



**Fixed and Variable
Aspects Of
Islamic Legislation**

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Introduction

In the Name of Allah

Peace and blessings of Allah be upon His Beloved Chosen Messenger Muhammad (s.a.w.), his pure progeny and the righteous among his companions.

Islam has began to force its way through our contemporary world both on the plane of thought extending over an area which, until recently, was under the influence of the objective movements, and on the plane of practical situations here and there, in a number of positions. This renewed vigour is exhibited through political, economic, social and educational applications.

Thus, mankind is having a rendezvous with a new experience that forcefully presents itself on the international scene despite all efforts to hinder and contain it. There is the hope that this new pioneer will blossom and take root so that it can contribute in rescuing the international community from the yoke of the strangling oppression that encircles it from all quarters.



However, a number of questions and doubts are raised in regard to the ability and the extent to which Islam can go in solving the current problems of life, with the complexities and challenges associated with contemporary conditions. Can Islam furnish us with beneficial prescriptions at a time when other ideologies have retreated, failing to cure the ills of contemporary man? These ideologies have indeed failed to solve even partially the woes and incurable diseases threatening the human civilization; in truth even contributing in perpetrating these evils.

Despite these potent realities, doubts on the ability and appropriateness of the rising Islamic project are raised especially from the vestiges of westernization and secularization which are clinging to their last stronghold in Islamic countries, let alone some neo-colonial circles harping on this biased claim whenever they feel the increase of the Islamic "threat". It is unfortunate that some Muslims are involved in creating this confusion.

Sometimes they present it innocently, not knowing the implications, and some other times under the guise of scientific investigation or objective research or even in the name of Islamic enthusiasm! These presentations are issued in apparently neutral language and methods although, in essence, they are only repeating the words of vengeful orientalis. A keen eye would never miss this fact.

These poisoned views aside, any objective scientific investigation will definitely conclude that the immortality of Islam confirms its greatness which, in turn, is derived from the fact that it is a Divine Message sent as a mercy for the whole of humanity: "And We did not send you (O Muhammad) except as a mercy for the worlds", suitable for all times, "This day have I completed your religion for you, completed my favour upon you and have chosen for you Islam as your religion."

The deluge of the fall of materialistic ideologies ushered in a period of decline in western civilization. This is no longer a secret since hardly a day will pass without hearing some leaders, of thoughts from the West, sounding a warning on the consequences of a headlong fall to which this civilization is hastening.

Thus, there is no choice left for mankind after being tortured and threatened with imminent disaster except to resort to the only means of salvation, Islam, which possesses the key solution and the way out of this dangerous strait. This is so, because Islam has a distinction not seen in other ideologies; a dynamic feature amenable to renewal and openness and capable of combining established truths and renewed legislations opened to the facts of life. Therefore, Islam will never lack the ability to care for the spiritual needs of man, on the one hand, and fully grasp the civilizational changes that take place in the course of human development, on the other.

Because of our having a strong belief in the necessity of spreading this clear understanding of the nature of Islamic legislation, Al-Balagh Foundation has decided to publish this book, which is small in size, but rich in content. All praise is due to Allah, the Lord of the Worlds.

Al-Balagh Foundation

Islam and the Pre-Islamic Period of Ignorance `Jahiliyya`

Since the descending of heavenly Messages, mankind has been divided into two parties that contradict each other in matters pertaining to belief, understanding and views towards life and what it contains of wealth, pleasure, enjoyment, social relationships and the connections between the soul and other things in existence. The Holy Qur'an recorded this phenomenon, saying:

"Mankind is a single nation. So Allah raised prophets as bearers of good news and as warners, and He revealed with them the Book with truth, that it might judge between people

concerning that in which they differed..." Holy Qur'an (Baqara 2: 213)

Primitive life embarked on development as a result of the evolution of man's faculty of thought, the power of his intellect and the improvement in scientific experiments. Human society, thus, took a more complex form; power and state came into existence, law and order emerged, then, followed the birth of philosophy, thought and theoretical concepts.

Ever since the descent of revelation to this earth, mankind had two parties; one following the course of the Prophets and the other that of the tyrants. The latter built their civilization upon apostasy and materialistic understanding. This course and chart sometimes rises and at other times falls, reaching its peak with Greek thought and Roman rule. By this time, it had definite philosophical, canonical and social forms. It was under this Greco-Roman civilization that 'Jahiliyya' thought took its theory and assumed more complex forms.

At the same time, divine thought pursued its work of reform, inviting mankind to believe in Allah and building man's life on the foundations of knowledge, faith and moral values. For all the period of human existence, there were Messengers and Prophets with their messages.

"...and there is not a people but a warner has gone among them." Holy Qur'an (Fatir 35: 24)

The struggle between materialistic and Divine thoughts continued throughout the ages and reached its peak on the advent of Islam and the Prophethood of the saviour of mankind, Muhammad (s.a.w.). The Islamic message triumphed on the plane of thought, as well as, in the arena of force and battle. Consequently, a society, a state and a civilization were brought into existence based on the principles of Islam, the power of which depended on the course of guidance and man's wholesome achievements.

