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Shari'ah The Islamic Law

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Chapter 1

What is Shari'ah

Allah is the Law Giver

Shari'ah is an Arabic word meaning the Path to be followed. Literally it means 'the way to a watering place.' It is the path not only leading to Allah, the Most High, but the path believed by all Muslims to be the path shown by Allah, the Creator Himself through His Messenger, Prophet Muḥammad (P.B.U.H.). In Islam, Allah alone is the sovereign and it is He who has the right to ordain a path for the guidance of mankind.¹ Thus it is only Shari'ah that liberates man from servitude to other than Allah. This is the only reason why Muslims are obliged to strive for the implementation of that path, and that of no other path.

«ثُمَّ جَعَلْنَاكَ عَلَىٰ شَرِيعَةٍ مِّنَ الْأَمْرِ فَاتَّبِعْهَا وَلَا تَتَّبِعْ أَهْوَاءَ الَّذِينَ لَا يَعْلَمُونَ»

"We made for you a law, so follow it, and not the fancies of those who have no knowledge."²

The absolute knowledge which is required to lay down a path for human life is not possessed by any group of people. In the words of Sayyid Quṭb, "They are equipped with nothing but fancies and ignorance when they undertake the task which is no concern of theirs and does not properly belong to them. Their claim to one of the properties of divinity is a great sin, and a great evil."³

The Injunctions on Justice in the Divine Revelations

There are a number of Qur'ānic injunctions commanding Muslims to do justice. Right from the beginning, Allah sent with His Apostles three gifts which aim at rendering justice and guiding the entire human society to the path of peace. In *Sūrah al-Ḥadīd*, the Qur'ān says:

«لَقَدْ أَرْسَلْنَا رُسُلَنَا بِالْبَيِّنَاتِ وَأَنزَلْنَا مَعَهُمُ الْكِتَابَ وَالْمِيزَانَ لِيَقُومَ النَّاسُ بِالْقِسْطِ»

"We sent aforetime our Apostles with Clear Signs and sent down with them The Book and the Balance (of Right and Wrong), that men May stand forth in Justice."⁴

Three things are mentioned as gifts of Allah. They are the Book, the Balance, and Iron, which stand as emblems of three things which hold society together, viz – Revelation, which commands Good and forbids Evil; Justice, which gives to each person his due; and the strong arm of the Law, which maintains sanctions for evil-doers.

Justice is a command of Allah, and whosoever violates it faces grievous punishment:

«إِنَّ اللَّهَ يَأْمُرُ بِالْعَدْلِ وَالْإِحْسَانِ وَإِيتَاءِ ذِي الْقُرْبَىٰ وَيَنْهَىٰ عَنِ الْفَحْشَاءِ وَالْمُنْكَرِ وَالْبَغْيِ، يَعِظُكُمْ لَعَلَّكُمْ تَذَكَّرُونَ»

"Allah command justice, the doing of good, and charity to Kith and Kin, and He forbids all shameful deeds, and injustice and rebellion: He instructs you, that ye may receive admonition."⁵

Justice is a comprehensive term, and may include all the virtues of good behaviour. But the religion of Islam asks for something warmer and more human, the doing of good deeds even where perhaps they are not strictly demanded by justice, such as returning good for ill, or obliging those who in worldly language "have no claim" on you; and of course the fulfilling of the claims of those whose claims are recognised in social life. Similarly the opposites are to be avoided: everything that is recognised as shameful, and everything that is really unjust, and any inward rebellion against Allah's Law or our own conscience in its most sensitive form.

The Prophet of Allah is asked to tell to people to do justice as the Creator, the Nourisher and the Cherisher of all has commanded it:

«قُلْ أَمَرَ رَبِّي بِالْقِسْطِ»

"Say: My Lord has commanded justice."⁶

The command is repeated in *Sūrah al-Nisā*:

«أَنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُوَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ»

“Allah commanded you to render back your trusts to those to whom they are due. And when you judge between man and man, that you judge with justice.”

The Prophet is asked to administer justice according to the *Kitāb-Allāh* (Book of Allah):

«إِنَّا أَنْزَلْنَا إِلَيْكَ الْكِتَابَ بِالْحَقِّ لِتَحْكُمَ بَيْنَ النَّاسِ بِمَا أَرَاكَ اللَّهُ - وَلَا تَكُنْ لِلْخَائِنِينَ خَصِيمًا».

“We have sent down to thee the Book in truth, That you might judge between men, as guided By Allah: so be not (used) as an advocate by those who betray their trust.”⁸

The Commentators explain this passage with reference to the case of Ta'imah ibn Ubairaq, who was nominally a Muslim, but in reality was a hypocrite, and given to all sorts of wicked deeds. He was suspected of having stolen a set of armour, and when the trail was hot, he planted the stolen property into the house of a Jew, where it was found. The Jew denied the charge and accused Ta'imah, but the sympathies of the Muslim community were with Ta'imah on account of his nominal profession of Islam. The case was brought to the Apostle, who acquitted the Jew according to the strict principle of justice, as “guided by Allah”. Attempts were made to prejudice him and deceive him into using his authority to favour Ta'imah.

The general lesson is that the righteous man is faced with all sorts of subtle wiles: the wicked will try to appeal to his highest sympathies any most honourable motives to deceive him and use him as an instrument for defeating justice. He should be careful and cautious, and seek the help of Allah for protection against deception and for firmness in dealing the strictest justice without fear or favour. To do otherwise is to betray a sacred trust: the trustee must defeat all attempts made to mislead him.

