the right of justice , the right of the individual to a fair trial , the right of protection from oppression of authority , the right of protection from troture , the right of the individual to protection of his honor and reputation , the right of asylum , the rights of minorities , the right of participation in public life , the right of free thinking , belief and expression , the right of religious freedom , the right of missionary work , economic rights , the right of ownership , the rights and duties of the worker , the right of the individual to self-sufficiency , the right to set up a family , the rights of the wife , the right of education , the right of the individual to protect his private possessions , the right of mobility and residence .

The second declaration is entitled : " Human Rights in Islam". It was formulated by a committee that consisted of : Adnan Al-Khatib , Shukri Faysal , Wahbi Zuhayli , Rafik Gouwaigati and Ismail Majid Al-Hamzawi . The committee was commissioned to formulate the declaration by the Organization of Muslim Conference in 1980 . The Organization did not examine it after its formulation , and , consequently , it was published by one of its authors in 1992 in Damascus (23) . This declaration agrees in form with the Universal Declaration of Human Rights more than the first . It presents twelve principles subdivided into twenty-five articles . The principles are : Basic rights , political rights , family rights , the right of citizenship and nationality , the rights of education , the rights of work and social security , the rights of earning a living and benefiting and literary ownership , the rights of trial , the right of mobility and asylum , the rights and duties during war time , sanctity of the dead and the limits and interpretation of this legitimate document .

The publisher , Adnan Al-Khatib , mentions that this manifesto is " the first codification of the principles of Muslim divine law or Sharia in what concerns human rights . " This part is

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followed by and enlarged explanation of the articles that were undertaken by Dr. Al-Khatib alone . He also states in it as well as at the end of the manifesto that its articles are taken from Sharia and it is the sole reference to clarify all ambiguities in the articles

As previously stated , the two manifestos insist that they are taken from the texts of the Qoran and Sunnah . However , the wording of the first manifesto is that of a group of intellectuals while the wording of the second manifesto is that of a group of legists . The first is truly a manifesto , but the second is a declaration whose formulators aspired to make it resemble the declaration of the United Nations in form at least . Furthermore , it resembles the U.N. declaration in content . Differences appear only when Adnan Al-Khatib begins to explain the concise items mentioned in it . As a result , questions such as equality between men and women , and apostasy emerge . The manifesto of the Muslim council does not speak in detail on these issues mentioned under " equality " and "religious freedom " . We do not actually know what the opinions of its authors are on these delicate issues . Althought they do not bring in anything new as far as Ijtihad and pending issues are concerned , they - and also similar attempts - are useful in educating common Muslims and clarifying the importance of the issue to them . What is clear , however , is that the formulators of the two manifestos did not have the Muslim public in mind but the Western educated elites in an attempt to justify their distinctiveness and their right to take this position . It is interesting to note that the formulators of the two manifesto do not mention jurisprudence (fiqh) , that is Ijtihad , that underlie the " intentions of sharia " as understood by the ancient jurists . They wish their explanation to be final in its certainty to stop any further debate . For this reason , the formulators of the first manifesto claimed absoluteness and infallability for it because it is directly derived from the Qoran adn sunnah . On the other hand, the formulators of the second manifesto mentioned that sharia is its sole source . They could have mentioned jurisprudence (fiqh) that answered the issue of intentions or ultimate goals (maqasid) which is not directly

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derived from a text of sharia but is sensed by reading between the lines. The issue of maqasid (intentions) appeared as a result of cultural and legal development that lasted for centuries.

III

At the opening of this lecture, I mentioned the names of two books : one by Franz Rosenthal and the other by Ann E.Mayer on freedom and human rights in the course of ancient and modern Muslim context. I have mentioned that both books are many short comings. Furthermore, Muslim reactions to them were ungratifiying. The first book have an example of traditional orientalism that had some benefits, but which remains of narrow scope and philologist bent. The second reduces the question to an cultural issue and it states that contemporary Muslims do not possess the culture that entitles them to be concerned with human rights ! Muslims did not critically examine the allegations stated in both books which could serve man's situation at present and in the future ; instead, they were satisfied to condemn and accuse the writers of conspiracy and egocentrism. It is not true that Muslim intellectuals are not concerned with the issues of human rights and democracy. In the past years, and after they have become an important political party in most of the Arab countries, Muslim intellectuals embarked on writing and publishing works on these issues. They employed their terminology and asserted the distinctions between Western and Muslim points of view on human rights (24). They insist on separating between the democratic or liberal philosophy on the one hand and the right of people or umma to express its will in any manner - including elections - on the issues that are directly related to its interests and the management of its affairs. They consider that philosophy and the ultimate authority is for God and not for people which would render the authority of the majority limited by the limits of sharia. It is interesting to point out that they fear for sharia from the opinion of the majority or from most Muslims who are supposed to abide by the rulings of Sharia. At the time that the fundamentalists among them stress the importance of the head of authority who will assume the power to

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implement sharia , the moderates among the leaders of the Awakening insist that the powers given by sharia to the ruler are meagre . This latter group says that authority is for the sharia and not for individuals and organizations even though they are elected . This conceptuatization in both forms suffers from too much emphasis on theology that permeates all its parts . This makes God or his sharia the direct source for everything that pertains to human rights which , in their opinions (25) are originally Takalif or God's ordinances and not rights . They believe that when they affirm the divine origin of rights and duties they would be giving them greater power without observing that their viewpoint in most of its elements is independent interpretation and invention that they had undertaken and not a matter that is textually stated . Hence , the greater weakness in the Islamist viewpoint on human rights is the process that they call ta'sil or authentication (26) that is , the attempt to ascribe to what conclusions they reach in the way of independent interpretation to a fixed and certain origin in sharia to give these opinions power and clarity on the basis of their revealed origin . Furthermore , evidence cited is artificial in many cases . What is a cause of wondernment is the claim that every problem that faces Muslims today has been resolved a long time ago in the Qoran and sunnah athough they know that there is no trace for these problems in the Islamic legislative history in the previous centuries . Hence , human right issues are on the verge of becoming rigid topics in the framework of their views that come under " the intentions of sharia " or " legitimate rignts" issues related to democracy are about to become rigid issues under the umbrella of Shura (27) that is expanding every day . This is due to the automatic addition of new materials and elements which are said to be ancient and supported by divine texts that have eluded the attention of eralier thinkers but caught the attention of the thinkers of Muslim Awakening .

Nevertheless , we must admit that the modern Muslim jurists transformed , under the pressure of domestic problems and the Western model , human rights issues to noted issues by the public and they have reached solutions for issues such as

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equality before the law and meaning of citizenship and they even bypassed the medieval concept of Dar al- Islam and Dar Al-harb . However , Muslim sternness that loomed large during the epoch of Awakening in the past decades prevented the consideration of the rest of the issues bravely such as the distinction between men and women , the issues of the kind of punishment stipulated in sharia (Hudud) and the problem of apostasy . In reality , it is possible to distinguish between problems that are historical and those supported by texts from sharia . It is also observed that many restrictions came about as a result of specific historical or legal circumstances , and many modern jurists said that the rulings branching off from these circumstances are abolished by the abolition of these rulings according to the juristic rule which says that rulings change with changes of time . But the rulings based on Qoranic or Prophetic texts that have been confirmed by ancient customs and traditions seem to be difficult to solve . Jurisprudent reformists during the first half of the twentieth century resorted to " intentions of Sharia " (maqasid) to solve these problems . Today, however , maqasid Ash-Sharia are used sometimes to prevent that . It is said that fiqh al-Masalih or the understanding of interests supports the texts that prohibits apostasy . Since if the door is thrown wide open , it will lead to the disintegration of the community consequently religious freedom as stated in the Qoran would come to mean man's freedom to embrace Islam and not to leave it . Therefore , citing the principle of maslaha or interest restricts text that advocates religious freedom and does not advocate adherence to it . If we argue that public interest requires that we do not distinguish between men and women in inheritance , we are faced with a clear text on this matter and , consequently , the text stands against maslaha in this matter while maslaha contradicted the text in the first instance . My teacher Sheikh Muhammad Abu-Zahra advised that we go back in these cases to the principle of al-maqasid al- 'Amma or ulitmate intentions of legislation where the principles of freedom and equality figure prominently . But sternness of the previous decades limited the jurists' ability to act

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A group of Muslim intellectuals advocate , under the intense dogmatic atmosphere to dismantle the text or strike against its dogmantism a la Feuerbach (28) . Moreover , the theological example is truly disturbing but our modern experience with legislative development shows that juristic solutions that takes into consideration the texts and interests are the ones that are acceptable to the public and they persist It does not benefit us in any way if we fight the texts and traditions in the name of secularism or liberalism , we must insist on change from within even if it takes a long time . We can learn a great deal from Christians in the way they " authenticated " human rights (29) and confronted the challenges and problems of contemporary life at the same time . This became evident in the recent position taken by the Catholic Church in the Population and Development Conference held in Cairo which makes clear that Christians suffer from the problems of social and cultural modernization similar to what we are suffering though the problems and their intensity differ .

It is required to change the doctrinal environment or get rid of its dogmatism to permit the discussion of all problems in their cultural, social and intellectual context . Once the discussion has matured and the time of preponderance has arrived, it will become possible to follow the juristic mechanism in this respect . However the common opinion of modernist thinking in the Arab World is that social , cultural and political variables have disrupted the traditonal mechanism for creativity, independent interpretation and renewal ; it is indispensable in their opinion that we must introduce new ideas in form as well as in content .

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Footnotes

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1 - Ismat Sayf -ad-Dawla , " Islam and Human Rights , Controversy and Agreement " ; Minbar Al-Hiwar magazine , third year , no.9, Spring 1988; pp.33-39. The article was originally a lecture delivered in Abu-Dhabi, 1987.

2 - Ibid ., p. 37 . Islamists , in the course of denying Natural Law , meant to substitute by fitra or natural inclination . Compare Muhammad Al-Ghazali in : Human Rights between the Teachings of Islam and the declaration of the United Nations ; Dar Al-Dawa , Cairo , 1993 ; p. 23 . Saudi Arabia objected to three points in the Universal Declaration of Human Rights ; Marriage of a Muslim Woman to a non-Muslim ; the right of the Muslim to change his religion and the right of workers in Saudi Arabia to organize labor unions . Compare with : A Scientific Symposium on Sharia and Human Rights in Islam ; Dar al- Kitab Al-Lubnani , Beirut , 1973; pp. 36-41.

3 - For example , Compare Albert Hourani , Arabic Thought in the Liberal Age , 1789-1939, Oxford University Press, 1979. See also the dialectic of " Human Rights " relations with the West by M. Allal Sinasir : " Muslim Legacy and Human Rights " in " Minbar al-Hiwar ", 3rd year , no.9 Spring 1988; pp.7-32 . The above issue of Minbar Al-Hiwar is a special issue on human rights .

4 - Compare Tabari's Tafsir , Vol.I, Cairo , 2nd ed. , 1954 , pp .199-201. Waltraud Wieland gave a good definition of the concept of deputyship in J.schwartlander (ed.) Freiheit u. Religion , Mainz 1993, pp. 179-209 .

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5 - At-Tabari's Tafsir 1/200-201 .

6 - Compare , for example , M. Fathi Othman in Human Rights in Muslim Shari'a and legalistic Thought in the West , Dar Ash-Shuruq , Cairo , 2nd ed. , 1982 , pp.62-63 and M. Al-Ghazali in Human Rights Between Muslim Teachings and the U.N. Charter ; Dar Ad-Da'wa , Alexandria , 1993; pp. 13-15 .

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بسم الله الرحمن الرحيم

نظام العدالة الجنائية فى الإسلام

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نظام العدالة الجنائية في الإسلام

حافظ الشيخ الزاكي، نائب رئيس القضاء السودان

العدالة قيمة عليا من القيم الإسلامية حتى أن الله سبحانه وتعالى يبين في كتابة القرآن أنه أرسل الرسل وأنزل الكتب ليقيم الناس العدل فيما بينهم (١). وقد أوجبت شريعة الإسلام العدل حتى مع العدو(٢) في القول والعمل والأحكام(٣) وعدم محاباة الصديق أو القريب (٤) وقد وضعت الشريعة أساسا لنظام العدالة الجنائية طوره المسلمون بالاجتهاد وطبقوه في الدولة الإسلامية في عصورها المختلفة فبلغوا درجة عالية في تحقيق العدل.

ويمكننا أن نوجز أسس نظام العدالة الجنائية في الإسلام في المبادئ التالية:

١. مبدأ الشرعية:

من المبادئ المقررة في الشريعة الإسلامية أن الإنسان لا يواخذ جنائيا على الفعل إلا إذا كان محرما وقت ارتكابه . وقد أكد القرآن هذا المعنى في قول الله " وما كنا معذبين حتى تبعث رسولا " الإسراء ١٧ الآية ١٥ وآيات أخرى(٥) وطبق الرسول (ص) هذه القاعدة في حجة الوداع عندما أعلن عدم مسئولية الناس جنائيا عن الجرائم التي ارتكبوها في الجاهلية قبل الإسلام(٦) وقد استنتج الفقهاء من هذه الآيات والأحاديث قواعد أصولية تؤكد أن استحقاق العقاب متوقف علي سبق الإنذار به، منها قاعدة " لا تكليف قبل ورود الشرع " وقاعدة " الأصل في الأشياء الإباحة" ومعنى ذلك أن من يرتكب فعلا أو يسلك سلوكا ما لا يعاقب عليه إلا إذا كان هناك نص تشريعي يوجب ذلك العقاب(٧).

يتضح مما سبق أن الشريعة تأخذ بقاعدة شرعية الجرائم والعقوبات وما يترتب عليها من عدم رجعية القانون الجنائي بحيث لا يطبق القانون الجنائي على الأفعال التي وقعت في الماضي قبل صدوره وإنما يكون تطبيقه على الوقائع اللاحقة.

ويقتضي الأخذ بمبدأ الشرعية نشر القوانين ليعلم بها الناس فلا يؤاخذ الجاني على الفعل إلا إذا كان على علم بالتحريم حقيقة أو حكما. ومعنى ذلك أن الجهل بالقانون من شخص لا يتوقع منه معرفته يمكن أن يكون عذرا يعفى من المسئولية أو يخفف من العقوبة. ويتضح ذلك في الأمثلة الآتية:

الأول: عدم مؤاخذة الرسول(ص) للإعرابي الذي بال في المسجد لأنه جاء من البادية ولم يكن يعرف حرمة ذلك الفعل.

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الثاني: أن سيدنا عمر بن الخطاب عاقب رجلاً خالف أمره بعدم طواف الرجال مع النساء وعندما أنكر الرجل علمه بذلك الأمر أعتذر له سيدنا عمر معترفاً بخطئه.

الثالث: روى عبد الرازق في مصنفه بسنده عن سعيد بن المسيب قال: ذكر الزنى بالشام فقال رجل زنيت البارحة، فقالوا ما تقول؟ قال ما علمت أن الله عز وجل حرمه.فكتبوا بذلك إلي عمر بن الخطاب فكتب إليهم: إن كان عالماً فحدوه وإن لم يكن علم فاعلموه،فان عاد فحدوه"(٨).

٢. أساس المسئولية الجنائية:

تشترط الشريعة الإسلامية ثلاثة شروط لقيام المسئولية الجنائية هي البلوغ والعقل والاختيار(٩)

أولاً: البلوغ فلا يعتبر الصغير الذي لم يبلغ الحلم مرتكباً لجريمة. ويثبت البلوغ بظهور العلامات الطبيعية القاطعة مع إكمال الخامسة عشرة من عمره، أو ببلوغه سن الثامنة عشرة حتى ولو لم تظهر عليه امارات البلوغ.

ثانياً: العقل وكمال الإدراك فلا يعد مرتكباً جريمة الشخص الذي لا يكون وقت ارتكاب الفعل مدركاً لماهية أفعاله أو نتائجها أو قادراً على السيطرة عليها بسبب:

(أ) الجنون أو العاهة العقلية أو

(ب) النوم أو الإغماء أو

(ج) تناول مادة مسكرة أو مخدرة نتيجة إكراه أو ضرورة أو بدون علمه.

ثالثاً: حرية الاختيار، فلا يعتبر مرتكباً جريمة الشخص الذي لم يكن وقت ارتكاب الفعل مختاراً ولا في وسعه السيطرة على أفعاله بسبب قوة قاهرة كالعاصفة أو السيل الجارف أو بسبب مرض فجائي يجعله عاجزاً عن تفادى ذلك الفعل. أو الشخص الذي ألجأته إلى الفعل حالة ضرورة لوقاية نفسه أو ماله أو أهله أو غيرهم من خطر جسيم محدق لا يمكن اتقاؤه بوسيلة أخرى. وكذلك الشخص الذي يفعل الفعل تحت تأثير الإكراه بالإجبار أو التهديد بالقتل أو الأذى الجسيم إذا غلب على ظنه وقوع ما هدد به ولم يكن في قدرته تفادى ذلك بوسيلة أخرى.

ومن ذلك يتضح أن الشريعة الإسلامية لا تعتبر الشخص مسئولاً عن أفعاله ومؤاخذاً عليها إلا إذا كان يتمتع بكامل قواه العقلية وأقدم على الفعل طائعاً مختاراً عالماً بنتائجه.

٣.حماية الإنسان في نفسه وعرضه وماله

١. تجريم العدوان على النفس:

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تحترم الشريعة الإسلامية الحياة الإنسانية وتحمى حق الإنسان في الحياة وتحرم العدوان على النفس بالقتل أو الأذى وتعاقب عليه بأشد العقوبات حتى تصون حياة الأفراد وتضمن استقرار الجماعة. وفى ذلك يقول الله تعالى" ولكم في القصاص حياة يا أولى الألباب لعلكم تتقون" البقرة ٢ أية ١٧٩ ولا يفرق الإسلام بين أن يكون القتيل رجلاً أو امرأة ، بالغاً أو صبياً، عاقلاً أو مجنوناً، مسلماً أو غير مسلم وذلك لعموم قوله تعالى" وكتبنا عليهم فيها أن النفس بالنفس" المائدة ٥ آية ٤٥ ولما روى محمد بن الحسن بإسناده عن رسول الله (ص) أنه أفاد مؤمناً بكافر (أي قتل مسلماً بذمي) وقال" أنا أحق من وفىٌ ذمته"(١٠)

ولا يفرق الإسلام أن يكون القاتل واحداً أو جماعة، فلو قتل جماعة واحداً يقتلون به قصاصاً .وقد قتل عمر بن الخطاب جماعة في واحد وقال قولته المشهورة" لو تمالأ عليه أهل صنعاء لقتلتهم جميعاً(١١).

أما في القتل الخطأ فيعاقب القاتل بالحبس ويلزم بدفع الدية لآل المقتول تعويضاً لهم. ولا يكتفي الإسلام بهذه العقوبات بل يتوعد القاتل بغضب الله عليه ولعنته وعذابه في الآخرة(١٢)

كذلك حرمت الشريعة الإسلامية تسبيب الأذى للإنسان وعاقبت عليه إذا كان عمداً بالقصاص، إذا توفرت شروطه أو بالحبس والتعويض.

٢. تجريم العدوان على العرض والسمعة

تحترم الشريعة الإسلامية كرامة الإنسان وتحمي عرضه وسمعته ويتضح ذلك من العقوبات الشديدة التي توقعها في حالة الزنى والاغتصاب والأفعال الفاحشة والقذف وإشانة السمعة. وفى تحريم الغيبة والتجسس والسخرية واللمز والتنابز بالألقاب.

ومثلما تعاقب الشريعة الإسلامية على الزني فإنها تعاقب على الرمي بالزنى للإنسان العفيف وهو القذف إذا عجز الجاني عن إثبات التهمة . بل أن الإسلام يحرم كل عمل أو قول يمس كرامة الإنسان ، وآيات القرآن وأحاديث الرسول (ص) الدالة على هذا المعنى كثيرة ، نكتفى منها فى هذا السياق بقوله تعالى " يا أيها الذين آمنوا لايسخر قوم من قوم عسى أن يكونوا خيراً منهم ، ولا نساء من نساء عسى أن يكن خيراً منهن ، ولاتلمزوا أنفسكم ولاتنابزوا بالألقاب ، بئس الاسم الفسوق بعد الإيمان ومن لم يتب فأولئك هم الظالمون. يا أيها الذين آمنوا اجتنبوا كثيراً من الظن أن بعض الظن إثم ، ولا تجسسوا ولا يغتب بعضكم بعضا، أيحب أحدكم أن يأكل لحم أخيه ميتاً فكرهتموه ، واتقوا الله ان الله تواب رحيم . يا أيها الناس انا خلقناكم من ذكر وأنثى وجعلناكم شعوباً وقبائل لتعارفوا إن أكرمكم عند الله اتقاكم إن الله عليم خبير" سورة الحجرات ٤٩ آيات ١١-١٣.

(ج) تجريم العدوان على المال:

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حرص الإسلام على حماية المال فحرم جميع أنواع الاعتداء على المال كالسرقة والحرابة التي يستخدم فيها السارق السلاح أو يقطع الطريق أو يرهب الناس ،أو خيانة الأمانة أو التعدي وفرض العقوبات الشديدة على المعتدين (١٣).

وفى سبيل حماية الملكية الفردية يجيز الإسلام للمالك أن يدفع عن ماله بكل وسائل الدفاع حتى لو الجأه ذلك إلي قتل المعتدى ، وفى هذه الحالة لا قصاص عليه.

ومثلما يحترم الإسلام المال يحترم العمل ويعلى من شأنه ويحث عليه ويأمر رب العمل بالتعجيل باداء الأجر للعامل ، وفى هذا الصدد يقول الرسول (ص) " أعطوا الأجير حقه قبل أن يجف عرقه" .

غير أن الإسلام أحاط الملكية الخاصة ببعض القيود التي تكفل تحقيق العدالة الاجتماعية وتقليل الفروق بين الطبقات ، فحرم التصرف الذي يضر بالآخرين وأجاز نزع الملكية إذا أساء المالك استخدام حقه أو اقتضت ذلك المصلحة العامة.

(د) حماية الحرية الشخصية

حرص الإسلام على حماية الحياة الخاصة للإنسان وحريته الشخصية ، ومنع التعدي على تلك الحرية بمنعه تقييد حركة الشخص وحجزه دون سبب مشروع محرماً خطفه أو استدراجه إذا كان صغيراً أو مختل العقل ، ومحرماً إجباره إجباراً غير مشروع على العمل رغم إرادته. كما حرم الاعتقال غير المشروع وعاقب عليه وزاد عقوبته إذا كان القصد منه انتزاع اعتراف المعتقل أو إكراهه على فعل مخالف للقانون.

وقد أعترف الإسلام للإنسان بالحق في الخصوصية وحرم انتهاكها بالإطلاع على الشخص في بيته دون إذنه أو التصنت عليه أو الإطلاع على رسائله وأسراره وعاقب على ذلك بالعقوبات الرادعة (١٤).

٤- حقوق المتهم في مرحلة التحري والتحقيق

تقوم الشريعة الإسلامية على العدل الذي يوازن بين الحقوق المختلفة لأطراف الدعوى الجنائية : الشاكي والمتهم والنيابة التي تمثل المصلحة العامة . وفى إطار ذلك التوازن تقرر الشريعة الإسلامية للمتهم حقوقاً كثيرة في مرحلة التحري والتحقيق معه وهى مرحلة الأشتباه وتوجيه التهمة.

(أ) التثبت في التحري وعدم الأخذ بالشبهة:

تنطلق الشريعة الإسلامية في معاملة المتهم من القاعدة الشرعية أن الأصل في الإنسان البراءة وان على المدعى إثبات دعواه . فالمتهم برئ حتى تثبت إدانته دون شك معقول .

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والبينة على من أدعى ، وأن الشك يفسر لصالح المتهم. وفى الحديث " إن الإمام لأن يخطئ في العفو خير من أن يخطئ في العقوبة" (١٥).

فالشريعة الإسلامية تقتضي التثبت في التحري وعدم الأخذ بالشبهة .وقد قسم الفقهاء المتهمين إلي ثلاثة أقسام :-

الأول: من ليس من أهل التهمة وقد عرف بالاستقامة والصلاح فهذا لا يجوز حبسه.

الثاني: مجهول الحال الذي لا يعرف صلاحه من فساده فهذا يحبس حتى يتضح أمره.

الثالث: المتهم المعروف بالفجور والإجرام فهذا يكون حبسه أولى من مجهول الحال (١٦).

ولم يحدد الفقهاء مدة الحبس للتهمة وإنما ترك ذلك لولى الأمر يحدده بتشريع أو قرار .

(ب)معاملة المقبوض عليه

الحبس في الشريعة الإسلامية لا يستهدف تعذيب المتهم أو إرهابه ولا يشترط فيه أن يكون في مكان مغلق وإنما هو مجرد منع المتهم من الحركة حتى يتم التحري المطلوب أو يفصل القاضي في الدعوى. ولابد أن يراعى في الحبس ما يحفظ كرامة الإنسان فلا يحبس في مكان ضيق يعوق حركته ولا في مكان نجس يمنعه من أداء العبادة، وأن يكون ساتراً بحيث لا يطلع فيه أحد على عورة الآخر، وأن يتوافر فيه الدفء في الشتاء والهواء في الصيف. وأن تتوفر له الرعاية الصحية(١٧).

وتحظر الشريعة الإسلامية إيذاء المقبوض عليه بدنياً أو معنوياً أو التأثير عليه بالإكراه أو الإغراء لحمله على الاعتراف أو الشهادة علي غيره. وللمقبوض عليه حق الاتصال بأهله وبمن يعاونه في الدفاع عن نفسه.

وقد قرر فقهاء الإسلام بأنه يجب على القاضي أول ما يجب الكشف علي المحبوسين والنظر في أمرهم وفي مدة إقامتهم في الحبس، وأن يبدأ بقضايا المحبوسين(١٨)

(ج) الحق في الإفراج بالضمان أو الكفالة

ربطت الشريعة الإسلامية الحبس رهن المحاكمة بالإثبات فلم يسمح به إلا إذا توافرت أدلة ضد المتهم كافية لاتهامه. وعليه لو قال المدعي لا بينة لي أو بينتي غائبة خارج المصر لا يحبس المتهم بالإجماع(١٩).

فالأصل أن يفرج عن المتهم متى قدم تعهداً أو كفيلاً إلا إذا كان الإفراج قد يؤدى ألي هروبه أو يضر بالتحري أو يشكل خطراً عليه. ولا يجوز الإفراج في الجرائم الخطيرة التي تكون عقوبتها الإعدام أو القطع حداً أو الجرائم التي تتعلق بمال عام أي ما يسميه الفقهاء حق الله ويعنون به الحق العام.

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ويوجب بعض الفقهاء أخذ كفيل في حالة تأجيل نظر الدعوى وذلك في جميع المسائل ضماناً لحق المدعي. وخص بعضهم الكفالة والضمانة ببعض المسائل في الجنايات التي توجب المال: دية أو تعويضاً(٢٠).

ويراعى في تقدير الضمانة المطلوب إيداعها طبيعة الجريمة والضرر المترتب عليها ومقدار المال موضوع الجريمة، ولا يجوز المبالغة في تقديرها.

٥. حقوق المتهم في مرحلة المحاكمة:

كفلت الشريعة الإسلامية للمتهم حقوقاً أمام القضاء أهمها حقه في محاكمة عادلة أمام محكمة مستقلة ومؤهلة يكفل له فيها حق الدفاع عن نفسه والاستعانة بمدافع ويضمن له التسوية مع خصمه واستجواب شهوده، ويكون له حق الطعن في الحكم.

(أ) حق المتهم في محاكمة عادلة

للمتهم الحق في محاكمة عادلة يضمن له فيها التسوية مع خصمه، وهذه المساواة اساس القضاء في الإسلام ولا احترام للقضاء بدونها. وقد وجه عمر بن الخطاب قاضيه في رسالته المشهورة في القضاء بضرورة التسوية بين المتقاضين في مجلسه ونظرته وقضائه(٢١)وتوجب الشريعة الإسلامية على القاضي التثبت في الحكم بالتحقق من صحة ما اسند للمتهم وسماع دفاعه ومناقشة إقراره والتثبت من عدالة الشهود حتى ينفي شهادة الزور. يقول الله تعالى" يا أيها الذين آمنوا إن جاءكم فاسق بنبأ فتبينوا أن تصيبوا قوماً بجهالة فتصبحوا علي ما فعلتم نادمين"(٢٢).

ويشترط جمهور الفقهاء في القاضي أهلية الاجتهاد بالقدرة علي استنباط الأحكام. قال القاضي أبو يعلى " من لم يكن من أهل الاجتهاد لم يجز له أن يفتي ولا يقضي، وإن قلد القضاء كان حكمه باطلاً "(٢٣) ولا يولي القضاء إلا الموثوق في عفافه وعقله وصلاحه وفهمه وعلمه بالسنة والآثار ووجوه الفقه، ولا يولى صاحب رأي ليس له علم بالسنة والأحاديث، ولا صاحب حديث ليس له علم بالفقه(٢٤).

ومن ضمانات العدل استقلال القضاء بحيث يكون القاضي مستقلاً في حكمه ولا يجوز التأثير عليه أو التدخل في عمله من السلطة التنفيذية أو غيرها وقد أرسى الإسلام مبدأ استقلال القضاء ومنع الحكام والولاة من التدخل في قضائهم، وقد روى أن معاوية والي عمر علي الشام أغلظ علي القاضي عبادة من الصامت فشكاه عبادة إلي عمر فكتب عمر إلي معاوية " لا امرة لك على عبادة"(٢٥).

وقد عرف النظام القضائي الإسلامي علنية الجلسات وسهولة الوصول إليها ويرى الإمام الشافعي ضرورة القضاء في موضع بارز للناس بدرجة لا تحوج الخصوم إلي الاستئذان على القاضي(٢٦). ويقول آدم ميتز " كانت جلسات القاضي علنية، وكان القاضي

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يجلس في مكان لا يمنع أحد من الدخول إليه وهو المسجد الجامع أو مجلس يشرف على الطريق(٢٧).

كما عرف النظام الإسلامي تدوين الأحكام في سجل يتضمن الوقائع والحكم الصادر فيها وإجراءات نظرها وتاريخ الحكم والتنفيذ. ويكون السجل من نسختين عليهما توقيع القاضي تسلم إحداهما للمحكوم له وتوضع الأخرى في ديوان القضاء للحاجة(٢٨).

(ب) حق المتهم في الدفاع

تكفل الشريعة الإسلامية للمتهم حق الدفاع عن نفسه بتمكينه من دفع الاتهام عن نفسه وتقديم البينة على براءته. وفي حديث الرسول (ص) لعلي بن أبي طالب " إذا أتاك الخصمان فلا تقضين لأحدهما حتى تسمع من الآخر كما سمعت من الأول فإنه أحرى أن يتبين لك القضاء... وتعلم لمن الحق"(٢٩).

ويشترط أن يكون المتهم قادراً على الدفاع عن نفسه فان كان عاجزاً عن ذلك لم تصح إدانته لأن العجز عن الدفاع كالحرمان منه. ويحق للمتهم أن يستعين بمن يدافع عنه. وقد أجاز الفقهاء التوكيل بالخصومة لحاجة الناس إليها واستندوا في ذلك لبعض الآثار التي حدثت في عصر الصحابة (٣٠) كما أجاز الفقهاء للقاضي أن يتخذ مترجماً إذا كان أحد الخصوم لا يعرف العربية.

(ج) حق المتهم في الطعن في الحكم

الأصل في حكم القضاء الإمضاء ما لم يقع في الحكم خطأ يقتضي المراجعة. وقد أجمع الفقهاء علي أن الحكم الخطأ يستوجب الإلغاء بما يتفق وأحكام الشريعة الإسلامية، وأنه يجوز للقاضي نفسه الذي أصدر الحكم إذا تبين له وجه الخطأ فيه إن يصححه، كما يجوز لغيره من القضاة. وأساس ذلك ما ورد في رسالة سيدنا عمر بن الخطاب إلى أبي موسى الأشعري " لا يمنعنك قضاء قضيت فيه اليوم فراجعت فيه رأيك فهديت فيه لرشدك أن تراجع فيه الحق، فإن الحق قديم لا يبطله شئ، ومراجعة الحق خير من التمادي في الباطل" فالمفهوم الإسلامي للطعن يشمل الاستئناف الذي يطلبه المحكوم عليه والفحص والمراجعة التى تتولاها المحكمة من تلقاء ذاتها أو بناء على طلب من أطراف الدعوى. وقد عرف النظام القضائي الإسلامي درجات التقاضي وحق المحكوم عليه في الاستئناف وسلطة المحاكم الأعلى فى المراجعة وتصحيح الأحكام حتى توافق حكم الشريعة الإسلامية وتحقق العدل.وقد عرفت الشريعة الإسلامية مبدأ مسئولية القاضي عما يقع منه من أخطاء في حكمه، فإذا تعمد القاضي الجور فإنه يعزر وينقض حكمه. فإذا نفذ الحكم فان القاضي يضمن فى ماله. وأما إذا لم يكن خطؤه متعمداً فإن حكمه ينقض وإذا تعذر نقضه كان الضمان في بيت المال(٣١).