This Divine Message provided humanity with a complete ideological project for the leadership of human society. This project was able to vanquish all the theories, ideologies and philosophies of atheistic materialism which are opposed to the call to belief and moral values. Islamic culture and civilization had, in a day, flourished, while different branches of natural and social sciences thrived over many centuries. Faith was guiding, fostering and directing the path of science while the latter served faith by establishing its principles in the souls. Thus, science and faith were but twins whose fruits compliment each other and they helped one another in constructing the society and human welfare.

The history of human thought had witnessed a gigantic scientific revolution at the hands of Muslim scholars in the fields of philosophy, ethics, thought and investigations on the intellect, literature, art, historical, political and social sciences and studies in legislation and law, etc. Similarly, the Muslims enriched human thought in the natural and biological sciences by

establishing methods of scientific research and investigated on and discovered scientific theories in the fields of physics, medicine, pharmacy, astronomy, mathematics, engineering, chemistry and other physical sciences.

A famous writer on the history of science, Gorge Serton, had this to say:

"The Muslims are the geniuses, of the east, in the Middle Ages. That they had the greatest influence on mankind, can be realized considering the fact that they undertook the writing of the most valuable works and studies surpassing all others in originality and depth. They wrote in their language, Arabic, which was without doubt, mankind's scientific language during the period from the middle of the eighth to the end of the eleventh century. The importance of Arabic in the sciences was such that any scholar who wanted to acquaint himself with the culture of his time and the most current issues in the sciences had to learn Arabic."

Knowledge, science and systematic methods of scientific research reached Europe through Muslims in Andalusia (Spain) and Sicily. These scientific foundations formed the basis of a modern scientific renaissance in Europe, at a time when the Muslims retrogressed after they stripped themselves of their Islamic values; differences and the struggle for power was rife. Their empire divided into small kingdoms and their rulers reveled in pleasures and worldly desires.

The result of these internal weaknesses was that the Muslim empire became politically torn apart. Their lofty position in science collapsed, and a very dreadful relapse occurred to the Muslim world with the loss of Andalusia and the continuity of the crusades. European advancement in science and knowledge started, while the crusades was busy destroying and occupying Islamic lands for two centuries.

This situation subjected the Muslims to the worst stages in history; relegating them to a life of darkness, backwardness and the abominable colonial oppression, especially after the Second World War. The Muslims, who had been liberators and conquerers now turned into a colonized people under the yoke of servitude to foreign powers, and from being exporters of thought, science and culture to receivers of the same.

The worst phenomenon witnessed by the declining Muslim position is the emergence of Zionism, Socialism and European Capitalist civilizations as allied powers working for the annihilation of Islam. The socialist camp, whose political and cultural existence was based on the Marxist theory, has imploded because of internal contradictions, leaving the arena open for the alliance of the Jews and the European Crusaders who are allied against Islamic existence.

In the closing decades of this century (20th century), the Islamic world has witnessed the herald of an ideological renaissance as a result of which Islamic awareness has increased, Islamic tendency has grown, in-roads have been made and widespread developments in the Islamic community have occurred. These positive changes, in the Islamic camp, are an indication of a return of Islam as a civilizational enterprise and a political existence, which would play its natural role in leading the world at a time when the Marxist civilization has collapsed and European civilization is passing through an ideological vacuum. The death knell of Judaism and Christianity has been sounded and today we witness the increase of propaganda and political, ideological and armed attacks on Islam and Islamic awareness.

The Holy Qur'an has prepared our minds with complete awareness of the present world events by furnishing us with its analysis of the existing contest between Islam and its opponents. In the light of Qur'anic language, it is a contest between Islam and a new form of Jahiliyya, the likes of which Islam has faced since its revelation to the Prophet of Mercy, Muhammad (s.a.w.), who identified the nature of Jahiliyya and its foundations.

The materialistic civilization, spearheaded by Europe and America in alliance with Zionism, is passing through economic and moral crises eating into its very fabric and leading it into an abyss. At this same time, the graph of the Islamic course is registering a notable rise exhibiting the signs of victory, by Allah's permission. Morad Forman, the German Ambassador to Morocco, had this to say: "The twenty-first century is that in which Islam shall spring forth in Europe."

This assertion confirms the statement of Bernard Shaw in which he predicted as follows: "I predict that in the future, Europeans will turn to the religion of Muhammad. It is already gaining acceptance in today's Europe".

The Holy Qur'an, in the course of its revelation to the Messenger of Allah, Muhammad (s.a.w.), has clearly identified the reality of Jahiliyya and what miseries and catastrophes it visited on mankind. In a number of Qur'anic declarations, the ideological, political, economical and behavioural foundations of the Jahiliyya system have been exposed. It is clearly pointed out that the basis of this system is disbelief in Allah, His Messenger and His Prophets; turning away from the divine legislation, shari'a and holding the call to guidance in contempt and attacking the principles of faith- exactly what modern Jahiliyya subscribes to.