Justice must be done equally to all and sundry, even if it is to be done against one's self, or one's parent or relatives. There must be no difference between rich and poor. All are servants of Allah, and must be judged according to the Book of Allah:

«يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ بِالْقِسْطِ شُهَدَاءَ لِلَّهِ وَلَوْ عَلَى أَنْفُسِكُمْ أَوِ الْوَالِدِينَ وَالْأَقْرَبِينَ - إِنْ يَكُنْ غَنِيًّا أَوْ فَقِيرًا فَالِلَّهِ أُولَىٰ بِهِمَا فَلَا تَتَّبِعُوا الْهَوَىٰ أَنْ تَعْدِلُوا - وَإِنْ تَلَوْا أَوْ تَعْرِضُوا فَإِنَّ اللَّهَ كَانُ بِمَا تَعْمَلُونَ خَبِيرًا».

“O ye who believe: Stand out firmly for justice, as witnesses to GOD, even as against Yourselves, or your parents, or your Kin, and whether it be (against) rich or poor. For God can best protect both. Follow not the lusts (Of your hearts), lest ye swerve, and if you distort (justice) or decline to do justice, Verily Allah is well-acquainted with all that you do.”⁹

Justice is Allah's attribute, and to stand firm for justice is to be a witness to Allah, even if it is detrimental to our own interests, as we conceive them, or the interests of those who are near and dear to us. According to the Latin saying, “Let justice be done though heaven should fall”.

But Islamic justice is something higher than the formal justice of Roman Law or any other human Law. It is even more penetrative than the subtler justice in the speculations of the Greek philosophers. It searches out the innermost motives, because we are to act as in the presence of Allah, to whom all things, acts, and motives are known.

Some people may be inclined to favour the rich, because they expect something from them. Some people may be inclined to favour the poor because they are generally helpless. Partiality in either case is wrong. We are asked to be just, without fear or favour. Both the rich and the poor are under Allah's protection as far as their legitimate interests are concerned, but they cannot expect to be favoured at the expense of others. Allah can protect their interests of all, far better than any man.

In the Shari'ah, therefore, there is an explicit emphasis on the fact that Allah is the Lawgiver and the whole *Ummah*, the nation of Islam, is merely His trustee. It is because of this principle that the *Ummah* enjoys a derivative rule-making power and not an absolute law-creating prerogative. The Islamic State, like the whole of what one might call Islamic political psychology, views the *Dār al-Islam* (Abode of Islam) as one vast homogeneous commonwealth of people who have a common goal and a common destiny and who are guided by a common ideology in all matters both spiritual and temporal. The entire Muslim *Ummah* lives under the Shari'ah to which every member has to submit, with sovereignty belong to Allah alone.¹⁰

Every Muslim who is capable and qualified to give a sound opinion on matters of Shari'ah, is entitled to interpret the law of Allah when such interpretation becomes necessary. In this sense Islamic policy is a democracy. But where an explicit command of Allah or his Prophet already exists, no Muslim leader or legislature, or any religious scholar can form an independent judgement; not even all the Muslims of the world put together have any right to make the least alteration in it.¹¹

The executive function, therefore, under the Shari'ah vest solely in the just ruler or a group of such people who appoints his delegates and is responsible only to the Shari'ah as represented by the Council of Jurists.

(‘Ulamā and Fuqahā’) in whom the legislative function of deriving laws from the Book of Allah and the Sunnah is vested. New laws according to the needs of the time and circumstances are only made by these men learned in the guiding principles of law, men chosen by the popular assembly from among the multitudes of those learned in the Shari’ah on account of their enlightenment and understanding of the need of the people.¹²

But the fundamental principles on which rests the Islamic legal system is that the laws of Islam are not passed in a heated assembly by men who ardently desire the legislation in their interest, against men who ardently oppose it in their interest. The laws of Islam are firmly based upon the Shari’ah and are, therefore, in the interest of the people as a whole. They are not the work of warring politicians, but of sober jurists.¹³

This is the reason why there is a greater degree of stability in the Shari’ah mainly due to its Divine Origin as compared to any other man-made secular legislation in the world.

The difference between other legal systems and the Shari’ah is that under the Shari’ah its fountainhead is the Qur’ān and Sunnah, the Wahy al-Jalī (the revelation *per se*) and the Wahy al-Khafī (the hidden revelation). The Qur’ān and the Sunnah are the gifts given to entire Ummah. Therefore the Ummah as a whole is collectively responsible for the administration of Justice. This is the reason why any legislative or consultative assembly in any Muslim land has no power of encroachment on any legal right of the members of the Ummah and those who live with them in peaceful co-existence.

The other important point in this regard is that in Shari’ah, Justice is administered in the name of Allah, one of Whose attributes is Al-Ādil (the Just and the Giver of Justice). Any injustice or any tribal or racial consideration is nothing but a grave sin and disobedience to Allah. “To judge justly” is, therefore, a religious duty and a devotional act. Neither a king, nor a caliph or a sultan can ever claim his words are laws as was done by tyrant rulers from Pharroh to Louis XIV. They are not the fountainhead of justice even though some wrong-headed Muslim rulers might have posed as if they possessed such authority. With this in mind, we shall proceed to examine briefly the sources and the aims of Shari’ah.

The Aims of Shari’ah

The Shari’ah, originated from the direct commandment of Allah; but there is the provision or power given to man in order to interpret and expand Divine commandment, by means of analogical deductions and through other processes.¹⁴ Unlike the Roman law which developed from

the action of English Common Law which developed from the writs¹⁵ the very first source of Shari’ah is the Holy Qur’ān. The second source is the Sunnah or the Practice of Prophet Muḥammad (S.A.W.) who has rightly explained:

“I leave two things for you. You will never go stray while holding them firmly. The Book of Allah and the Sunnah of His Prophet”.