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(د) ضوابط تنفيذ الأحكام

إذا أصبحت الأحكام الجنائية نهائية وجب تنفيذها بدون تأخير. ويتفق الفقهاء علـــى أن تنفيذ أحكام الحدود والتعازير من مسئولية الدولة، وكـانوا يـرون أن حـق اسـتيفاء أحكـام القصاص للمجني عليه أو وليه تحت إشراف السلطة ولكنهم جوزوا تعيين خبير لتنفيذ الحكـم. ولا شك أن الضرورة اليوم يستوجب أن تتولى الدولة تنفيذ جميع الأحكام الجنائية بما في ذلـك أحكام القصاص التي يحق للمجني عليه أو وليه شهود تنفيذها ليطمئن علي استيفائه لحقه.

لقد حددت الشريعة الإسلامية ضوابط لتنفيذ الأحكام الجنائية منها مراعـــاة الحالـة الصحيـة للمحكوم عليه بحيث يؤخر التنفيذ إذا كان المحكوم عليه مريضاً حتى لا يـؤدى التنفيـذ إلـي هلاكه وعدم التنفيذ علي الحامل حتى تضع جنينها ولا علي المرضع حتى تفطم الرضيع(٣٢). كما أن بعض الفقهاء يرون عدم تنفيذ عقوبة السجن والاعدام في جرائم التعازير علي الشـيخ الكبير الذي تجاوز السبعين. ولا علي الصغير الذي لم يبلغ الثامن عشرة من عمره(٣٣).

٦. العقوبات الشرعية وضوابطها

للعقوبة الشرعية ثلاثة أهداف هي:

الأول: الجزاء المقابل للجريمة بحيث تكون العقوبة علي قـدر الجـرم تحقيقـاً للعـدل قـال تعالي:"وجزاء سيئة مثلها" الشورى آية ٤٠.

الثاني: منع الجريمة وذلك بمنع الجاني من معاودة الجريمة او التمادي في الإجرام ومنع غيره من ارتكاب الجريمة. ويتأكد المنع بتنفيذ العقوبة علانية. قال تعالي: " وليشهد عذابهما طائفـة من المؤمنين " النور ٢٤ آية ٢ كما يتأكدبنشر القوانين.

الثالث: الاصلاح والتهذيب للجاني ومنحه فرصة للتوبة. وليس المقصود منها الانتقام ولذلـك تختلف معاملة المحكوم عليهم، فمنهم من يوقف تنفيذ العقوبة بالنسبة له، كما في الحديث" اقيلوا ذوي الهيئات عثراتهم" (٣٤) ومنهم من يعفي وتسقط عنه العقوبة بعد ثبوت توبته.

وخصائص العقوبة في الشريعة الاسلامية انها شخصية حيث تقتصر علي الجـاني دون غيره وإذا مات سقطت. وأنها شرعية حيث تستند الي نص في الكتاب أو السـنة أو تشـريع الدولة. وأنها عادلة حيث تطبق علي الجميع بما يحقق المساواة. وأنها مفوضة الي الحـاكم أو القاضي ليختار في كل حالة العقوبة التي يراها كافية لزجر الجاني بحيـث يراعـي ظـروف الجاني والمجني عليه والزمان والمكان.

وهناك ضوابط لازمة لتوقيع العقوبة تتمثل فيما يلي:

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(أ) إثبات عناصر الجريمة

لا توقع العقوبة حتي يثبت الادعاء جميع عناصر الجريمة وتتأكد المحكمة من انتفاء موانع المسئولية الجنائية. وتشمل عناصر الجريمة اركانها وشروط تطبيقها ودرجة الاثبات المطلوبة في كل جريمة. فعقوبة السرقة الحدية مثلا لا توقع إلا باثبات العناصر التالية:
أخذ مال (٢) منقول (٣) متقوم (٤) مملوك للغير (٥) بلغ نصابا (٦) أن يكون الاخذ خفية (٧) من الحرز (٨) بنية تملكه (٩) إثبات السرقة بشاهدين أو باقرار المتهم (١٠) انتفاء جميع مسقطات العقوبة الحدية.

(ب)مسقطات العقوبة الحدية

تشترط الشريعة الاسلامية لتوقيع العقوبة في الجرائم الحدية كالسرقة او الحرابة والزني عدم وجود واحد من مسقطات العقوبة الحدية والا اعتبرت ذلك شبهة تدرأ الحد عن الجاني استنادا الي قول الرسول (ص) "ادرءوا الحدود بالشبهات" وقوله " أدرءوا الحدود عن المسلمين ما استطعتم فان وجدتم للمسلم مخرجا فأخلوا سبيله " سنن الارقطى ج ١ ص ٣٢٤ وذكر ابن قوامة في المغني ان ابن المنذر قال: " اجمع كل من تحفظ عنه من أهل العلم ان الحدود تدرأ بالشبهات".

وكمثال للشبهات التي تسقط العقوبة الحدية نورد مسقطات حد السرقة وهي:

١. إذا وقعت السرقة بين الاصول والفروع او بين الزوجين او ذوي الأرحام المحرمة.
٢. إذا كان الجاني في حالة ضرورة ولم يأخذ من المال الا ما لا يجاوز النصاب فوق كفاية حاجته او حاج من تجب عليه نفقته للقوت او العلاج.
٣. إذا كان للجاني نصيب او كان يعتقد بحسن نية أن له نصيبا في المال المسروق وكان المال المسروق لا يتجاوز ذلك النصيب بما يبلغ النصاب.
٤. إذا كان الجاني دائنا للمسروق منه وكان المسروق منه مماطلا او جاحدا وحل أجل الدين قبل السرقة وكان ما استولى عليه الجاني يساوي حقه او أكثر من حقه بما لايجاوز النصاب.
٥. إذا حدث قبل تقديمه للمحاكمة ان رد الجاني المال المدعي سرقته وأعلن توبته او تملك المال المدعي سرقته وكان فضلا عن ذلك خالي الصحيفة من سوابق الاتهام او الادانة في الجرائم الواقعة علي المال.
٦. إذا رجع الجاني عن اقراره قبل تنفيذ العقوبة وكانت السرقة الحدية ثابته بالاقرار وحده.
٧. إذا كان الجاني مأذونا له في دخول الرز.
٨. إذا كان القطع يعرض حياة الجاني للخطر او كانت يده اليسري مقطوعة او شلاء.

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وإذا سقطت عقوبة السرقة الحدية بأي من المسقطات السابقة يجوز معاقبة الجاني بالسجن او الغرامة او بالعقوبتين معا.

(ج) سلطة القاضي التقديرية في العقوبة

تعطي الشريعة الاسلامية القاضي سلطة واسعة في تقدير العقوبة في الجرائم التعزيرية أي في غير جرائم الحدود والقصاص. وتراعي المحكمة عند تعيين العقوبة التعزيرية الناسبة جميع الظروف المخففة أو المشددة وبوجه خاص درجة المسئولية والبواعث على الجريمة وخطورة الفعل وحسامة الضرر وخطورة شخصية الجاني ومركزه وسوابقه الجنائية وسائر الظروف التي اكتنفت الواقعة

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الهوامش

١. لقد أرسلنا رسلنا بالبينات وأنزلنا معهم الكتاب والميزان ليقوم الناس بالقسط" الحديد ٥٧ آيه ٢٥.
٢. " ولا يجرمنكم شنآن قوم علي الا تعدلوا، اعدلوا هو أقرب للتقوي".
٣. "ان الله يأمركم أن تؤدوا الأمانات الي أهلها وإذا حكمتم بين الناس أن تحكموا بالعدل" النساء ٤ الآية ٥٨.
٤. " يا أيها الذين آمنوا كونوا قوامين بالقسط شهداء لله ولو علي أنفسكم أو الوالدين والأقربين إن يكن غنيا أو فقيرا فالله أولي بهما فلا تتبعوا الهوي ان تعدلوا.." النساء ٤ الآية ١٣٥.
٥. "قل للذين كفروا أن ينتهوا يغفر لهم ما قد سلف" الأنفال ٨ الآية ٣٨.
٦. " ألا وان دم الجاهلية موضوع وأول دم ابدأ به دم الحارث بن عبد المطلب" الوثائق السياسية لمحمد حميد الله.
٧. محمد سليم العوا: في أصول النظام الجنائي الإسلامي" ص ٥٩.
٨. المصنف ج ٧ ص ٤٠٣.
٩. قال رسول الله (ص) " رفع القلم عن ثلاثة: الصبي حتي يحتلم والمجنون حتي يفيق والنائم حتي يستيقظ" رواه الإمام أحمد. وقال "رفع عن أمتي الخطأ والنسيان وما استكرهوا عليه" رواه أصحاب السنن.
١٠. بدائع الصنائع للكاساني الجزء السابع ص ٢٣٧.
١١. الميداني علي القدوري ص ٢٨٠.
١٢. " ومن يقتل مؤمنا متعمدا فجزاؤه جهنم خالدا فيها وغضب الله عليه ولعنه واعد له عذابا عظيما" النساء ٤ آية ٩٣.
١٣. " والسارق والسارقة فاقطعوا أيديهما جزاء بما كسبا نكالا من الله" المائدة ٥ آية ٤٨ ويقول الرسول (ص) " من اقتطع مال امرئ مسلم بغير حق لقي الله عز وجل وهو عليه غضبان".
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بسم الله الرحمن الرحيم

وبه نستعين في أمور الدنيا والدين

THE ISLAMIC CONCEPT OF MAN AND ITS IMPLICATIONS FOR THE MUSLIMS' APPRECIATION OF THE CIVIL AND POLITICAL RIGHTS

Paper prepared for the Seminar on Enriching the Universalities of Human Rights: Islamic Perspectives on the Universal Declaration of Human Rights, Geneva, 9-10 November 1998

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Introduction

This paper starts with the assumption that to appropriately understand Islam and Human Rights we should, before anything else, understand the Islamic concept of man according to the Qur'ân and Sunnah (Prophetic Traditions). In discussing the subject of Islam and Human Rights, we can jump to some salient issues and problems that entangle Islam or, at least, Muslims, whether as individuals or as collectivities. But then we are prone to lose the sight of the forest because of a tree or some trees. In the manner of going back to basics, we have to understand principal aspects of Islam in such a way as to delineate what this religion normatively says about the nature of human beings and how such human nature relates to religions and civil lives of human communities.

Some features of Islam relevant to Human Rights are notable enough, such as equalitarianism, the readiness to admit the right of existence of other religions and religious communities, race blindness and the tradition of legal consciousness ingrained in the idea of Sharî'ah. But a good number of them are simply not elaborated enough as to make the genuine and conceivable basis for understanding Human Rights. Below is a humble undertaking, due to several personal limitations, to submit the fundamental concepts of man in Islam as they are expounded in the Holy Book and in the Tradition of the Prophet Muhammad.

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The Concept of Man

The first and the foremost thing that every Muslim understands about man is that God declared Adam, the man, as His Vicegerent (*Khalîfah*, "Caliph") on earth. The angels questioned the Divine wisdom, arguing that it is the nature of man to make destruction of the earth and to shed blood, while they themselves, apparently claiming better aptitude for the vicegerency, celebrate God's praises and glorify His holy name. The curious thing is that God rejects the angels' apparent claim, saying that He knows what the angels do not know.[1] God gives man spiritual and intellectual faculties that make him able to discern and make use of his surroundings, symbolized in God's teaching to Adam the nature of all things. God then placed those things before the angels and challenged them to say what they know about the nature of those things if they are right.[2] They failed to meet the challenge, and the superiority of man over the angels was then established.[3] The angels were commanded to bow down to Adam in recognition of man's superiority over them.[4] All obeyed the command except Iblîs, the devil, that is, the diabolical spirit. Because of his haughtiness, Iblîs was condemned as among those who reject Faith, and thus fell in disrepute.[5]

Iblîs asserted his superiority over man by indicating that he is made of fire and man is made of clay, assuming that fire is superior to clay,[6] ignoring the fact that God had not merely made man's body from clay, but had given him spiritual form and taught him the nature of things, raising him above the angels. Iblîs thus committed the sin of racism, that is, the unjustified claim of superiority over others only on the basis of some ascriptive factors, not factual achievements. This makes racism the first and the most grievous diabolical sin ever committed by a creature. Because of that racial haughtiness, there begun the enmity between Iblîs, the Satan, and man.[7]

Second only to the capacity to have knowledge about the nature of things, freedom is the most important Divine gift to man as the preparation for his office of vicegerency. God says to Adam and Eve, his wife, to dwell in the Garden of Eden with the total freedom (*'raghad-an'* — رغدا) to enjoy the bountiful sustenance in it as they will (*'haythu*

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[1]Qur'ân, s. al-Baqarah/2:30.
[2]Qur'ân, s. al-Baqarah/2:31.
[3]Qur'ân, s. al-Baqarah/2:32.
[4]Qur'ân, s. al-Baqarah/2:33.
[5]Qur'ân, s. al-Baqarah/2:34. According to an expert on Arabic language, the Arabic word *"iblîs"* is a borrowing from the Greek *"diabolos"* which is also the origin of the English words *"devil"* and *"diabolical"*. (See Abû Mansûr al-Jawâlîqî, *Al-Mu'arrab min al-Kalâm al-A'jamîy 'alâ Hurûf al-Mu'jam*, edited by Dr. F. 'Abd-ur Rahîm, Damascus, Dâr al-Qalam, 1410 AH / 1990 CE, s.v. *"Iblîs"*).
[6]Qur'ân, s. al-A'râf/7:12.
[7]Qur'ân, s. al-Baqarah/2:36., s. al-A'râf/7:27 and s. Fâtir/35:6.

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shi'tumâ" — حيث شئتما), but they should not approach a certain tree, which is the tree of evil, otherwise they would run into the harm of transgression.[8] Freedom is thus one of the first and foremost God-given human qualities from primordial time, establishing his dignity as God's Vicegerent. Such freedom is limited only by man's conscience as not to transgress the forbidden "tree of evil".

Related to freedom is the Primordial Covenant (Arabic: *'ahd* — عهد, or *mîthâq* — ميثاق) between God and man that the latter should follow the straight path, worshipping only God in complete submission to Him, rejecting the way of Satan.[9] God had beforehand taken the Covenant from Adam but Adam forgot, and God found on Adam's part no firm resolve.[10] Adam and Eve could not stand the temptation of Satan, and they transgressed the limit of freedom by approaching the tree of evil, tasting some of its fruits. As the consequence, Adam and Eve were expelled from the Garden in ignominy, and hence the mutual animosity between man and Satan.[11] But then God, out of His bountiful Grace, provided Adam and Eve with "Words of Guidance" (*Kalimât* — كلمات) as their "spiritual safety net" in their free exercise of freedom, and they learned to understand them, upon which God then returned to them.[12]

The "Words of Guidance" or *Kalimât* for Adam constituted the primeval forms of Divine guidance or religion for human beings, which is but the continuation and the reaffirmation of the Primordial Covenant. The Qur'ân mentions that such Covenant has also been taken from every individual of human beings, the Children of Adam (*Banî Âdam*), before their respective coming into existence in this world, reminding all of them of their duty to their Lord (*Al-Rabb* who is *Al-Lâh*, The God), lest they forget and deny responsibility in the Day of Judgment:

> When thy Lord drew forth from the children of Adam from their loins their descendants and made them testify concerning themselves (saying): "Am I not your Lord (*Rabb*, who cherishes and sustains you)?" They said: "Yea! we do testify!" (This) lest ye should say on the Day of Judgment: "of this we were never mindful."
>
> Or lest ye should say: "Our fathers before us may have taken false gods but we are (their) descendants after them: wilt thou then destroy us because of the deeds of men who were futile?"
>
> Thus do We explain the signs in detail! and perchance they may turn (unto Us).[13]

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[8]Qur'ân, s. al-Baqarah/2:35.
[9]Qur'ân, s. Yâsîn/36:60-63.
[10]Qur'ân, s. Tâhâ/20:115.
[11]Qur'ân, s. al-Baqarah/2:36.
[12]Qur'ân, s. al-Baqarah/2:37.
[13]Qur'ân, s. al-A'râf/7:172-174.

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The nature of man is to perpetually seek the way to fulfill his Covenant with God, so that God would keep His Covenant with man. Man is thus born with the innate and natural drive to seek the way to return to God, as indeed God has only created man that he may serve Him.[14] It is in serving God that man finds his dignity and happiness, just as the feeling of tranquillity results from the success of "returning home", that is, coming back to the Origin.[15] On the practical level, the fulfillment of the Covenant means to hold fast to God's religion, the teaching of obedience to God, which is the the subsequent Covenant between God and man, to reaffirm and realize the Primordial Covenant. An example of such subsequent Covenant is The Ten Commandments which, according to the Qur'ân, God made with the Children of Israel through Moses on the Mount of Sinai.[16] The Ten Commandments make up the Torah or *Tawrâh*, the Law of God. The Qur'ân recognizes the extremely important position of The Ten Commandments in the series of God's religions that also embrace the teachings of 'Îsâ al-Masîh (Jesus Christ) and Prophet Muhammad.[17]

At the center of the Covenant is the idea of obedience to God, the essence of religion which is called in Arabic "*dîn*" (دين), meaning "the teaching of absolute obedience (to the Lord, God)". This understanding corresponds perfectly to the idea of "*islâm*" (إسلام), meaning "complete self submission (to God)", because it is indeed man's obedience to God, Lord the Creator, and his willingness to submit himself to Him that make the central theme of the Covenant. Beside that complete obedience to God is the nature of the whole universe, it is also the religion of the whole humanity communicated by the prophets and the messengers of God. Any idea of existential obedience other than the obedience and the complete self submission to God is invalid and, therefore, existentially fallacious.[18] From this perspective, to follow a religion is only part of his spiritual venture of returning to God (*inâbah* — إنابة), and submitting himself to Him (*islâm* — إسلام), in the fulfillment of the Primordial Covenant.[19]

But an extremely crucial question is, what is it that existentially makes up the actual act of returning to God and submitting oneself to Him as the fulfillment of the Covenant, and in what way? It would take all religions in all of their forms to answer such question. At the face of the impossibility for man to exhaustively grasp the whole idea, the Qur'ân

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[14]Qur'ân, s. al-Dzâriyât/51:56.
[15]Qur'ân, s. al-Fajr/89:27-30.
[16]See Qur'ân, s. al-Baqarah/2:63.
[17]The recognition is symbolized, in the Qur'ân, s. al-Tîn/95:1-3, by God's making oath with (the tree of) Fig, (Mount of) Olive, (Mount of) Sinai, and (the City of) Mecca. (See Appendix 1 for the commentary).
[18]See Qur'ân, s. Âlu 'Imrân/3:18-19 and 83-85.
[19]Therefore responding to the Divine call to humankind to return to Him and submit themselves to Him is only natural action that bring forth the true happines to them. For such Divine calling, see Qur'ân, s. al-Zumar/39:53-61.

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puts the answer to the question in seemingly simple but very fundamental way. It is mentioned in the Holy Book that man should set himself to the Faith as he is naturally and innately inclined toward the Truth (*hanîf-an* —حنيفا , [as man by nature upright][20]). Such natural inclination is the consequence of the natural disposition (*fitrah* — فطرة , [the pristine creation]) which God has instilled into man. The natural disposition for uprightness is immutable, not subject to any change forever, which is therefore perennial in man. The natural disposition establishes the kernel of the straight religion, the truth that most people, according to the Qur'ân, unfortunately do not know about.[21] Commenting on the Qur'ânic elucidation about *fitrah* and *hanîfîyah*, A. Yusuf Ali has the following to say:

> As turned out from the creative hand of God, man is innocent, pure, true, free, inclined to right and virtue, and endued with true understanding about his own position in the Universe and about God's goodness, wisdom, and power. That is his true nature, just as the nature of a lamb is to be gentle and of a horse is to be swift.[22]

Thus the Qur'ân defines the true religion as none other than the primordial, pristine quality of humanity, expressed in the innate and the naturally unspoiled inclination of man to the sacred and the true, which is the essence of the universal humanism, the *fitrah* and the *hanîfîyah*. Thus the saying of the Prophet Muhammad that God creates all men upon *fitrah* that makes them all *hunafâ'*, that is, all having the qualities of *hanîfîyah*, the natural inclination to the sacred and the true.[23] The locale of these qualities is the conscience of man, called in Islamic religious literature *nûrânîy* (نوراني), the luminous heart. It is so called because the conscience, in its state of being pure and unspoiled, is the primordial Divine guidance that illuminates the straight path of man's life leading to God, bringing him back to his Origin. In conformity with this perception, the Prophet Muhammad says that "virtue is that which comforts the conscience, and sinfulness is that which troubles the conscience."[24] Therefore the significance of human acts are dependent upon the intentions of the actors.[25] And the best of all religions, Prophet Muhammad says, is the *hanîfîyah samhah*, the broad-minded natural inclination to the sacred and the true.[26]

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[20]As a concept, the Qur'ânic term "*hanîf*" has meaning with nuances difficult to convey in translation to other language. Muhammad Marmaduke Pickthall translates it into "as man by nature upright". (See Muhammad Marmaduke Pickthall, *The Meaning of the Glorious Koran*).
[21]See the Qur'ân, s. al-Rûm/30:30.
[22]A. Yusuf Ali, *The Holy Qur'ân, Text, Translation and Commentary*, note 3541.
[23]Hadîth, by Muslim (see Appendix 2).
[24]Hadîth, by Ahmad and al-Dârimî (see Appendix 3).
[25]Hadîth, by al-Bukhârî (see Appendix 4).
[26]Hadîth, by Ahmad (see Appendix 5).

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The *mîrânîy* or the conscience is also the locale of the primordial inspiration from God to every individual of man that makes each person have the innate capacity to identify and then differentiate between two ways (*najdayn* — نجدين), the way of sinfulness (*fujûr* — فجور) and the way of piety (*taqwâ* — تقوى).[27] This innate capacity establishes in each person the natural sense of right and wrong. Just as all of this is the immutable *fitrah* from God, deep inside of the human spirit is the sense of the *scientia sacra*, which is also the *philosophia perennis*, "that universal gnosis which always has existed and always will exist."[28] Man is perennially driven to make strenuous venture in seeking ways leading him to the sacred and the true, and to love the sacred and the true, the ultimate of which is the Absolute Sacred (*Al-Subbûh* — السبّوح or *Al-Quddûs* — القدّوس) and the Absolute True (*Al-Haqq* — الحقّ), that is, God, the Lord.[29] Thus the unspoiled *fitrah* of man leads him to move along the straight path (*al-sirât al-mustaqîm*) toward the Goal of life, God, the Lord. Indeed religion is always described metaphorically as path or way (the basic meaning of the Qur'ânic terms of *sirât, sharî'ah, tarîqah,* and *sabîl,* and in some ways also *minhâj* and *mansak*), all of which indicate that perception of truth by man is dynamic rather than static, as man should move without end, in striving to get the closest approximation (*taqarrub*) of The Truth (*Al-Haqq*), God. Thus the assurance made by God for those who make strenuous efforts (*mujâhadah*) toward Him that He would guide them to His paths: *"And those who strive in Our (Cause) We will certainly guide them to Our Paths: for verily God is with those who do right."*[30]

Now just as such gnosis is universal among mankind, the religion as the expression of the gnosis, according to the Qur'ân, is one and universal, and that the followers of all prophets, that is, of all religions, are just one community (*ummat wâhidah* — أمة واحدة), notions that correspond to the Qur'ânic concept that humanity is just one community. The universality of religion and the oneness of humanity lays the foundation for the necessity of believing in all religions symbolized in the Islamic article of faith of believing in all prophets and all holy books. Here are some extensive quotations from the Qur'ân relevant to the principles:

> The same religion has He established for you as that which He enjoined on Noah — the which We have sent by inspiration to thee — and that which We enjoined on Abraham, Moses and Jesus: namely that ye should remain steadfast in Religion and make no divisions therein; to those who

[27]See Qur'ân, s. al-Balad/90:10 and s. al-Shams/91:8.
[28]Frithjof Schuon, *Understanding Islam*, English translation by D. M. Matheson, London, George Allen & Unwin Ltd., 1972, p. 7 (Foreword).
[29]See the Qur'ân, s. al-Inshiqâq/84:6.
[30]Qur'ân, s. al-'Ankabût/29:69.

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worship other things than God hard is the (way) to which thou callest them. God chooses to Himself those whom He pleases and guides to Himself those who turn (to Him).[31]

Mankind was one single community (*ummat wâhidah*) and God sent Messengers with glad tidings and warnings; and with them He sent the Book in truth to judge between people in matters wherein they differed.[32]

Mankind was but one nation but differed (later). Had it not been for a word that went forth before from thy Lord their differences would have been settled between them.[33]

O ye apostles! Enjoy (all) things good and pure and work righteousness: for I am well-acquainted with (all) that ye do.
And verily this community of yours is a single community (*ummat wâhidah*), and I am your Lord and Cherisher: therefore fear Me (and no other).
But people have cut off their affair (of unity) between them into sects: each party rejoices in that which is with itself.
But leave them in their confused ignorance for a time.[34]

Say ye: "We believe in God and the revelation given to us and to Abraham, Ishmael, Isaac, Jacob and the Tribes and that given to Moses and Jesus and that given to (all) Prophets from their Lord; we make no difference between one and another of them and we all submit ourselves to Him (*muslimûn*)."[35]

Now then for that (reason) call (them to the Faith) and stand steadfast as thou art commanded nor follow thou their vain desires; but say: "I believe in the Book which God has sent down; and I am commanded to judge justly between you. God is our Lord and your Lord. For us (is the responsibility for) our deeds and for you for your deeds. There is no contention between us and you. God will bring us together and to Him is (our) final goal.[36]

To this last quoted verse, A. Yusuf Ali in his commentary or *tafsîr* deduces six crucial principles:

(1) The more sectarianism and division there is in the world, the more need is there for the Gospel of Unity.
(2) It must steadfastly pursue its way.
(3) It must not be deflected by worldly or political motives.

[31]Qur'ân, s. al-Shûrâ/42:13.
[32]Qur'ân, s. al-Baqarah/2:213.
[33]Qur'ân, s. Yûnus/10:19.
[34]Qur'ân, s. al-Mu'minûn/23:51-54.
[35]Qur'ân, s. al-Baqarah/2:136.
[36]Qur'ân, s. al-Shûrâ/42:15.

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(4) Its faith must be directly in God and in God's Revelation. "The Book" mentioned here covers all the revelations sent by God to His prophets.

(5) It must judge justly between warring factions, as the Religion of Peace and Unity.

(6) The God whom it preaches is not an exclusive God. He is the Lord of the Worlds: to any given person, of whatever faith, 'He is your God, as well as mine.'[37]

The corollary to those perspectives is that salvation is not the monopoly of a certain people or a certain religion. If *fitrah* is universal to man, and if *hanîfiyah* is the nature of every individual, then all men have the potential of finding the truth which leads them to salvation. It is only to reinforce the *fitrah* that God sends messengers to every nation and all communities.[38] According to Prophet Muhammad, God had raised 124.000 prophets all along the past history of mankind, and 315 of them were messengers, "a huge number", the Prophet insisted.[39] All people are therefore necessarily expected to believe in all prophets and all messengers of God, implying recognition of the fundamental truth in their tenets. As quoted above, the Qur'ân instructs its followers to declare that they believe in all prophets, and to confirm that "we make no difference between one and another of them and we all submit ourselves to Him (*muslimûn*)."[40] It is also due to these principles that the Qur'ân does not recognize the exclusivistic notion of the phrase, *"Extra ecclesiam nullus propheta"* (there is no prophet outside the church), neither the phrase, *"Extra ecclesiam nulla sallus"* (there is no salvation outside the church). Instead, the Qur'ân proclaims that,

> Those who believe (in the Qur'ân) and those who follow the Jewish (Scriptures) and the Christians and the Sabians, whoever believe in God and the last day and work righteousness, shall have their reward with their Lord; on them shall be no fear nor shall they grieve.[41]

> Those who believe (in the Qur'ân) and those who follow the Jewish (Scriptures) and the Sabians and the Christians, any who believe in God and the Last Day and work righteousness, on them shall be no fear nor shall they grieve.[42]

It is due to this all inclusive concept of religion that the authorization to wage a war given by God to the community of Believers (*al-Mu'minûn*) is contrived to protect the religious freedom so that people would not be persecuted "only because they say, 'Our Lord is God'", and to protect religious institutions such as "monasteries, churches,

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[37]A. Yusuf Ali, *The Holy Qur'ân, Text, Translation and Commentary*, notes 4547 and 4548.
[38]Qur'ân, s. al-Nahl/16:36.
[39]Hadîth, by Ahmad. (See Appendix 6).
[40]Qur'ân, s. al-Baqarah/2:136.
[41]Qur'ân, s. al-Baqarah/2:62. (For further commentary on this verse, see Appendix 7).
[42]Qur'ân, s. al-Mâ'idah/5:69. (For further commentary on this verse, see Appendix 8).

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synagogues and mosques in which the name of God is commemorated in abundant measure",[43] that is, in which the highest values of human life are perpetuated in congregations. The principle of the religious freedom and the protection of religious institutions involves that of all worship, Jewish or Christian as well as Muslim, and of all foundations built for pious uses.[44]

At the face of the universality of religions and of their fundamental unity, all of the apparent differences among religions are but the external forms and the symbolical expressions of the same and one perennial truth which is basically ineffable. God gives every community their own way and method of attaining salvation,[45] and there are many, not one, ways of God and ways of salvation,[46] although man should be cautious against some of them which are devious.[47] Every community has its own point of orientation (*wijhah* — وجهة), and members of a community are not supposed to question the validity of the point of orientation of other communities, but all communities should be encouraged to *"strive together (as in a race) toward all that is good."*[48]

> To each among you have We prescribed a Law and an Open Way. If God had so willed He would have made you a single people but (His plan is) to test you in what He hath given you: so strive as in a race in all virtues. The goal of you all is to God; it is He that will show you the truth of the matters in which ye dispute.[49]

It is on the basis of such fundamental values that the Qur'ân categorically inhibits compulsion of faith upon anybody. No one is authoritative enough, not to say not holy enough, to coerce his faith upon other people, so much so that even Prophet Muhammad was strongly admonished by God not to compel people to follow the truth of the revelation. *"If it had been thy Lord's Will they would all have believed all who are on earth! Wilt thou then compel mankind against their will to believe?!"*[50] *"Let there be no compulsion in religion. Truth stands out clear from error; whoever rejects evil and believes in God hath grasped the most trustworthy hand-hold that never breaks. And God heareth and knoweth all things."*[51]

Thus the principle of the freedom of conscience is firmly established in the Qur'ân. The principle is an absolute necessity because at the ultimate stage it is individuals rather than collectivities who will be held responsible for all of their respective worldly activities.

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[43]See Qur'ân, s. al-Hajj/22:39-40.
[44]See A. Yusuf Ali, *The Holy Qur'ân, Text, Translation and Commentary*, note 2817.
[45]See Qur'ân, s. al-Mâ'idah/5:48.
[46]See Qur'ân, s. al-'Ankabût/29:69 and s. al-Mâ'idah/5:16.
[47]See Qur'ân, s. al-Nahl/16:9.
[48]Qur'ân, s. al-Baqarah/2:148.
[49]Qur'ân, s. al-Mâ'idah/5:48.
[50]Qur'ân, s. Yûnus/10:99.
[51]Qur'ân, s. al-Baqarah/2:256.