Many verses of the Holy Qur'an deal with this topic, viz:

"And those who have no knowledge say: 'Why does not Allah speak to us or a sign come to us?' Even thus said those before them, the like of what they say. Their hearts are all alike. Indeed We have made the messages clear for a people who are sure." Holy Qur'an (Baqara 2:

118)

"Like those before you - they were stronger than you in power and had more wealth and children. So they enjoyed their portion; thus have you enjoyed your portion as those before you enjoyed their portion, and you indulge in idle talk as they did. These are they whose works are null in this world and the Hereafter, and these are they who are the losers." Holy Qur'an (Tawba 9: 69)

"Have they charged each other with this? Nay, they are an inordinate people." Holy Qur'an (Dariyat 51: 53)

An analysis of these verses will reveal what the Jahiliyya of different peoples and nations throughout history have in common in ideology and behaviour, their possessions and attainments in science and civilization notwithstanding. In Qur'anic terminology, Jahiliyya does not only refer to an epoch passed in history, nor exclusively to the Arabs before the advent of Islam, as some people think. Rather Jahiliyya means the continuation of a system of thought and civilization founded on disbelief in Allah, His Messengers and His legislation. To depict this, Allah, the Most High said:

"Their hearts are all alike", "Have they charged each other with this?", "and you have indulged in idle talk as they did.", "Even thus said those before them."

This characteristic of the ideological and social milieu of Jahiliyya with its conceited mentality as a result of its science, knowledge, power and wealth, is further highlighted; Allah said:

"Do they not travel in the land and see what was the end of those before them? They were more numerous than these and greater in strength and in fortifications in the land, but what they earned availed them not. Then when their messengers came to them with clear arguments, they exulted in what they had with them of knowledge and that at which they used to mock befell them." Holy Qur'an (Ghafir 40: 82-83)

Thus, Jahiliyya's thought, throughout the ages, has been arrogant due to power, wealth and scientific attainments. At no stage in history is this conceit worse than it is in contemporary Jahiliyya thought - which considers these attainments as yardstick for judging Islam and attacking its eternal values. In this way, the propagators of this materialistic ideology try to convince others on the veracity of their thoughts and theories.

Contemporary materialistic ideology is founded on principles and philosophies propounded in order to serve as the basis of thought for building a civilization with its culture, law and order and modes of human behavior. This world view takes refuge in those philosophies in the war

with the Islamic camp and its formation. The foundations of this Jahiliyya civilization can be summarized in the following principles:

1- The materialistic method believes only in sensory perception as a means of acquiring knowledge, science and extorting human intellect in discovering scientific facts.

2- In harmony with the materialistic method, science, knowledge, civilization and materialistic culture flourished in a manner unconnected with faith in Allah, His messages and Messengers. Therefore, the culture of this Jahiliyya rejected the existence of Allah and belied the unseen. Its thinkers and philosophers assumed this atheistic outlook in their methods and began attacking the divine method of thought by stripping it of all scientific features. They only acted in this way after establishing in their minds the firm belief that science and scientific thinking is peculiar to the materialistic method of investigation.

3- On those ideological premises, they founded the call to secularism which means divorcing religion from practical life and erecting it on the basis of what they discovered in knowledge and science, devoid of belief in Allah and ethical principles. This led mankind to nothing but misery and suffering. Secularism became a tool for enthroning tyrants and extending hegemony over the weak, a glaring fact in the contemporary political experiments where the dominating powers subject the weak to killings, massacres, starvation, torture and all out tyranny in all nooks and corners of the world.

4- Studies and investigations in psychology and behavioural sciences are, likewise, based on the foundations of materialistic thinking and methods of research. In this way, they ended up calling for licentiousness and complete freedom in behavioral thinking that belief in the values of permission, prohibition and ethics is a shackle preventing man from gratifying his inner tendencies and mental desires. And that Islamic laws and ethical values cause suppression of natural urges and self-deprivation resulting in mental stress and the killing of man's inclinations and internal desires.

We shall observe, by way of statistical data, how licentiousness and moral depravity was not only unable to deliver man from misery and mental torture, but, also caused multiple mental tribulations, thereby increasing the rate of crime, drug addiction, anxiety, homeless-ness, political scandals and economic crises. Perhaps what exposes the reality of secular, materialistic civilization or Jahiliyya, as the Qur'an calls it, is the statistics which portray the different sides of the individual, economic and political behavioural picture of life.

Based on three figures we can judge the claim of the secular, materialistic approach and the truth of how it regards Islamic thought as retrogressive, not on a par with the contemporary world and incapable of encompassing the scientific movement or the ever-progressing

civilization.

Let us now consider the Qur'anic declaration and analyses on a Jahiliyya society, and the confirmation of this description, by reports and statistics that portray those deteriorating conditions.

Man and Materialistic Civilization

Allah, the Most High said:

"But followed after them a succession who neglected prayers and they followed lust,..." Holy Qur'an (Maryam 19: 59)

"...and hinder (others) from the path of Allah and seek it to be crooked; these are in errors far away (from the right path)." Holy Qur'an (Ibrahim 14 : 3)

"And when it is said unto them, 'make you not mischief in the earth' say they, 'Verily we are only the well-doers.' Beware! Verily, they are the mischief-mongers but they perceive (it) not." Holy Qur'an (Baqara 2: 11)

"O you who believe! Respond you to Allah and to His Apostle (Muhammad) when He calls you to that which gives you life; ..." Holy Qur'an (Anfal 8: 24)

"He it is Who sends down unto His Servants signs manifest, so that He may bring you out of the darkness (of infidelity) into the light (of faith):..." Holy Qur'an (Hdid 57: 9)

"...I desire naught but reform what I am able to (do)..." Holy Qur'an (Hud 11: 88)

In these verses, the Holy Qur'an discusses about man's ideological and mental frame under the Jahiliyya society, the society of materialistic civilization. The Qur'an warns him of falling into that abyss, exhorting:

"...O mankind! Your rebellion is against your own selves..." Holy Qur'an (Yunus 10: 23)

The Qur'an warns man that he will definitely reap the fruits of his evil deeds and straying from the

right path and sends a word of caution that man should not meekly obey his base desires nor deviate from the straight way, the way of divine guidance.