The third source which may be classified as both “Ijmā’” consensus of opinion of ‘Ulamā’, and ‘Qiyās’ analogical deductions provide detailed understanding derived from the Qur’ān and Sunnah, covering the myriads of problems that arise in the course of man’s life.¹⁶ As a matter of fact, the ideal code of conduct or a pure way of life which is the Shari’ah, has much wider scope and purpose than an ordinary legal system in the western sense of the term.¹⁷ The Shari’ah through this process aims at regulating the relationship of man with Allah and man with man. This the reason why the Shari’ah law cannot be separated from Islamic ethics. The process of revelation of various injunctions (Aḥkām) of the Qur’ān shows that the revelation came down when some social, moral or religious necessity arose, or when some Companions consulted the Prophet concerning some significant problems which had wide repercussions on the lives of Muslims.

The Qur’ān, therefore, is the best commentary (*Tafsīr*) of the Qur’ān and the main sources of the Shari’ah.

The scholars of the Qur’ān have enumerated varying number of verses of legal injunctions, but the number is approximately considered to be 500.¹⁸ They deal with marriage, polygamy, dower, maintenance, rights and obligations of the spouses, divorce and various modes of dissolution of marriage, the period of retreat after divorce (Iddah), fosterage, contracts, loans, deposits, weights and measures, removal of injury, oaths and vows, punishments for crime, wills, inheritance, equity, fraternity, liberty, justice to all, principles of an ideal, state, fundamental human rights, laws of war and peace, judicial administration etc.¹⁹

The Qur’ānic injunctions, from which is derived the Shari’ah, are further explained and translated into practice by the Sunnah of the Prophet. Sunnah literally means a way, practice, rule of life; and refers to the exemplary conduct or the model behaviour of the Prophet in what he said, did or approved. Thus it became a very important source of the Shari’ah only second in authority after the Holy Qur’ān.

Besides the Qur’ān and the Sunnah, the consensus of the opinion of the learned men and jurists, known in the Shari’ah terminology as the Ijma, plays an important role in Islamic law since it provides a broad vehicle of progress and reconstruction. Qiyās or analogical deduction is

also recognised as the source of Islamic legal system since it gives an instrument to cope with the growing needs and requirements of society. But such analogical deduction is based on very strict, logical and systematic principles and is not to be misconstrued as mere fancies and imaginations of men. Alongside these four sources, the Shari'ah takes into consideration Istihsan or juristic preference or equity of a jurist as against Qiyās which helps in providing elasticity and adaptability to the entire Islamic legal system. The concept of al-Masalih al Mursalah (the matters which are in public interest and which are not specifically defined in the Shari'ah) was enunciated by Imām Mālik bin Anas (d. 795 A.D.) and has also become a part of the Shari'ah system.

Justice as Respect to People

The central notion of Justice in the Shari'ah is based on mutual respect of one human being by another. The just Society in Islam means the society that secures and maintains respect for persons through various social arrangements that are in the common interests of all members. A man as Khalifat-Allāh (vice-regent of Allah) on earth must be treated as an end in himself and never merely as a means since he is the cream of Creation and hence the central theme of the Qur'ān. What is required is the equal integrity of each person in the society and his loyalty to the country concerned which in turn will make it the duty of the society to provide equally for each person's pursuit of happiness. This is the reason why things unlawful (Harām) for Muslims but lawful for non-Muslims will not be made forbidden for them in the Muslim country.

Politically, respect for persons was the motivating thought behind the Kalimah al-Shahādah, the creed of confession of Islam, which neglected any other deity other than Allah who created all human beings as equal irrespective of their tribes or clans. It was this teaching which made the Quraishites, Prophet Muḥammad's tribesmen, angry when he helped to liberate the slaves and destitutes like Bilāl, Zaid and many others in the early days of Islam. It is a fact of history that all of Khadijah's wealth was spent after freeing the slaves; and before her death she, along with the Prophet, could hardly get a square meal a day. It was the same principle which guided the first city state of Medina as shown in its charter which guaranteed individual rights irrespective of religious beliefs of the communities living in Medina.

Respect for persons in the Shari'ah is rooted in the Divine injunctions of the Qur'ān and the precepts of the Prophet. The Bill of Rights, Suffrage, Civil Rights and the slogans for political equality as we know today are of a very recent origin and seem to be mere reflections of what

the Shari'ah taught 1400 years ago from now. The treatment accorded by the Shari'ah made the aristocracies of birth, race, wealth, language, the features which vary from person to person, all suspect as disrespectful of persons. The criterion of respect was only the Taqwah, the fear of Allah.

«ان أكرمكم عند الله اتقاكم»

"The best among you in the eyes of Allah are those who are stronger in Taqwah (fear of Allah)"

The Shari'ah, it should be noted, gives priority to human welfare over human liberty. Muslims as well as non-Muslims living in a Muslim state are duty bound not to exploit common resources to their own advantage, destroy good producing land, and ruin the potential harvest or encroach upon a neighbour's land. Since a man in Islam is not merely an economic animal, each person's equal right to life, and to a decent level of living, has priority over the so called economic liberty.

Behind every legal, social or political institutions of Islam, there is a divine sanction which every believer is expected to reverence no matter where he lives. He cannot change his own whims into laws. There are the limits of Allah (Ḥudūd-Allāh) which are imposed in order to curtail man's ambitions and devices. Halāl (lawful) and Harām (unlawful) are clearly mentioned and these are the boundaries which every Muslim as well as non-Muslim living with them must respect. If he transgresses any of these limits, he is doing wrong or committing a crime. Even between these two boundaries of 'lawful' and 'unlawful', there exists the things which are doubtful (Mushttabihāt), which must be refrained from in order to avoid excesses. The ḥadīth of the Prophet says:

«ان الحلال بين، وإن الحرام بين، وبينهما أمور مشتبّهات لا يعلمهن كثير من الناس - فمن إتقى الشبّهات فقد أسترأ لدينه وعرضه - ومن وقع في الشبّهات وقع في الحرام - كالراعي يرعى حول الحمى يوشك أن يرتع فيه. الا وأن لكل ملك حمى، الا وأن حمى الله محارمه. الا وأن في الجسد مضغة، إذا صلحت صلح الجسد كله، وإذا فسدت فسد الجسد كله، الا وهي القلب».