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The Qur'ân is replete with assertions that in the Day of Judgment people will be summoned by God absolutely individually to account for their deeds:

> Nay, is he not acquainted with what is in the books of Moses?
> And of Abraham who fulfilled his engagements?
> Namely that no bearer of burdens can bear the burden of another;
> That man can have nothing but what he strives for;
> That (the fruit of) his striving will soon come in sight;
> Then will he be rewarded with a reward complete;
> That to thy Lord is the final Goal.[52]

> Then guard yourselves against a day when one soul shall not avail another, nor shall intercession be accepted for her, nor shall compensation be taken from her, nor shall anyone be helped (from outside).[53]

> O mankind! do your duty to your Lord and fear (the coming of) a Day when no father can avail aught for his son nor a son avail aught for his father. Verily the promise of God is true: let not then this present life deceive you nor let the Chief Deceiver deceive you about God.[54]

> And behold! ye come to Us bare and alone as We created you for the first time: Ye have left behind you all (the favors) which We bestowed on you: We see not with you your intercessors whom ye thought to be partners in your affairs: so now all relations between you have been cut off and your (pet) fancies have left you in the lurch![55]

Just as man is the Vicegerent of God, he is the highest among all creatures in ranking,[56] in such a way as none is above him except God. Therefore man should not look up to anything other than God. God honors the Children of Adam,[57] and subjects the whole universe as His bounty for them, as long as they use their reason.[58] And human beings are worthy of the Divine honor as individuals, that the Qur'ân says that every individual of man is worth the whole humanity, *"that if anyone slew a person unless it be for murder or for spreading mischief in the land it would be as if he slew the whole people: and if anyone saved a life it would be as if he saved the life of the whole*

[52]Qur'ân, s. al-Najm/53:36-42.
[53]Qur'ân, s. al-Baqarah/2:48.
[54]Qur'ân, s. Luqmân/31:33.
[55]Qur'ân, s. al-An'âm/6:94.
[56]Qur'ân, s. al-Tîn/95:4.
[57]Qur'ân, s. al-Isrâ'/17:70.
[58]Qur'ân, s. al-Jâthiyah/45:13.

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people."[59] The respectability of man in Islam had left some impressions in the minds of Renaissance thinkers in Europe that one of them, Giovanni Pico della Mirandola says,

> I have read in the records of the Arabians, reverend Fathers, that Abdala the Saracen, when questioned as to what on this stage of the world, as it were, could be seen most worthy of wonder, replied: 'There is nothing to be seen more wonderful than man.' In agreement with this opinion is the saying of Hermes Trismegistus, 'A great miracle, Asclepius, is man.'[60]

Just as the whole universe is created for man, it is man that is the center of all creations. All Divine life prescriptions for man are not for the interest of God, but for the interest of man himself. *"Whoever works righteousness benefits himself; whoever works evil it is against himself: nor is thy Lord ever unjust (in the least) to His servants.*"[61] *"And if any is grateful truly his gratitude is (a gain) for his own soul; but if any is ungrateful truly my Lord is Free of All Needs, Supreme in Honor!*"[62] *"...for the scum disappears like froth cast out; while that which is for the good of mankind remains on the earth. Thus doth God set forth parables.*"[63] Even the design of God that He created man only to serve Him is for the benefit of man himself rather than God. *"No sustenance do I require of them nor do I require that they should feed Me. For God is He Who gives (all) Sustenance, Lord of Power, Steadfast (for ever).*"[64]

The Civil and Political Rights

By virtue of the individual dignity of man as the Vicegerent of God, each person has the right to exercise freedom to choose what he conceives as good for him to perform in activities that he would be personally and individually held accountable for in front of his Lord, just as it is exactly all of the purpose of this life. *"He (God) Who created death and life that He may try which of you is best in deed: and He is the Exalted in Might, Oft-Forgiving.*"[65] Individual accountability presupposes individual freedom, because someone can not be held accountable for his deeds if he does not have any choice other than what

[59]Qur'ân, s. al-Mâ'dah/5:32.
[60]Giovanni Pico della Mirandola, "Oration on the Dignity of Man", translated by Elizabeth Livermore Forbes, in Ernst Cassirer, et. al. *The Renaissance Philosophy of Man,* Chicago: The University of Chicago Press, 1948, p. 223
[61]Qur'ân, s. Fussilat/41:46.
[62]Qur'ân, s. al-Naml/27:40.
[63]Qur'ân, s. al-Ra'd/13:17.
[64]Qur'ân, s. al-Dhâriyât/51:57-58.
[65]Qur'ân, s. al-Mulk/67:2.

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he has done. This postulate is very strongly indicated in the Qur'ân: *"Anyone who after accepting faith in God utters unbelief* <u>*except under compulsion*</u> *while his heart remains firm in faith, but such as open their breast to unbelief, on them is wrath from God and theirs will be a dreadful Penalty."*[66]

Therefore one of the basic rights of every individual is to participate in all processes of decision making that effect their lives through open and mutual deliberation and consultation (*shûrâ, mushâwarah*). Prophet himself was ordained by God to perform the *shûrâ,*[67] and the first four enlightened Caliphs firmly held the prescript. It is very unfortunate that the open and enlightened political arrangement of Islam lasted very shortly. It lasted only for about forty years beginning with the Hijrah of the Prophet from Mecca to Yathrib (Greek Yethroba, renamed Madînah) until the assassination of Ali, the fourth Caliph. The system was then usurped by the Umayyads, terminating the basic Islamic social and political arrangement and replacing it with pre-Islamic Arabian system. Robert Bellah, one of the leading authority in the sociology of religion, observes that the system laid down by the Prophet and developed by the first four Caliphs "did so closely enough to provide a better model for modern national community building than might be imagined..." But *"It was too modern to succeed.* (Italics is added). The necessary social infrastructure did not yet exist to sustain it..." Here it may be of some help to make a fuller quotation from Bellah

> ... There is no question but that under Muhammad, Arabian society made a remarkable leap forward in social complexity and political capacity. When the structure that took shape under the prophet was extended by the early caliphs to provide the organizing principle for a world empire, the result is something that for its time and place is remarkably modern. It is modern in the high degree of commitment, involvement, and participation expected from the rank-and-file members of the community. It is modern in the openness of its leadership positions to ability judged on universalistic grounds and symbolized in the attempt to institutionalize a nonhereditary top leadership. Even in the earliest times certain restraints operated to keep the community from wholly exemplifying these principles, but it did so closely enough to provide a better model for modern national community building than might be imagined. The effort of modern Muslims to depict the early community as a very type of equalitarian participant nationalism is by no means an unhistorical ideological fabrication.
>
> In a way the failure of the early community, the relapse into pre-Islamic principles of social organization, is an added proof of the modernity of the early experiment. It was too modern to succeed. The necessary social infrastructure did not yet exist to sustain it....[68]

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[66]Qur'ân, s. al-Na<u>h</u>l/16:106.

[67]See Qur'ân, s. Âlu 'Imrân/3:159 and s. al-Shûrâ/42:38.

[68]Robert N. Bellah, "Islamic Tradition and the Problem of Modernization", in Robert N. Bellah, ed., *Beyond Belief*, New York: Harper & Row, paperback edition, 1976, pp. 150-151.

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As for "the relapse into pre-Islamic principles of social organization", it was done by the Umayyads from Damascus, beginning with Mu'âwiyah's decision to appoint his own son, Yazîd, to succeed him as the Caliph, discarding the system of the preceding Caliphs. Reactions against the Umayyads by the Medinese and Meccans were harsh and radical. In Medina, 'Abd-ur Rahmân ibn Abî Bakr, brother of 'Â'ishah the wife of the Prophet, categorically rejected the plan, accusing the Umayyads of shedding the *Sunnah* of the Prophet and the Caliphs, adopting the "*Sunnah*" of the Persian Khusro and the Roman Caesar. Other leading figures like 'Abd-u 'l-Lâh ibn 'Umar and 'Abd-u 'l-Lâh ibn al-Zubayr reacted in the same way, charging the Umayyads of leaving behind the Qur'ânic principle of mutual consultation and the Sunnah of the nascent Islamic community of open election of caliphs.[69] As it is well known, eversince the time of the Umayyads, the Muslim world has not known except hereditary, genealogical dynasties in political system until the reintroduction of the idea of republic and open election by the West in modern time. Evenmore than that, starting with the Umayyads the Muslims know only states or dynasties named after the ruling clans, like "the Umayyads", "the Abbasids", "the Fatimids", or after the ruling tribe, like "the Moguls" in India. All of this is against the very basic principle of the Qur'ânic and Prophetic perspectives.[70]

Conclusion

After all of the discussion above, limited as it is, we may safely come to a conclusion, as described by Emile Dermenghem, that,

> Islam, which has contributed to the spiritual life of humanity and has enriched its culture, offers permanent values from which all have profited. *Intermediate* nation as the Qur'ân says, it has its role to play between east and west. If it has, like all religions and moral codes, its "closed" and "static" aspects in the Bergsonian sense, it also has what is needed for an *open* religion.[71]

As an "open religion", Islam has developed cultural system which is highly receptive of other cultures. The outlook can be conveyed to modern time, that Islam must be able to positively and consistently accept and validate modern values akin to its own very fundamental principles like the ideas propounded in the Universal Declaration of Human Rights. May be there is a need for some very particular adjustments of the Islamic

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[69]See Jalâl al-Dîn al-Suyûtî (d. 911 AH), *Târîkh al-Khulafâ'*, Beirut, Dâr al-Kutub, 1408/1988, pp. 156-7. (See Appendix 9).

[70] Hadîths, by Ahmad (See Appendix 10).

[71]Emile Dermenghem, *Muhammad and the Islamic Tradition*, New York, The Overlook Press, 1981, p. 87.

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principles, but it should be seen as the imperative of the adjustment to particular cultural environment or particular requirement of a certain time and space. Such an adjustment has been given example by Caliph Umar in the way he handled the problem of redistributing the agricultural lands of the liberated regions. When he was confronted with the fierce opposition from some leading Muslim figures in Medina using the literal references from the Holy Book, he managed to overcome it by his enlightened success in elevating the Qur'ânic principles from literal approach and understanding to a highly generalized principles and then bringing them down to the requisites of the realities of the situation.[72]

It is absolutely important to bear in mind that the mission of the Prophet Muhammad is not unique, as he is only one of the messengers of God to humankind, and the last of them. This brings about the belief that the religion of the Prophet Muhammad, which is then *"Islâm par excellence"* is nothing but the culmination and the perfection of the whole series of God's revelation to mankind. The perfection of this *"Islâm par excellence"* is declared in the Qur'ân: *"This day have I perfected your religion for you completed my favor upon you and have chosen for you Islam as your religion."*[73] It is important to note that this declaration of the perfection of Islam was revealed within the context of dietary law and some marriage law, insisting that the food of the People of the Book is lawful for Muslims, just as it is lawful for Muslims to be married to the People of the Book in accordance with the stipulation of the Sharî'ah. All of this signifies the basic unity of all religions and the unity of mankind:

> This day are (all) things good and pure made lawful unto you. The food of the People of the Book is lawful unto you and yours is lawful unto them. (Lawful unto you in marriage) are (not only) chaste women who are believers but chaste women among the People of the Book revealed before your time when ye give them their due dowers and desire chastity not lewdness nor secret intrigues. If anyone rejects faith fruitless is his work and in the Hereafter he will be in the ranks of those who have lost (all spiritual good).[74]

Furthermore, it is also important to put into consideration that God's declaration of the perfection of Islam was revealed to the Prophet Muhammad at Arafah, near Makkah, in Friday afternoon after the Prophet made the famous Farewell Speech[75] (so called because about 80 days after the speech the Prophet passed away). It is in that Farewell Speech that the Prophet elaborated the principles which today would be called "Human

[72]For further discussion of Umar's approach, see Dr. Muhammad 'Abd-u l-Qâdir Abû Fâris, *al-Shûrâ wa Qadâyâ al-Ijtihâd al-Jamâ'î*, Zarqâ', Jordan, Maktabat al-Manâr, 1406 / 1986, pp. 65-70.
[73]Qur'ân, s. al-Mâ'idah/5:3.
[74]Qur'ân, s. al-Mâ'idah/5:5.
[75]Hadîth, by al-Bukhârî (see Appendix 11).

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Rights". Narrated in a good number of Hadîths, the Prophet insisted the sacredness of Life (*al-dimâ'* — الدماء), Property (*al-amwâl* — الأموال) and Honor (*al-a'râd* — الأعراض). (These Prophetic principles could be compared with John Locke's "Life, Liberty and Property" and Thomas Jefferson's "Life, Liberty and Pursuit of happiness"). In the Farewell Speech, the Prophet also refined many other principles, including the rights of women, the slaves and workers, and the strict prohibition of economic dealings and transactions that would result in the exploitation of man by man.[76] Thus the whole process of the development and the perfection of Prophet Muhammad's sacred mission was culminated by his declaration of the principles of human rights.

Jakarta, 2 November 1998

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[76]Hadîth, by Ahmad (see Appendix 12). That there should be no exploitation of man by man is also elucidated in the Qur'ân, s. al-Baqarah/2:278-279, which is also quoted by the Prophet in the speech.

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Appendices:

(1). The substantive proposition is in verses 4-8, and it is clinched by an appeal to four sacred symbols, viz., the Fig, the Olive, Mount Sinai, and the sacred City of Makkah. About the precise interpretation of the first two symbols, and especially of the symbol of the Fig, there is much difference of opinion. If we take the Fig literally to refer to the fruit or the tree, it can stand as a symbol of man's destiny in many ways. Under cultivation it can be one of the finest, most delicious, and most wholesome fruits in existence: in its wild state, it is nothing but tiny seeds. and is insipid, and often full of worms and maggots. So man at his best has a noble destiny: at his worst, he is "the lowest of the low". Christ is said to have cursed a fig tree for having only leaves, and not producing fruit (Matt. xxi. 18-20), enforcing the same lesson. There is also a parable of the fig tree in Matt. xxiv. 32-35. See also the parable of the good and evil figs in Jeremiah, xxiv. 1-10. (A. Yusuf Ali, *The Holy Qur'ân, Text, Translation and Commentary*, note 6194).

For the sacred symbolism of the Olive, see n. 2880 to xxiii. 20, and notes 3000- 3002 to xxiv. 35, where the parable of God's Light includes a reference to the Olive. But it is possible that the Olive here refers to the Mount of Olives. just outside the walls of the City of Jerusalem (see n. 5038 to Iii. 2), for this is the scene in the Gospel story (Matt. xxiv. 3-4) of Christ's description of the Judgment to come. (A. Yusuf Ali, *The Holy Qur'ân, Text, Translation and Commentary*, note 6195).

Having discussed the four symbols in detail. let us consider them together. It is clear that they refer to God's Light or Revelation, which offers man the highest destiny if he will follow the Way. Makkah stands for Islam. Sinai for Israel. and the Mount of Olives for Christ's original and pure Message. (A. Yusuf Ali, *The Holy Qur'ân, Text, Translation and Commentary*, note 6198).

(2). Hadîth, by Muslim:

عَنْ عِيَاضِ بْنِ حِمَارٍ الْمُجَاشِعِيِّ أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ ذَاتَ يَوْمٍ فِي خُطْبَتِهِ أَلَا إِنَّ رَبِّي أَمَرَنِي أَنْ أُعَلِّمَكُمْ مَا جَهِلْتُمْ مِمَّا
عَلَّمَنِي يَوْمِي هَذَا كُلُّ مَالٍ نَحَلْتُهُ عَبْدًا حَلَالٌ وَإِنِّي خَلَقْتُ عِبَادِي حُنَفَاءَ كُلَّهُمْ وَإِنَّهُمْ أَتَتْهُمُ الشَّيَاطِينُ فَاجْتَالَتْهُمْ عَنْ دِينِهِمْ وَحَرَّمَتْ عَلَيْهِمْ
مَا أَحْلَلْتُ لَهُمْ وَأَمَرَتْهُمْ أَنْ يُشْرِكُوا بِي مَا لَمْ أُنَزِّلْ بِهِ سُلْطَانًا وَإِنَّ اللَّهَ نَظَرَ إِلَى أَهْلِ الْأَرْضِ فَمَقَتَهُمْ عَرَبَهُمْ وَعَجَمَهُمْ إِلَّا بَقَايَا مِنْ أَهْلِ
الْكِتَابِ وَقَالَ إِنَّمَا بَعَثْتُكَ لِأَبْتَلِيَكَ بِكَ وَأَبْتَلِيَ بِكَ وَأَنْزَلْتُ عَلَيْكَ كِتَابًا لَا يَغْسِلُهُ الْمَاءُ تَقْرَؤُهُ نَائِمًا وَيَقْظَانَ وَإِنَّ اللَّهَ أَمَرَنِي أَنْ أُحَرِّقَ قُرَيْشًا فَقُلْتُ
رَبِّ إِذًا يَثْلَغُوا رَأْسِي فَيَدَعُوهُ خُبْزَةً قَالَ اسْتَخْرِجْهُمْ كَمَا اسْتَخْرَجُوكَ وَاغْزُهُمْ نُغْزِكَ وَأَنْفِقْ فَسَنُنْفِقَ عَلَيْكَ وَابْعَثْ جَيْشًا نَبْعَثْ خَمْسَةً مِثْلَهُ
وَقَاتِلْ بِمَنْ أَطَاعَكَ مَنْ عَصَاكَ قَالَ وَأَهْلُ الْجَنَّةِ ثَلَاثَةٌ ذُو سُلْطَانٍ مُقْسِطٌ مُتَصَدِّقٌ مُوَفَّقٌ وَرَجُلٌ رَحِيمٌ رَقِيقُ الْقَلْبِ لِكُلِّ ذِي قُرْبَى وَمُسْلِمٍ
وَعَفِيفٌ مُتَعَفِّفٌ ذُو عِيَالٍ قَالَ وَأَهْلُ النَّارِ خَمْسَةٌ الضَّعِيفُ الَّذِي لَا زَبْرَ لَهُ الَّذِينَ هُمْ فِيكُمْ تَبَعًا لَا يَبْتَغُونَ أَهْلًا وَلَا مَالًا وَالْخَائِنُ الَّذِي لَا يَخْفَى لَهُ
طَمَعٌ وَإِنْ دَقَّ إِلَّا خَانَهُ وَرَجُلٌ لَا يُصْبِحُ وَلَا يُمْسِي إِلَّا وَهُوَ يُخَادِعُكَ عَنْ أَهْلِكَ وَمَالِكَ وَذَكَرَ الْبُخْلَ أَوِ الْكَذِبَ وَالشِّنْظِيرُ الْفَحَّاشُ وَلَمْ يَذْكُرْ
أَبُو غَسَّانَ فِي حَدِيثِهِ وَأَنْفِقْ فَسَنُنْفِقَ عَلَيْكَ و حَدَّثَنَاه مُحَمَّدُ بْنُ الْمُثَنَّى الْعَنَزِيُّ حَدَّثَنَا مُحَمَّدُ بْنُ أَبِي عَدِيٍّ عَنْ سَعِيدٍ عَنْ قَتَادَةَ بِهَذَا الْإِسْنَادِ وَلَمْ
يَذْكُرْ فِي حَدِيثِهِ كُلُّ مَالٍ نَحَلْتُهُ عَبْدًا حَلَالٌ حَدَّثَنِي عَبْدُ الرَّحْمَنِ بْنُ بِشْرٍ الْعَبْدِيُّ حَدَّثَنَا يَحْيَى بْنُ سَعِيدٍ عَنْ هِشَامٍ صَاحِبِ الدَّسْتَوَائِيِّ حَدَّثَنَا
قَتَادَةُ عَنْ مُطَرِّفٍ عَنْ عِيَاضِ بْنِ حِمَارٍ أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ خَطَبَ ذَاتَ يَوْمٍ وَسَاقَ الْحَدِيثَ وَقَالَ فِي آخِرِهِ قَالَ يَحْيَى قَالَ
شُعْبَةُ عَنْ قَتَادَةَ قَالَ سَمِعْتُ مُطَرِّفًا فِي هَذَا الْحَدِيثِ و حَدَّثَنِي أَبُو عَمَّارٍ حُسَيْنُ بْنُ حُرَيْثٍ حَدَّثَنَا الْفَضْلُ بْنُ مُوسَى عَنِ الْحُسَيْنِ عَنْ مَطَرٍ
حَدَّثَنِي قَتَادَةُ عَنْ مُطَرِّفِ بْنِ عَبْدِ اللَّهِ بْنِ الشِّخِّيرِ عَنْ عِيَاضِ بْنِ حِمَارٍ أَخِي بَنِي مُجَاشِعٍ قَالَ قَامَ فِينَا رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ ذَاتَ يَوْمٍ
خَطِيبًا فَقَالَ إِنَّ اللَّهَ أَمَرَنِي وَسَاقَ الْحَدِيثَ بِمِثْلِ حَدِيثِ هِشَامٍ عَنْ قَتَادَةَ وَزَادَ فِيهِ وَإِنَّ اللَّهَ أَوْحَى إِلَيَّ أَنْ تَوَاضَعُوا حَتَّى لَا يَفْخَرَ أَحَدٌ عَلَى أَحَدٍ
وَلَا يَبْغِ أَحَدٌ عَلَى أَحَدٍ وَقَالَ فِي حَدِيثِهِ وَهُمْ فِيكُمْ تَبَعًا لَا يَبْغُونَ أَهْلًا وَلَا مَالًا فَقُلْتُ فَيَكُونُ ذَلِكَ يَا أَبَا عَبْدِ اللَّهِ قَالَ نَعَمْ وَاللَّهِ لَقَدْ أَدْرَكْتُهُمْ فِي

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الْجَاهِلِيَّةِ وَإِنَّ الرَّجُلَ لَيَرْعَى عَلَى الْحَيِّ مَا بِهِ إِلَّا وَلِيدَتُهُمْ يَطَؤُهَا. (موسوعة الحديث الشريف، القاهرة، شركة صخر لبرامج الحاسب، ١٩٩٥، رواه مسلم، حديث رقم ٥١٠٩).

(3). Hadîth, by Ahmad and al-Dârimî:

عَنْ وَابِصَةَ بْنِ مَعْبَدٍ قَالَ أَتَيْتُ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ وَأَنَا أُرِيدُ أَنْ لَا أَدَعَ شَيْئًا مِنَ الْبِرِّ وَالْإِثْمِ إِلَّا سَأَلْتُهُ عَنْهُ وَإِذَا عِنْدَهُ جَمْعٌ فَذَهَبْتُ أَتَخَطَّى النَّاسَ فَقَالُوا إِلَيْكَ يَا وَابِصَةُ عَنْ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ إِلَيْكَ يَا وَابِصَةُ فَقُلْتُ أَنَا وَابِصَةُ دَعُونِي أَدْنُو مِنْهُ فَإِنَّهُ مِنْ أَحَبِّ النَّاسِ إِلَيَّ أَنْ أَدْنُوَ مِنْهُ فَقَالَ لِي ادْنُ يَا وَابِصَةُ ادْنُ يَا وَابِصَةُ فَدَنَوْتُ مِنْهُ حَتَّى مَسَّتْ رُكْبَتِي رُكْبَتَهُ فَقَالَ يَا وَابِصَةُ أُخْبِرُكَ مَا جِئْتَ تَسْأَلُنِي عَنْهُ أَوْ تَسْأَلُنِي فَقُلْتُ يَا رَسُولَ اللَّهِ فَأَخْبِرْنِي قَالَ جِئْتَ تَسْأَلُنِي عَنِ الْبِرِّ وَالْإِثْمِ قُلْتُ نَعَمْ فَجَمَعَ أَصَابِعَهُ الثَّلَاثَ فَجَعَلَ يَنْكُتُ بِهَا فِي صَدْرِي وَيَقُولُ يَا وَابِصَةُ اسْتَفْتِ نَفْسَكَ الْبِرُّ مَا اطْمَأَنَّ إِلَيْهِ الْقَلْبُ وَاطْمَأَنَّتْ إِلَيْهِ النَّفْسُ وَالْإِثْمُ مَا حَاكَ فِي النَّفْسِ وَتَرَدَّدَ فِي الصَّدْرِ وَإِنْ أَفْتَاكَ النَّاسُ قَالَ سُفْيَانُ وَأَفْتَوْكَ. (موسوعة الحديث الشريف، القاهرة، شركة صخر لبرامج الحاسب، ١٩٩٥. رواه أحمد، حديث رقم ١٧٣١٥).

عَنْ وَابِصَةَ بْنِ مَعْبَدٍ الْأَسَدِيِّ أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ لِوَابِصَةَ جِئْتَ تَسْأَلُ عَنِ الْبِرِّ وَالْإِثْمِ قَالَ قُلْتُ نَعَمْ قَالَ فَجَمَعَ أَصَابِعَهُ فَضَرَبَ بِهَا صَدْرَهُ وَقَالَ اسْتَفْتِ نَفْسَكَ اسْتَفْتِ قَلْبَكَ يَا وَابِصَةُ ثَلَاثًا الْبِرُّ مَا اطْمَأَنَّتْ إِلَيْهِ النَّفْسُ وَاطْمَأَنَّ إِلَيْهِ الْقَلْبُ وَالْإِثْمُ مَا حَاكَ فِي النَّفْسِ وَتَرَدَّدَ فِي الصَّدْرِ وَإِنْ أَفْتَاكَ النَّاسُ وَأَفْتَوْكَ. (موسوعة الحديث الشريف، القاهرة، شركة صخر لبرامج الحاسب، ١٩٩٥، رواه الدارمي، حديث رقم ٢٤٠١).

(4). Hadîth, by al-Bukhârî:

عَلْقَمَةُ بْنُ وَقَّاصٍ اللَّيْثِيُّ يَقُولُ سَمِعْتُ عُمَرَ بْنَ الْخَطَّابِ رَضِيَ اللَّهُ عَنْهُ عَلَى الْمِنْبَرِ قَالَ سَمِعْتُ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَقُولُ إِنَّمَا الْأَعْمَالُ بِالنِّيَّاتِ وَإِنَّمَا لِكُلِّ امْرِئٍ مَا نَوَى فَمَنْ كَانَتْ هِجْرَتُهُ إِلَى دُنْيَا يُصِيبُهَا أَوْ إِلَى امْرَأَةٍ يَنْكِحُهَا فَهِجْرَتُهُ إِلَى مَا هَاجَرَ إِلَيْهِ. (موسوعة الحديث الشريف، القاهرة، شركة صخر لبرامج الحاسب، ١٩٩٥، رواه البخاري، حديث رقم ١).

(5). Hadîth, by Ahmad:

عَنِ ابْنِ عَبَّاسٍ قَالَ قِيلَ لِرَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ أَيُّ الْأَدْيَانِ أَحَبُّ إِلَى اللَّهِ قَالَ الْحَنِيفِيَّةُ السَّمْحَةُ. (موسوعة الحديث الشريف، القاهرة، شركة صخر لبرامج الحاسب، ١٩٩٥، رواه أحمد، حديث رقم ٢٠٠٣).

(6). Hadîth, by Ahmad:

عَنْ أَبِي أُمَامَةَ قَالَ كَانَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فِي الْمَسْجِدِ جَالِسًا وَكَانُوا يَظُنُّونَ أَنَّهُ يَنْزِلُ عَلَيْهِ فَأَقْصَرُوا عَنْهُ حَتَّى جَاءَ أَبُو ذَرٍّ فَاقْتَحَمَ فَأَتَى فَجَلَسَ إِلَيْهِ فَأَقْبَلَ عَلَيْهِمُ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَقَالَ يَا أَبَا ذَرٍّ هَلْ صَلَّيْتَ الْيَوْمَ قَالَ لَا قَالَ قُمْ فَصَلِّ فَلَمَّا صَلَّى أَرْبَعَ رَكَعَاتٍ الضُّحَى أَقْبَلَ عَلَيْهِ فَقَالَ يَا أَبَا ذَرٍّ تَعَوَّذْ مِنْ شَرِّ شَيَاطِينِ الْجِنِّ وَالْإِنْسِ قَالَ يَا نَبِيَّ اللَّهِ وَهَلْ لِلْإِنْسِ شَيَاطِينٌ قَالَ نَعَمْ شَيَاطِينُ الْإِنْسِ وَالْجِنِّ يُوحِي بَعْضُهُمْ إِلَى بَعْضٍ زُخْرُفَ الْقَوْلِ غُرُورًا ثُمَّ قَالَ يَا أَبَا ذَرٍّ أَلَا أُعَلِّمُكَ مِنْ كَنْزِ الْجَنَّةِ قَالَ بَلَى جَعَلَنِي اللَّهُ فِدَاءَكَ قَالَ قُلْ لَا حَوْلَ وَلَا قُوَّةَ إِلَّا بِاللَّهِ قَالَ فَقُلْتُ لَا حَوْلَ وَلَا قُوَّةَ إِلَّا بِاللَّهِ قَالَ ثُمَّ سَكَتَ عَنِّي فَاسْتَبْطَأْتُ كَلَامَهُ قَالَ قُلْتُ يَا نَبِيَّ اللَّهِ إِنَّا كُنَّا أَهْلَ جَاهِلِيَّةٍ وَعَبَدَةَ أَوْثَانٍ فَبَعَثَكَ اللَّهُ رَحْمَةً لِلْعَالَمِينَ أَرَأَيْتَ الصَّلَاةَ مَاذَا هِيَ قَالَ خَيْرٌ مَوْضُوعٌ مَنْ شَاءَ اسْتَقَلَّ وَمَنْ شَاءَ اسْتَكْثَرَ قَالَ قُلْتُ يَا نَبِيَّ اللَّهِ أَرَأَيْتَ الصِّيَامَ مَاذَا هُوَ قَالَ فَرْضٌ مُجْزِئٌ قَالَ قُلْتُ يَا نَبِيَّ اللَّهِ أَرَأَيْتَ الصَّدَقَةَ مَاذَا هِيَ قَالَ أَضْعَافٌ مُضَاعَفَةٌ وَعِنْدَ اللَّهِ الْمَزِيدُ قَالَ قُلْتُ يَا نَبِيَّ اللَّهِ فَأَيُّ الصَّدَقَةِ أَفْضَلُ قَالَ سِرٌّ إِلَى فَقِيرٍ وَجُهْدٌ مِنْ مُقِلٍّ قَالَ قُلْتُ يَا نَبِيَّ اللَّهِ أَيُّمَا نَزَلَ عَلَيْكَ أَعْظَمُ قَالَ (اللَّهُ لَا إِلَهَ إِلَّا هُوَ الْحَيُّ الْقَيُّومُ) آيَةُ الْكُرْسِيِّ قَالَ قُلْتُ يَا نَبِيَّ اللَّهِ أَيُّ الشُّهَدَاءِ أَفْضَلُ قَالَ مَنْ سُفِكَ دَمُهُ وَعُقِرَ جَوَادُهُ قَالَ قُلْتُ يَا نَبِيَّ اللَّهِ فَأَيُّ الرِّقَابِ أَفْضَلُ قَالَ أَغْلَاهَا ثَمَنًا وَأَنْفَسُهَا عِنْدَ أَهْلِهَا قَالَ قُلْتُ يَا

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نَبِيُّ اللَّهِ فَأَيُّ الْأَنْبِيَاءِ كَانَ أَوَّلَ قَالَ آدَمُ عَلَيْهِ السَّلَام قَالَ قُلْتُ يَا نَبِيَّ اللَّهِ أَوَنَبِيٌّ كَانَ آدَمُ قَالَ نَعَمْ نَبِيٌّ مُكَلَّمٌ خَلَقَهُ اللَّهُ بِيَدِهِ ثُمَّ نَفَخَ فِيهِ رُوحَهُ ثُمَّ قَالَ لَهُ يَا آدَمُ قُبُلًا قَالَ قُلْتُ يَا رَسُولَ اللَّهِ كَمْ وَفَى عِدَّةُ الْأَنْبِيَاءِ قَالَ مِائَةُ أَلْفٍ وَأَرْبَعَةٌ وَعِشْرُونَ أَلْفًا الرُّسُلُ مِنْ ذَلِكَ ثَلَاثُ مِائَةٍ وَخَمْسَةَ عَشَرَ جَمًّا غَفِيرًا. ((موسوعة الحديث الشريف، القاهرة، شركة صخر لبرامج الحاسب، ١٩٩٥، رواه أحمد، حديث رقم ٢١٢٥٧).