A number of passages reiterate this signal:

"who neglected prayers", "they followed lust", "and hinder (others) from the path of Allah", "and seek it to be crooked", "when it is said unto them, make you not mischief in the earth", "say they: 'Verily we are only the well-doers'", "Beware! Verily, they are the mischief-mongers", " but they perceive (it) not."

Studies and analysis on contemporary materialistic societies reveal those facts clearly, exposing this deep seated disease. This is a disease of base desires, deviation and abnormal behaviour whose manifestations have appeared on the formation of modern materialistic civilization to an extent that serves as a warning of imminent collapse. The followers of the same sick civilization work day and night to sell it to the Islamic world as a substitute for the noble Islamic project.

To attain this sinister objective, they depend on informational misguidance and the backward condition suffered by the Muslims in economic, industrial and service sectors, the latter being a result of colonial hegemony over Muslim lands. The war of misinformation is especially aimed at the Islamic enterprise whose purpose is to salvage mankind from all forms of misguidance and corruption both in the political and ethical fields.

The agents of Jahiliyya know full well that Islamic victory will thwart their selfish interests and oppressive domination over the Islamic world, and that the light of Islam will creep over the dark life in whose labyrinths they wallow. That is why they employ a great number of rulers, parties and information foundations that are subservient to their will, to conduct their plans in the war of civilizations. In some cases, they resort to force and military occupation when their interests dictate so.

The ideological and psychological war they launch on the Islamic project, and its true followers tries its very best to show Islam as a retrogressive system which hinders man's development and progress. They do this so as to impose on the Islamic principle the responsibility of the backward condition and suffering of the Muslims; a situation they, themselves, created.

The condition of emptiness and ruin embedded in the materialistic system and the educational and behavioural system, run by modern European civilizations with roots in pagan Rome, will be unexpectedly swept away just as socialism amazingly fell, despite its possession of awesome stockpiles of arms, gigantic and sophisticated industrial capability and an ideological theory, the Marxist Socialist Theory. Their stubborn subservience to this artificial, antihuman doctrine resulted in rivers of blood and three generations being forced to endure suffering, bitterness and

torture in the name of depending socialism and spreading its ideas. Thus, the world was divided into two opposing camps each threatening the other with destruction and complete annihilation.

The European civilization reigning in Europe, America, Japan and Russia, as a matter of primary concern, put forth exhaustive efforts in leading the world for the abdication of Islam, being its only ideological and political rival. However, the studies, statistics and analyses, conducted in this field, point to the opposite; the decline of this European culture and its imminent collapse, while Islam shows all the signs of victory, even though, it might take a long time. This is the norm prescribed by Allah to which the Qur'an alludes when discussing the Jahiliyya civilization. The verses impart to us the lessons of the dynamics of history and civilizations. Allah declares:

"...but when came unto them a warner it increased not in them but their aversion. (In) priding in the earth, and planning evil; and the evil plans (of theirs) shall beset not but the devisers themselves; then wait they for aught save the course of the people gone before? For never shall you find any change in the course of Allah; and never shall you find in the course of Allah any alterna-tion.

Have they travelled not in the earth and seen was the end of those before them though they were stronger than them in strength? And Allah is not such to frustrate Him aught in the heavens or in the eath; Verily He is the All-Knowing, All-Powerful." Holy Qur'an (Fatir 35: 42-44)

"But when He deliveres them, behold! they rebel in the earth unjustly; O mankind! your rebellion is against your own selves, a provision for the life of (only) this world, then unto Us shall be your return, then will We inform you of what you were doing." Holy Qur'an (Yunus 10: 23)

If these Qur'anic statements, through scientific analysis on the causes of the fall of civilizations, prove that material power, in the form of armies, wealth, riches and industrialization, cannot prevent civiliza-tions, nations and societies following the evil path of oppression, injustice, deviation, arrogance and anomal-ous behaviour from falling, then we can conclude that the fundamental causes of the destruction are ideological and ethical in nature. The fact that the Qur'an explains these causes in its discussion on the histories and experiments of nations and that we are living witnesses, to the plunge of socialism, is enough to discern from the signs of ethical and behavioural breakdown a warning on the total collapse in spite of efforts for restoration and improvement.

Statistics released by special institutions and circles in Europe, America, Japan, China and other countries in the materialistic camp (modern Jahiliyya) express the presence of these signs. These figures prove that materialistic civilization is incapable of solving man's problems; it even multiplies them.

They also indicate that this ideology is the cause of the miseries and suffering in this life. Likewise, they are the cause of man's loss of the hereafter and the pleasure of Allah, the Glorious. These proofs show that man has no other refuge than to return to Islam and a life under the shade of the Qur'an.