"That which is lawful is plain and that which is unlawful is plain and between the two of them are doubtful matters about which not many people know. Thus he avoids doubtful matters clears himself in regard to his religion and his honour, but he who falls into doubtful matters fall into that which is unlawful, like the shepherd who pastures around a sanctuary, all but grazing therein. Truly every kind has a sanctuary, and truly Allah's sanctuary is His prohibitions. Truly, in the body there is a morsel of flesh which, if it be whole, all the body is whole and which, if it be diseased, all of it is diseased. Truly, it is the heart."²⁰

In reality, these limits provide safeguards of the rights of men and nations and give men sense of responsibility to Allah and hence to the entire mankind. These limits stop him from being inhuman, and make him respect the blood and property of another man, and give equality of treatment to all individuals, male and female before law. In commercial dealings, these limits provide for respect for contractual dealings and pledged words and the prohibition of usury and gambling. In the case of individual conduct, these limits provide for the prohibition of intoxicants and not to do injustice to servants and give charity to poor relations and provide for the strict law governing inheritance. In the dealings with nations, these limits provide for respect for treaties, and give strict code of conduct for one's dealings with the fellowmen by not destroying even the enemies means of sustenance, and show mercy to the surrendered enemy and show respect for non-combatants. In short, in every action of a man's dealings with fellow men there are limits (Ḥudūd) imposed by Allah which are nothings but the sanctions of the Divine Shari'ah.

Judicial power, according to Shari'ah, must always operate in conformity with equity, even to the benefit of an enemy and to the detriment of a relative. Shari'ah does not allow the slightest modification in the rule of perfect justice, or any form of arbitrary procedure to replace it. It firmly establishes the rule of law, eliminating all differences between the high and the low.

Qur'an asserts that all mankind, born of the same father and mothers, forms one single family, that the God of men is Unique, that the Creator has ordered men according to nations and tribes so that they may know, and assist one another, for the good of all.

In the administration of justice, therefore, a Judge must be upright, sober, calm and cool. Nothing should ruffle his mind from the path of rectitude. If he does wrong, he is not only responsible to the people but also to God. The noble Prophet (S.A.W.) advised: "No judge shall pass a judgement between two men while he is angry."²¹ He must not feel kindness in executing the ordained sentences for the prescribed crimes. The Qur'an says: "Let not pity detain you in the matter of obedience to Allah if you believe in Allah and the Last Day and let a party of believers witness their sentences."²² He must decide disputes with as much speed and promptness as possible, for delayed justice produces no appreciable good. He must not accept any present or bribery from the parties concerned. He must exert hard to arrive at a just conclusion. The Prophet said: "Verily Allah is with a judge so long as he is not unjust. When he is (willingly) unjust, he goes off him and the devil keeps attached to him."²³ To a judge, all are equal in the eye of the law. As God

dispenses justice among His subjects, so a judge should judge without any distinction whatsoever. The Prophet said: "The previous nations were destroyed, because they let off persons of high rank and punished the poor and the helpless". In the Shari'ah, a judge is a judge for every matter – civil, criminal and military. There is no separate Judiciary for separate civil, criminal and military departments.

The basic principles of Shari'ah, therefore, can be summed up as follows:

- (a) The larger interest of society takes precedence over the interest of the individual.
- (b) Although 'relieving hardship' and 'promoting benefit' are both among the prime objectives of the Shari'ah the former takes precedence over the latter.
- (c) A bigger loss cannot be inflicted to relieve a smaller loss or a bigger benefit cannot be sacrificed for a smaller one. Conversely, a smaller harm can be inflicted to avoid a bigger harm or a smaller benefit can be sacrificed for a larger benefit.

Al-Qādi (The Judge) and His Responsibilities Under Shari'ah

Qualification of a Qādi:

As we have seen, Islam has given a great importance to Justice which must be done at all cost. Those who perform the function of the *Qādis* (judges) or *Qāḍī al-Quḍāt* (Chief Justice) must be not only men of deep insight, profound knowledge of the Shari'ah, but they must also be Allah-fearing, forth right, honest, sincere men of integrity. The Holy Prophet (S.A.W.) has said:

The Messenger of Allah said: "The *Qādis* are of three types. One type will go to paradise and the remaining two will end up in the fire of hell. The person who will go to paradise is one who understood the truth and judged accordingly. One who judged unjustly after understanding the truth, they will go to hell. Likewise, *Qāḍī* who judged in ignorance also will go to the hell."²⁴

The above Ḥadīth shows how delicate and responsible job of *Qāḍī* is in Islam. His knowledge of Qur'an and Shari'ah must be very deep and that he judges justly. Otherwise, it can really ruin a man's spiritual future in the next world. The life in this world is only for a limited period while the life in the next world is for ever. Then why should one really undertake to be a judge when he does not have the required qualifications and character to be a judge? In another Ḥadīth, one who is given this responsibility to be a *Qāḍī* as if he is slaughtered without a knife.

عن أبي هريرة قال قال رسول الله صلى الله عليه وسلم: «من جعل قاضيا بين الناس فقد ذبح بغير سكين».

It is reported by Abū Hurairah that the Messenger of Allah said: "One who is made a Qāḍī to administer justice among people as if he is slaughtered without a knife".