(7). The point of the verse is that Islam does not teach an exclusive doctrine, and is not meant exclusively for one people. The Jews claimed this for themselves, and the Christians in their own origin were a sect of the Jews. Even the modern organized Christian churches, though they have been, consciously or unconsciously, influenced by the Time-spirit, including the historical fact of Islam, yet cling to the idea of Vicarious Atonement, which means that all who do not believe in it or who lived previously to the death of Christ are at a disadvantage spiritually before the Throne of God. The attitude of Islam is entirely different. Islam existed before the preaching of Muhammad on this earth: the Qur-an expressly calls Abraham a Muslim (*muslim*, that is, someone who submits himself to God — Qur'ân, s. Âlu 'Imrân/3:67 — NM). Its teaching (submission to God's will) has been and will be the teaching of Religion for all time and for all peoples. (A. Yusuf Ali, *The Holy Qur'ân, Text, Translation and Commentary*, note 77).

(8). Here, as in Sura Al-Baqarah (ii. 62), the Qur-an underscores the importance of true and genuine faith, which is to be judged by a sincere belief in God and man's accountability to Him backed by a righteous conduct rather than by mere forms or labels. At both the places it repudiates the false claims of the People of the Book that they had a special relationship with God for they were the children of Abraham; that they were a chosen people with special privileges, and no matter what they did, their high status would remain unaffected. Here this false notion is refuted and the People of the Book are being reminded that it is through sincere belief and righteous conduct rather than pretentious claims that man can win his Lord's pleasure and achieve ultimate success. The verse does not purport to lay down an exhaustive list of the articles of faith. Nor does it seek to spell out the essentials of a genuine belief in God, which has no meaning unless it is accompanied by belief in His Prophets for it is through their agency alone that we know God's Will and can abide by it in our practical lives. This is especially true of His final Prophet, Muhammad (peace be on him) whose message is universal, and not confined to any particular group or section of humanity. Belief in the Prophethood of Muhammad (peace be on him) is thus an integral part and a logical corollary of belief in God. Moreover, it is also an essential test of genuineness of such belief. This becomes clear when the verse is read in conjunction with other relevant verses of the Qur-an. (A. Yusuf Ali, *The Holy Qur'ân, Text, Translation and Commentary*, note 779).

(9). Jalâl al-Dîn al-Suyûṯî:

وفى سنة خمسين فتحت قوهستان عنوة. وفيها دعا معاوية أهل الشام إلى البيعة بولاية العهد من بعده لابنه يزيد. فبايعوه. وهو أول من عهد الخلافة لابنه، وأول من عهد بها فى صحته. ثم إنه كتب إلى مروان بالمدينة أن يأخذ البيعة، فخطب مروان فقال: "إن أمير المؤمنين رأى أن يستخلف عليكم ولده يزيد سنة أبى بكر وعمر." فقام عبد الرحمن بن أبى بكر الصديق، فقال: "بل سنة كسرى وقيصر! إن أبا بكر وعمر لم يجعلاها فى أولادهما، ولا فى أحد من أهل بيتهما!" (جلال الدين السيوطى [المتوفى سنة ٩١١هـ] . تاريخ الخلفاء، بيروت، دار الكتب، ١٤٠٨هـ/١٩٨٨م، ص ١٥٦).

ثم حج معاوية سنة إحدى وخمسين، وأخذ البيعة لابنه، فبعث إلى (عبد الله) ابن عمر فتشهد وقال: "أما بعد، يا ابن عمر، إنك كنت تحدثنى أنك لاتحب أن تبيت ليلة سوداء ليس عليك فيها أمير، وإنى أحذرك أن تَشُقَّ عصى المسلمين أو تسعى فى فساد ذات بينهم." فحمد ابن عمر وأثنى عليه ثم قال: "أما بعد، فإنه قد كان قبلك خلفاء لهم أبناء ليس ابنك بخير من أبنائهم. فلم يروا فى أبنائهم ما رأيت فى ابنك، ولكنهم اختاروا للمسلمين حيث علموا الخيار. وإنك تحذرنى أن أشق عصا المسلمين، و لم أكن لأفعل. وإنما أنا رجل من المسلمين، فإذا

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اجتمعوا على أمر فإنما أنا رجل منهم." فقال (معاوية)، "يرحمك الله." فخرج ابن عمر. ثم أرسل إلى (عبد الرحمن) ابن أبي بكر، فتشهد ثم أخذ في الكلام فقطع (ابن أبي بكر) عليه كلامه، وقال: "إنك لوددتَ أنّا وكناك في أمر ابنك إلى الله، وإنا والله لانفعل، والله لتُرُدَّنَّ هذا الأمر شورى في المسلمين أو لَنعيدَنَّها عليك جَذَعَةً." ثم وثب ومضى. فقال معاوية: "اللهم اكفنيه بما شئت." ثم قال: "على رسلك أيها الرجل، لاتشرفن على أهل الشام؛ فإني أخاف أن يسبقوني بنفسك حتى أخبر العشية أنك قد بايعت. ثم كن بعد على ما بدا لك من أمرك!" ثم أرسا إلى (عبد الله) ابن الزبير: "إنما أنت ثعلب روّاغ كلما خرج من جحر دخل في آخر. وإنك عمدت إلى هذين الرجلين فنفخت في مناخرهما وحملتهما على غير رأيهما!" فقال ابن الزبير: "إن كنت قد ملئت الإمارة فاعتزلها، وهلم ابنك نبايعه. أرأيت إذا بايعنا ابنك معك لأيكما نسمع ونطيع؟ لاتجتمع البيعة لكما أبدا!" ثم راح، فصعد معاوية المنبر فحمد الله وأثنى عليه ثم قال: "إنا وجدنا أحاديث الناس ذات عَوَار، زعموا أن ابن عمر وابن أبي بكر وابن الزبير لن يبايعوا يزيد، وقد سمعوا وأطاعوا وبايعوا له." فقال أهل الشام: "والله لانرضى حتى يبايعوا على رؤوس الأشهاد، وإلا ضربنا أعناقهم." فقال (معاوية): "سبحان الله! ما أسرع الناس إلى قريش بالشر، لاأسمع هذه المقالة من أحد منكم بعد اليوم!" ثم نزل، فقال الناس: "بايع ابن عمر وابن أبي بكر وابن الزبير، وهم يقولون: لا، والله ما بايعنا، فيقول الناس، بلى." وارتحل معاوية فلحق بالشام. (جلال الدين السيوطي [المتوفى سنة ٩١١هـ] ، تاريخ الخلفاء، بيروت. دار الكتب، ١٤٠٨هـ/١٩٨٨م، ص ١٥٦-١٥٧).

(10). Hadîth by Ahmad:

عَنْ أَبِي هُرَيْرَةَ قَالَ سَمِعْتُ رَسُولَ اللَّهِ صَلَّى اللَّهم عَلَيْهِ وَسَلَّمَ يَقُولُ مَنْ فَارَقَ الْجَمَاعَةَ وَخَرَجَ مِنَ الطَّاعَةِ فَمَاتَ فَمِيتَتُهُ جَاهِلِيَّةٌ وَمَنْ خَرَجَ عَلَى أُمَّتِي بِسَيْفِهِ يَضْرِبُ بَرَّهَا وَفَاجِرَهَا لَا يُحَاشِي مُؤْمِنًا لِإِيمَانِهِ وَلَا يَفِي لِذِي عَهْدٍ بِعَهْدِهِ فَلَيْسَ مِنْ أُمَّتِي وَمَنْ قُتِلَ تَحْتَ رَايَةٍ عِمِّيَّةٍ يَغْضَبُ لِلْعَصَبِيَّةِ أَوْ يُقَاتِلُ لِلْعَصَبِيَّةِ أَوْ يَدْعُو إِلَى الْعَصَبِيَّةِ فَقِتْلَةٌ جَاهِلِيَّةٌ. (موسوعة الحديث الشريف. القاهرة، شركة صخر لبرامج الحاسب، ١٩٩٥، رواه أحمد، حديث رقم ٧٧١٦).

عَنْ أَبِي هُرَيْرَةَ أَنَّ النَّبِيَّ صَلَّى اللَّهم عَلَيْهِ وَسَلَّمَ قَالَ لَيَدَعَنَّ رِجَالٌ فَخْرَهُمْ بِأَقْوَامٍ إِنَّمَا هُمْ فَحْمٌ مِنْ فَحْمِ جَهَنَّمَ أَوْ لَيَكُونُنَّ أَهْوَنَ عَلَى اللَّهِ مِنَ الْجِعْلَانِ الَّتِي تَدْفَعُ بِأَنْفِهَا النَّتِنَ وَقَالَ إِنَّ اللَّهَ عَزَّ وَجَلَّ قَدْ أَذْهَبَ عَنْكُمْ عُبِّيَّةَ الْجَاهِلِيَّةِ وَفَخْرَهَا بِالْآبَاءِ مُؤْمِنٌ تَقِيٌّ وَفَاجِرٌ شَقِيٌّ النَّاسُ بَنُو آدَمَ وَآدَمُ مِنْ تُرَابٍ. (موسوعة الحديث الشريف، القاهرة، شركة صخر لبرامج الحاسب، ١٩٩٥، رواه أحمد، حديث رقم ١٠٣٦٣).

عَنْ عُقْبَةَ بْنِ عَامِرٍ أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهم عَلَيْهِ وَسَلَّمَ قَالَ إِنَّ أَنْسَابَكُمْ هَذِهِ لَيْسَتْ بِسِبَابٍ عَلَى أَحَدٍ وَإِنَّمَا أَنْتُمْ وَلَدُ آدَمَ طَفُّ الصَّاعِ لَمْ تَمْلَئُوهُ لَيْسَ لِأَحَدٍ فَضْلٌ إِلَّا بِالدِّينِ أَوْ عَمَلٍ صَالِحٍ حَسْبُ الرَّجُلِ أَنْ يَكُونَ فَاحِشًا بَذِيًّا بَخِيلًا جَبَانًا. (موسوعة الحديث الشريف، القاهرة، شركة صخر لبرامج الحاسب، ١٩٩٥، رواه أحمد، حديث رقم ١٦٦٧٥).

(11). Hadîth, by al-Bukhârî:

عَنْ عُمَرَ بْنِ الْخَطَّابِ أَنَّ رَجُلًا مِنَ الْيَهُودِ قَالَ لَهُ يَا أَمِيرَ الْمُؤْمِنِينَ آيَةٌ فِي كِتَابِكُمْ تَقْرَءُونَهَا لَوْ عَلَيْنَا مَعْشَرَ الْيَهُودِ نَزَلَتْ لَاتَّخَذْنَا ذَلِكَ الْيَوْمَ عِيدًا قَالَ أَيُّ آيَةٍ قَالَ (الْيَوْمَ أَكْمَلْتُ لَكُمْ دِينَكُمْ وَأَتْمَمْتُ عَلَيْكُمْ نِعْمَتِي وَرَضِيتُ لَكُمُ الْإِسْلَامَ دِينًا) قَالَ عُمَرُ قَدْ عَرَفْنَا ذَلِكَ الْيَوْمَ وَالْمَكَانَ الَّذِي نَزَلَتْ فِيهِ عَلَى النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ وَهُوَ قَائِمٌ بِعَرَفَةَ يَوْمَ جُمُعَةٍ. (موسوعة الحديث الشريف، القاهرة، شركة صخر لبرامج الحاسب، ١٩٩٥، رواه البخاري، حديث رقم ٤٣).

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(12). Hadîth by Ahmad:

عَنْ أَبِي حُرَّةَ الرَّقَاشِيِّ عَنْ عَمِّهِ قَالَ كُنْتُ آخِذًا بِزِمَامِ نَاقَةِ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فِي أَوْسَطِ أَيَّامِ التَّشْرِيقِ أَذُودُ عَنْهُ النَّاسَ فَقَالَ يَا أَيُّهَا النَّاسُ أَتَدْرُونَ فِي أَيِّ شَهْرٍ أَنْتُمْ وَفِي أَيِّ يَوْمٍ أَنْتُمْ وَفِي أَيِّ بَلَدٍ أَنْتُمْ قَالُوا فِي يَوْمٍ حَرَامٍ وَشَهْرٍ حَرَامٍ وَبَلَدٍ حَرَامٍ قَالَ فَإِنَّ دِمَاءَكُمْ وَأَمْوَالَكُمْ وَأَعْرَاضَكُمْ عَلَيْكُمْ حَرَامٌ كَحُرْمَةِ يَوْمِكُمْ هَذَا فِي شَهْرِكُمْ هَذَا فِي بَلَدِكُمْ هَذَا إِلَى يَوْمِ تَلْقَوْنَهُ ثُمَّ قَالَ اسْمَعُوا مِنِّي تَعِيشُوا أَلا لا تَظْلِمُوا أَلا لا تَظْلِمُوا أَلا لا تَظْلِمُوا إِنَّهُ لا يَحِلُّ مَالُ امْرِئٍ إِلا بِطِيبِ نَفْسٍ مِنْهُ أَلا وَإِنَّ كُلَّ دَمٍ وَمَالٍ وَمَأْثَرَةٍ كَانَتْ فِي الْجَاهِلِيَّةِ تَحْتَ قَدَمِي هَذِهِ إِلَى يَوْمِ الْقِيَامَةِ وَإِنَّ أَوَّلَ دَمٍ يُوضَعُ دَمُ رَبِيعَةَ ابْنِ الْحَارِثِ بْنِ عَبْدِ الْمُطَّلِبِ كَانَ مُسْتَرْضِعًا فِي بَنِي لَيْثٍ فَقَتَلَتْهُ هُذَيْلٌ أَلا وَإِنَّ كُلَّ رِبًا كَانَ فِي الْجَاهِلِيَّةِ مَوْضُوعٌ وَإِنَّ اللَّهَ عَزَّ وَجَلَّ قَضَى أَنَّ أَوَّلَ رِبًا يُوضَعُ رِبَا الْعَبَّاسِ بْنِ عَبْدِ الْمُطَّلِبِ لَكُمْ رُءُوسُ أَمْوَالِكُمْ لا تَظْلِمُونَ وَلا تُظْلَمُونَ أَلا وَإِنَّ الزَّمَانَ قَدِ اسْتَدَارَ كَهَيْئَتِهِ يَوْمَ خَلَقَ اللَّهُ السَّمَوَاتِ وَالأَرْضَ إِنَّ عِدَّةَ الشُّهُورِ عِنْدَ اللَّهِ اثْنَا عَشَرَ شَهْرًا فِي كِتَابِ اللَّهِ يَوْمَ خَلَقَ السَّمَوَاتِ وَالأَرْضَ مِنْهَا أَرْبَعَةٌ حُرُمٌ ذَلِكَ الدِّينُ الْقَيِّمُ فَلا تَظْلِمُوا فِيهِنَّ أَنْفُسَكُمْ) أَلا لا تَرْجِعُوا بَعْدِي كُفَّارًا يَضْرِبُ بَعْضُكُمْ رِقَابَ بَعْضٍ أَلا إِنَّ الشَّيْطَانَ قَدْ أَيِسَ أَنْ يَعْبُدَهُ الْمُصَلُّونَ وَلَكِنَّهُ فِي التَّحْرِيشِ بَيْنَكُمْ فَاتَّقُوا اللَّهَ عَزَّ وَجَلَّ فِي النِّسَاءِ فَإِنَّهُنَّ عِنْدَكُمْ عَوَانٌ لا يَمْلِكْنَ لأَنْفُسِهِنَّ شَيْئًا وَإِنَّ لَهُنَّ عَلَيْكُمْ وَلَكُمْ عَلَيْهِنَّ حَقًّا أَنْ لا يُوطِئْنَ فُرُشَكُمْ أَحَدًا غَيْرَكُمْ وَلا يَأْذَنَّ فِي بُيُوتِكُمْ لأَحَدٍ تَكْرَهُونَهُ فَإِنْ خِفْتُمْ نُشُوزَهُنَّ فَعِظُوهُنَّ وَاهْجُرُوهُنَّ فِي الْمَضَاجِعِ وَاضْرِبُوهُنَّ ضَرْبًا غَيْرَ مُبَرِّحٍ قَالَ حُمَيْدٌ قُلْتُ لِلْحَسَنِ مَا الْمُبَرِّحُ قَالَ الْمُؤَثِّرُ وَلَهُنَّ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ وَإِنَّمَا أَخَذْتُمُوهُنَّ بِأَمَانَةِ اللَّهِ وَاسْتَحْلَلْتُمْ فُرُوجَهُنَّ بِكَلِمَةِ اللَّهِ عَزَّ وَجَلَّ وَمَنْ كَانَتْ عِنْدَهُ أَمَانَةٌ فَلْيُؤَدِّهَا إِلَى مَنِ ائْتَمَنَهُ عَلَيْهَا وَبَسَطَ يَدَيْهِ فَقَالَ أَلا هَلْ بَلَّغْتُ أَلا هَلْ بَلَّغْتُ أَلا هَلْ بَلَّغْتُ ثُمَّ قَالَ لِيُبَلِّغِ الشَّاهِدُ الْغَائِبَ فَإِنَّهُ رُبَّ مُبَلَّغٍ أَسْعَدُ مِنْ سَامِعٍ قَالَ حُمَيْدٌ قَالَ الْحَسَنُ حِينَ بَلَّغَ هَذِهِ الْكَلِمَةَ قَدْ وَاللَّهِ بَلَّغُوا أَقْوَامًا كَانُوا أَسْعَدَ بِهِ. (موسوعة الحديث الشريف، القاهرة، شركة صخر لبرامج الحاسب، ١٩٩٥، رواه أحمد، حديث رقم ١٩٧٧٤).

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HAUT COMMISSARIAT DES NATIONS UNIES
AUX DROITS DE L'HOMME

SEMINAIRE

ENRICHIR L'UNIVERSALITE DES DROITS DE L'HOMME
PERSPECTIVES ISLAMIQUES SUR LA DECLARATION UNIVERSELLE
DES DROITS DE L'HOMME
(GENEVE, 09 -10 Novembre 1998)

LE SYSTEME DE JUSTICE PENALE EN ISLAM

« Tous les êtres humains naissent libres et égaux en dignité et en droit...». Ce début de l'Article Premier de la Déclaration universelle des Droits de l'Homme résume un hadith du Prophète Muhammad (PSL) et une tradition du Calife ᶜUmar, qui disaient respectivement : « les hommes sont égaux telles les dents d'un peigne » (***An-nâs sawâsiyatun ka asnân al-musht***) et « depuis quand asservissez-vous les hommes alors qu'ils sont nés libres ? » ([1]).

Ces deux postulats, qui résument, chacun en le fondant, tout un système de droit, s'opposent-ils ou se complètent-ils ? Ne permettent-ils pas une réflexion sur une large possibilité d'enrichissement de la Déclaration universelle des Droits de l'Homme par le système du droit islamique, notamment dans un domaine aussi sensible que celui de la justice pénale ?

Pour susciter quelques réflexions autour de ce constat, nous éviterons d'adopter une approche conduisant plus ou moins à une tentative de substitution d'un code à un autre ou d'un système de droit à un autre.

Nous éviterons également de faire une comparaison consistant à faire des va et vient entre les différents articles de la Déclaration universelle des Droits de l'Homme, d'une part, et les versets et hadiths constituant les fondements du système juridique islamique, d'autre part. Une telle approche risquerait de ne point déboucher sur des points pertinents. L'objectif visé est de mettre en lumière, quelques éléments de droit du système islamique pouvant enrichir la Déclaration universelle des Droits de l'Homme.

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[1] - Cf. Al-Gazâlî, Muhammad. -Huqûq al-Insân Bayn Taᶜâlîm al-Islâm wa Iᶜlân al-Umam al-Muttahida. Alexandrie : Dâr ad-Daᶜwa, 1993, p 25.

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Il faut signaler toutefois qu'à ce niveau subsiste une difficulté découlant de l'obligation faite aux experts de se limiter strictement, dans le choix des sources du droit islamique, au Coran et à la Sunna. Certes, cela permettrait d'éviter non seulement de verser dans les controverses doctrinales qui, au gré de certaines interprétations, sont entretenues au sein des écoles juridiques, mais aussi de faire simplement l'historique du droit, à travers son application dans le temps et dans l'espace ([2]).

Mais, on devrait pouvoir ajouter aux deux sources que constituent le Coran et la ***Sunna*** ([3]), une troisième source qui est le Consensus (***ijmâ°***) ([4]), qui traduit essentiellement un point de convergence des jurisconsultes.

Il est à noter que cette approche n'est pas sans imposer une contrainte, celle de faire des commentaires, qui, à défaut d'être empruntés aux professionnels du droit islamique de tous les temps, risquent d'être strictement personnels. Néanmoins nous nous efforcerons de les réduire au strict minimum.

Il est à préciser, par ailleurs, qu'à travers la Déclaration universelle des Droits de l'Homme, seuls les Articles allant de 8 à 14 se rapportent à des degrés divers à la justice pénale. Quant à la Déclaration islamique des Droits de l'Homme adoptée au Caire, en 1990, à la session des Ministres des Affaires Etrangères de l'OCI, elle n'a pas abordé cette question.

A la lumière de ces considérations, le thème **système de justice pénale en Islam** sera développé à travers les quatre parties suivantes :

- Les deux grandes catégories de fautes pénales;
- L'appréciation de la faute pénale ;
- L'application des sanctions pénales;
- La protection de l'individu.

Première Partie : Les Deux Grandes Catégories de Fautes Pénales

Les fautes pénales selon l'Islam sont de deux catégories, à savoir les fautes graves dont les peines sont fixées par le Coran et les autres fautes dont les sanctions sont laissées à l'appréciation du juge ou de l'autorité judiciaire compétente.

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[2] - Cf. –Al-Jazâ'irî, °Abd Ar-Rahmân. – Kitâb al-Fiqh °alâ-l-Madâhib al-Arba°. – Le Caire : Al-Maktaba at-Tijâriyya al-Kubrâ, 1392 H. vol V

[3] - C'est à dire la tradition du Prophète

[4] - Troisième source de loi en Islam. Son statut de source de loi est appuyé par nombre de Hadith.

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La catégorie des fautes graves comprend :

1 - le meurtre ;
2 - l'adultère ;
3 - le vol ;
4 - le vol à main armée ;
5 - l'apostasie ;
6 - l'accusation d'adultère ;
7 - la consommation de l'alcool.

La loi en Islam, en matière pénale, se fonde sur le postulat suivant : « lorsque l'intérêt général est menacé, la loi doit transcender les intérêts particuliers pour sauvegarder les intérêts communs » ([5]). Le droit revient donc à Dieu. C'est dire que lorsque l'intérêt général est menacé, les hommes, qui sont chargés d'appliquer les sanctions , peuvent être amenés à observer une certaine partialité. Or la loi, pour être transcendante, doit se situer au dessus de tous les individus.

Pour le droit positif, cela relève de l'autorité du souverain, du chef d'Etat qui a le droit de pardonner même après que la sentence de mort aura été prononcée, alors que pour l'Islam cette expression de souveraineté est d'émanation divine.

Selon la ***Sharî'a***, l'appréciation des peines à infliger aux auteurs de chacune de ces fautes relève de la souveraineté divine exclusivement ([6]). Il s'agit de peines fixées par le Coran. Elles portent le nom de « ***Hudûd*** » (peines). Son appellation est essentiellement coranique. Il s'agit de fautes qui exposent l'Etat à un danger réel, particulièrement au plan de l'équilibre social, moral et spirituel. Elles sont moins punies pour ce qu'elles représentent en tant qu' acte individuel, circonscrit, particulier, que pour les conséquences négatives qu'elles entraînent au sein de la société.

Le hadith suivant du Prophète (PSL) permet de comprendre cela : « une faute, que l'on commet avec dissimulation, ne nuit qu'à son auteur. Alors que lorsqu'on la rend publique, ses conséquences négatives se propagent au sein de la société » ([7]).

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[5] - Cf. Abû Zahra, Muhammad. -- Al – Jarîma wa-l-'Uqûba fi-l-fiqh al-Islâmî ; Al-Jarîma. – Le Caire : Dâr al-Fikr al-'Arabî, 1976, p. 32. Voir aussi : Sharaf ad-Dîn, 'Abd al-'Azîm. – Al 'Uqûba al-Muhqaddara li maslaha al-Mujtama al-Islâmî. -- Le Caire : Mataba al-Kulliyât al-Azhariyya, 1973, p 3 et sq.
[6] - Cf. Coran : La Table, verset 44.
[7] - Cf. Al-'Uqûba, op. cit., p. 3

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Les textes applicables estiment à propos, par exemple, de l'espionnage que l'acte en soi est moins grave que les conséquences qu'entraîne l'espionnage. En effet, l'espionnage a des effets sur l'équilibre moral, sur le comportement de l'espion. Alors qu'au plan communautaire, les conséquences se traduisent par un manque de confiance entre les différents membres composant la société, avec tout ce qui pourrait en découler comme mensonge, comme ruse, comme tentative de nuire à l'autre, autant de facteurs qui sapent les fondements de toute communauté humaine .

La deuxième catégorie renferme toutes les autres fautes punies selon l'appréciation de l'autorité judiciaire compétente. Elles peuvent être pardonnées, allégées ou commuées, alors que les premières, qui relèvent de la seule autorité de Dieu, doivent être appliquées une fois que la culpabilité de l'auteur est établie. Cette première catégorie de fautes n'existe pas dans les droits modernes.

Les deux systèmes de droit se situent à deux plans différents. Tout en considérant, que ce qui prime c'est la sauvegarde de l'intérêt général, ils diffèrent sur les moyens de sauvegarde de cet intérêt. Mais, dans chacun des deux systèmes, il y a absence d'appel en matière criminelle. Cette souveraineté n'étant donc pas soumise à une mise en cause quelconque, qu'elle soit une souveraineté d'émanation populaire ou une souveraineté d'émanation divine. L'on comprend donc aisément sous cet angle, que si l'Islam prévoit un certain nombre de sanctions pénales immuables c'est pour éviter que le verdict, donné par les membres d'une cour d'assise ne soit considéré comme une décision subjective.

Mais comment le juge apprécie-t-il la faute pénale ?

Deuxième Partie : l'Appréciation de la Faute Pénale par le Juge

La deuxième catégorie de fautes pénales, celles dont l'appréciation est du ressort du juge ou de l'autorité judiciaire compétente comprend les fautes dont la sanction ne fait pas l'objet d'un texte scripturaire figurant ou dans le Coran ou dans la Sunna, mais relevant simplement de la jurisprudence ([8]).

Si l'on considère le système juridique islamique, on voit une simplicité apparente à travers un hadith du Prophète qui dit en substance que : « les preuves légales conduisant à l'inculpation du détenu doivent être fournies par le

[8] - Cf. Milliot, Louis. – Introduction à l'étude du droit musulman. – Paris : Recueil Sirey, 1957, p.167-179.

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plaignant, si le délinquant ne les récusent pas, il est déclaré coupable et la sanction ou la sentence est appliquée. Au cas où il récuse la véracité des preuves légales établies ou présentées par le plaignant, il doit jurer pour être déclaré non coupable » ([9]).

Mais, par souci d'équité, si le plaignant renforce sa plainte par le témoignage de deux témoins jouissant de toutes les conditions d'honorabilité requise, le jugement est rendu en sa faveur. Cette règle de droit est énoncée par le Prophète dans un hadith où il dit : « tes deux témoins ou son serment ».

Cependant, il faut dire que même si l'Islam punit aussi sévèrement les fautes pénales, on ne doit pas manquer de souligner que la sentence n'est appliquée que si certaines conditions sont réunies. Et c'est à ce niveau qu'on peut parler de la protection de l'individu ou du délinquant.

« ***Shâhidâka aw yamînuhû*** », c'est-à-dire ou deux témoins à l'appui de ta plainte, ou il jure pour être déclaré non coupable.

Cette impartialité, cette objectivité transparaît dans l'application d'une peine par le Prophète (PSL) à l'encontre d'un musulman qui avait tué un non musulman. Le Prophète dit : « il est de mon devoir d'imposer le talion en faveur des ***dhimmis*** et par fidélité envers eux. Le ***dhimmi*** c'est le client, c'est le non musulman qui vit en terre d'Islam et qui par conséquent doit bénéficier de toute la protection requise. En le disant, le Prophète avait autorisé l'exécution d'un musulman qui avait tué un ***dhimmi***.

Ce hadith est rapporté par Shawkâni dans «***Nayl al-Awtâr*** », et également par Marâghî, dans « ***At-Tashrîᶜ al-Islâmî lighayr al-Muslimîn*** ». Il est à noter que l'application des peines que voilà relève de la seule responsabilité du souverain de l'Etat islamique ([10]).

Si alors, la faute qu'il aura commise fait partie de l'une des sept fautes qui avaient été énumérées ci-dessus, la sanction ou la sentence qui sera prononcée à son encontre sera appliquée sans appréciation, sans allègement. Car une telle sanction relève de la souveraineté divine. Par contre, lorsque la faute se situe au

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[9] - Idem, p.754

[10] - Cf. Al-Bayhaqi, Abû Bakr Ahmad. – As-Sunan al-Kubrâ. – Haydarabâd : Matbaᶜa Majlis Dâ'ria al-Maᶜârif, 1354 H, vol VIII, p. 245-249. Pour de plus amples informations sur la question, voir aussi : Abû ᶜUyayn Badrân. – Al-ᶜAlâqât al Ijtimâᶜiyya Bayn al-Muslimîn wa ghayr al-Muslimîn.. – Alexandrie : Mu'assasa Shibâb al Jâmiᶜa, 1984, p. 251 et sq.

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dessous de l'une des sept fautes dont il était question, la sanction provient de l'appréciation que l'autorité judiciaire compétente aura faite.

Troisième Partie : S'agissant de l'Application des Sanctions Pénales

Cette partie essaiera de mettre l'accent sur l'approche islamique en matière d'application des sanctions pénales. Le Prophète, protégeant l'accusé, a dit : « évitez de recourir à l'application des sanctions pénales autant que vous pouvez le faire » et il a dit également : «on ne peut jamais appliquer une sanction pénale tant qu'il subsiste un doute ». Nous allons donc ainsi aborder quelques fautes pénales en étudiant les modalités d'application de ces peines ou les conditions dans lesquelles elles sont appliquées.

La sanction n'est jamais une fin en soi. Elle vise toujours un objectif : le maintien de l'intérêt supérieur de la communauté. Pour ce faire, elle assure la protection de la communauté, le renforcement de la justice, tout en permettant au délinquant de s'amender en vue de s'améliorer positivement ([11]).

Il convient de rappeler que si les sanctions pénales n'atteignent pas leurs objectifs elles demeurent un simple préjudice qu'on fait subir à un délinquant. Suivant la gravité de la faute ou du crime, la sanction peut tendre à priver l'individu de l'un de ses quatre droits suivants :

1 – son droit à la vie, par la mise à mort, pour meurtre et apostasie ;
2 – son droit à la liberté de mouvement, par l'emprisonnement;
3 – son droit à jouir du bien être de son corps, par la flagellation, pour alcool et accusation d'adultère ;
4– son droit à jouir de ses biens, par l'amende, pour meurtre involontaire.

Ces peines, toutes édictées par le Coran et la Sunna, c'est à dire les deux sources fondamentales de loi en Islam, ne sont applicables, vu leur gravité, que lorsque la culpabilité de l'individu est bien établie.

Il est à noter, par ailleurs, que pour rendre cette justice, la ***Sharî'a*** ne fait aucune différence entre l'homme appartenant à une caste noble et l'autre. Ainsi, pour l'Islam, c'est devant le même juge que comparaissent le noble et le roturier ([12]). Devant cette justice divine, il ne doit exister qu'un seul tribunal en vertu

[11] . Cf. 'Awad, 'Abd al-Qâdir. – At- Tashrî' al-Jinâ'î al-Islâmî muqâranan bi-l-Qânûn al-wad'î. – Beyrouth : Mu'assasa ar-Risâla, 1994, vol I, p 686.

[12] - Cf. – le hadith rapporté par Ibn Mâja où le Prophète dit : « Ce qui avait perdu les peuples qui vous ont précédés c'est que quand un vol avait été commis par un noble, ils le laissaient impuni, et que quand il

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essentiellement du hadith du Prophète : « les hommes sont égaux telles les dents d'un peigne ». Or, c'est le contraire qui a prévalu en Europe, jusqu'à la veille de la Révolution de 1789, où il existait des tribunaux pour le clergé, des tribunaux pour les nobles et les aristocrates et des tribunaux pour le tiers ordre ou le peuple.

L'application d'une sanction de mise à mort ou de l'ablation d'un membre organique étant d'une certaine gravité, pour protéger le détenu ou le délinquant, il faudrait que des mesures de sauvegarde suffisantes soient prises. Il faut dire que les choses se passaient ainsi, même en France jusqu'à la révolution de 1789.