A Glance at Islamic Legislation

"And We have revealed to you the Book with the truth, verifying that which is before it of the Book and a guardian over it, so judge between them by what Allah has revealed, and follow not their low desires (turning away) from the truth that has come to you. For every one of you We appointed a law and a way..." Holy Qur'an (Ma'ida (5: 48)

"Then We made you follow a course in the Affair, so follow it, and follow not the low desires of those who know not.." Holy Qur'an (Jathiyah 45: 18)

The Noble Qur'an and Pure Sunna (Prophetic tradition) have discussed about law and legislation (Shar`a and Tashri') and this terminology was used by the Qur'an in its technical sense. Before, this term was applied only to the literal meaning derived from the Arab's environment. Arabic lexicologists have defined this term as follows:

Ragib Isfahani said: "Shar`a means to take a wide road. It is said " I have made for him a path". Ashshar'u is a verbal noun, then it was taken to mean a path, a road. Shir`un, shar`un and shari'atun mean a way. These terms are used metaphorically to mean the divine path." Then he quoted the tafsir (Qur'anic exegesis) of Ibn Abbas saying: Ibn Abbas said: "Ash-shir'atu refers to what is brought by the Qur'an and al-Minhaj refers to what the sunna contains."

Thus the meaning of Shari`a, as it occurs in the Qur'an, is the divine path along which it is incumbent on mankind to walk in life. In other words, the term shari'a refers to the collection of laws and rules brought by the Qur'an and by the sunna. The Holy Qur'an has named the process of enacting Shari`a rules, by Allah the Most High, legislation `shar'u' or 'assigning' (ja'al) as the scholars of Principles of Islamic Jurisprudence (Usul al-Fiqh) call it. This shari'a is enacted to reform mankind, rectify their behaviour and order their lives.

It is confirmed by the Qur'an that the power of legislation is Allah's while the role of the Messenger is to convey this legislation. Whatever legislative competency the Prophet (s.a.w.) enjoys revolves round the divine enactments and assessing human conditions: "...Say: I follow only that which is revealed to me from my Lord...." Holy Qur'an (A'raf 7: 203)

"...Say: It is not for me to change it of my own accord. I follow naught but what is revealed to me..." Holy Qur'an (Yunus 10: 15)

What issues from the sunna on the authority of the Prophet (s.a.w.) is nothing but elucidation and explanation of what is revealed to him. The Prophet (s.a.w.) neither errs nor does he commit mistakes in what emanates from him because of the knowledge, infallibility and divine guidance bestowed on him. More light has been shed on this fact by Imam Ja'far bin Muhammad al-Sadiq (a.s..) in what he was reported to have said:

"Surely the Messenger of Allah was guided and supported by the Holy Spirit. He neither slips nor errs pertaining to anything with which he governs the creation." The issue of 'assigning' (ja`al) and enacting rules or legislation has been investigated thoroughly by the Islamic jurists, just as Islamic theologians treated this topic by way of exegesis. The question at stake is this: Is Islamic legislation based on facts, interests and scientific assessment and calculations related to the very essence of the acts about which it legislates or is it just the Legislator's consideration (I'tibar) without regard to the those elements? This issue is treated under the name 'beauty' and abomination (al-Husun wal Qubh).

In accordance with the theological method and technicalities, the topic is worded in this way: Are 'beauty and abomination' comprehensible by way of the intellect or through legislative pronouncements? In other words, is 'beauty' or 'abomination' an essential quality of a given act or a subjective one regarded by the Legislator to be associated with the act.

Islamic theologians have two opinions concerning this issue. Scholars from the Ahl-ul-Bait school regard the natures of beauty and abomination as intellectually comprehensible, that is, they are never legislative. For example, the prohibition of alcoholic drinks and adultery is based on their essential ugliness, and it is not possible for the Legislator to consider this abomination as a beauty so that the act will accordingly become a good one. Scholars from the Ash'ari sect take the opposite view.

The jurists of prescribed law treated this topic under the title "Constitution of the Legal Principles". It is discussed, here, also considering the legal principle as a value-assigning principle. This means that it aims at ordering and reforming human behaviour and relationships.

The results of the studies undertaken by the jurist is that the legal principle consist of the following points:

1- Substance or Content: This is what the legal principle comprises. It is derived from different factors; economic, social and established scientific findings. However, positive law does not commit itself to the result of scientific investigations and practical experience. Science has

confirmed that wine, adultery, sodomy and hoarding are harmful, but, objective laws still allow it and even regard these acts as part of individual rights and freedom. The term substance or content (al-Madda aw al-Madhmun) is known in Islamic jurisprudence as a basis or (mal?k). Jurists and experts in Islamic legislation regard mal?k as the essence and spirit of the substance of law.

2- Form or Formation: "What is meant by form is to define the substance or subject matter precisely, delimiting the content through technical formulation acceptable to the authority granting the legal principle to the force of law."

This element (form) is known in Islamic jurisprudence as l'itibar (consideration). l'itibar means "a verbal expression" with which the Legislator manifest His will which indicates the criterion (mil?k) of legislation.

Studies in positive jurisprudence divides the elements of content into two categories:

1- The element of reality derived from experience and witnessed in the community. Such elements include social, economic, political, ethical, religious and human nature.

2- The element of example that is regarded as a model for justice, the course of which it is incumbent to tread in all positive laws.