Naturally, a man who is appointed as a Qāḍī or a judge does not have an easy job to perform. If he becomes slightly irresponsible and unjust, he will be caught on the Day of Judgement. On the other hand, when he is just and administers justice according to the Book of Allah and the Sunnah of the Prophet (S.A.W.), he is taken as an enemy of highly influential people in the society. The responsibility of a Qāḍī is like a double-edged sword, and one has to be extraordinarily careful in fulfilling it. The following is the guidance from the Sunnah of the Prophet which every judge must follow in their task of administering justice:

(1) *Equality of All Litigants:* A Muslim judge must treat all his litigants equal whether he is a king or his page, a master or his servant, a rich man or a poor man, a relative or a stranger and a friend or a foe:

عن عبادة بن الصامت قال قال رسول الله صلى الله عليه وسلم: «أقيموا حدود الشرع في القريب والبعيد ولا تأخذكم في الله لومة لائم».

It is reported by Ubādah bin al-Sāmit that the Messenger of Allah (S.A.W.) said: "Let the *ḥudūd* of Allah be applied equally on your relatives and the total strangers. You should not care a bit for the reproachment of any critic whatsoever."²⁵

The Prophet (S.A.W.) has also said:

عن عائشة رضي الله عنها أن النبي صلى الله عليه وسلم قال: «أقبلوا ذوى الهيآت عثراتهم إلا الحدود».

It is reported by 'Aishah that the Messenger of Allah said: "Forgive the shortcomings of highly respected people but certainly do not forgive them in awarding the *ḥadd* punishment to them."²⁶

(2) *The Defendant and Appeallant must appear before the Qāḍī:* Even though one is a highly placed person or a king or an emperor or an administrator of a country, he must not be exempted from appearing before the judge to answer the charges levelled against him:

It is reported by 'Abdullah bin Zubair that the Messenger of Allah said: "Both the parties in a dispute must be brought before the judge."²⁷

(3) *The Defendant should be given right to take an oath:* Human being, being what he is, will keep on grumbling and blaming others for his own faults or in order to hide his faults and escape punishments. If every

one's claim is taken seriously, there would appear so many claimants of people's life and property. The remedy is suggested by the Holy Prophet as follows:

عن ابن عباس عن النبي صلى الله عليه وسلم قال: «لو يعطى الناس بدعواهم لا دعى ناس دماء رجال وأموالهم ولكن اليمين على المدعى عليه».

It is reported by 'Abdallah bin 'Abbas that the Messenger of Allah (S.A.W.) said: "If people were to be judged merely on account of their claims, there would appear claimants of the life and property of everyone (so that there would remain none whose life and property can remain safe.) So, the defendant must be given right to take an oath (concerning the charge levelled against him)."²⁸

The above guidance of the Prophet will provide the defendants with an opportunity to get acquitted of the calumny put against them.

(4) *The judge must be careful in awarding Ḥadd punishment:* *Ḥadd* punishment is meant to be a deterrent so that people may not become complacent and commit crimes simply because they find punishment to be just nominal. But while awarding *Ḥadd* punishment, the Judge must make sure that the crime is definitely committed. If there is a slight doubt in establishing the crime, he should refrain from awarding *ḥadd* punishment. The Prophet has said:

It is reported by Aishah that the Messenger of Allah (S.A.W.) said: "As far as possible, refrain from awarding *Ḥadd* punishment to a Muslim. If there is found slight excuse (or doubt), leave him alone because it is better for the judge to err in acquitting the accused rather than erring in awarding him punishment."²⁹

From the above *Ḥadīth*, it is also clear that in order to find out the crime committed by the accused, the judge must endeavour to the best of his ability. To keep an accused in unlawful custody without due process of Law is also against the spirit of Justice.

Should We Shun Our Responsibility In Accepting the Position of a Judge?

Although the responsibility of a Qāḍī or a Judge are very great, it is essential that the learned jurists must accept the position of a Judge in order to administer justice and save humanity from chaos, anarchy and law of the jungle. The Messenger of Allah said to Amr bin al-'As:

"If the Judges exercise *Ijtihād*, and arrives at the correct decision he is doubly rewarded, and if he arrives at a wrong decision, he is still rewarded singly provided he exercised *Ijtihād*."³⁰

The best instrument in the hands of a Qāḍī are the *Book of Allah*, the *Sunnah of the Prophet*, the *decisions of the Ṣaḥābah*, *Tābi'in* and *Tābi'īn* and above all *Taqwah* (fear of Allah). With these, if he

adminsisters justice and makes a mistake, Allah will forgive him and reward him. Some people erroneously put forward the case of Imam Abū Ḥanīfah who refused to accept the position of a Judge on account of his personal piety. But they forget that although Imām Abū Ḥanīfah himself refused to be a judge, he did not stop his companion and disciple Abū Yūsuf to render the same services to the *Ummah*. The Prophet once said:

"I am but a human, and I give judgement according to what I hear (from the parties), but should I decide in favour of a party because that party is better in tendering their own case, when in fact the other party to the dispute is the one in the right then the party in whose favour judgement was erroneously rendered has reserved for himself a place in hell".

When this could happen to the rightly guided Messenger of Allah, what about any ordinary member of his *Ummah*?

Caliph 'Umar's Guidance for Judges

The Judges were appointed for the administration of justice by the Prophet (S.A.W.) himself. He sent Mua'dh bin Jabal to Yemen as Judge. Likewise, he had entrusted Judicial task to 'Alī bin Abū Tālib and Ibn Yaṣār. The *Rāshidūn* Caliphs continued with the same practice and sent judges to different parts of the Muslim world. Sayyidnā 'Umar appointed Abul Dardā to help him as a *Qāḍī* in Medina. Shurayh was appointed as a judge in Basrah, and Abū Mūsā al-Ash'ari in Kūfah in Iraq.