Avec la constitution du 03 septembre 1791, qui a donné lieu, entre autres, à la création du tribunal criminel, les décisions des juridictions criminelles n'étaient plus susceptibles d'appel. Car, elles constituent l'expression de la souveraineté du peuple et partant inéluctablement marquées du sceau de la vérité. Vox populi, vox dei : « La voix du peuple est la voix de Dieu »

On voit ainsi que jusqu'après la Révolution de 1789, le peuple estimait, en rendant la justice, être un dépositaire du pouvoir divin. Pour en arriver là, il a fallu créer et consolider le mythe de l'infaillibilité populaire en vertu de laquelle il ne saurait y avoir aucun appel contre les décisions des juridictions criminelles.

A travers le système de droit de cette époque, on perçoit la présence en filigrane de l'innovation anglaise reposant sur le système de jury qui avait profondément marqué Voltaire et Montesquieu. Cela faisait dire à Montesquieu que la puissance de juger devait être confiée à des personnes tirées du corps du peuple dans certains temps de l'année. C'est à partir de cet instant que ce mythe de la souveraineté et de l'infaillibilité populaires a été mis en place et consolidé les années suivantes.

Pour ce qui est des sanctions que la ***Sharî'a*** inflige aux individus ayant commis des fautes pénales graves, il faut noter qu'elles ne sont pas appliquées sans la prise en considération d'un certain nombre de conditions. Et lorsque l'une de ces conditions n'est pas remplie la sentence ne doit pas être appliquée.

L'on pourrait, à titre d'illustration, examiner les deux cas de figure du vol et de l'adultère qui suscitent le plus de commentaire souvent à l'encontre de la

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s'agissait d'un roturier, ils lui coupaient la main. Mais je jure par celui (Dieu) qui détient ma vie entre Ses mains si Fâtima, ma fille, avait volé, je lui aurais coupé la main »

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Sharî'a et qui sont punis respectivement par la coupure de main et la flagellation ou la mise à mort ([13]).

a) – le vol

Avant d'appliquer la sentence coranique, à savoir la coupure de la main, le juge doit passer en revue dans l'appréciation du délit, les cinq conditions suivantes :

- la valeur de l'objet

L'objet volé doit, pour entraîner la coupure de la main du voleur, atteindre, selon un hadith du Prophète, au minimum, une certaine valeur : le quart de Dinar ([14]) ;

- la garde de l'objet

Lorsque l'objet volé n'est pas gardé, ce qui suscite souvent une tentation, quelle que soit sa valeur, la main de celui qui l'a volé ne doit pas être coupée.

- le pardon de la victime

Lorsqu' après le vol, la victime, propriétaire de l'objet volé, a pardonné au voleur avant que l'autorité judiciaire compétente, le juge en l'occurrence, n'ait été saisie, la main du voleur sera épargnée, même si toutes les autres conditions sont réunies ([15]).

- ne pas être l'hôte de la victime

La sentence ne s'applique pas lorsque le voleur, hôte de quelqu'un, vole ses biens. Dans ce cas de figure, quelle que soit la valeur de l'objet volé, la *Sharî'a* ne fait pas couper la main de ce voleur qui en principe bénéficie de la confiance de son hôte ([16]).

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[13] - Cf. – Coran : la Table, verset 35 ; Coran : La Lumière, verset 2.
[14] - Cf. – Sunan Ibn Mâja, op. cit., vol II, p. 863.
[15] - Coran : La Vache, verset 178
[16] - Al-Mâwardî, Abû al-Hasan. – Kitâb al-Hudûd min al-Hâwî al-Kabîr. – Le Caire : Dar al-Manâr, 1995, vol II, p 715.

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- vol par nécessité vitale

Lorsque le voleur est poussé par les besoins vitaux de subsistance ou lorsqu'il est dans une conjoncture de famine la ***Sharî'a*** n'applique pas cette sentence ([17]).

b) - l'adultère

En partant de la sanction que le Coran a prévue à l'encontre de celui qui accuse quelqu'un d'adultère, on comprend la gravité de cette faute pénale, faute extrêmement grave dont l'auteur, dans certains cas est passible de la peine de mort.

Ainsi, loin d'être systématique, l'application de cette peine obéit, elle aussi, à des conditions strictes édictées, et dans leur rigueur par le Coran qui dit :

« Et ceux qui lancent des accusations contre des femmes chastes sans produire par la suite quatre témoins, fouettez-les de quatre-vingts coups de fouet, et n'acceptez plus jamais leur témoignage. Et ceux-là sont des pervers » ([18]).

A la lumière de ce verset qui applique une sanction pénale, non pas à l'accusé d'adultère mais à l'accusateur, on comprend combien l'Islam est soucieux de la sauvegarde de la bonne réputation de l'individu et des valeurs morales.

Aussi, pour être sanctionné pénalement, il aura fallu que l'adultérin se livre à l'acte presque publiquement. En effet, pour qu'il le soit, il faut que les trois conditions cumulatives suivantes soient remplies :

- **Etre vu à l'acte par quatre témoins jouissant des conditions d'honorabilité requise ;**
- **Que chacun d'entre eux atteste avoir vu les sexes des deux partenaires, l'un dans l'autre ;**

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[17] - Cf. – 'Umar wa Usul at-Tashrî' al-Islami

[18] - Coran : La Lumière, verset 24

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- **Que chacun des témoignages enregistrés chez le juge ou auprès de l'autorité compétente porte sur le même acte ayant lieu au même endroit et au même moment.**

Si l'une de ces conditions fait défaut ou s'il y'a discordance dans la déclaration des témoins, la sentence leur est appliquée au lieu d'être appliquée au présumé adultérin.

Un hadith du Prophète, rapporté par ***Sa^c^d Ibn ^c^Ubâda*** dit sans ambages :

« O envoyé d'Allah, si je trouve un homme sur mon épouse dois-je le laisser et aller chercher quatre témoins » ? Oui, lui répond le Prophète ([19]).

Dans un autre cas de figure, le Prophète, par souci d'exactitude, a posé des questions portant sur l'identité de l'autre partenaire, à quelqu'un venu faire un aveu en lui déclarant avoir fait l'adultère. « Avec qui » ?, lui dit-il. « Avec une telle », répondit-il ([20]).

A un autre, dans une situation identique, il a dit : « Est-ce que ton organe a pénétré le sien... Comme le sceau pénètre dans le puit ? Oui, répondit-il.

A travers ces hadiths, rapportés par Bukhârî et Muslim, le Prophète a montré avec forces détails que des accusations sans preuves acceptables sont à rejeter.

Pour ce qui est de la garantie de procès équitables, il est à noter que ni l'autorité judiciaire, ni même le souverain ne dispose d'un pouvoir absolu les mettant au-dessus de la loi ou protégeant les décisions qu'ils peuvent être amenés à prendre, décisions sur lesquelles les autres n'ont rien à dire. Ceci est d'autant plus vrai qu'à l'origine la ***Sharî^c^a*** fait reposer toute prise de décision en matière de droit sur la consultation. « Ils se consultent entre eux à propos de leurs affaires», dit expressément le Coran ([21]). Ce qui est assez significatif, comme le note l'un des éminents traducteurs des sens du Coran, « cet important verset met en relief les traits caractéristiques de l'Islam. La consultation entre musulmans est un principe constitutionnel de la communauté islamique ».

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[19] - Cf. As-Sunan al-Kubrâ, op. cit, vol VIII, p 337. Ce hadith est rapporté par Muslim de Zuhayr Ibn Harb qui l'a tenu de Ishâq.

[20] - Idem, p. 229

[21] - Coran : La Consultation, verset 38

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Dans le même ordre d'idée, Dieu dit au Prophète : « Consulte-les à propos des affaires» ([22]). Il est ainsi établi que l'appréciation des fautes ne saurait être un domaine de compétence réservé ni pour le souverain, ni pour l'autorité judiciaire appelés à appliquer les sentences.

La justice islamique, qui repose sur ces fondements et sur des bases d'équité, protège le faible contre le fort tel que cela ressort à travers de nombreuses traditions dont celle-ci : « Le fort n'est pas fort devant la loi. Le faible n'est pas faible devant la loi », disait le Calife ᶜUmar, deuxième successeur du Prophète ([23]).

Ces dispositions témoignent assez éloquemment combien la ***Sharīᶜa*** garantit l'innocence de l'individu tant que sa culpabilité totale n'est pas établie. Le verset 4 de la Sourate 24 « La lumière », dont le sens est davantage renforcé par ces hadiths du Prophète, protège l'honneur et la dignité de l'individu.

Ce souci d'équité est d'autant plus renforcé que nul n'osera accuser quelqu'un d'adultère, si véridique qu'on puisse être, tant qu'on n'est pas sûr que le nombre de témoignages requis sera obtenu. Ce qui n'est possible que lorsque l'acte sexuel se produit dans une flagrance toute bestiale.

Quatrième Partie : Pour ce qui est de la protection de l'individu

Il est à souligner que les dispositifs qui sont mis en place par la ***Sharīᶜa*** peuvent protéger l'individu contre d'éventuels abus du Législateur ou de l'autorité judiciaire compétente en matière d'application des sanctions pénales.

La ***Sharīᶜa*** accorde à tout individu une protection. On peut dire une immunité. Cette immunité est conférée au musulman, grâce à l'Islam par sa foi ; au non musulman, le client qui réside en territoire musulman ([24]), en vertu du pacte qui le lie à cet Etat ; au non musulman non résident, grâce à l'autorisation qui lui est accordée. Cette immunité fait considérer l'individu comme innocent jusqu'à ce que la preuve de sa culpabilité soit établie.

Cependant, visant à sauvegarder les intérêts supérieurs de l'humanité dont la préservation constitue une condition essentielle pour le maintien de la paix

[22] - Coran : La Famille de ᶜImran, verset 159
[23] - Cf. Huqûq al-Insân, op. cit., p. 26-27
[24] - Cf. Al-ᶜAlâqât al-Ijtimâᶜiyya, op.cit.

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sociale, la ***Sharî'a*** a toutefois mis en place un certain nombre de sanctions à l'encontre de tout contrevenant dont l'action, les agissements, constituent une menace à l'équilibre social que voilà. La sanction qui doit avoir une valeur exemplaire doit être prise en toute objectivité. Alors, elle donne les résultats attendus. « L'application de la loi du « talion » épargne les vies humaines. Si vous le saviez », dit le Coran ([25]).

La sanction, sous cet angle, est un mal, un préjudice que l'on fait subir au délinquant. Ainsi, il n'y a pas de sanction sans préjudice et sans mal physique ou moral. Pour certaines fautes, c'est la mise à mort ; pour d'autres fautes, c'est la flagellation ;

Pour que la justice soit bien faite et que la vérité triomphe, le Prophète est invité par Dieu à approfondir la recherche de la vérité. L'accusé est présumé innocent jusqu'à preuve de sa culpabilité. Le Coran en premier lieu lui dit : « si un prévaricateur avéré vous apporte une information vérifiez-la avant que vous n'ayez à sévir contre des gens par méconnaissance de cause et que vous finissez par le regretter » ([26]).

Voilà un verset qui somme le Prophète et ses compagnons, engagés dans des batailles contre l'ennemi, de faire d'abord des enquêtes, de s'entourer de toutes les garanties, de réunir des preuves sûres avant de penser à mener des représailles. Le texte sacré précise les raisons qui sont derrière une telle attitude sage en disant dans un autre passage : « gardez-vous de susciter des représailles (***fitna***) qui ne toucheraient pas seulement ceux qui ont tort » ([27]).

Des intérêts purement matériels qu'on vise ne devraient pas aussi obnubiler à telle enseigne qu'on ne vérifie pas les mobiles qui poussent à agir. Dans ce sens, un autre verset met en demeure contre de tels actes en stipulant : « O croyants, si vous partez en voyage d'expédition pour la cause de Dieu, soyez circonspects. Ne dites point à celui qui vous parle de paix : « vous n'êtes point un croyant » ([28]), ne visant que les biens précaires de ce bas monde. Sachez qu'auprès de Dieu il y a de nombreux gains. C'est ainsi que vous étiez auparavant mais il vous apporte Sa Grâce : « usez de circonspection car Dieu est informé de ce que vous faites » ([29])

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[25] - Coran : La Vache, verset 178
[26] - Coran : Les Appartements, verset 6
[27] - Coran : Les Butins de guerre, verset 25
[28] - Coran : Les Femmes, verset 94
[29] - Coran : Les Femmes, verset 94

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Recourir à une juridiction est un principe et une règle du Droit Islamique. Il existe nombre de versets coraniques qui mettent l'accent là-dessus en enjoignant au Prophète, à qui on faisait recours pour être jugé, de dire le droit en s'appuyant sur les règles juridiques contenues dans le livre. Le Coran dit : « Dieu vous commande de rendre les dépôts à leurs consignataires et que quand vous jugez entre les hommes, vous jugez avec équité... » ([30]).

Dans la sourate d'*Al-Mâ'ida*, il réitère le commandement : « Si tu juges, juges entre eux avec équité » ([31]). Qualifiant le Coran comme le recours juridique, un autre verdict : « c'est nous qui t'avons révélé le livre par la vérité, afin que tu juges équitablement entre les hommes selon ce que Dieu vous a enseigné ». Comme nous le voyons, il ne s'agit pas seulement de juger, mais de le faire équitablement. Voilà, entre autres, autant de versets qui font même obligation aux musulmans de recourir à la justice dans les différends qui les opposent. Mieux, ils invitent les musulmans à s'exécuter lorsqu'ils sont appelés à être jugés ([32]).

Le délit d'être jugé publiquement (***ᶜalâ aᶜyuni-n-nâs***) est reconnu par le Coran qui, non seulement fait obligation au Prophète de juger équitablement, mais il adresse la même obligation aux musulmans auxquels il dit par l'intermédiaire du Prophète : «je jure qu'ils ne croiront pas tant qu'ils ne te prennent pas pour arbitre de leur différends et qu'ils ne trouvent en eux aucune gêne quant au jugement que tu aurais rendu et qu'ils l'admettent entièrement » ([33]). Et puis l'expression « ***bayna-n-nâs*** » ne laisse aucun doute sur le caractère public de ces procès...

Si le système juridique islamique ne prévoit pas de recours des condamnés, ni encore non plus une possibilité de pardon, de rémission, de grâce ou de commutation de peine, il a cependant mis en place un système assurant la défense la plus totale de l'innocent, la défense la plus totale du détenu qui sera protégé avec le bénéfice de la présomption d'innocence jusqu'à ce que sa culpabilité soit établie.

Le Coran invite à assurer la protection des croyants et des non-croyants. C'est là où la protection des réfugiés prend tout son sens. Certains individus parmi les non musulmans cherchaient refuge auprès du Prophète pour échapper à la persécution que l'oligarchie Mecquoise leur faisaient subir. Sur injonction

[30] - Coran : Les Femmes, verset 58
[31] - Coran : La Table, verset 42
[32] - Coran : La Lumière, verset 24
[33] - Coran : Les Femmes, verset 165

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du Coran, le Prophète leur accorde l'asile. « Si un des associateurs vient te demander asile, accorde-le lui jusqu'à ce qu'il entende la Parole de Dieu ([34]).

C'est dire que la torture et le traitement cruel des prisonniers sont expressément bannis par la ***Sharî'a***. Aussi après la Bataille de Badr, le Prophète a-t-il ordonné que les prisonniers se rachètent (***fidâ'***) ou être simplement élargis (***mann***). Al-Bayhaqî rapporte qu'Ali Ibn Abî Tâlib avait interdit aux compagnons de maltraiter Ibn Muljam qui venait de le poignarder à mort, en leur demandant de ne pas le torturer, de le traiter humainement pendant sa détention (***ahsinû isârahû***) ([35]).

Est-ce là une volonté d'amorcer un dialogue entre deux systèmes juridiques que la mondialisation condamne à s'entendre pour réaliser ensemble la paix sociale, fondement de tout développement ?

A y regarder de près, on s'aperçoit que la Déclaration universelle des Droits de l'Homme vise essentiellement à protéger l'individu contre les abus, qu'ils viennent des systèmes juridiques ou des pouvoirs politiques, tandis que la ***Sharî'a***, qui protège, certes, beaucoup la société, protège également l'individu.

Sous cet angle, un dialogue fécondant permettrait la mise en place de mécanismes favorisant un enrichissement positif de la Déclaration Universelle des Droits de l'Homme, voire une interfécondation entre les deux systèmes, vu les multiples points de convergence.

Professeur Ravane MBAYE

DAKAR

[34] - Coran : Le Repentir, verset 6
[35] - Cf. Sunan al-Kubrâ, op. cit.

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IN THE NAME OF GOD

FREEDOM OF OPINION AND EXPRESSION

BY:
DR. HOSSEIN MEHRPOUR
FROM: ISLAMIC REPUBLIC OF IRAN

'Freedom' has undoubtedly been the most pleasant word heard in the recent centuries, at the same time this term has raised the most controversial and delicate debates in respect of similar terms and social concepts such as justice and equality etc.

Freedom of speech and belief are amongst the fundamental human rights, contained in the univesal declaration of human rights, to be respected by all nations. Artecle 19 of the declaration proclaims:

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas thrwugh any media and regardless of frontiers."

Naturally, freedom of religion and religious belief, also have very often been supported.

Article 18 of the universal declaration of human rights in this respect provides:

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

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rtght incsudes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teamhing, practice, worship and observance."

Thus from the point of view of the declaration of human rights every individual as a human being is entitled to have or to choose any religious belief or religion, as religious belief is private and no one specially the state is entitled to persecute any one for holding a certain religious belief or to intimidate him for accepting a special religion.

Having regard to the above stated, we turn to consider, what is the view point of islam in this regard? And how are freedom of speech and religious belief treated by islam?

In order to explicate the view point of islam with the Bnefit of Quranic line of reasoning the following titles will be considered briefly:

The Aimfulness of Creation and Responsibility of Man

From the viewpoint of Islam human being is not merely a temporal being, who goes through life in pursuit of a material world with a preoccupation of running his individual and social life in the present world.

But, in addition to the present materialistic world, there is an eternal world ahead and the man must manage his belief, behaviour and affairs in such

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manner as to provide for the etermal life.

According to Islam every human being who has the benefit of intelligence may not remain indifferent and spend his life in pursuit of worldly affairs. Of cours, within the materialistic perception of the world the personal belief and behaviour of the individual is of little importance, and the only criteria would be the individual's materialistic interests in the society and every restrain and liberty would be regulated by that standard.

Every kind of belief and personal behaviour therefore, in so far as, does not harm the society, dispite being indecent, superstitious and futile may not be challenged and neither the society nor the author feel obliged to amend or change them.

Whilst the Quran repeatedly reminds us of the fact that human being is not confined to the present world and every individual is primarily responsible for sustaining worthy beliefs and decent behaviour, as failing that misery and misfortune shall follow.

sura h Mumanin verse 115 states:

"What! did you then think that we had created you in vain and that you shall not be returned to Us?"

And in sura h Ghiamat verse 36 states:

"Does man think that he is to be left to wander without an aim?"

And in sura h Jathiah verse 24 states:

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"And they say: There is nothing but our life in this world; we live and die and nothing destroys us but time, and they have no knowledge of that, they only conjecture."

And in sura h Queses verses 77 provides:

"And seek by means of what Allah has given you the future abode, and do not neglect your portion of this world, and do good (to others) as Allah has done good to you, and do not seek to make mischief in the land, surely Allah does not love the mischief - makers."

The Vindication of Unity and Negation of Polytheism

The law of Islam is based on unity as well as learned morality such as justice, honesty, trustworthiness ... etc., and invariably invites human beings to give credence to unity and believe in resurrection and negation of polytheism.

Islam, negates idolatry and infidelity and seeks to encourage individuals to ponder upon their affairs and to abandon superstition and resort to unicity and monotheism.

sura h Nesah verse 116 states:

"surely allah does not forgive that anything should be associated with him, and he forgives what is besides this"

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sura zomar states:

"If you are ungrateful, then surely Allah is self - sufficient, above all need of you; and He does not like ungratefulness in HIs servants."

From the point of view of individual accountability therefore, individuals are not in liberty to follow polytheism and to overlook their faith to unique God and choose to follow superstitious thoughts. (this, however, does not necessarily mean that the state may force the individual to follow a certain faith nor does it mean that a special belief may be imposed upon them this will be discussed in datail later.)

Accordingly, the thought that individuals are not accountable and are at liberty to follow every belief and faith and will not be subjected to censure must vanish because the least is that is not accepted by God and results in punishment in the after world. There are various Quranic verses in support of this claim.

From the universal and social point of view,in the end, the cognition of unity and rulership of truth and the religion based on unity will conquer the world. This is the will of God, it will therefore come through. islam sustains that, the religion of unity, the religion of truth and the monotheist servants of God will finally conquer, and the rulership of truth and unity will be established:

"He it is who sent his apostle with the guidance and the true religion that he

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may make it prevail over all the religions; and allah is enough for a witness."

(sura h fath, verse 28)

Similiarly in sura h saff, verse 9 is stated:

"He it is Who sent His Apostle with the guidance and the true religion, that He may make it overcome the religions, all of them, though the polytheists may be averse."

the same meaning appears in soura Tovbah verse 33 and in soura Anbia verse 105: "And certainly we wrote in the book after the reminder that (ASFOR) the land, my righteous servants shall inheritit."

The same also appears in sura Anffal verse 39 and sura Baqareh verse 193 with regard to the fact that the infidels shall be defeated and the religion of truth shall conquer the world states:

"And fight with them until there is no persecution, and religion should be only for Allah,"

Promotion of Reflection and Free Thinking

Islam, invites, individual to reflect and reason and does not tolerate the acceptance of belief through coercion, and criticises those who without sufficient reflection, blindly preserve the superstitious belief of their ancestors, Islam's desire is the acceptence of religion through reflection.

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The Quran has used various means to put this point across. There are about 300 verses inviting individuals to think and insight or inspires the prophet to provide reason in order to prove the truth or reject the vain or explains the grace of prophets in reasoning and argumentation and criticises bias and unqualified imitation and irrationality of infidels and praises those who thoughtfully and through clear proof accepted the true words and became faithful followers.

In sura h Hadid verse 25 states:

"Certainly We sent Our apostles with clear arguments, and sent down with them the Book and the balance that men may conduct themselves with equity;"

In sura h Abraham verse 4 states:

"And we did not send any apostle but with the language of his people, so that he might explain to them clearly; then Allah makes whom he pleases err and He guides whom He pleases, and He is the Mighty, the wise."

In sura h Mohammad verse 24 states:

"Do they not then reflect on the Quran? Nay, on the hearts there are locks."

Also, in soura (h) Baqarah verse 170

The holy Quran also conveys the story of reasoning offered by Abraham in nullifying the people's belief in their ancestors idolatry, worshipping the moon, sun or stars, and in the prophet's surahs and Inam soura h criticises

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the infidels for lack of reasoning in the rejection of the faith.

From the point of view of islam therefore, an individual must in absolute liberty use his common sense and contemplate in the world of creation and free himself from fanaticism and superstition, and with reason and perception become a believer in the unique God and the religion of unity.

In the religion of unity therefore, if an individual abstain from the fanaticism, superstition and blind imitation shall become a faithful follower.

(sura h Rome, verse 30):

"Then set your face upright for religion in the right state the nature made by Allah in which He has made men; there is no altering of Allah's creation; that is the right religion, but most people do not know."

Freedom of Belief and Negation of Coercion in Religion

Although from the point of Islam the religion of truth and unity must conquer the world and every individual is reponsible for using his intellect, and believe in the present and eternal world and avoid polytheism and infedility. However it is expressly stated in many Quranic verses that people can not become true believer through coercion. To use coercion for the imposition of belief is neither allowed nor practiced. Promotion of truth,

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and clarification of the maxim of unicity and to inform the individual of their duty and responsibility is of almost importance. There are various Quranic verses on this concept. Some of which are mentioned below:

Sura h Baqarah verse 256 states:

"There is no compulsion in religion; truly the right way has become clearly distinct from error,"

The interperation of this is that religion can not fundamentally be by force, and religious belief can not be forced on people.

sourah Unose verse 99 address the prophet as follows:

"And if your lord had please, surely all those who are in carth would have believed, all of them; will you then force till they become believers?"

Sura h Dahr verse 3 states:

"Surely we have shown him the way: he may be thankful or unthankful."

Various Quranic verses stipulate that the duty of the prophet, is the explication of the truth, unity and negation of polytheism, and in relation to the individuals beliefs his duty is even greater in respect of warning the individuals of the consequence of infidelity, which is aberration and punishment in the afterlife. However his mission does not include promotion of religious belief and unity through means such as force and coercion.

In this regard there are various Quranic verses some which will be

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mentioned:

Sura h Zomar verse 41 states:

"Surely we have revealed to you the Book with the truth for the sake of men; so whoever follows the right way, it is for his own soul and whoever errs, he errs only to its detriment; and you are not a custodian over them."

Similarly sura h Unose, verse 108.

On the other side the mandate of prophete to invite the people into the true religion is to draw atfention the people by reason and Good statement. so the people themeselves recognize the truth and belive.

In sura h Nahl verse 125 stated that:

"Call to the way of your lord with wisdom and goodly exhortation, and have disputations with them in the best manner; surely your Lord best knows those who go astray from his path, and he knows best those who follow the right way."

When Moses and Haroon were assigned to submit the religion of truth to the Pharaoh, God prounaced as follows:

"Go both to Firon, surely he has become inordinate; Then speak to him a gentle word haply he may mind or fear."

(sura h Taha verses 43 and 44)

The approach of the prophets and those active in the promotion of the religion of truth invariably stated their views with reason and rationality

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and never have they tried to impose their views or negate the individuals views through coercion. On the contrary, it were the contenders who were not ready to listen to reason, or would make fun of the words of wisdom or would try to nullify them by imposition of force or tortured and tormented those who accepted the religion of truth. The holy Quran in this regard states when the polytheists found themselves disabled by the Abraham's pleadings about their idolatry, threatend to put him to death in the burning fire. When Pharaoh who found himself helpless by the logical words of Moses and when the sorcery was no longer effective and the sorcerers themselves were converted threatened to torture and to cut their limbs.

Smiliraly when the prophet read the Quran and invited the people to unicity the opponents knowing that if people understood correctly would convert prevent them from listening:

"And those who disbelieve say: Do not listen to this Quran and make noise therein, perhaps you may overcome."

(Sura h Fossellat verse 26)

In any event pressure and harm and imposition of belief were practiced by opponents on the prophets and harbingers, particularly on the prophet of Islam and his followers. They were tortured for their belief and its promotion, and were invariably advised to be patience and disclose their belief in a reasoned and proved fashion. However there has never been any

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mention of force or coercion on individual for their conversion, indeed they were given the freedom of choice.

The Battles of Islam and its Relationship with the Freedom of Belief

Having regard to the above stated, we turn to consider the question of battles and struggles of the Moslems with the infidels, and their relation with the freedom of belief and imposition of the religious belief. In order to see whether Islam through its battles, wholly wars [redacted] intended to impose a certion religious belief on people?

If we review the routes of the promotion of Islam and follow the route of the descend of the Quranic verses, the period of its invitation and establishment may be divided into 3 periods:

Period one: Beginning of the Appearance of Islam and the Summoning of the People to Unity

During this period the prophet of Islam, began his invitation to monotheism and gradually gained some followers. During this period which lasted thirteen years the prophet and the faithful lacked the power to fight their opponents, and were invariably subject to different kinds of torments by the infidels. During this period the method of Islam for invitation of the people

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was to draw their attention to God and reflection about the world of creation and to awaken their conscience (from the view point of Islam if these factors are present, individuals would avoid polytheism and convert into unity). Through making comparisons and telling stories about the nations of the past the people were warned about of polytheism, which results in the divine punishment in the afterlife. The major part of the Quranic verses in this regard descended in Mecca.

During this period the prophet and his followers showed a great deal of stamina and vigor and suffered in the hand of the cruel and egoistic people and enemies of unity and those who stood in the way of reflection and freedom of choice.

Second Period: Development of the Invitation and the Beginning of the Prophet's Battles

This period begins following the Hejira by the prophet to medina. During this period the question of war and battles were raised,[illegible] During the same period, the major theme of the Quranic verses were to awaken the individuals to their responsibility to themselves and the acceptance of the religion of truth and to find salvation. The verses descended during this period once again are concerned with the reflection of the individuals in the

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Quranic verses and the fact that the prophet is responsible to communicate the message (not to impose the religion) and the individuals must choose their faith through knowledge and insight. For instance, certain verses descended in Midina in this regard may be illustrated, such as:

"And obey Allah and obey the apostle, but if you turn back, then upon our apostle devolves only the clear delivery (of message)"

(Sura h Taghabon, Madani verse 12),

"Say: Obey allah and obey the Apostle; but if you turn back, then on him rests that which is imposed on him and on you rests that which is imposed on you; and if you obey him, you are on the right way; and nothing rests on the Apostle but clear delivering (of the message)."

(Sura h Noor, Madani verse 54),

But, what is said about the battles and bloodshed are substantially contained in the sure h Alleomran and Anfal and Baghara and Nessa. They are in the form of vindication against the crules and those who stood in the way of the promotion of unity and indeed those who tormented the Moslems and the faithful. As during this period the Moslems had increased in numbers and had found a force within themselves, they were no longer obliged to remain silent in the face of oppression and suffocation caused by the infidels, but were enable to defend themselves and fight against those who seeked to trample on their legitimate rights and freedom and remove

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the obstacles created on the promotion of their rightful aim and the religion of unity.

In any event the debate is about the struggle against those who fight against the Moslems and exert pressure to prevent the religion of the divine from development.

For that, the following verses may be referred to:

"And fight in the way of Allah with those who fight with you, and do not exceed the limits, surely Allah does not love those who exceed the limits."

(Sura h Baqareh verse 190),

"And what reason have you that you should not fight in the way of Allah and of the weak among the men and the women and the children..."

(Sura h Nesa verse 75),

(Sura h Haj, Madani verses 38, 39, 40):

"Surely Allag will defend those who believe; surely Allah does not love any one who is unfaithful, ungrateful."

"Permission (to fight) is given to those upon whom war is made because they are oppressed, and most surely Allah is well able to assist them;"

"Those who have been expelled from their homes without a just cause except that they say: Our Lord is Allah."

It is therefore clear that the Moslem's wars during this period were in selt defence and thier own very existence and to protect their own religious

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befief against the invasion of enemies who practiced oppression and exerted pressure, not to impose religious belief by coercion and war. As already mentioned the verse 256 of Baqarafi:

"There is no compulsion in religion; truly the right way has become clearly distinct from error,"

Wich descended in about the same era, i.e. the 4th year of Hejira whilst they had the power of to exercise coercion negated coercion in religion.

Third Period: The Spread of Islam and Estabilization of the Power of Islamic State

During this period which begins from the 6th year of Hijra, Islam was powerful enough to establish a state and to set up a new system, particularly after mecca was conquered in the 8th year of Hejira, and its light travelled beyond the frontiers of its birth place. During this period Islam was able to resist its opponents, who, intended to stand in the way of its development and severely reacted against the traitors, and in the 9th year of Hejra strongly worded verses of the sura ﻷﻫﻟ Tobeh about the polytheists and the traitors, were decended inviting the Moslems to declare war against them.

However, non of the Quranic verses may be interpreted to the effect that, Islam intends to convert people by coercion or non acceptance of Islam per

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se, may result in war against them. Instead it tells the prophet that: "If one of the infidels seeks refuge of you, give him shelter, so that he hears the words of God however, dose not state that he must be detained till the time he has accepted the religion of truth.

"And if one of the idolaters seek protection from you, grant him protection till he hears the word of Allah, then make him attain his place of safety; this is because they are a people who do not know."

(Sura h Tovbah, verse 6).

The cause of the instigation of war [redacted] against the infidels were breach of promise, aggression, sarcasm and initiation of war by them against the Moslems:

"And if they break their oaths after their agreement and (openly) revile your religion, then fight the leaders of unbelief surely their oaths are nothing so that they may desist."

"What! will you not fight a people who broke their oaths and aimed at the expulsion of the Apostle, and they attacked you first; do you fear them? But Allah is most deserving that you should fear Him, if you are believers."

(Sura h Tovbah, verses 12 and 13).