However, in reality, objective law is proved incapable of treading the path of justice with respect to the element of reality and that of example. Researches and studies in positive law are late in defining the fundamentals which constitute the legal principle, while Islamic legislation and shari'a rules have those facts as their essential constituents. Islamic legislation, by its very nature, is based on knowledge and justice, because it takes into consideration the psychological and social nature of man, his material needs and ethical values. These issues will be elucidated in the subsequent topics.

Islamic legislation takes as its fundamental precepts around which the law revolves, the principles of truth, justice, and the doing of good. Both the law and society march toward these goals. Allah, the Most High said:

"Surely Allah enjoins justice and the doing good (to others) and the giving to the kindred, and He forbids indecency and evil and rebellion..." Holy Qur'an (Nahl 16: 90)

And He also said:

"And with truth have We revealed it, and with truth did it come..." Holy Qur'an (Isra' 17: 105)

In Islam, the legal principle or law (Hukm) derives its force from the fact that it is a Divine law, the commitment to which is obligatory as a duty to Allah, the Glorious. No authority or power has any hand in giving it the force of law. The exception is in what Islamic legislation bestows on the Islamic authority legislative competence in issuing some laws for the purpose of achieving the common interests, or stopping corruption. And they have the power to enact laws to enable the application of the Islamic laws, according to existing social conditions. These types of enactment derive their force of law from the enacting authorities.

And since these authorities derive their legislative competence from the Divine law, their role of granting legal force to these enactments is only a secondary one.

Legislation and Legal Formulation

We now know that the rule or the legal principle is comprised of a subject matter and form, and we know the meanings of these terms. We also know that to legislate is to 'assign' (ja'al) or enact rules. The jurists define legislation as a declaration, by a specific authority, of legal principles, through the means of specific expressions.

It is also an established fact of Islamic ideology that legislation belongs exclusively to Allah, the Glorious. And to Him belong the creation, the command, the kingdom, power and authority.

We also understand that the government, in whose hands are the affairs of the community, Ummah, enjoys a degree of legislative competence derived from the divine law which takes knowledge, justice, the doing of good and wisdom as its fundamental principles. Indeed, the All-Knowing, All-Wise Legislator has taken into consideration the nature and conditions of mankind as regards to his creation, psychological, intellectual, material and social life in designing a code of living for him.

It is pertinent, here, to explain that the method of formulating the legislative content of rules and the Islamic legal principle has passed through two main stages. They are: The Qur'anic formulation, which is the divine expression of rules via Qur'anic verses and the Prophetic formulation is encountered in the traditions (hadith) and sayings. The Imams of the Prophet's household followed the latter method in elucidating the rules. The acts and confirmations (taqrir) of the Messenger (s.a.w.) and the Imams of the Prophet's household, just like their sayings, represent another way of expressing the rules and legal principles in Islam.

Thus, the early methods of expressing the Islamic rules and legal principles are as follows:

1- Verbal expression emanating from Allah, the Most High, or from the Messenger (s.a.w.) and the Imams (a.s.) via the two known methods of formulation used in the Qur'an and the pure Sunna (tradition of the Prophet or Imams).

2- Acts and confirmations by the Prophet (s.a.w.) and the Imams (a.s.).

Thereafter, studies on legislation evolved producing the science of jurisprudence and its technical terms, the result of which is the emergence of a new method of formulating Islamic laws and rules by Islamic jurists and theoreticians. This method of formulation is the one usually encountered in books of fiqh, and epistles of Islamic rules, written by the jurists. This method, because it carries jurisprudential jargon, differs from that used by the Qur'an and the sunna. It is beneficial to point out that the Islamic jurists have divided the shari'a rules, according to the language of fiqh, into four categories:

a- The rules of worship (ibadah): These are rules for acts that require the one who practices the acts of worship to have the intention of attaining nearness to Allah, the Most High. Such acts include prayer, fasting, pilgrimage, vows.

b- The laws of contracts: These are rules governing acts, the existence and validity of which depends on the consent of the two parties. Here, there is no need to intend attaining nearness to Allah. Such laws govern marriage, business transactions, companies, etc. However, concluding a contract for the sake of Allah is recommended.

c- The laws of Iqa'at (one party transactions): These are rules for acts requiring neither the intention to attain proximity to Allah nor a second party, for they can be discharged by a single party. Example of such acts include divorce (the husband can divorce his wife with or without her consent) and a testament containing a responsibility to be discharged by the survivors.

d- Rules: These laws are termed simply as rules without any qualification. They include the laws of inheritance, suckling, punishments, etc.

From the foregoing, it will be clear that the issue of categorizing fiqh and the formulation of rules is not a determined and finalized one. The fact is that the jurists were responsible for originating ways and methods for formulating arrangement and categorization, suitable for the needs and requirements of the various stages in the history of Islamic jurisprudence.

Studies in jurisprudence revolved around those four central points. From another angle,

investigations and studies, from the point of view of the individual, had their stamp on the method, treatment, issues covered and categorization of fiqh, in spite of the fact, concerning government and power, there existed special jurisprudential studies; such as, books on the rules of government and guardianship and those pertaining to collective activity.

This individualistic approach was subscribed to because the methodology of fiqh was not based on a societal view of Muslim life within an Islamic state with a government running an Islamic society, in which case, jurisprudential studies would have revolved around the individual, the society and the state. It could be said that the individualistic method was imposed by the realities of the Muslim's situation throughout history.