The memorable letter of Sayyidnā 'Umar written to Abū Mūsā al-Ash'ari on the eve of his appointment as the *Qāḍī* outlines the functions and responsibilities of a Muslim Judge and is equally relevant even today. Among other things he said in the letter:

"Try to understand the depositions that are made before you because it will be useless to consider a plea that is not valid. Consider all equal before you in the court and (consider them equal) in giving your attention to them so that the highly placed people may not expect you to be partial and the humble may not despair of justice from you. The claimant must produce evidence. An oath must be taken from the defendant. It is permissible to have compromise among Muslims but not an agreement through which *Ḥarām* (unlawful) would be turned to *Ḥalāl* (lawful) and vice versa.

If you have given a judgement yesterday and today you may arrive to a correct opinion upon re-thinking, you must not feel prevented from retracting from your first judgement, because justice is primeval, and it is better to retract than to continue in error. Use your own individual judgement about matters that perplex and about which neither an answer is found in the Qur'ān and the Sunnah. Know the similitude and weigh the issues accordingly (here Abū Mūsā is asked to use individual judgement and arrive to a logical conclusion through the use of *Qiyās* and *Ijtihād*).³¹ If one brings a claim, which he may or may not be able to prove,

decide a time-limit for him. If he produces evidence within the time-limit set (by you), you should allow his claim, otherwise you are at liberty to give judgement against him. This is the best way to forestall or clear any possible doubt. All Muslims are acceptable as witnesses against each other, except those who have received a punishment (earlier) provided by the *Sharī'ah*, and those who are proved to have given false witness, and those who are suspected partially on the ground of client status or relationship because Allah praised be His name, forgives one because of taking oaths and postpones punishment in the face of the evidence. Avoid weariness, fatigue and annoyance at the litigants. Allah will grant you a great reward and give good reputation for establishing justice in the courts of justice. Good bye."

Shūrā: The Mutual Consultation in Sharī'ah

Since the *Ummah* has the first allegiance to be paid to Allah, all the affairs of Muslims should be guided by the Divine Book (*Kitāb-Allāh*). Human inspiration, intellect and judgement to run their affairs should be based on the authority of power and Wisdom of Allah. Unlike human power, this power is good and merciful. Unlike human wisdom, this wisdom is necessarily complete and indisputable.

Whatever Allah has given us is merely for the convenience of this life, but we should always be mindful of the fact that whatever is with Allah is better and more lasting.³² Therefore our efforts should be directed to make not only this life better but the life hereafter secure. Those who are believers should put their trust in God while executing all their affairs, should avoid greater crimes and shameful deeds and should forgive even they are angry.³³ After making us aware of our responsibility, verses 42 of *Sūrah al-Shūrā* says:

«وَالَّذِينَ اسْتَقَامُوا لِرَبِّهِمْ وَأَقَامُوا الصَّلَاةَ وَأَمْرُهُمْ شُورَى بَيْنَهُمْ وَمِمَّا رَزَقْنَاهُمْ يُنْفِقُونَ»

"Those who answered the call of their Lord, and establish regular prayer, and whose affairs are a matter of counsel (i.e. they are conducted by mutual consultation), and who spend out of what we bestow on them for sustenance",³⁴

The Muslim Jurists have said that when mutual consultation was made necessary for the Prophet himself to follow, it really becomes incumbent upon his followers to resort to *Shūrā* in all our activities whether individual, social or political matters. The Messenger of Allah used to receive revelation from Allah, hence, seemingly he was not in need of mutual consultation but still he was asked to do so through divine commandment. It is on this basis that Ibn Taimiyyah has said that "The leader has no other option but to resort to *Shūrā* since Allah had commanded his Prophet to do so. All others, therefore, have a special need for mutual consultation."³⁵ The Prophet has said in a

Ḥadīth: "If I were to make any one a caliph without consultation, I would have named Abdallah bin Mas'ūd.³⁶ Likewise, Caliph 'Umar has also said that caliphate can never function without mutual consultation.³⁷

عن عمر بن الخطاب قال: «لا خلافة الا عن شوري»

In the Battle of Uḥud, the companions of the Prophet had recommended that it is better that they defend against the enemies coming from Mecca while keeping themselves in Medina. But Hamza, the uncle of the Prophet and other young men were of the opinion that they should bravely go out of Medina and fight the incoming enemies. After viewing their opinions the Prophet resolved (*Azm*) to go out of Medina and fight. Later the elderly companions persuaded the young men to withdraw their suggestion. The young men went to the Prophet and with repentance withdrew their opinion but the Prophet said that now after weighing the view points in the consultation he had already resolved and it would be against the prophetic mission to go back on the final resolution.³⁸

The other fine example to show how the righteous caliphs depended on the mutual consultations of the public is that of caliph 'Umar who was of the opinion that after the conquest of Iraq and Syria the land should not be divided among the warriors as booty but should be made the property of the state so that through its produce and income the essential works of public welfare can be carried out. But some companions opposed the view of the caliph. When they could not find any solution through mutual consultation, the caliph called a public meeting in the prophetic mosque for general consultation and addressed the public in the following words: "I have not just gathered you here and given you the trouble for nothing. The reason for inviting you is that you should also participate in the trust of the caliphate which has been trust upon me by you. Undoubtedly, I am an ordinary human being like you. I want that those who have opposed my point of view and those who have favoured it should declare it openly. I do not wish that you should follow my point of view because you all possess the Book of Allah (from which you may derive guidance to resolve the issue).

Mutual consultation is, therefore, one of the great qualities that the Faithful (*Mu'min*) has to cultivate in himself. It is ordained by Allah in Ayah 159 of *Sūrah āl-Imrān*:

«فَبِمَا رَحْمَةٍ مِنَ اللَّهِ لِنْتَ لَهُمْ وَلَوْ كُنْتَ فَظًّا غَلِيظَ الْقَلْبِ لَانْفَضُّوا مِنْ حَوْلِكَ فَاعْفُ عَنْهُمْ وَاسْتَغْفِرْ لَهُمْ وَشَاوِرْهُمْ فِي الْأَمْرِ فَإِذَا عَزَمْتَ فَتَوَكَّلْ عَلَى اللَّهِ، إِنَّ اللَّهَ يُحِبُّ الْمُتَوَكِّلِينَ».