Clearly when Islam is established as a ruling system, its rules must govern the society and, the individuals social behaviour must correspond with the Islamic rules. In the event of a seditious intention to bring contempt and

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disaffection by the oppoinent against Islam, it will result in the declaration of war against the conspirators.

However, Islam, as the ruling system is not in search of finding the individuals' personal belief or thier inquisition and their punishment for non accepatence of Islam. Verses 8 and 9 of the sura h Momtahana prove the said point:

"Allah does not forbid you respecting those who have not made war against you on account of (your) religion, and have not driven you forth from your homes, that you show them kindness and deal with them justly; surely Allah loves the doers of justice."

"Allah only forbids you respectiog those who made war upion you on account of (your) religion, and drove you forth from your homes and backed up (others) in your expulsion, that you make friends with them, and whoever makes friends with them, these are the unjust."

Imam Ali as one of his primary advice to Malik Ashtar, who was about to become the ruler of Egypt stated that peoples' rights whether Moslem or not must not be violated.

Indeed, the truth is that the Islamic regimes in principle did not resort to impose religion by coercion, nor subjected the individual to torment for their belief. Furthermore, history shows that the Islamic regimes, even when ruled by despotic and egoistic rulers never impose severe punishment,

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such as those applied against the opponents of the Christian religion in the inquistion courts of the middle ages, and whenever the Islamic ruler were smore pious and informed the rights of non-Moslems were better observed.

Conclusion

Islam, regards people as responsible to use every endeavour to find the proper belief and the truth in order to reach the eternal happiness. The creation of human being is not vain and life is not restricted to the present materialistic world. Human being possess the power of intellect, they therefore, must freely take advantage of it. They must reflect on creation and the divine verses, consider the beliefs and doctrines and only then with the use of logic, reason and proof accept a belidf.

Islam regards the religion of unity and acceptance of the creation and resurrection as the true belief and guides the individual in that direction, and believes that if individuals take advantage of their powers of intellect would convert to the religion of unity.

Individually, every human being is regarded by God as responsible to try and accept the religion of unity and avoid polytheisc. Islam therefore can not accept the indifferent and unattentiveness in that respect, however, no coercion is used to alter one's belief.

The major search of the prophet and the holy Quran is the explication of the

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truth and the people's guidance towards the conversion to the religion of truth and to restrain them froc deviation. Its aim therefore is not to impose the belief, as stated in the holy Quran:"There is no coersion in religion" Generally, if Quranic verses, are considered wherever a worldly penalty applicable by the Islamic government is provided, it merely becomes active against those whose action, behaviour, and endeavour, are in defiance of the Islamic regime, and their seditious intention causes public disorder, and regarded as a crime or a wrong against the state. Although polytheistic beliefs, and beliefs contrary to Islam are strongly condeemed, however, the penalty in this respect is provided by the Quran for the hereafter.

Freedom of Speech

From what has already been said the question of freedom speech is to some extent clear, because as mentioned an individual is free in his choice of belief It follows that an individual is free to proclaim his belief and according to John Stewart Mill: "it is impossible to separate the freedom of belief from the two other inherent freedom of speech and press". From the point of view of Islam human beings are free to proclaim their opininon and to hold contention and debate about them. The holy Quran praises the faithful followers for hearing all and choosing the best:

"Those who listen to the word, then follow the best of it; those are they whom

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Allah has guided, and those it is who are the men of understanding."
(Sura h Zomar, verses 17 and 18).

It is clear therefore to achieve this goal, freedom of opinion and capacity to listen to other people's reason, opinion and arguments are essential. Of course, we can not overlook the fact that promotion of polytheism which is contrary to unity may not be free in an Islamic society, as it is unreasonable to expect a religion, which fights against polytheism and intends to uproot infidelity and believes that the religion of unity is in conformity with the nature of human beings and expect to conquer the world to remain silent.

It must be noted, that within a Islamic regime, religion, is not regarded merely as a personal affair, and an internal relationship with God and ones creator (although Islam is not indifferent about people's private and internal state). But religion is an aggregation of thoughts, beliefs and principles which forms the good order in the society and is a combination of personal affair and social norms. Defiance of the foundation of religion and promotion of principles and beliefs against it, harms the structure of the society and the ruling government and finally, results in harm to others and is contrary to the interest of the public. It may therefore be free, so long as it does not harm this interest.

In relation to social issues also, Islam has a great deal of respect for freedom of speech. From the view point of Islam individuals are allowed to

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express their opinion and objection in respect of the social issues, and the management of the state, so long as it dose not harm the public. The principle of the enjoinment of the good and prohibition of evil ensures the freedom of speech for the sake of the prevention of evil, and to meet of the public interest. It is even regaded as a duty.

"And from among you there should be a praty who invite to good and enjoin what is right and forbid the wrong, and these it is that shall be successful." (Sura h Al-e-Omran, verse 104).

The prophet and the first four caliphs' style also was to respecte the people's opinion and to hear their views and to grant them the freedom of speech. Even Imam Ali as a ruler and caliph invited the people to express their views, and must not imagine that their views are unpleasent and hard on him and furthermore, states that "as a human being I am also liable to make mistake, and mistake find its way into my affairs, unless God protects me from them". The first caliph also in his first sermon stated "my people I have become your ruler, whilst I am not better than yourselves, and if I carry out my duties well duties well assist me, if not, guide me towards the truth.....so long as I obey God and the prophet remain as my followers, otherwise you are not obliged to obey me".

Unfortunately, in the past despotic and egoistic rulers, have repressed the principles and teachings of Islam and overlooked the legitimate freedom of

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the people. However from the beginning of the establishment of Islamic government, till now, whenever one or more people who were familiar and committed to the principles of the Islamic government ruled the people, that period was a period for the florishment for the peoples' freedom and freedom of speech and the individual's opinion in respect of the social and government; issues were better observed.

The best example of such government, was the 5 year rule of Imam Ali, during which time freedom of speech and other legitimate freedoms were observed in the best possible manner and Imam Ali's approach towards the most prejudiced and unreasonable opponents of his government according to the facts of history is the best proof of this claim.

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Enriching the Universality of Human Rights: Islamic Perspectives on the Universal Declaration of Human Rights

The Right to Development: social and cultural rights and duties to the Community

Mr. NANJI

The Quran is explicit in stating that human conduct and aspirations have relevance as acts of faith within the wider human, social and cultural context. It is in this sense that the idea that Islam is an encompassing religion is best understood:

It is not righteousness that you turn your faces to the East and to the West. The righteous are those who believe in Allah, the Last Day, the Angels, the Book, the prophets and who give from what they have, to: relatives, orphans, those in need, the ones away from home, those who ask, and in order to free the enslaved. They observe prayer and give in charity and support and keep their word when they make a commitment, persevering patiently when faced with difficulty, adversity and hardship. Such are the firmly committed and the truly aware (Q 2:177).

While the Quran sees humankind as having constituted originally a Single Community – *Ummah Wahidah* (Q 2:213) and all human beings as creations from a Single Source – *Nafsin Wahidah* (Q 4:1), it recognises and validates the historical diversity that marks society.

O humankind! We have created you out of male and female and constituted you into different groups and societies, so that you may come to know each other – the noblest of you in the sight of Allah, are the aware (Q 49:13).

For each community we have granted a Law and a Code of Conduct. If Allah wished, He could have made you One Community, but He wishes rather to challenge you through that which has been given to you. So vie with each other to excel in goodness and virtue (Q 5:51)

It is against this essential background of a pluralistic world in which people are urged to seek

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common moral ground, that Quranic perspectives on social and cultural rights and duties to the community are best understood. Such perspectives are rooted in certain foundational guidelines and ethical assumptions that one finds expressed repeatedly in the Quran. They are:

1. There is no dichotomy between spiritual and material endeavours in human life, i.e. acts sanctioned as part of faith, *din*, are also linked to the daily conditions of life in the world, *dunya*, so that Muslims may achieve an equilibrium between the two.

2. The Quran lays central emphasis on the Muslim community's role as a model exemplifying to all humanity, ideals that reflect balance and equilibrium:

Hence, We have made you a community of equilibrium and balance ("ummatan wastan"), so that you might witness to humanity, as the Messenger (i.e. the Prophet Muhammad) witnesses to you (Q 2:143)

3. The concept of a custodial trusteeship, expressed in the Quran through the notion of the individual's role as *khalifah* – stewardship (Q 2:30) and hence accountability for the way in which such a role is undertaken for the betterment of society, and for future generations.

Individuals, communities and indeed the state, act as the instruments by which these ideals are translated into practice. In order to accomplish these goals, God has endowed humanity with the capacity of knowledge and the gift of the intellect to acknowledge and respond to revelation, and by the exercise of reason ensure that the moral vision of the Quran can be fulfilled in personal and

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community life. The Prophet Muhammad's own life exemplifies such a commitment: "Increase me in knowledge" (Q 20:114) was one of the prayers enjoined to him by the Quran. Indeed, the earliest revelations to the Prophet evoke powerful symbols of learning and of knowledge: "Read! Your Lord is full of generosity, instructing by the pen, educating humanity about that which they did not know" (Q 96:3-5).

Human beings have a special place within creation (Q 95:4). In the Quranic account of the story of creation, Adam is distinguished and even elevated from other creations, such as angels. Shaped form matter, enlivened by divine spirit and endowed with the capacity to name things (Q 2:31), Adam is a layered and multi-dimensional being in whom material, spiritual, intellectual and cultural orientations are anchored. God created humanity from one soul, then from it male and female (Q 39:6), like all creation, in binary fashion. Human destiny thus presents an opportunity to create conditions that enable life to be lived according to an ethical and moral purpose in response to the divine gifts, so that the fulfilling of responsibilities for the salvation of the self also obligates one to strive to better the conditions of the society in which one is living.

One expression of the Quran's emphasis on social responsibility is the ethic of giving and sharing wealth and resources. While the term giving may suggest a somewhat simplified and more focused act of charity directed to the poor and needy, the Quran articulates a very textured and multivalent concept of giving. Inclusive of the notion of charitable acts, such a concept extends the significance to encompass the ideals of compassion, social justice, sharing, and strengthening. Such an ethic aims to be socially corrective and beneficial and to reflect the moral and spiritual value attached to

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the qualitative uses that are attached to wealth, property, resources and voluntary effort in personal as well as community contexts.

While recognising that individuals were differently endowed with abilities, resources, and property, the Quran emphasised the ideal of social solidarity, and enjoined justice and generosity (Q 16:90). In particular, while condemning the hoarders of wealth (Q 3:180), it upheld as truly virtuous those who spent from their resources to assist others (Q 57:18).

The specific notions of setting aside a portion for others or of recognising the necessity and value of giving is articulated in the Quran through a number of terms that are often used interchangeably or whose meanings are integrated. The most significant of these terms are *ßadaqa*, and *zakåt*.

In elaborating the uses to which such contributions may be put, Q 9:60 specifies the types of recipient who ought to benefit from it: those afflicted by poverty; those in need and incapable of assisting themselves; those who act, sometimes in a voluntary capacity, as collection stewards and custodians to ensure the collection and appropriate uses for which the dues are intended; those whose hearts are favourably inclined and such others who fall into circumstances from which they might be redeemed, such as the enslaved or captives in battle, those in debt, in travel or transit and finally those active in promoting the divine purpose (*fí sabil li llåh*).

While all these categories came to be more formally defined by subsequent Muslim schools of thought and these uses of *ßadaqa* were assimilated into the definition and elaboration of *zakåt* to reflect a more obligatory characterisation of giving, it is clear from the verse (Q 58:12) that the

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Quran envisaged a broadly encompassing framework for those who might benefit from the more formalised practice that was evolving in the early Muslim community and for the fiscal support of the community's needy and poor. Moreover, with the growth of the *Umma* and its transition to a more institutionalised setting in Medina, such a commitment served as a resource to benefit and assist the *muhåjirún* who had migrated from Mecca with the Prophet, to encourage others to join the Muslim community, and to support the Muslims in the ensuing conflict against Mecca. Q 2:273 suggests that these broader uses were to assist the poor, but also others who during this period of transition did not visibly reflect their condition of need, but nonetheless required assistance to enhance their livelihood, or to be directed towards new occupations and economic opportunities. While one aspect of moral responsibility in the Quran was clearly projected towards charitable acts for the poor and the needy, the concept also encompassed the wider goal of applying the donations to improve the general condition and economic well-being of other recipients and constituencies in the growing *Umma*. The fact that in due course the Prophet organised collection and distribution suggests that the social vision was aimed at the broader purpose of supporting all elements in society through institutional action, and enabling the development of the community in an inclusive way. One element of this expression was to enable the less fortunate to become self-sufficient and to attain dignity.

The word *zakå* suggests the idea of growth to emphasise that the giving of one's resources is simultaneously an act that is cleansing of oneself and one's property and through sharing, a growing of the capacity of others. More specifically, this kind of giving is considered analogous in the Quran to a fertile garden, whose yield is increased by abundant rain (Q 2:265). It is this multiple

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connotation that is reflected in subsequent interpretations and institutionalisation of the principle in Muslim thought and practice.

The Quran also fosters an awareness that acts of compassion and support need not always involve a material offering. It may be a kind act or word of comfort (Q 2:263). As in the case of assistance to those who had migrated during the *Hijra*, support could take the form of good will, shelter and enhancement of capacity to undertake new ways of earning a living. The moral agency of such acts are also reflected in a manner of giving so that neither the value of the act nor the one receiving it is diminished by imposing it or making it serve selfish and personal ends.

It is apparent that by the time of the Prophet's death in 632 a framework of practices that governed the collection and distribution of the *ßadaqa* and *zakåt* contributions had developed. Though much of the formalised, juristic pattern for the institutionalisation of this framework occurred later, some direction had emerged from the experience of the early community as well as the period of the first four Caliphs. The record of this period suggests that they had overseen and directed the assessment, collection and distributions of the dues, appointed collectors and entrusted them and other followers to safeguard and apportion them for the intended recipients. It is significant that the ideals attached to giving and its underlying values were not left simply at the level of voluntary action, but that already in the Prophet's time, there were attempts to structure patterns whereby such practices could evolve institutional forms.

Systematisation and formalisation did not preclude acts of voluntary almsgiving outside of what was deemed obligatory. Among the institutions that developed out of Prophetic precedent were those that expressed the Quranic value of gifting to God a beautiful loan (Q 2:245). A narrative recounts

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how the Prophet wished to purchase land from a group for the building of a mosque. Rather than agreeing to sell the land, they gave it to the Prophet for the "sake of God." Such acts of giving, which converted resources of the land, etc., into a perpetual trust for charitable uses, became a very important part of Muslim practice and were used to endow mosques, madrasas, hospitals, water fountains and other conveniences that were beneficial for the public. Notable Muslims, descendants of the Prophet, and many women played noteworthy roles in generating such philanthropic works. Such acts and their benefits were not restricted to Muslims. There are narratives of the Prophet's life illustrating certain Quranic verses that indicate that non-Muslims could also be beneficiaries of charitable acts and gifts and were also encouraged to give alms and establish charitable works to benefit the communities of which they were a part.

The ideal of the value of human life, its nurture and social development, is also at the heart of Quranic teaching. This is illustrated in the abolition of the practice of female infanticide. One would have thought this to be a rare practice in seventh century Arabia, but there is reference to it in several places in the Quran. Historical sources suggest that it was sufficiently common and was in some instances related to the threat of food deprivation. One of the verses specifically forbidding the practice states:

"Do not kill your children because you are afraid of poverty and hunger,
We shall provide for them and for you." (Q 17:31)

The notions of security of life and its development through security of food were highlighted as an important moral commitment. There are similar examples of affirming the social rights of those

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most subject to abuse and injustice, orphans, widows and divorced women, in particular. It is clear that the Quran's moral and prescriptive language aims at protecting and enhancing the well-being and self-worth of the weakest members of society, by affording them a share in the community's resources through individual and collective efforts.

The abolition of the practice of female infanticide, and the notion of entitlement to secure life and development represents Islam's commitment to replace the non-formalised custom of pre-Islamic Arab tradition with its apparent disregard for marginal groups such as orphans, women, and the poor with a formalised language of obligations and entitlements grounded in a larger view of social contracts between human beings. Also, during its formative state, the Muslim constituted a minority within the region and within an oral culture where rights and obligations were not dependent on a defined code specifying conduct based on a covenant or contract. Rather it was based on a customary framework of practices dependent largely on the will and generosity of those who were its custodians and had the power to maintain or disregard its provisions. In the formative Muslim Community, the Quran marks the first step in creating a moral environment and an institutional fabric to advocate a framework for the common good that went beyond tribal and ethnic boundaries, validating obligations to groups like the hungry and imposing obligations on Muslims to take appropriate corrective measures. In particular, the shift in early Muslim society from its Meccan setting to its Medinan one marks a radical change in social empowerment. The Prophet and many of his followers migrated to Medina, established a community, and had, for the first time, the power to build institutions to support their moral vision. From a comparative perspective, the process of the institutionalisation of ethics and

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community development occurred in a more tangible manner historically in Islam's founding period than has been the case in the experience of other religious communities, based on different historical conditions.

The language of the Quran thus addresses issues that might be perceived as being distinctly political, social, economic, ethical or religious simultaneously. This simultaneity is part of the total vocabulary afforded by the Quran, which, like similar founding texts, did not separate the questions of individual rights, social obligations and moral values from its religious vision. The new boundary within which such an integrated vision would operate for Muslims was in a moral community in which the Islamic ethical dispensation would find form. The *ummah* and its leaders were the custodians of these values and the community was also the context in which these values could be implemented, enforced and institutionalised. The emergence of *fiqh*, the science of jurisprudence, as a way of codifying, juristically, the obligations and entitlements referred back to this grounding vision as legal developments also tried to take into account the enlargement of the Muslim *ummah* in subsequent centuries. As a result, wherever Islam spread and Muslim authority was established, these principles and prescriptions relating to social rights formed part of the legal obligations of the state and of Muslim authority to oversee the needs of society.

Cultural Rights

As in the case of social rights, Quranic perspectives on the cultural dimension relates to the issues of improving and enhancing quality of life, the environment and the total natural and built heritage

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and traditions of people. Just as Allah has a universal aspect:

"to Him belongs the East and the West: wherever you turn, there is His face.

He is all-present, all-knowing (Q 2:115),

so His providence extends to all of creation. The universe as a whole is a sign (*ayah*) of the creative power and beneficence of God that extends to every creature:

Your Lord inspired the bee, saying: Make your hives in the hills and trees ... there comes from the bees a delicately coloured drink, with the power to heal. This is a sign for those who reflect (Q 16: 68-69)

The living animals on earth and creatures that fly with wings, are but communities like you

(Q 6:38)

Their rights to co-exist with humanity are therefore a crucial component of universality. This principle of universality extends to communication, and revelation through human history:

to every people have we sent a messenger (Q 16:36)

All of these messengers came from the same, One God, with the mission of mediating between God and their peoples in their own languages and in the context of their own cultures. One implication of this comprehensive and universal notion of divine revelation is that the great prophetic voices and faith communities are linked collectively as representing the diverse threads of human history.

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Communities that sustain and mirror this diversity are to be protected. In the Quran they are referred to as the "People of the Book" but also the *Ahl al Dhimma*, those afforded protection of their faith and heritage of practice and religious spaces. The Quran urges a positive approach to human diversity and cultural pluralism, endorsing its value in providing a sense of identity to members of different societies and cultures:

And among his signs is the creation of the heavens and the earth and the diversity in your language and colour (Q 30:22)

The role of stewardship entrusted to human beings also necessitates an ethical stance towards the development of natural resources and the public space inhabited by human beings:

We have made you heirs in the land after them, to see how you will behave (Q 10:14)

and

Indeed all things have we created in proportion and balance (Q 54:49).

And yet the glories and fruits of creation are also a gift and a resource:

Say: Who has forbidden the beautiful (gifts) of God? (Q 7:32)

One's environment thus affords an opportunity through the enhancement of living spaces to improve the quality of life, to foster community values and to use human creativity to sustain the beauty as well as the vitality of the natural and built environment.

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This legacy, however, is meant to be sustained for future generations and neither exploited nor treated with careless disdain:

Swell not with pride nor walk insolently through the earth, for God loves not the arrogant (Q 31:18)

The elements of God's creation that enhance the quality of human life are to be respected, cared for and shared:

It is He who produces gardens, with trellises and without, dates and cultivation of all kinds, olives and pomegranates, similar and yet different in variety. Eat of their fruit in season but render the correct proportion that is due from them, when the harvest is gathered. Waste not through excess, for God does not love the wasteful. (Q 6:141)

The sense of appropriate use of land is also extended to livestock but rather than just being a food source, the Quran also refers to them as a

source of pride and beauty (Q 16:6),

extending the connection and relationships with other creatures to a cultural level.

This brief review of Quranic teaching on social and cultural rights and duties to the community, highlights universal Islamic principles that are vital to the social and cultural underpinnings of peaceful, tolerant and caring societies. At a time of significant global change, economic and social uncertainty and civil and international conflict, they are a reminder that respect for diversity and pluralism, an engaged social conscience, the nurturing and awareness of the natural and inherited

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environment and a spirit of compassion, are ideals that transcend local boundaries in the pursuit of the common good for people of all faiths and backgrounds.

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Human Rights as a Universal Concept in Islam

Norani Othman

Introduction

Human rights today are defined in a normative framework of democracy and freedom. It is in this context that human rights are made in reference to the whole of humanity regardless of ethnicity, religion, social status, etc. The pertinent questions we confront when we reflect upon the issue of Islam and its compatibility with the Universal Human Rights Declaration (UDHR), which almost all of the nations of the world are supposed to uphold, are: (a) Can *shari'a* meet the demand for human rights? (b) Can it become a legal framework in which one can understand and conceptualise the universality of human rights. These are questions which ultimately hinge upon the problem of interpretation of the *Qur'an* and *Sunna* or more specifically that of a hermeneutics of the foundational texts of Islam.

At first glance these questions seems controversial. While there are few who seek to deny categorically that there can be any such thing as human rights in Islam, many thoughtful and also highly influential individuals, including religious and political leaders from the now more assertive nations of the non-Western world, do question and even challenge the universality of Western notions of human rights.

How do we then engage ourselves as culturally-diverse human beings to discuss human rights and seek that human capacity for mutual empathy and understanding? How do we ultimately define a notion of human rights in its "universal dimension" in a world of rich human diversity, difference and cultural specificities? It is indeed a challenging task, one which none of us can any longer avoid or postpone as we enter into the new millennium of our human and civilizational existence. This challenge is all the more pertinent when we consider how processes of globalization over the last two-and-a-half decades have increasingly brought many diverse nation-states and communities into a single

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'global' context.

It is not difficult to recognize the argument that Western notions of human rights may be culturally and civilizationally contingent, not universal. But conceding that point still leaves the non-Western (particularly Muslim) rights-activists faced with the question whether, historically, it has been the Western tradition alone which has formed an explicit concern with human rights, with the rights of people as individuals, as citizens within a political community, and as members of the important social groupings of which civil and political society is constituted. Does Western discourse alone, even if it is of compromised universality, have the capacity to generate such a concern with or a conception of human rights?

Or can a concern for, an affirmation, articulation and defence of human rights be effectively and autonomously generated from within other, non-Western cultural traditions, philosophical idioms, religious and civilizational frameworks? Perhaps such alternative formulations of ideas of generic human rights have already appeared and been historically elaborated in other (non-Western) cultural forms, grounded in different moral and ideological systems. But even if hitherto they have not--or the potentials for their elaboration have been only partially or fitfully recognized and imperfectly developed---are such intellectual resources made available in other, non-Western contexts and traditions?

The central concern of this paper is to consider these questions through the exploration of one important and revealing case study of a great religious tradition: that of Islam, the religion with which I am personally most familiar. I have argued elsewhere that what is done in the name of Islam is often not Islam itself, certainly not normative Islam at the level of central ideas and animating principles. The present discussion again takes up the case of Islam with an explicit objective to explore potentials and realities of--as well as the entrenched resistance to--the generation and elaboration of an effective non-Western discourse of human rights. This enterprise is one that, while it may be as culturally contingent or conditioned in its own way as its Western counterpart, nevertheless has the capacity to yield a

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notion of universal human rights: the very idea that in virtue of their intrinsic or generic humanity transcending all their contingent cultural and historically conditioned differences, people share certain essential entitlements. Whether embodied within the formal political constitutions of human communities or seen as inhering, by divine creation, within human ontology (e.g. the concept of *fitrah* in the Qur'an), the idea of human rights is too insistent to have been the intellectual discovery of only one of the many historic communities or civilizations of humankind.

In their attempt to find an alternative to the derivatively Western political framework of the modern nation-state and all its constitutional and legal paraphernalia, many societies have looked for guidance to their religious community's formative (or historically-significant) and, within their own terms, culturally-authentic experience. This process, as different peoples and societies pursue it in their own various ways, is necessarily differentiating and particularizing. It produces and promotes the elaboration of difference. The huge question facing us is whether it consequently undercuts or narrows the grounds for shared cross-cultural, even universal, understandings of human rights.

It is in this context perhaps that it may be useful and challenging for us to examine what "cultural sources" of human rights that religious traditions such as Islam can offer towards the expression of a universal struggle for human rights. Perhaps a far greater challenge that we all face, as humans, within our various cultural expressions of an emerging contemporary "civilization of modernity" is to engage in the *public* debate over human rights as a global issue based on an inter-civilizational dialogue. This negotiation can only be achieved on the basis of finding an "overlapping consensus" on universal principles of human rights derived from some common cultural and ethical foundations that are evidently necessary for our common survival and coexistence with others. One cannot deny that such foundational values characterise all religious traditions and embrace all humankind.

The Universal Dimension: finding a normative or overlapping consensus

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across nations, cultures and religions

The principle that all human beings should enjoy equal rights of freedom and participation is a modern idea born of the intellectual legacy of the Enlightenment in Western Europe. However, it seems natural that members of all faith communities including Muslims, Christians and Buddhists should be committed to promoting and implementing international human rights. After all, do not all religions profess a profound concern for human life and human dignity while providing ethical guidance for the private, public and social lives of their adherents or believers?

A more pertinent consideration is: how does one maintain a basic standard of human life in dignity and freedom in the face of human diversity, pluralism and multiculturalism (as well as the enormous diversity to be found within various religious traditions)? Indeed, how does one go about establishing--or even begin to create the ground for engaging in--inter-faith dialogue? We need to remind ourselves, too, that the first objective of that dialogue is to find a normative consensus for international or global coexistence and cooperation while at the same time accommodating a multiplicity of different convictions and different ways of life. The real challenge is to find a normative and overlapping consensus across nations, cultures and religions capable of sustaining and even enriching modern human rights standards.

Yet to say that the explicit articulation of human rights standards is a modern phenomenon is not synonymous with claiming that those modern expressions are superior to traditional or religious forms of ethics and law. One may in fact see the development of human rights as a central theme in a shared history of "civilizational progress". Yet such a narrative with its central theme of increasing progress would also imply a general superiority of modernity over premodern periods; that modern concepts of rights are somehow more "advanced" than the earlier formulations available in the ethical discourse of all of humankind's great religious traditions. This, I will suggest, is a view or implication that we need not accept.

In this context we must recognize that modern threats to human life and

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dignity have made it urgent, even imperative, to find new ways of protecting human dignity and freedom. Outstanding modern experiences of injustice and exploitation--such as colonialism and the imperial domination exercised by Western states over large parts of the African, Asian, and American continents, together with the outbreak of various religious, civil and ethnic wars and the dangers of capitalist exploitation, mass impoverishment and proletarianization and unemployment--all attest to that need to find a common global approach to protecting human dignity and freedom. Modernization crises are far-reaching, and their persistent occurrence has prompted an awareness and the gradual evolution of the human rights concept in its modern international form.

In this context too it becomes logically imperative that members of different communities of faith seek a *critical reconciliation* between the 'secular' international standards of human rights on the one hand and the normative traditions of their various religious heritage on the other. A critical reconciliation of tradition and modernity, loyalty (or strong social ties) and emancipation, religious normative claims and secular standards of human rights therefore requires an honest and critical reevaluation of the different historical legacies of each tradition: that is, a re-evaluation that not only acknowledges the strengths of those religious legacies, so far as human rights are concerned, but which also clearly recognizes and addresses, rather than "fudges" its way around, their gaps and limitations. In other words, in the context of Islam this calls for a renewed and critical "ijtihad" which amongst others has first to address the undeveloped concept within a Muslim worldview, that is the concept of equality of all human beings: believers, unbelievers or believers of other kinds of faiths.

Human rights standards in their modern international conception are, after all, a political means of recognizing human dignity in a legally and binding way across many diverse nations. Yet this legal codification requires first and foremost the endowment of all people regardless of colour, creed or gender with *equal* rights and freedom--individual and community-based--so that their freedom of varying religious

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practice and conscience can be equally protected. Crucial here is the need to ensure not only freedom ***to*** religion but also freedom ***within*** and even ***from*** religion: from coerced conformity of minorities to majority religions or to dominant trends within interpretations of the religious faiths to which they adhere.

Universal dimension in the Qur'an: the principle of "one-ness" and the notion of "the children of Adam" (*banu Adam*) as the basis for the principle of human universality

The purpose of this seminar is to seek that critical reconciliation between Islam and the Universal Declaration of Human Rights. Towards that objective , I shall outline how in many of its verses and chapters the Qur'an expressed the one-ness and universality of humankind and how all of humankind ("children of Adam" is the term used by the Qur'an) is conferred dignity and freedom by Allah. This forms the essential quality of being human.

The Quranic approach to the faith in the One God is to call attention to the whole universe in its various physical and biological phenomena, and to its incessant laws and systematic order which maintain continuation and coordination. From these observations, the Qur'an presents the argument about the One God and His attributes, and His relation to His creation. God in Islam stands as the unchanging absolute and abstract reality of all existence, including human existence. The message of Islam is explicitly universal, directed and communicated to all people or humankind (*insan*) on earth. The sense of universalism is also couched within the principle of dignity and the essential equality of all human beings. The notions of vicegerency (*istikhalf*) and trust (*amanah*) pertains to the reasoning of creation based on the idea that humankind takes charge of its own destiny and that of the universe. They also imply certain rights and responsibilities in fulfilling those roles and trust.

The areas about rights and fundamental rights in Islam which we have to be clear and articulate are: the relations between men and women, and those between

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Muslims and non-Muslims or the "Other". Muslims have to deal with all including the non-Muslims or people of other faiths with justice, fairness, and kindness and to promote peaceful actions and relations, "for verily, God loves those who act justly" (*Qur'an*, 60: 8). Many Muslims may accept the requirement of being "nice" to the other, but not the principle that the other is "equal" to him or her. Many also believe or think that the two attitudes are the same, or that "nicety" may suffice or substitute for equality. But they are not the same; "nicety" is essential for human relations, while "equality" is crucial to both the individual legal entitlement and the entire order of legal justice. Equality may also be merely a legal outward formality if it is not based on "moral" conviction and virtousness. Whatever the "nicety" in human relations may be in daily life, "equality" has to be secured and sanctioned by law. We may be talking in two different languages with those who believe in universal human rights, when we insist on speaking about our belief in, and practice, of nicety and tolerance, while they need an explicit and clear commitment of "equality" of the "other" to "us" from us, in spite of whatever difference there is between the "other" and "us".

I have also argued elsewhere that two main issues confront modern Muslims. First, there is a need to examine currently prevailing *shari'a* definitions of human and citizenship rights. What is at issue here is not the rights of Muslims, of non-Muslims, of majorities or of minorities but the rights of human beings as simply human beings, generically. Any consideration of the position of any special category or "sub-set" of human beings can only follow from, and be couched within, the parameters of such an examination. This awareness is by no means alien to Islam but is grounded in the Qur'anic notion of a common human ontology [*fitrah*], couched in an Islamic idiom of moral universalism which predates much of the Western discourse about human rights. I could have made you all the same, Allah explains to humankind in the *Qur'an*, but I <u>*chose*</u> to make you different, so that you might come to know one another and thereby better understand your own selves (see for example *Al-Maidah*, 5: 48, Qur'an "... if Allah had so willed, He would have made you a single people, but [His plan is] to test you in what He hath given you, so strive as in a race in all virtues.

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The goal of you all is to Allah; it is He that will show you the truth of the matters in which ye dispute"; see also *Hud*, 11:118-119, Qur'an "If thy Lord had so willed, He could have made mankind one people; but they will not cease to dispute, except those on whom thy Lord hath bestowed His Mercy: And for this did He create Them: and the Word of thy Lord shall be fulfilled: "I will fill Hell with jinns and men all together.").