While the scholars of Islamic legislation divide its studies into four, the jurists of the conventional law studied law through its division into:

- 1- General Law
- 2- Individual Law.

The jurist define public law as "the law that regulates legal relationships in which the state, in its capacity as the sovereign, is a party." They define Individual law as: "The law that regulates relationships between individuals or between them and the state not in its capacity as the sovereign."

The factor responsible for the difference between these two legal precepts and these two categories of rules is for the state, in its capacity as the sovereign, to act as a party in a contract. However, in a case whereby the state, not in its state as the sovereign, enters into a contract, say, renting a house or the sale of an estate, it will act as an individual devoid of any prerogatives, as is the case of a company, society or party. Therefore, the individual law is the one to regulate such contracts between the two parties.

It is pertinent, at this junction, to suggest that Islamic jurisprudence stands in need of new studies and categorization in which the laws would be classified into general and individual laws, even in cases related to worship, if they carry a legal colouring. The issue of zakat, for instance, is a financial legislation and the state receives zakat in its capacity as the sovereign. Islamic legislation makes it obligatory to submit zakat to the legal ruler (Hakim al-Shar'i) and anyone who fails to do so is considered a rebel and is compelled to submit it.

The present conditions as well as the nature of Islamic law, call for a review of the classification of laws. It should be noted that Islamic law is comprehensive and covers all issues big and small, individual and collective, which affect the individual, society or state. This need for a new study of Islamic jurisprudence, its classification and rearrangement, on the basis of categorizing laws as

general and individual, is even rendered more urgent by the emergence of an Islamic state and the call for the Islamic enterprises as an alternative to the laws and systems of secularism; such as, capitalism and the likes of it. We are in a situation whereby the Islamists are requested to present the Islamic alternative as a project capable of theorizing and law making.

For the benefit of the reader, we will mention the division of general and individual laws, indicating whether the state, in the relations regulated by these legal sub-divisions, acts as a sovereign or not, while dealing with individuals and other states.

Division of General Law:

General law can be divided into many sections, some of which are mentioned below:

- 1- International General Law: "is a set of legal principles governing the relationships between nations, both in the condition of peace and war."
- 2- Constitutional Law: "is a set of legal principles that govern the foundations of a nation and defines how it is constituted."
- 3- Administrative Law: "is the principles that governs the activities of the executive power and the method of discharging its administrative responsibilities."
- 4- Fiscal Law: "Is the law that guides state finances, its income expenditure".
- 5- Criminal Law: "This law defines the different crimes and stipulates their punishments."
- 6- Criminal Procedures Law: "Is the law that regulates the procedures for investigating crimes and what might be required of detention, releasing or prosecuting a suspect. These laws determine the court of competent jurisdiction, explain prosecution procedures, how to deliver judgement, how to appeal against it and the execution of the judgement and how it is done."

Division of Individual Law:

From among the main divisions of individual law we will mention the following:

- 1- Civil Law: This law regulates matters pertaining to the family (personal status) such as marriage, divorce, inheritance and expenditure on the family. It also regulates a person's property rights, the way through which he acquires these rights, their terminations, etc.
- 2- Commercial Law: This is a set of principles governing commercial activities.
- 3- Maritime Law: This is a set of principles that regulate navigation. It deals with the purchase of ships, their hiring, insuring ship and cargo and maritime loans.

4- Aviation Law: This is a set of principles governing aviation activities. These consist of the ownership, type and registration of aircrafts and contracts on air transportation and responsibility, in case of any harm that might befall passengers or other persons on land.

5- Labour Law: This regulates the relationship between employers and employees.

6- Civil Procedures Law: This is a set of principles that govern the setting-up of courts and their jurisdiction, method of litigation, and giving evidence, delivering judgement and ways of appeal and implementing the judgement on the issue in contention, the properties of a debtor...etc.

7- Private International Law: This is a set of rules that chart out the mandatory solution in issues where conflicts between parties, each of which is affiliated to a different state, is subject to a given set of laws.

Legislative Hierarchy:

One of the important aspects of legislation, its formulation and contemporary categorization that pertains to regulating state and society, of which the Islamic Republic of Iran has applied and in fact which any Islamic state is in need of, is the legislative structure which should consist of the following three levels, viz: 1- Constitution: "This is the document that presents the system of government of a given state."

2- The Law: "It is a set of general principles for the regulation of individual behaviour in the society and whose respect is guaranteed by the government through the use of force, where necessary, by meting out punishment for disobedience."

3- Bills of Law: "These are rules enacted by the executive powers to enable the execution of normal laws or for regulating general good and organization or for the maintenance of security, health, managing affairs, etc."

As previously stated, the formulations of laws is a technical affair, flexible in nature; not in the garb of fixed terms. Let us look at the way Islamic jurisprudence acts to phrase the legislative constituent according to the above mentioned hierarchy.

We are going to give a brief account of how the Islamic constitution consists of two types of constituents:

1- Rules and legislations derived from shari'a rules that denote responsibility 'taklif' and those that affect conditions 'wad'i'. Such legislations include constitutional laws, like competence and attributes of the president, and relationships between the nation and the government; others are

rules regulating individual economic, social and behavioural life...etc.