"It is part of the Mercy of Allah that you do deal gently with them, were you severe or harsh hearted, they would have broken away from about you: So pass over their faults and ask for Allah's forgiveness for them, and consult them in affairs. Then when you have taken a decision, put your trust in Allah."³⁹

On this basis, consultation among Muslims is an important pillar of the beautiful and elaborate building of the Islamic way of life. To do any collective work without prior mutual consultation is not only a way of the ignorant but is also a clear defiance of the regulation laid down by Allah. The great importance given to the whole process of consultation is based upon three reasons:

Firstly, it is very unfair to decide alone a matter concerning two or more people. In collective matters nobody has a right to do according to one's sweet will. All the people concerned with the matter should be consulted, and if it is concerned with a very large number of persons then their representatives should be sounded for their considered opinion.

Secondly, if a man tries to act autocratically or arbitrarily, either he wants to usurp the right of others or he considers himself superior to others whom he holds in contempt. From moral point of view both these attitudes are bad and reprehensible. However, even a trace of these wrong attitudes cannot be found in the Faithful (*Mu'min*), who is neither selfish so as to take unfair advantage of others, nor is proud and self-conceited so as to believe himself a paragon of intelligence and knowledge.

Thirdly, it is a concern of great responsibility to take decisions on matter relating to the rights and interests of others. Anyone, who is conscious of Allah and His inevitable judgement, cannot dare to bear the burden of such responsibility all alone. Such reckless acts are done by only those people who are devoid of fear of Allah and are without care of the hereafter. Allah-fearing person with conscious awareness of the Day of Judgement will necessarily try to consult all the people or their trusted representatives concerned with a collective matter in coming to a decision and line of action so that a just and impartial decision is made and if ever a mistake is made the burden of responsibility does not fall on one person alone.

These are the three reasons about which if one ponders, one can well understand why mutual consultation is a necessary requirement of the type or morality taught by Islam to man, and why violation of it is such an immoral and unethical act that Islam can never allow it. Islamic way of life requires that the principle of consultation should be applicable to every small or big collective affair. In the affairs of the household husband and wife should consult each other before doing anything, and then the children attain the age of puberty their opinion should also be

taken into account. If the affairs of the whole family are being dealt with, then counsel should be taken with every sane adult member of the family.

If the affairs are of relatives, a clan, a tribe, a whole village, or an entire town or city and it is not possible to take counsel with everybody, then the decisions should be taken by an assembly of trusted representatives of the people, who are selected or elected according to an agreed method and set procedure. If the affairs belong to a whole nation then the national head should be appointed after knowing the opinion of all. The head in turn should run the affairs of the country with the help of such counsellors who command the confidence of the nation. Such a leader should remain at the help of the affairs of the nation until the time set by the nation and no longer. No honest person can ever desire to try to become the head of a nation or to continue to be the head by coercion or forceful means, nor can he use deceitful ways and means in order to appoint himself as the principal authority of the nation by using force and then demanding approval from the people by means of a coerced obedience, nor can he use crafty tactics, so that the people instead of choosing, of their own free will, persons of their liking should select those who would vote and wait for him and support his wrong policies. Such desires and actions are only present in a person whose intentions are bad and corrupt.

To present a false appearance of "and whose affairs are a matter of counsel", and to make its basic requirements practically ineffective can only be the motives of a person who is unscrupulous enough to try to deceive Allah and the general public despite the fact that neither Allah can be misled nor the public can be so blind that a person openly commits an act of daylight banditry and he continues to believe sincerely that he is not committing robbery with violence but is serving the public. The rule of "and whose affairs are a matter of counsel" by its very nature demands five things for its fulfilment.

First, those people, whose rights and interests are involved, should have full freedom of expression and should be kept informed about how their affairs are being run. They should have also the full right to protest if they see any deficiency, negligence or error in the proper discharge of the duties of leadership pertaining to their affairs. Still if they find no improvement in the performance of such duties they should be able to change their leaders appropriately. To order the collective affairs of the people after stifling their voice, fettering their hands and feet and keeping them in the dark is a clear-cut dishonesty and nobody can agreed that it is an implementation of "and whose affairs are a matter of counsel".

Secondly, the person for shouldering the responsibility of managing the collective affairs should be appointed with the express approval of the people. This approval should be freely given without let or hindrance. It should not be obtained with coercion, intimidation, bribery, temptation, intrigue, deceit or trickery. The real and rightful leader of a nation is not the one who imposes himself upon it by every possible artifice, but who is chosen by the people of their free will.

Thirdly, the advisers of the head of the nation should also have full confidence of the people and should prove worthy of it. It is very obvious that the people cannot trust men who gain representative places through pressure, monetary temptation, falsehood and skill in trickery.

Fourthly, the people who give their counsel or considered opinion should do so according to their knowledge and conscience in full freedom. If it is not so and the counsellors give their opinion under duress of their knowledge and conscientious beliefs, then this is manifest dishonesty and treachery and not any compliance with "and whose affairs are a matter of counsel".

Fifthly, the collective advice or decision arrived at by the principle of unanimity or majority should be accepted without reservation, because if one clique is free to follow its whims in spite of listening to the consultative assembly then the process of consultation becomes meaningless and null and void. Allah ordains that their affairs are run by mutual consultation, but does not say that they are consulted in their affairs. Thus this commandment is not to put into practice by merely consulting one another but it is very essential that the actual affairs be conducted according to the decisions reached unanimously or by the majority at the end of the process of consultation.