Human diversity and cultural pluralism in this Qur'anic view are not a regrettable mistake or limitation nor a political obstacle but a sign of divine grace and blessing among humankind. Like modern discourses about human rights, the Islamic tradition is centrally concerned with the human, moral and therefore ultimately religious meaning of human beings themselves, within and also transcending their cultural differences and social diversity. This question of the human meaning of human beings presents a growing challenge to *all* theological traditions, cultures and civilizations. In the increasingly interdependent and globalised world which we all now inhabit and must share, human beings have rights simply as human beings, regardless of differences of race, gender and religion. We must find humanly inclusive ways of sharing our world while also grounding our common rights--including our right to be who we are, and hence to be different from others--within it. This, doctrinally, is the view that lies immanent but central within the Qur'anic "worldview" itself. The challenge to contemporary Islam, and Muslims, is to adopt that same standpoint as its, and their, own. The challenge to today's Muslims--and especially the new traditionalist ideologues who provide the main intellectual and political impetus for all the kinds of religious resurgence that are gathered together under the vague label of "fundamentalism"--is to begin to see humans, all humans, in the way that their faith insists God or Allah (himself) sees them. This is also the challenge to today's Muslims to define and elaborate an understanding of the concept of pluralism not only within the community of Muslims but throughout all the communities of humankind. Human diversity or pluralism can be seen as not only inherent in the divine scheme of things but also deliberately

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designed to promote understanding and cooperation among various peoples. Perhaps one of the central challenges of *taqwa* (faith) for today's Muslims is how to make a judgement of human worth based on the person's moral conduct rather than by his or her membership in a particular ethnic, religious or other affiliations.

This may pose as a central challenge because just as one can select the above verses of the Qur'an (as many Muslims had done when making an argument for the universal concept of human rights in Islam) to demonstrate its "inclusive" concept of pluralism as embracing all human beings, there are those other verses in the Qur'an which also speak about "exclusivity" in the sense of "believers" as *awliya* (allies and supporters of one another) and "non-believers" as *awliya* of one another [see for example verses of the Qur'an such as 3:28; 4:139, 144; 8: 72-73]. Clearly one is faced with a problem of how to address such apparently conflicting verses of the Qur'an.

Second, Muslims need to contribute their own modern and Islamically appropriate conceptions of social relations, established on a basis of equality, between men and women. Here again, Qur'anic conceptions of the rights and duties of men and women--in the family, to own and manage property, and to participate in public life and to hold public office, for example--provide the basis for a far more enlightened and egalitarian view of gender relations than the regressive ideas that are currently offered--quite misleadingly in the name of Islam itself and with the supposed imprimatur of its faith--by resurgent Islamists and traditionalist ideologues the world over.

In debating these issues, Muslims must also recognize another dimension--the dimension of existing international human rights documents with their own distinctive conceptual basis and perspective. Until the two main issues which I have just outlined are clearly addressed, any Muslim critique or rejection of those documents remains premature, even questionable. Those instruments and their moral foundations, derivatively Western perhaps in their origins and history, can be neither embraced wholesale nor summarily rejected at the outset of any such

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process of consideration by modern Muslims. Only after a critical reevaluation of their Islamic heritage--and especially the idea of an underlying common humanity that finds variable cultural expression within the differing societies of a diverse humankind--can progressive Muslims decide in what ways and to what extent they should accept, reject, modify or renegotiate the stock of the so-called derivatively Western concepts and ideas that are now offered as the basis for a universal discourse or theory of human rights.

The challenge and the process that I have just outlined is not one unique to Muslims. It faces all the great faith communities of humankind and is a key task for their thoughtful adherents. As we all in clear sight and good conscience examine our own varying religious and civilizational heritages, we will be drawn not further apart but closer together, on the grounds of a culturally and religiously pluralistic but together humanly inclusive reconsideration of human plurality itself.

The problem of universal human rights for most Muslims may also be related to certain other general conceptual matters (apart from the concept of pluralism mentioned earlier) that has remained somewhat unresolved. One example often cited by Muslims themselves is that "some specific details in the UDHR issued by the General Assembly of the United Nations in December 10, 1948 have raised some controversy among Muslims, at the head of which has been human freedom of changing beliefs [article 18]". But the divine sources of Islam--the Qur'an and the Prophet's traditions (or Sunna)--do provide ample if not comprehensive legal principles and also some specific rules in the various arenas of human life including the social, political and governance. The Qur'an addresses, in many verses, the "Children of Adam" in the sense of "human beings" as a whole, while at the same time it addresses in many other verses, those "who have attained to faith" or simply "the believers". That human beings are all different cannot be argued. but that does not mean or imply that they are not one. "Islam is a monotheistic religion, built on the notion of one-ness of god. Corollary with this essential position is the doctrine of one-ness of humankind". The Qur'an states that Allah honours and confers dignity

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on all the "Children of Adam" (*Al Isra*, 17: 70) whatever their inborn and acquired differences may be. The "Other" is as equally human as the Muslim or the believer since the Qur'an emphasizes that all of humankind came out from one couple: a male and a female, in spite of all their diversification into various peoples and tribes which are meant to develop knowing and complementing one another through the diversity of human qualities (see for example, *Al Hujurat*, 49:13, "O mankind, We create you from a single (pair) of a male and a female, and made you into nations and tribes, that ye may know each other..."). Diversity is thus a natural law for humankind, and no conformity or domination of one single way of thinking or way of life can be expected. People are different in their various abilities so as to be tested with how they deal with their differences and constructively interact with one another, while benefitting from God's gracious guidance in their efforts (see Qur'an, 5: 48; 11: 118-9; 49: 13). Here again the challenging task in the promotion of universal human rights is an appreciation and practice of the principle of "equality" not merely implementing a policy of "nicety" or *religious tolerance*. Muslims and non-Muslims should be equal in rights and obligations in a Muslim country which means for the non-Muslims: the right to vote, to be a member of parliament, a minister, a judge, an officer in the army; i.e. not just the enjoyment of their belief or practice of their religion. A substantive principle of equality and the right of freedom together form the underlying principle of the entire order of right. Freedom plays the central role within the conceptual framework of right comparable to the role of moral autonomy within the conceptual framework of morality while equality is in fact the precondition to the recognition of everyone's freedom. They form two interconnected aspects of one and the same principle that recognizes and promote human dignity. The right to freedom is expressed in the Qur'an by the assertion of the *al Baqarah* surah "let there be no coercion in the matters of faith" (2: 256). In this verse, the Qur'an secures the rights of free belief, and what is inseparable from it such as free expression of this belief, and free assembly of the believers, whether in the form of a temporary gathering or a permanent organization for the support of this belief. God

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consciousnes
s cannot produce its moral and behavioural consequences if it is not deeply rooted in the human heart and mind by free will and full conviction.

The way of how to achieve such an order of right lies at the centre of what may be called the Qur'anic worldview of human dignity, its plurality, and moral autonomy and responsibility. A closer and careful examination of various verses from the Qur'an attest to a moral and ethical judgement and conduct which upholds free will, entitlements and respect among all humans. A few examples of the Qur'anic worldview which supports the notion of human rights as a universal concept are given below. They are taken from a recent publication by a much-respected contemporary Muslim scholar, Professor Fathi Osman, 1997 *Concepts of the Qur'an: A Topical Reading*. I chose only the three topics (below) from many others that the author has judiciously selected to make his strong argument in support of what I called a Qur'anic worldview of universal human rights, freedom and justice.

1. One Faith, different laws and practices

> "And to you We have sent the Book, setting forth the truth, confirming the truth of whatever remains of earlier revealed books, and watching over it; so judge between them [the People of the Book] according to what God has revealed, and follow not their whims, diverging from the truth that has come to you. To each of you We have appointed a law and a way to follow. And had God so willed, He would have made you all one single people, but [He willed it otherwise] so as to test you through what He has given you. Vie, then, with one another, in good deeds; unto Allah you shall return, and He will make you understand all on which you differed. (5:48)

This verse clearly spells out the place of the Qur'an with regard to the earlier divine books that had been revealed before and were still remaining when the message of Islam came. Although Muslims believe that the Qur'an is the final word to humanity and thus represents the culmination of the divine revelation that has addressed, in a condensed way, essential human needs in different times and places , they must also believe that "there is no coercion in matters of faith" {2: 256], and that God has created humanity to be diverse.

Pluralism is therefore a fundamental law of nature, with which the messages of God and their laws comply "*to each among you We have appointed a law and a way to follow. If God had so willed, He could surely have made you all one single, but [His plan is] to test you through what He has given you*". All adherents of earlier

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divine revelations who believe truly in the One God and in human accountability in the life to come and conduct their life according to God's moral guidance and righteousness will be fairly judged and rewarded and need not fear their present or future [see Qur'an, 2: 62; 3:113-115; and 5: 69]. Followers of different messages and ways of life should "*vie with one another in doing good deeds*", and thus pluralism should stimulate constructive competitiveness as well as essential cooperation [Qur'an, 2: 177; 5:2; and 49: 13]. God's laws in the Qur'an then secure pluralism which complies with human diversity, and although Muslims believe that the divine revelation which they follow is the final word of God, and that it has remained intact since that time of revelation, the Qur'an does not impose one system or expression of beliefs at the expense of others, nor does it claim to monopolize righteousness and God's grace in this life and the life to come. Accordingly, human consent is conditional for any legitimate obligation, and compulsion nullifies any human statement or agreement.

2. Human dignity, the right to development, and freedom of movement and mobility

> We have conferred dignity on the children of Adam, and carried them on land and sea, and provided for them sustenance out of the good things of life, and favored them far above many of Our creation. [17:70]

God has favored human beings with the spiritual and intellectual faculties to make judgement about right and wrong, and with *free will* to choose what he/she may believe in or how he/she may act [e.g. Qur'an, 90: 10, and 91: 7-9]. Human beings can use their physical and intellectual abilities to move from place to place through land or sea, or by other ways including air and space [e.g. Qur'an, 42: 29; and 45: 12-13]. It is the right and obligation of the individuals, society and authorities to secure and develop human powers to their full potential in various dimensions. Human being is created to be universal, and to move from place to place to earn his/her living or to gain more knowledge, and to contact other peoples and develop

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human relations and ties such as economic cooperation with them.

It is a human right and obligation to acquire sustenance out of the good things of life that ought to be nutritive and fairly distributed in the society and exchanged in the whole world. This has to be secured through fair chances for work, and laws that secure justice in business and in the labour market and prevent exploitation and fraud by all means. Human dignity cannot be maintained and developed unless an awareness of individual and public responsibility is nurtured, and the fulfillment of human obligations is combined with the demand of human rights. Quranic "human dignity" combines rights and duties. It is comprehensive for the holistic human needs: physical, intellectual, spiritual and moral. It is universal as it secures dignity for the human being as a human being, regardless of gender, ethnicity, faith or power. It is stated by God who is the Creator of all humanity and is not biased with or against any of them, and it is guarded by God-consciousness which is deeper in its roots and wider in its range than any human philosophy, national constitution or international documents.

3. Moral responsibility of government, and guiding public opinion and actions

> Those who if We firmly establish them [and enable them to seize power] in the land, keep up prayer and render purifying welfare dues (zakat), and enjoin the doing of what is right and forbid the doing of what is wrong; with God rests the final outcome of all events. [Qur'an, 22:41]

Since spreading righteousness and justice and resisting evil and injustice sum up the message of Islam and its followers, these become the essential duties of those who are entrusted with authority from among the people, by them, in any land. Such individuals have to use their authority to secure the moral values and principles of justice in God's message in the land under their power, and to give support for morality, justice and peace all over the world. It is only when such a commitment to righteousness and justice is fulfilled internally and universally that Muslims become a

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constructive power in the world for the good of themselves and humanity [Qur'an, 3: 110]. The Conveyor of God's message will be the witness over them in fulfilling their responsibility, while they become witness over the whole of humanity in this regard [Qur'an, 22: 78]. This is a universal moral responsibility of all believers, men and women, but should be secured and supported by those who are in power.

Concluding Remarks

Whatever the various implications of the international pluralism and justice may be, the moral responsibility of all human beings with all their inborn and acquired differences as individuals, groups or communities lies in their thought, judgement and conduct. As the Qur'an itself states: "Verily, God does not change people's condition unless they change their inner selves" (13: 11).

The above citation demonstrates what another contemporary Muslim scholar describes as "choice and/or interpretation of verses in the Qur'an (or any other text for that matter) in relation to human experience and relationships is necessarily informed by the orientation of the person in question." As he rightly asserted "Muslims, for example, have always differed, and will always differ, in their choice of verses to cite in support of their views, and also in their understanding of the verses they quote. That is one of the reasons why there are so many schools of Islamic theology and jurisprudence, with a wide variety of views within each school. This feature of Islamic discourse is often cited by Muslims [themselves] with great pride as conclusive evidence of the flexibility and adaptability of Islam to the different circumstances of time and place."

Indeed we now come to the heart of the matter: the historicity of interpretation of religious texts. As stated earlier it is not Islam per se that is problematic in its relationship with modern human rights standards but it is the re-traditionalizing interpretation of the *shari'a*--one which renders the *shari'a* as a comprehensive system of politically enforceable normative regulations. To deny that there is no problem with the relationship between the *shari'a* and human rights is simply

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unrealistic if not an intellectual dishonesty. A notable Muslim judge in Egypt has already pointed out that Muslims must not confuse the historical jurisprudence (*fiqh*) as of equal status with revelatory guidance. For all Muslims the Qur'an is divine, sacred and authoritative. But for the "re-traditionalizing interpreters" and their supporters, they also

> "treat as virtually no less authoritative and binding the interpretations of that scared text that were made—under the often limiting sociolegal conditions then prevailing—by the early Muslim legal scholars who codified Islamic law in its traditional or classical formulations. For the adherents of this approach, history offers not new possibilities but imposes a troubling remoteness, even alienation. As history advances, it takes the *umma* ever further away from the paradigmatic ideal of its founding generations, from the secure example and guidance of those who enjoyed a direct understanding of Islam in its authentic and formative phase. For them, accordingly, the way to close that gap—to heal the wounding distance imposed upon modern Muslims by relentlessly advancing history—is to reaffirm and to reimpose in the present the understandings of Qur'anic ethical imperatives of those early times: that is, as they were first codified in their not simply premodern but actually [for our times] most archaic legal forms. Seen in this way, the desire to implement what its proponents regard as the essence of Islamic law—[including those that are contrary to modern human rights standards]—becomes understandable. But it can also be recognized for what it really is: an anachronistic attempt to impose in modern times and upon modern Muslims of good faith what is not the essence or culmination of Islamic law but only Islamic law in its most archaic, provisional and historically unevolved form.

In evaluating issues such as human rights we confront not only the problem of coping with the historicity of early post-Qur'anic Islamic texts but, no less difficult, of how we are to read even the eternal message of the Qur'an itself into the present. In either case,

> we in the present have to read those texts in order to understand them at all; but in seeking to understand them we—like all Muslims throughout history—bring to our own reading of those texts the frameworks of understanding of our own time and place. We hear the past voices that speak to us speaking with contemporary accents, as it were—our own. So we are always, like all the great *ulama* of the past—even if they were not aware of it—both reading the present back into the past from which we seek contemporary guidance, and also left with the problem—even if and where we think we know clearly and

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> authoritatively what the past is telling us—of deciding *how* we are now to implement or proceed upon that understanding.

Abdullahi Ahmed An-Nai'm, a contemporary Muslim legal scholar has also called for a new hermeneutic approach to reading the Qur'an. For An-Nai'm, "the community of believers as a whole should be the 'living frame of interpretation and ultimate arbiter and mediator of interpretative rules, techniques and underlying assumptions". According to him "...the process of religious revival and reformation is often about breaking the monopoly of the clergy or technocrats of hermeneutics and reclaiming the right of the community to be the living frame of interpretation for their own religion and its normative regime."

Ultimately it is for Muslims themselves who have to contend with the fact that *shari'a* is a product of human understanding. Thus in making decisions concerning implementation in our modern times and circumstances of the eternal imperatives of the Qur'an, we bring to that process of interpretation and decision our own contemporary understandings. We simply cannot do otherwise. Both the eternal text of the Qur'an and the historical, contingent texts of the *sunna* and *shari'a* are read and humanly understood by living people—*ulama* and other believers—of their own particular time and place. Our history, our past never speaks to us directly, and even the Qur'an—however it speaks to us—is only heard and understood by real living people, limited in the ways and by the circumstances of their own time. All our understanding is imperfect, human, historical and provisional—and capable, accordingly, of being changed and even deepened in the light of changing circumstances of a constantly unfolding future in ways that, in the very nature of the case, it is impossible for us now to anticipate or even imagine. The past, in whose light we wish to read and find guidance for the present, is itself known only through an image into whose formation our own present enters. In Islam there are things that are divine and eternal, but they are only ever known by humans in forms that are stamped, and also limited, by the historicity of all human understanding.

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One often hears in Islamic discourse the proposition that "Islam is suitable (valid) for all times and places". It is for this maxim that Muslims must consider and accept that there must be flexibility and change in the understanding and implementation of Islam over time and place. A crucial issue in this effort is the credibility of advocates of universal human rights in the eyes of their own local constituencies. These advocates must draw upon the symbols, and sources of their own culture and history; speak the 'language' of their own people, know and respect their concerns and priorities. It is only within this strategy that they will be in a position to advocate universal human rights standards in cultural terms that are locally persuasive and authentic.

Towards this objective I shall quote from An Na'im who said that "in the final analysis, the acknowledgement and implementation of universal human rights should be regarded as a co-operative process as well as a common objective –a global joint venture and not an attempt to universalize a particular cultural or religious model".

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ISLAM, ECONOMIC, SOCIAL AND CULTURAL

RIGHTS AND THE UNIVERSAL DECLARATION
OF HUMAN RIGHTS WITH PARTICULAR

FOCUS ON WOMEN

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Mashuda Khatun Shefali

Introduction:

The source on which Islamic tradition is based, mainly the **Qur'an**, which Muslims believes to be God's word transmitted through Angel Gabriel to the Prophet Muhammad, the **Sunnah,** is the practice of Prophet Mohammed, **Hadith**, the attributes to the prophet Mohammed- the **Fiqh** (jurisprudence) interpreted by Muslim scholars. Like the other major religious traditions of the world, Islam, or the Islamic traditions does not consists of or derive from a single sources. There are four recognized schools of laws in fundamental Islamic beliefs that differ from each other. All these sources have contributed what is cumulatively referred to as Islam or Islamic tradition, do not derived from a coherent or consistent body of teachings or percepts from which a universally agreed upon set of Islamic norms can be derived. Only Muslim men who have arrogated to themselves the task of defining the ontological, theological, sociological and eschatological status of women interpret all of these sources of documentation. As such, in their interpretations women's positions and status, are effected, hence the Islamic Patriarchy is much more stronger than non-Muslim society. Since, Islam as a religion has many variations, in relation to faith and practice, even within the **Shariah (** the Islamic legal code, that regulates all aspects of Muslim life) the status of Muslim women varies due to the localized cultural traditions. Some countries Muslim women have more freedom while other is still far behind to reach that level. On the other hand it is difficult to establishing just what the Islamic norms about women are due to its multiple sources and inconsistencies between various sources (Qur'an, and the Hadith and even within the Hadith literature). Given the complex nature of each sources of Islam, it is not easy to generalize Islam and about the women's status in Islam. However, in the contemporary modern Muslim world some Muslim country marginalised their old laws by reforming and adding civil laws. But there is not much improvement in the status of women, when it comes to women's' rights, religion and theology are evoked.

Islamic Tradition, Values, Culture & Women:

Most of the Muslim countries are relatively a homogenous society as there is 80-90% of the population is Muslims, the reminder may be the other religious believer as minority. The Muslim community is also existing in any other non- Muslim states. At present there are 55 Muslim Country exclusively practicing Islam, but in a variety of social, cultural diversity and political context. No tradition or culture is monolithic, static or insulated. There have been cross influences between different religious and cultural practice of communities, and therefore, in any local communities, religion often takes on syncretic forms whereby localised cultural forms become integrated into the social practice of religion. Islam is an expansive religion and as such it has incorporated local customs throughout the continents to which it has spread, giving rise to a wide cultural diversity. As a result, Muslim countries localized cultural identity

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underlying the history and the traditions of each nation with their differing conceptions of the socialization in every country's context. It is therefore, fundamentally important for women's rights in Islamic countries to established what pertains to cultural norms and traditions. Some of them are pre-Islamic, what have been incorporated into local practices and what pertains to the formal doctrine and its sources. For example, the Arab-Islamic culture of the early centuries of Islam infiltrated the Islamic tradition largely through the Hadith literature and undermined the intent of the Qur'an to liberate women from the status of inferior creatures, making them free and equal to men.

Women in Islamic tradition have different story needed to be consulted. There are three foundation of theological assumptions on which the super structure of men's alleged superiority to women has been based, Which includes that: (1) God's primary creation is man, not women. Women is believed to have been created from men's left rib, hence is derivative and secondary ontologically. (2) Women, not men was the primary agent of what is generally referred as man's expulsion from the garden of Eden, hence all daughters of Eve are to be regarded with hatred, suspicion and contempt and (3) women was created from men and also for men, which makes a women's existence merely instrumental and not essentially fundamental. These three assumptions may logically be regarded to be answered as (1) how were women created? (2) Were women responsible for the fall of man? and (3) Why was women created?

Without being answered the above mentioned questions how could resolve the question of men and women's equality. If God has created man and women equal, then they should not become unequal at the outset of the present world's demand for women's empowerment and equality. That is making enormous debates and contradictions between Islam and women's development. However, the Qur'an uses generic terms for humanity (an-nas, al-insan) and there is no mention of 'Hawwa' and Eve. The word Adams accurse in Qur'an 25 times but it is used in 21 cases as a symbol for self-conscious humanity. Infect the word Adam is Hebrew word that means 'soil' and it is generally referring to the human rather than to a male person. In the Qur'an, the Adam derived from the Hebrew in Arabic mostly does not refer to a particular human being. It rather refers to human being in a particular way.. In the verses of Qur'an, which deal with the origin of man as living being, it uses the words like Insan, Bashar, not Adam, which it reserves for man in his capacity as God's vice-regent on Earth.

Muslim Women and Purdah (seclusion and Veiling):

Islam enjoins women not to display their chastity for safeguarding women and immunize them against perversion in the society. It also forbids meetings of unmarried men and women in isolation, to avoid temptation and sin and thereby preserve the women's dignity and social status. Therefore, women have been told that a particular mode of dress would protect them. This is accentuated by the rules governing dress for women such as veiling or other dress far-reaching forms of concealing the body by wearing a certain type o clothing. Subsequently, the practice of covering body and keeping women out from the male spaces became a usual order for all Muslim women to follow as Islamic social institutions. As a result, veiling defined separate spaces for men and women and ties the protection of family honor (izzat) to the control of female sexuality. Veiling in physical term rejects seeing men without close kinship and restrict women's mobility outside the household. The symbol of the veil is 'spatial'. Veiling also represents a set of norms internalized by women regarding appropriate behavior and confined women beyond her assigned space as some one who does not exists. However, the question

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of dress for women paramount in any Islamization programs in the Islamic globe. It is merely obsessing some one that should in certain way is reflecting of one's faith. The social realities have shown that, dress cannot shield women from sexual violence. In fact, for the protection of women's dignity, the Quran (in Surah Al Nur 24:30-31) first orders men, if they be believers to lower gaze and guard their own modesty. Often men disregarded the responsibility, but have forced women to accept any forms of veiling and seclusion. Thus women have been made responsible for limiting men's lustfulness and for any loss of their self-control. Male domination in the name of religion controls women politically and socially in almost all Muslim Countries. This control has been falsely regulated with legitimate authority. But these prejudices have been projected as if divinely sanctioned. If women were encouraged to understand fully the Quranic verses and Hadith and other faith regulation, concerning their status and tradition, they would be able to make choices based upon their own faith and their religious practice. To force upon on Muslim women men's choice to the exclusion of their own, violates the development of faith and personal conviction. Coercion denies women's personal identity, their right to full social participation and their very existence as part of God's creation on earth. That creation is an individual with inalienable rights, right to self-determination, thoughts, choices and independent judgements. This sanctioned the women's physical and spatial seclusion of women perceives in many forms and all these forms put a separate social world between men and women.

In countries where seclusion of from public places are under practice, women are subject to all sorts of constraints and obstacles to participate in their education, paid employment, health improvements and in the political participation and formal decision making process. In the countries where women within the seclusion maintains separate place of compartmentalized participation in the development process remain weaker and women's equal contribution is marginalized and underestimated.

Sex segregation occurs in all Muslim countries, but the degree of hindrance to women varies considerably. More or less, in present Muslim world now a day in the changing situation Purdah is begin to be less significant. In poor community where the women's contribution to the family income become essential women's seclusion and practice of sex segregation is getting less valued. Generally the Purdah and the veiling of women became a social customs and social class and political identity. In addition, age and marital status of women also play a prevailing role in practicing Purdah throughout the society. Moreover, educated, urban, elite class takes pride in the fact that, women are able to develop free movement like other secular sects. The sex segregation is also getting less restricted due to the needs for mainstreaming women into the overall development process. For example in Bangladesh over a millions of women were employed into the Ready Made Garment (RMG) industries, it is impossible for them be veiling within their working environment, whereas all of the female workers were living under Purdah before entering the factory work. Despite some examples of changes women in Muslim communities are still deprived of participation from ranges of economic, social and cultural activities and their involvement in public office, formal decision making process and public sectors employment.

The religious restriction on women as instruments of social control now a days in any Islamic culture, women are often the primary groups of the expression of Islamic regimes to treat as self - evident. Women are often single out as the bearers and demonstrator their cultural authenticity and are made to serve as boundary makers as codification and classification of gender relations in Muslim societies. Muslim women, thus have been kept for centuries in physical, mental and emotional bondage and accepted the situation passively. This context rather re-enforces this practice and positioning women in such a subjugated and outdated

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tradition in the name of Islam. As a result demands for change women's place in Islamic tradition now rising in most of the Islamic countries. However, demand for the change of women's position often resisted by religious authority, because of destroying the Islamic symbols primarily the tradition of Purdah and cultural identity. It is as if the whole burden of the Islamic tradition rests on the shoulder of women.

It allows male authorities to exercise control over all women in personal and the public sphere. In current process of Islamization all over the world, harsh interpretations of Islamic prescription as they relate to women by male authorities may be one way in which male interests are protected in the face of growing social differentiation and rapid social change. Women who transgress social and religious norms may be scapgoated. Women and personal law is an arena in which wider interest are fought out between groups of men, both at local, national and international level, often in the name of protecting women's interest solicited by 'Shariah.' Within the 'Shariah, the Islamic legal Code, the status of Muslim women varies due to their localized cultural forms become integrated into the social practice of religion with differing the conception of gender.

Islamic Patriarchy and Shariah:

The Sharia , the rules by which Muslim societies have been governed throughout centuries, is historically determined but temporarily situated. The objectives of Shariah are the preservation of religion, the self, the species, property and the mind, as the Shariah controls entire private and personal life of Women. The Shariah, as Islamic laws was an expression of the responsibility of individuals not only for their personal life for the whole ordering of society, as such everything became the responsibility of community as a whole and therefore, of the individuals in particular.

Marriage in Islam is Sunnat, the family is the core of the social fabric, motherhood is the women's fundamental duty, and women is considered as the tree giving promise of the fruit. Marriage in Islam is also considered as preservation of human species towards populating the earth, women therefore, is like fertile land, men are allowed to cultivate the crops. In marital relationship, men are the providers and protectors for women's overall wellbeing of life. Marriage in Islam consists of a set of principles and provisions which suite cases of both necessity and choice, they must seek to ensure the security if the entire society rather than satisfy individuals desire. The marriage of daughters is therefore considered inseperatable from the ideologies of men's honour. Children inherit paternal property and assets. Men is therefore, an eternal being whose life does not end even after their depart from the earthy death. His role continues through procreation, passes through his characteristics to his children. If man fails to procreation, wife may either accept the situation or request for divorce, husband may opt for polygamy. Today in reality, the husband has absolute right of unilateral divorce, the wife has no such rights. Moreover, when husband exercises his right, the wife has no redress. Women do have a right to divorces (talaq) but for women it needed prove a number of conditions and circumstances to exercise the rights.

In the event of divorce Muslim women often remain single and become female-headed household and are likely to suffer economic hardship and social disapproval as a result. After divorce, the guardianship of children and child custody usually go to husbands in the first

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instances. As a result divorce are less frequently instigated by women, both because of their lesser legal rights in this area as well their prospects following divorce tend to be bleak.

Polygamy is permitted under Shariah law based on the principle of rehabilitating orphans and women in disadvantaged positions with a strict principle of treating all wives fairly. In present Muslim world most polygamous husband go for virgins and younger wife, disregarding the original perception of polygamy. The economic advantage and advancement of a male head of the family also heighten the possibility that to take another wife. Nevertheless, whatever the actual incidence of polygamy, women in many Muslim countries are always conscious of the thread of a second marriage for their husbands. The inequitable basis on which the institution of marriage is built is most clearly indicated by the differing rights of men and women under the Shariah.
It is also evident that, human society has been structured in the present connotation as patriarchal and hierarchically across the ages, Shariah as other religiously inspired laws reflects and being added based on the then social reality specific to that particular age. In certain time, when the Qur'an and the Sunnah have been interpreted by the Ulama to reflect the historical reality and identity which they belongs to and which they favored. As result there is obviously been possible to have different interpretation by different interpreters at different epochs is that, the original Word is infinite in depth and scope and hence applicable to innumerable circumstances and able to define evolving conditions infinitely. This points produce a moral imperative in favor of achieving gender equality within Islamic preview and it is therefore, morally incumbent on the political system to promote gender equality, which needed to meet in the present Islamic world.

In many Muslim countries the present form of women's citizenship is dominantly prevents women's exercising their self-determination and personal autonomy. Most of the Islamic country are governing by several parallel legal systems i.e. law and rights defined under the countries constitution, Civil laws derived from English common law and the law derived form countries religion. While multiple legal system and authority exists in one socio-religo- political boundary there are specific implications for the rights and status of women. As a result there is an imperfect nature of women's citizenship functions in Muslim world compared to the secularist regimes. This has been widely acknowledged as because the national constitutions that award equal rights to men and women even before laws, the Sharia derived personal code that undermines this equality and define women as ward of men and their families. In this context the pervasiveness of Islamic patriarchy leads to an important observations, that the emancipatory measures directed to women, particularly to education, employment, political participation were never intended to re-negotiate men's existing roles of privileges.

The technological revolution and globalization of economy which created a new forms of social and economic demands and reality contradicts within the modern society in which women put themselves in public spaces goes against the background of prescribed legitimacy of their presence there. If Patriarchy is the order of the world, why not obtain whatever protection one may have from the laws mandating men to honor their divinely prescribed obligation. If men do not fulfill them, it might indeed be more effective to contest from within an Islamic discourse rather than to evoke dubious notions of civil rights in societies whose records demonstrate that these scarcely even apply to men themselves anyway. There are some verses in the Qur'an that, attest that God foresees human limitations and consequently enjoin the Prophet not to force human beings in religious matters. Qur'an clearly states that, some social policy must followed, the statement is by, implication, always bound to the requirements of time and space.