With the above explanation of the Islamic principle of consultation (shūra) this basic fact should also be kept in full view that 'shūra' is not the last word, nor the absolute authority in running the affairs of Muslims, but it is definitely limited within the confines of "Al-Dīn" of Islam, the code of life of Islam which has been decreed and codified by Allah himself. It is dependent upon the fundamental principle that in whatever matter there is difference of opinion between the Muslims they should refer to His Book, the Holy Qur'ān, and the Sunnah of the Holy Prophet. According to this basic principle Muslims can consult each other about matters in the Shari'ah regarding the correct meaning of a particular clause and correct observance of it in order to fulfil its purposes; but they cannot confer together with the purpose of replacing or altering in any manner the ruling or decision of Allah and His Prophet by their own conclusions.

This is a vast topic, but albeit, the outlines have been sketched.

Notes

1. Sayyid Qutb, *Hadha al-Din* (This Religion of Islam), U.S.A., I.I.F. S.O. Publication, undated, p. 19.
2. Qur'an, ch. 65:18
3. Sayyid Qutb, *op. cit.* p. 22.
4. Qur'an, ch. 57:25.
5. Qur'an, ch. 16:90.
6. Qur'an, ch. 7:29.
7. Qur'an, ch. 4:58.
8. Qur'an, ch. 4:105.
9. Qur'an, ch. 4:135.
10. Kumo Sulaiman, *The Rule of Law and Independence of Judiciary under the Shari'ah*, C.I.L.S. Publication, Zaria.
11. Maududi, A.A., *Political Theory of Islam*, a chapter in *Islam - Its Meaning and Message*, edited by Khurshid Ahmad, London, 1976. p. 161.
12. Cf. Pickthal, Marmaduke Muhammad, *Cultural Sides of Islam*, Lahore, 1976, p. 181.
13. *Ibid*, p. 181.
14. Hamidullah, Muhammad, *Muslim Conduct of State*, *op. cit.*, p. 6.
15. Coulson, N.J., *A History of Islamic Law*, Edinburgh, p. 8.
16. Maududi, *Toward Understanding Islam*, I.I.F. Publication, 1970, p. 143.
17. Coulson, N.J., *A History of Islamic Law*, *op. cit.*, p. 83.
18. Suyuti, Jalal al-Din, *Al-Itqan fi ulum al-Qur'an.*
19. Abdal-Wahhab Ibn Khallaf has tried to classify these verses in following order: 70 verses on family law, 70 verses on civil law, 30 verses on penal law, 13 verses on jurisdiction and procedures, 10 verses on constitutional law, 25 verses on international law, 20 verses on economic and financial order and 50 verses on sources of law in general. C.f. *Usul al-Fiqh*, Cairo, 1956, pp. 34-35.
20. Related by Al-Bukhari and Muslim.
21. *Mishkat al-Masabih*, 26:55.
22. Qur'an, ch. 24:2.
23. *Mishkat al-Masabih*, 26:61.
24. Abū Daud and Ibn Mājah.
25. Ibn Mājah and *Mishkāt - Kitāb al-Hudūd*.
26. Abū Daud. See *Mishkāt, Bāb al-Hudūd*.
27. Ahmad and Abū Daud. Also see *Mishkat, Bāb al-Aqdiyyah*.
28. Muslim. Also see *Mishkat, Bab al-Aqdiyyah*.
29. Tirmizi, also see *Mishkat*, *Kitab al-Hudud*.
30. Muslim, Bukhāri, Abu Daud and Tirmidhi.
31. The words in brackets are mine.
32. Surah al-Shura (ch. 42:36).
33. *Ibid*, ch. 42:38
34. *Ibid*, ch. 42:38
35. Al-Siyāsah al-Shariyyah, page 75.
36. Mustadrak of Al-Hakim.
37. Kanz al-Ummal.
38. Fath al-Bāri Vol. 7. See the page of Battle of Uhud.
39. Qur'an, ch. 3:159.

Chapter 2

Holy Qur'an: The First Primary Source of Shari'ah

The Book of Allah:

The Holy Qur'an is the Book of Allah (Kitāb Allāh)¹ sent through the last of the Prophets, Muhammad. It contains the knowledge (*al-'ilm*)² imparted by Allah and the guidance (*Al-Hudā*) for men who are righteous for all time to come. It is a declaration (*Bayān*)³ of the truth and light (*Nūr*)⁴ to show the right path. It is the wise (*al-Hakīm*)⁵ the complete exhortation (*maw'uzat*)⁶ and the clear message (*al-Balagh*).⁷ It is a rope of Allah (*Ḥubl-Allāh*)⁸ by holding which individuals and nations can achieve salvation. It is the remedy (*al-Shifā'*)⁹ for all the spiritual ailments of men. It is a constant reminder (*al-Dhikr*)¹⁰ for all of us that Prophets will not come any more for our guidance. It acts as the criterion (*al-Furqān*)¹¹ to choose between the truth and the falsehood.

As the final revelation (*Tanzīl*)¹² from Allah, it is the embodiment of the fairest statements (*ahsan al-Ḥadīth*)¹³ and Divine words of wisdom (*Hikmah*).¹⁴

The Qur'an provides a code of conduct for every believer and is the commandment (*Amr*)¹⁵ and a warrant (*Tadhkiyah*)¹⁶ for him. Its injunctions are manifest (*Mubīn*)¹⁷, sublime (*Ālī*)¹⁸ and blessed (*Mubārak*)¹⁹.

Early religious books were either very short (e.g., the Buddhist books) or very long (e.g., the Bible). But the Qur'an falls in between them and is of medium size.

Its composition in the desert of Arabia, was a remarkable feat considering the fact that very little writing had taken place before the revelation of the Qur'an.²⁰

The Qur'an is divided into 114 chapters and contains 86430 words and 3,23,760 Letters of the Alphabet. The total number of verses are 6666. In order to facilitate its reading the Qur'an is divided into 30 convenient