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Women's Economic Status in Islam:

Under the scope of Islamic socialization posed by the Islamic patriarchy on women, where there is no secular state or political opposition to combat, enforcement of Islamic law may be seen as an attempt at social control over women which caused economic discrepancy of women. Muslim women have no formal economic identity or liberty. They are dependent on male guardianship throughout their life cycle, from father through husband to sons. Under Shariah law, Muslim men are responsible to provide their daughters until their marriage and maintain their wives during marriage and for short period following divorce. But in many Muslim countries the poor husband often are unable to provide and maintenance of the family. Most instances like, polygamous husband or abandonment of the family Muslim men often disrespects the responsibility prescribed by the religion. In these case wives with their dependent children has to make their own living. Islam says nothing about the right of women to contribute to the family earnings, rather this being the responsibility of men. But in the present world women play a major role in the economy in all Muslim societies. The trend for women to become more involve in the labor markets for subsistence, where the family is poor and male members are absent in the family. The number of female-headed households in Muslim country is in increase due to many reasons. The terms of female-headed households in many Muslim countries are in absolute disadvantaged positions than others. Although women are playing a major role in the rural economy and to become more involve in income activities as providers and maintenance of their families in almost all Muslim countries, socially and traditionally remain unrecognized and underestimated. However, over the period women's economic participation has marked an increase than that of men, and relatively higher than the men. It has little to do with religious dogma. Because Quran does not consider women as a dependent element rather it views her as an autonomous being with an independent personality. For example, In the geneses story, the Quran stresses on the physical and spiritual unity of human beings, which entails equality in terms of responsibility and redistribution, No one is held in higher esteem of responsibility and redistribution. According to the Quranic conceptions of the rights and duties of men-women in the family, to own property, participate in public life and to hold the public office, provides the basis for a more dynamic intervention towards promoting gender responsive view than resistance and misleading the dimension in the name of Islam, that are currently making by the traditional and resurgent Islamist. This is rather reflects and follow the logic of real social domination on women. This logic may induce not only cynicism and covert resistance (in terms of bad veiling, dress women appropriately or allows locks of hire to appear from under the scarf) but also contestations from within Islamic discourse aimed enlarging the scope and interpretation of women's rights.

In addition, due to rise of religious fundamentalism, state patronization of Islam and politicization of Islam first forbids women's mobility, access into basic needs, food, employment, shelter and education. For example, in Afghanistan following the Soviet withdrawals and the take over by an Islamic government, religious 'Fatwas' were issued proclaiming Islam the state religion and demanding the intimidate expulsion of Afghan women from governmental, non governmental jobs market. Whereas, throughout the 15 years of warfare, Afghan Women especially ware widows had to take employment outside home to support the families and children. With the new Fatwas Female wage earner were ordered to stay at home and when in the public, return to the practice of veiling. This denied them the right to earn their livelihood and showed disregard for centuries old Afghan supported by Islamic principles. As a result, larger number

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of Afghan women and their dependent children fell into poverty and starvation.

In Bangladesh, while Islam declared as a State religion by one of the former military government it caused the rise of fundamentalism, which does not make any differences to the overall Bangladeshi culture. But the religious fundamentalists started religious decrees (fatwas) forbidding women's participation in income activities and micro credit from the Grameen Bank for self-help employment. The fundamental religious groups stands against the money lending to women, Because they apprehended that after getting the money women will be more mobile and thus they will be breaking the Purdah and will create a social disorder and consequently getting out of the purview of religious order. In this realization they sanctioned a ban on their mobility outside home and declared unilateral divorce on behalf of their husband, sanctioned ' hillas' (intermediary marriages with second person and divorce the person for reunification of the first marriage, which is already abolished) with the trees etc. These indicates that Islam is intrinsically fundamentalist, anti women's development and undemocratic-that is developed by the male domination and leadership with the objectives of consolidating male power.

Under the Sharia laws Muslim women's sources of living is the Maintenance provided by her husband. As maintenance Muslim woman shares her husband's income within the marriage. In most cases a large number of Muslim women particularly in the developing countries, have to deprived of their maintenance due to their husband's inability to earn living or abandoned by her husband due to extreme poverty situation or husband are unwilling to provide her maintenance due to his second marriage. As a result, Muslim women's economic position becomes extremely vulnerable when she is divorced. Sharia laws do not provide alimony except for three- month maintenance to the women. Thus a Muslim women looses all her right and shelter, which is in most cases she contributes during the marriage along with her husband to create the assets and resources. After the divorce she is only entitled to get the 'mehr' which often asked women to write off and not claim it and this is the way Muslim men disrespects the order of Shariah when it is their own responsibility.

In formal terms Muslim women permitted to own property. They retain the right to property brought into the marriage, since there is no community of property under the marriage contract. Islam grants women to inherit, but their share is only half that occurring to the man. That means daughters inherit half of the share of sons from their fathers property. A married woman inherits one eighth of share of their husbands' property, while husband owns one fourth of share of wives property if any. This inequitable property rights limits women's ability to exercise their control over the property. This context is the direct outcome of the sex seclusion of women from the public places by imposition of purdah constructed gender differences in Islamic traditions and make women less able to act as subjects than men. Within this structural dimension if Muslim women do own any assets like houses, land, animals, cash loans/capitals or any machinery as means of production usually revert to the male kin under the inheritance legal practice. Therefore, property inherits or earned by the individual women reverts back into family ownership, while sale or transfer of property inherited from male kin is out of exercise for a Muslim women. There are all sorts of socially constituted obstacles based on the Sharia's inheritance provisions that obstruct Muslim women securing their property rights/ control including their ignorance and inability to handle the matters. It is nothing to do with the religion, there is no religious dogma.

Historically Muslim women thus have been relegated to second class status being living with

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the mercy of men as providers and women being the dependent in their societies. Her status regresses further in the present world while their access into income earning outside home is restricted and failed to establish control over their jobs, income and assets, business capital and means of production under the modern society for their self-ownership. Muslim women can not achieve their economic empowerment without their own choice to exercise their role as productive members of the society.

Entering into the workforce is a major avenue by which Muslim women can substantially improve their positions. There are evidence in many Muslim country i.e. Bangladesh, Pakistan, Yemen, Turkey, Indonesia, Malaysia and Sudan where Muslim women have been able to increase their influences in decision making in the family relationships, self supported themselves became less vulnerable in the society and less subject of physical violence. However, there is a limited number of women within marriage have participated into the outside home employment, while primarily the unmarried and single women constituted the larger percentages of their involvement in the formal sector employment. Second largest group that constitutes the Muslim women's workforce is the female headed or single women after once married and their displacement under any circumstances. By winning the economic independence women are able to enhance their overall position in other areas of life as well. This is equally important with regard to women's access and control over property ownership.

Similarly in countries where strict sex segregation is practiced and women are consequently lacking in mobility and lack family supports, prevents Muslim women's participation in health care facilities as well, which often run by male staff. The distances to health care facilities, the privacy, which such facilities offer women and the availability of female health care workers, can influence the accessibility of health care in Muslim women. Women in Muslim countries have a great need for health education, access into health care system and birth control programs, including the treatment for sexual diseases. A pre-condition for this concern is to ensure the accessibility and are geared to the women's own needs. In a number of countries like Indonesia, Pakistan, Yemen for Muslim women's attendance at a health center for birth control require the written permission of their husband, while some countries women has to face enormous obstacles to have access into birth control programs. In reality the Muslim women have need to go for health care services both for their own and children.

Universal Declaration and Muslim women's Human Rights:

The Universal Declaration of Human Rights is the foundation of human rights intervention, which elaborated, and operationalised by its subsequent sources of Human Rights. These are the International Convent on Economic, Social and Cultural Rights (1966), International Convention on Civil and Political Rights (1966), UN Declaration of the Elimination of Violence against Women (1979), Convention on the Elimination of All Forms of Discrimination Against Women (1981) and the Vienna Declaration and Program of Action adopted by the World Conference on Human Rights (1994).

Since all of UN member states signed all the International sources of human rights provisions, many countries take more or less positive measures. Moreover, the women's movement of each national and global level picked up these universal references and always integrates thereto act on locally and globally. In doing so, there are some confusion, contradictions were

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raised. For some no true equality is possible within the framework of Islam. Because a successful outcome is depends on such a degree of textual knowledge and self-confidence. So these groups of beliefs have preferred to wage the fight on women's rights as basic and inalienable human rights. These groups also come to realize that, Taking up the struggle on this terrain also risks alienating them from the mass of poorer, less educated Muslim women. It opens them up to further merginalisation by male-dominated politics and government or religious organizations and authority that accuse them of being 'westernized' and 'opponents' of Islam. Both charges carry great resonance within popular Islamic tradition and culture. Some others promoting basic human rights and equality for Muslim women lies firmly within Islam and the correct interpretation of texts. Their opinion is that, it is extremely important to understand that, in the contemporary Muslim world, laws instituted in the name of Islam cannot be overturn by means of political action alone but through the use of better religious arguments. But vast majority of Muslim women often ignorant, illiterate no skills or aptitude to study the original text of Quran in their own vernacular to posses the insight and right to interpret 'God's word and the Prophet's advice and explanations correctly.

The third forces it the many individual men, whether maulanas, maulavis or Ulama, putting some selected Hadith and Ayat from Quran to justify gender inequality and protect the divine legitimacy. A lot these interpretations are corrupt or taken totally out of the context. Some are totally imagined. But in almost all instances, lack of knowledge of the correct text or its context prevents women from repudiating their alleged inferiority vis-a -vis man. In this context, ignorance maintains women's in present state of inequality.

The contemporary Islamic regimes are most distinct from other regimes through the positions they accord women in the family and in society. For Muslim Fundamentalists, women's rights are not negotiable. Among Islamist resurgence as Jamat-I- Islam in Pakistan, Bangladesh, Ikhwan al- Muslimin in Egypt, the Government of Islamic Republic in Iran, the Islamic Salvation Front (FIS) in Algeria, and the Taliban in Afghanistan. In some Muslim Societies like Afghanistan and Algeria, the struggle for women's rights is now decidedly life threatening. The religious dictate relies on it legitimacy on an ethic and tradition that re symbolized historically by the institutions of 'andarun' and 'Purdah', that is gender apartheid.

Women in many contemporary Muslim worlds object to fundamentalist interpretations of their opposition in all the international declarations towards protecting women's civil and human rights. As Muslim women across the globe strive for their rights, they articulated what their rights are, how they can relate to Islam epistemology, how they resonate with existing social and political power in specific Muslim societies and how they can strategize the solution to promote them to be developed. Muslim women do have identified the interpretation of religious texts as a top priority. As such they must address the questions such as, how should women approach these texts? What kind of expertise is needed for them to do so? How can experts include the insights of grassroots women in the interpretive process?

On the other hand, in secular women's movement, the crucial points of all international human rights documents were encapsulated in UN initiatives of women's advancement in global level. For example, the Mission Statement to the final Platform of Action of the fourth World Conference on Women (Beijing, 1995), of which the first and second articles are as follows:

The Platform for Action is an agenda for women's empowerment. It aims at accelerating the implementation of the Nairobi Forward-looking Strategies for the Advancement of Women and

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at removing all the obstacles to women's active participation in all sheers of public and private life through a full and equal share in economic, social, cultural and political decision-making. This means that the principle of shared power and responsibility should be established between women and men at home, in the workplace and in the wider national and international communities. Equality between women and men is a matter of human rights and a condition for social justice and is also a necessary and fundamental prerequisite for equality, development and peace. A transformed partnership based on equality between women and men is a condition for people-centered sustainable development. A sustained and long-term commitment is essential, so that women and men can work together for themselves, for their children and for society to meet the challenges of the twenty-first century.

The Platform for Action reaffirms the fundamental principle set for in the Vienna Declaration and Platforms of Action, adopted by the World Conference on Human Rights, that the human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights. As an agenda for action, the Platform seeks to promote and protect the full enjoyment of all human rights and the fundamental freedom of all women throughout their life cycle.

The Platform for Action identified 12 focus areas for the improvement of women's human rights: poverty, education, health, violence against women, effects of armed conflict, economic structures and politics, inequality of men and women in decision-making, gender equality, women's human rights, media, environment, and the girl child. The Conference emphasized that the objective of a reasonably efficient national human rights policy must be to make rights identified, articulated, and guaranteed in the international documents operational in particular political, economic, and cultural settings. This formulation implies that governments are committed to the promotion of women's human rights in their respective societies. When such is not the case the difficulties of transmission are exacerbated.

The Muslims world is not homogenous, nor do the all Muslims living under same legal and political environment. Millions and millions of women are surviving in respective country specific cultural, social norms, economic and political structures. Moreover, the contemporary women's movement globally and its local intervention along with the present form of 'globalization movement' and its subsequent effects and structural adjustment has ushered in conflict, a spectrum of values of freedom forced Muslim women to looking themselves at the world. At the center of such conflict the Muslim women face at the dawn of the new millennium is how to resolve the contradiction between the exigencies of living in the contemporary world and the requirements of being part of the Islamist worldview. Women in Islamic country hence raise their voices in different parts of the Muslim world, networking among themselves under the broader network and act on locally. For the last few decades, in which the Women's Decade for integrating women in the world nationals countries national development process gave women's ground to be involved and engaged in the development process. As a result, many Islamic countries women are already in a platform, became aware and active about their rights and needs. Following the women's decade it's subsequent international Human rights conventions, law reforms, and the last International Convention on Elimination of all sorts Discrimination Against Women (CEDAW) which declared in 1981 gave open avenues to women to raise their voice with references of the demands for human rights. But in many instances, women have no idea about the declarations and which rights have been protected for them. But Muslim women voices are in increase in the local, national and international arena.

In such a situation (In which the only source of logistic derives from Islam) women's civil rights and human rights that universally adopted for all UN members states, Muslim women are

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constrained to benefit out of these sources within the traditionally prescribed religious frameworks. As a result Muslim feminist, Feminist Theologist and human rights activists felt that, it would easier to reform and live with civil law towards civil rights, rather than wasting time and energy to reform the 'Sharia'. Many of them are also argues that, changing women's position is difficult in the Islamic culture even with in the present changing needs and circumstances. Because in Islam women symbolizes tradition and cultural identity of Islam. The Quranic text esposes universal values and principles. But these are often expressed through the context of the cultural and historical specification of the old centuries of Arabia. Muslim scholars have always recognized this characteristics of the Quran and facility it allows for accommodating human experiences across the various cultural manifestations of Islamic beliefs. Therefore, differences of opinion will always exist on how to apply Quranic injunction in differing and changing socio-cultural situations. For the similar reasons Muslim reformist also argues that, it is not the religion but the male interpretation of the Quran and Hadith at large, and there is increasingly re-enforcement that keeps and puts women oppressed along with the texts that were added on in the Middle ages.

Religion depends upon 'faith' and 'will' and this will meaningless if induced by force. However, the Quranic text is not meant to be frozen within a specific historical period and applicable to any necessary circumstances. The Study of Islamic history shows changes possibility according to Quran that, Sharia is the product of intense intellectual activity and diversity of opinion straddling a period of six centuries, before stagnation set in.

Conclusions:

The present challenges require a re-awaking of religious intellectual inquiry and discourse. Only then we can extract the universal principles that are found in the time and space bound examples in the text and applies them to our present socio-cultural context. For example, change has been brought regarding this in many aspects of the economic and political context of many parts of Islamic world today, in areas such as Islamic banking to advance the medicine, adoption of birth control etc. But somehow the ability to innovate, to use "ijtihad' (human reasoning on the basis of the text and to understand changing times and human needs), but circumstances has not been extended to issues affecting women in particular. The messages of Quran are not intended to cripple our mind. In deciding to make religion a part of public life, the daunting task for all of us today is to nurture an activity to reconcile our faith to the challenges of changing times and circumstances that we are living with.

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"An Outline Discussion of some aspects of Human Rights in Islam"

By:

H.E. Sheikh Ahmed Zaki Yamani

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IN THE NAME OF GOD, THE COMPASSIONATE, THE MERCIFUL

AN OUTLINE DISCUSSION OF SOME ASPECTS OF HUMAN RIGHTS IN ISLAM

INTRODUCTION

A Study of Human Rights in Islam is best served by confining the attention of the researcher to the text of the original sources, mainly the Quran and the authentic Sunna, and to the practical applications during the first three decades after the Prophet Muhammad (peace be upon him), which period witnessed the governance of the Muslim Community by the first four Caliphs, the rightly guided Caliphs.

This will reveal that the Islamic principles of Human Rights are as ancient as Islam itself. They pre-date all theories or principles of Human Rights that are mirrored in recorded history. The behaviour of some Islamic regimes since those early days, or the juristic opinions of some scholars over the ages, do not detract from the content or value of the original Islamic principles. Latter day conduct and opinions were often coloured by residual elements of pre-Islamic tribal custom or by the customs and practices of some of the peoples that embraced Islam.

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A comparison between the Islamic principles of Human Rights and the principles enunciated by the U.N. Universal Declaration of Human Rights and adopted by various other international and regional bodies, will reveal that there are many similarities and few differences. For a researcher to be able to draw a complete picture, he or she needs to study all aspects of Human Rights in Islam. For example, the principle of justice will require extensive study to show how it differs from the concept of justice as generally accepted in the Western legal sense. In Islam, it covers much greater areas than those that come within the scrutiny of the judicial authorities. The principal of equality in Islam also provides a fertile area for research. Then there is the principle of consultation, or the Shura, which embodies the right of the Muslim to participate in the decision-making process. Then come the various freedoms, and the principles of social solidarity and the rights owed by society to the individual and by the individual to his society. Covering all these various aspects is important to any study that purports to give a complete picture of Human Rights in Islam. It is also important, if the study is to do justice, to make a comparison between the Islamic system and the principles that have been adopted in the modern age.

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This, however, is an ideal and therefore ambitious objective. It cannot be achieved in a study for the purposes of a symposium on the subject held by the competent authority in the United Nations, such as this one. A participant in this symposium must, of necessity, restrict his or her attention to one or two aspects of the Islamic system. Starting from this premise, I have chosen to speak today of one of the freedoms, the freedom of speech, which may be the most important of all freedoms. I shall also address the subject of equality which, needless to say, is of great importance in all its manifestations including the rights of women and the rights of non-Muslims in Muslim societies. However, in view of the limited time available, I shall confine my attention to only one aspect of equality and that is the equality between the sexes in Islam. I believe that this would be apposite in light of the great debate that has raged about the rights of women in Islam and some of the misguided notions that seek to misrepresent the differences in status between men and women under the Islamic system.

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FREEDOM OF SPEECH

Under the Islamic legal system, the Sharia, the freedom of speech is provided for by the original texts, the Quran and the authentic Prophet's Sunnah. The Islamic concept of freedom of speech differs from the Western concept in that Islam considers it an "obligation" whereas Western systems consider it a "right". The difference between the two is significant, for where freedom of speech is a right, the individual may exercise it or refrain from doing so, whereas under the system which considers it an obligation, the individual who does not express his opinion commits a sin.

Consider the following Hadiths of the Prophet which underline the importance of freedom of speech as an obligation on all Muslims:

"Let none of you be a wimp who says I am one of the people, if they do good, I shall do good and if they do bad, I shall do likewise". (reported by Tirmidhi)

"One of the greatest forms of Jihad (combat in the way of God) is to confront a despotic ruler with a just word". (reported by Tirmidhi)

"Let not the fear of people prevent a man from telling the truth once it comes to his knowledge". (reported by Tirmidhi and Ibn Majah)

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It is also reported in the authentic records of the Prophet's traditions that one of the Companions, Ubadah bin Al Samit, said, " We pledged our allegiance to the Messenger of God, may God's peace and blessings be upon him, to listen and to obey, to tell the truth whatever it may be, not fearing blame from any quarter in carrying out God's command".

A considerable section of juristic opinion sees a link between the duty to express one's opinion in Islam and the general duty to enjoin the doing of good and prohibit evildoing, which is one of the mandatory requirements of religion. Jurists differ over whether it is an individual duty that binds every single Muslim, or a communal duty which is discharged by some members of the community performing it. A further difference of opinion among jurists relates to whether this general duty was first adopted because of its rational authority and then confirmed by a legislative provision, or whether the legislative command came first and was supported by rational and moral authority. There is no divergence of opinion as to the existence of the duty on both legislative and rational grounds.

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The legislative references to the duty to enjoin the doing of good and prohibiting evil is found in several Quaranic provisions, including the following:

"You are indeed the best community ever brought forth for mankind: you enjoin the doing of what is right and forbid the doing of what is wrong, and you believe in God". (Surah Al Imran 110)

"And the believers, both men and women, they are in charge of one another: they enjoin the doing of what is right and forbid the doing of what is wrong, and are constant in prayer, and render the purifying dues and obey God and His Messenger". (Surah Al Tawbah 71)

The jurists of the Imami Shiite and Mu'utazilite sects place certain conditions and constraints upon anyone attempting to enjoin the doing of good or prohibit the doing of evil. Two salient conditions are that such an individual must know what he is saying, and that his order or prohibition must not lead to a greater harm than that which he attempts to remove or prevent.

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In Sunni jurisprudence the conditions that are placed by the majority of jurists are on the prohibition of evil. They stipulate, for instance, that there must be consensus as to the evil nature of the thing that is being prohibited. Should there be a divergence of opinion as to whether it is an evil thing or not, then it is not allowed to attempt to prohibit it. Furthermore, the evil complained of must be publicly visible or ascertainable for, under the Sharia, it is not allowed to spy on people.

It is indeed regrettable that the religious duty to enjoin the doing of good and prohibit the doing of evil has at times been exploited as a tool to further ends other than those for which it was enacted. It has been used as an instrument to deprive people of their freedoms by certain bigoted quarters which attempt to impose their views on others. It is, therefore, of paramount importance for Muslims in authority everywhere to ensure that the duty of ordering the doing of good and the forbidding of evil is subjected to the most careful of studies and that strict and clear criteria are placed for its implementation. This is an essential requirement if we are to prevent the abuse of the legislative provisions, leading to results contrary to those intended.

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Before leaving this subject I must point out, however, that the freedom of speech in Islam is subject to one restriction: that it must not be exercised to commit or aid the commission of a breach of a religious principle. Freedom of speech is not the freedom to call to apostasy or atheism or to defame anyone, or to question the validity of the non-controversial prohibitions against crimes like murder, theft and adultery.

The restriction of freedom of speech where it impinges on religion, is probably an area where there is a difference in understanding between the Islamic and the Western systems. In the latter, there appear to be varying degrees of tolerance for individuals who express their rejection or disapproval of religion. But the Western systems have restrictions of their own as well. What springs to mind is the criminalisation of the opinions that cast doubt on the veracity of reports that concern the history of a certain section of Western populations during this century. It seems, therefore, that the Islamic and Western systems are in unison in one respect at least, and that is that the freedom of speech cannot be totally unrestricted.

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EQUALITY BETWEEN MEN AND WOMEN

The equality between men and women is one of the thorny issues in contemporary Muslim societies. In some of those societies one often wonders whether there is any connection between what the Sharia provides and the position to which women have been assigned.

This notwithstanding, it is a fact that Ijtihad (legal exertion to find answers to questions) is compulsory in the Islamic system, and differences of opinion are tolerated. There is, therefore, sufficient latitude for varying opinions on the position of women in Islamic societies, and comparisons between situations that differ with the difference of gender.

In a discourse like this, however, is it not pertinent to ask: should we or should we not be guided by the Prophet's deeds? Should not the position that the Prophet assigned for women in Madinese society during his lifetime be the basis and the minimum standard of women's positions in Mulsim societies today?

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The Prophet declared that women are the halves (shaqaiq) of men, thus imposing complete equality between the two; and equality that takes proper account of the natural differences between the sexes, and the financial burdens that men, but not women, are ordered to bear.

And the Quran states that, "....The believers, both men and women, are in charge of each other....." (Al Tawbah 71)

Women partook in battle alongside the Prophet; it is an established historical fact that fifteen women were amongst his soldiers in the Battle of the Trench. The Ansarite lady, Um Amanah Nasibah bin Kaab fought alongside the Prophet in the Battle of Uhud and suffered 12 wounds inflicted by spear or sword. Of this event, the second Caliph Umar bin Al Khattab says, "I heard the Messenger of God say, 'Wherever I looked I could see her fighting in my defence'." Another distinguished lady was Um Haram, for whom the Prophet prayed that she may sail the seas in order to fight in the way of God. The prayer was answered and she sailed to Cyprus where she died and where her grave can be found in Larnaca today.

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On a different plane, the Prophet's mosque in Madina was always a place of worship and learning. Women participated in the Mosque in both worship and the quest for knowledge. Likewise, women participated in the commercial and agricultural activities of their community; prominent amongst them was the Ansarite Um Mubashshir, the owner of a palm tree plantation. Women also shared with their husbands their social activities, including the functions of hospitality when their husbands entertained guests. Some women had hospitality stations of their own, such as Um Shuraik of the Ansaar, whose house afforded shelter to the early Muhajirs, i.e. the migrants from Makkah to Madina.

These then are the established facts that illustrate the position of women in Madina during the Prophet's lifetime. Across history, thereafter, Muslim women enjoyed a prominent social and cultural status. During the 7th century of the Hijri Islamic calendar, (the 14th of the Gregorian calendar), the city of Makkah witnessed more than 250 women scholars who were the subject of commentaries by the famous historian of that age, Ibn Fahd. Various other ages have borne witness to the valuable contributions of women to the progress of learning and education.

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Ibn Al Kayyim (the well known Hambali jurist) says, "A jurist must mesh between the legal obligation and the actual facts". If this commendable juristic opinion were to be applied to the Muslim woman in this age of information, many doors would have been opened to her and we would have averted the current disaster in which she is deprived of her natural Islamic rights.

In establishing the principal of equality between men and women, Islam did take cognisance of the natural differences between the sexes and the disparity between the financial responsibilities of each.

These differences, however, should have been kept within the bounds that were intended and not exacerbated to the point of extinguishing the principle that had made women the equal halves of men.

Men in Islam, for instance, are made to bear certain financial obligations from which women are exempt, even if they are wealthy. Consequently, in the field of succession, in some cases a woman is entitled to receive half the portion that a man

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can inherit. In other cases they may receive equal portions. A man's financial burdens include the provision of a dowry upon his marriage, the upkeep of his wife and children and caring for other needy relatives in the event that he has an excess of funds over his own and family's needs. None of these expenses need be borne by the woman, even if she is wealthy. This is why the man is given the supreme control of the household which is a responsibility as much as it is a right, and which does not deprive the wife of her will or her right to participate in determining the marital welfare.

The differences between the positions of men and women in Islam, then, are clearly defined and do not impair the balance of equality between them.

I shall now move on to examine two further areas which I have chosen because of their importance in exemplifying the role of women in Islam: women as witnesses in judicial proceedings and as holders of high public office.

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The Testimony of Female Witnesses in Judicial Proceedings

The verse of the "debt" in the second Surah of the Quran calls for a contract under which a debt is incurred to be written and for two males to witness the transaction. If there be not two men, then one man and two women, so that if one of the women should err, the other will remind her. Now, although the writing of a loan contract or the presence of 2 male witnesses or one male and 2 female witnesses are not considered to be vital conditions for the validity of the contract in Islamic jurisprudence, the evidentiary element in the Quaranic text referred to has been extended by analogy to become a requirement in all situations where the testimony of witnesses is required. This means that the male element in the giving of testimony is essential, i.e. at least one man and, if a second man cannot be found, then two women. Four women in lieu of 2 men will not do. Since the objective of the testimony is to find the truth and prove it, and women in those early days were not well conversant with the ways of trade and commerce, it was incumbent on the judge in trying to establish the truth to require that there should be a second woman to remind an erring female witness.

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At this juncture, it is apposite to examine the Islamic view of the construction of legislative provisions. In Islamic jurisprudence there are two schools of thought on this matter, the literal and the purposive. The literal school restricts itself to the literal meaning of the text in question, whether it is the Quran or the Sunnah, and refuses to go beyond it. The foremost holder of this view is the Zahiri sect. The second school of thought goes beyond the literal meaning of the text, seeking the objective for which it was enacted and the effective cause on which it was based. The presence or absence of legislative effect would therefore depend on the presence or absence of such an objective and effective cause. The first to initiate this school was Umar bin Al Khattab, the second Caliph after the Prophet. He was followed in his views by some of the companions and the followers of the second generation. This trend culminated in the emergence of the Imam Malik bin Anas, founder of the Maliki sect and leader of the concept of 'MAQASID AL SHARIAH, or the Objectives of the Shariah in Islamic Jurisprudence. In the modern age, this school of thought has seen a revival based on the works of the prominent Maliki jurist Al Shatibi. His valuable work, *ALMUWAFAQAT*, devotes the whole second volume to the subject.

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The Caliph Umar bin Al Khattab was the first to address the testimony of witnesses as a means to reach the truth. He considered this to be the legislative objective of the verse of debt in the Quran. Accordingly, he held that the testimony of women alone is sufficient, and that their testimony in certain matters which are best known to women, such as child-bearing and breast feeding, takes precedence over the testimony of men. He was followed in these views by several jurists, foremost amongst whom was Abu Hanifah, the founder and leader of the Hanafi sect.

Now, although Umar bin Al Khattab's philosophy would appear at times to lead to a departure from the enacted text, or to suspend it, that is not the case. What Umar did was to seek out the objective for which the legislation was enacted and then give the text the interpretation that would fulfil that objective. One wonders what Umar would have thought of the intellectual standard of some women of the modern age. Would he have given precedence to the testimony of an ignorant or half-educated man over that of a woman who was an acknowledged leader in one of the disciplines such as law, medicine, finance or administration? And would any of the jurists today consider it an affront if a scholar were to follow in the steps of Umar and state that many women of the modern age, educated and experts in their fields, do not err and do not need to be reminded?

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The Right of a Woman to Head a Government and to Assume High Public Office

There is nothing in the Quran prohibiting the assumption by women of the position of head of government, or other high public office. Those in Islam who adhered to such a prohibition relied on a tradition of the Prophet reported by Ali Bukrah (as recorded by Al Bukhari) which states that the Messenger of God, peace be upon him, when he heard that BURAN, the daughter of the Persian Emperor, became ruler of her people said, "A nation that submits to the leadership of a woman will not succeed".

Here, I do not propose to discuss the doubts cast upon the authenticity of this reported tradition, especially since it was reported after the murder of the third Caliph Uthman, and the assumption of the leadership of an army by the Mother of the Faithful, Aisha. However, even conceding the authenticity of this tradition, it cannot be understood to contain a total prohibition on women occupying any public post. The most that can be said for prohibition is that a woman is not allowed to be a Caliph, with all that would involve from leadership of armies in battle and worshippers in prayer, to other vital forms of governance.

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Abu Hanifa chose to interpret the tradition as imposing only a limited ban against women becoming Caliphs. An interesting explanation of the tradition is found in "*FAIDH AL QADEER SHARH AL JAMII AL SAGHEER*", vol. 5, page 303, where Al Imam Al Teebi is reported to have said, "This tradition only contains a prophecy that success would elude the Persians...". Subsequent jurists followed this by saying that the tradition does not contain a legislative provision but rather a prophecy in the same manner that the following Quranic verse from Surah AL-RUM conveys a prophecy: "Defeated have been the Byzantine in the lands close-by; yet it is they who, notwithstanding this defeat, shall be victorious within a few years...".

Also it must be remembered that the Quran praised Bilqees (the queen of Sheba) for her prudence and wisdom which led to the salvation of her people from certain destruction. This reinforces the argument that the tradition concerning the Persians was really limited to the factual circumstances of BURAN, the Queen of Persia at that time. According to one of the Islamic rues of construction, where a text is specific to the facts of a particular situation, it cannot be used as support for a generally applicable legislative provision.

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There are examples of women engaging in public duties in the days of the Prophet and his successors. Thus the Prophet appointed SAMRA BINT NUHAYK ALUSDIYYAH as prefect over the market in Makkah. Such prefectship is a form of judicial rank and a general public office. Umar went further by giving her a whip with which to discipline transgressors. Umar went on to appoint Al SHAFAA BINT ABDALLAH to the prefectship of the Madina market.

In contemporary jurisprudence, the late Shaikh Muhammad Al Ghazali said in his work on the Sunnah between the people of Fiqh and the people of Hadith words to the effect that the issue is not one of gender but of morals, psychological talents and abilities and of educational competence, which may be present in a woman but not in many men. A pious competent woman would be better than a man whose only qualification would appear to be a thick beard. Again, Dr. Muhammad Fareed Sadiq obtained his PH.D. from Cairo University in 1917 for his thesis on the political rights of women, wherein he gave a list of examples of, and evidences for, the participation of women in political affairs.

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It remains to us to ask: What is there to prevent a woman from heading a government? After all, the premiership of a government does not include the religious duties of a Muslim Caliph, and the caliphate as a political system has long disappeared, anyway.

Historians will recall the virtues of the Muslim Queen ARWA BINT AHMAD who ruled over The Yemen for a long period many centuries ago. She exemplified the wise and reformist ruler whose leadership and administration of the country was a great success story. Her wisdom and other virtues as a ruler have been the subject of several scholarly works, including a PH.D. thesis.

The limited time allotted to this presentation means that a lot of what can still be said about the freedom of opinion and equality of the sexes will have to be left out. I only hope that the necessary brevity of the presentation will not cause it to fall short of the outline picture that I have attempted to draw.

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