This part of the constitution can be divided into two groups, also:

- a. A clear stipulation about which there is no room for the exercising of independent judgement (ijtihad). For example, acknowledging private ownership and considering justice as a condition for a competent judge, etc. These rules are fixed and not liable to change.
- b. The second group is that of rules deduced by way of ijtihad practiced by the Islamic jurists, fuqaha. Such laws are liable to changes and other ijtihad enactments, that are more appropriate in regard to new conditions or occasioned by higher juristic competence, can replace the earlier rules.

2- Rules pertaining to the form and structural frame of the state involving organizational and technical matters. Such laws include legislations for electing the president or parliament or city councils. These laws can be changed and improved continuously as the situations change, with the condition that these sections of the constitution should never be inconsistent with the Islamic rules and values. It is worthwhile to note that those laws which are clear stipulations are binding on all sections of the society, because they represent unequivocal divine legislation. They carry this weight irrespective of whether they are codified within the constitution or not.

But as for the Ijtihad laws, such rules derive their legal force from the necessity of uniting the community in general matters by conforming to a uniting opinion capable of safeguarding the good of the community, warding off corruption and safeguarding general order. A second justification for furnishing such rules, with legal force, is the theory of permissibility of the division of imitation (taqlid). This view allows the Mukallaf (a person deemed by the Shari`a as responsible and answerable before the law) to imitate one mujtahid, in part, and another in other matters. Thirdly, such rules can obtain legal force by way of a supreme authority governing the ummah.

In the case of legal constituents regulating the organization and structure of the nation, legal force is derived from the necessity of safeguarding the common good and ensuring the best conditions for the community. It is also derived from the fact that the supreme authority, to which the citizens have invested with legitimacy, sanctions those legal constituents and makes them legally binding.

The Fixed and the Variable

The rules of Islamic legislation at our disposal, as a result of the evolution in jurisprudence and

ijtihad, can be classified into two:

1. Nass (Stipulation): This is a clear rule about which no ijtihad is exercised. For example, the obligation of prayers, fasting, zakat, catering for the wife, forbidding of alcoholic drinks, adultery and interest and permissibility of business transactions, marriage, acquiring property, partaking of the flesh of some livestock...etc.

2. Ijtihad Rules: This class can be further divided into two sections:

a. Ijtihad rules deduced by the jurists, from the Qur'an and the pure sunna, because of the existence of proofs covering such rules in a general sense or proofs indicating such rules, directly, in a way that makes deduction possible while they are not direct stipulations.

b. Vacant zones or where the rules are allowed legislative competence: These are areas left for the rules to fill by specifying the appropriate rules in the light of the Book or the Pure Sunna. Some of these areas include disallowing the hoarding of goods, services and utilities about which neither a clear stipulation or a general rule is available. Others include the imposition of additional taxes for the purpose of redeeming bad economic situations of the Muslims and controlling the prices of goods, considered by the rules as experiencing imbalance, in which the consumer, seller or producer is cheated.

While discussing on fixed and changing aspects of Islamic rules it is desirable to differentiate between change in the understanding of the jurist deriving the rules i.e., the legal ruler (Hakim al-Shar'i), from whom the change in the rules emanates, on the one hand, and the conditions in which a clear stipulation (nass) or ijtihad ruling would accept change or remain constant, on the other.

Scope of the Fixed and the Variable Rules:

While treating the issue of fixed and changing rules, it is pertinent to define the elements of the Islamic message, susceptible to change, and those that do not admit any variation:

1- Belief: Precepts like the belief in Allah, the Glorious, and the belief in His Messengers. These fundamentals are immune to changes and abrogation throughout the period of divine messages, not only in the Islamic message. However, we can find differences among the Muslims as regards the details of ideological principles, like the issue of explaining the nature of man's actions and his relationship with His Lord, understanding of the attributes of Allah, etc. This difference in understanding does not mean that these ideological issues are variable, but it exposes the fact that there exists two conflicting opinions in understanding the precepts, or the obstinacy and overstepping the bounds by some groups who refuse to accept the fact.

2- Ethics: This is among the fixed fundamentals in Islam and all other divine legislations. Ethical issues include truthfulness, justice, mercy, etc. These principles are not liable to change or substitution, being of similar nature to the precepts of belief.

3- Declarations and expositions of many questions of thought, knowledge, life, et.c: A lot of statements, in the Holy Qur'an and sunna, discuss and explain the norms and laws governing history, society, bodily and spiritual nature of man, etc. These are but fixed scientific laws neither changing nor admitting substitutes, since they portray established facts that govern the formation of man and nature.

4. Legislation: This comprises of rules and laws enacted to regulate man's relationship with Allah, with himself and with others. The portion which guarantees the regulation of man's relationship with Allah, the Glorious, i.e., rules on worship, such as prayer, fasting and pilgrimage are fixed and do not accept any substitute. As for the section on social organization, it can be seen that it consists of two parts; one fixed and unchangeable while the other is variable. We shall take up each part and discuss it later.

Sources of Islamic Legislation

It is unanimously accepted that the Holy Qur'an and the pure sunna are the sources of legislation and the custodians of Islamic thought and knowledge.

Imam Muhammad Baqir (a.s.), the master and authority of the jurists and one of the Imams of the Prophet's household from whom Allah removed all filth and purified with the utmost purification, summarized this belief in the following words:

"Surely Allah, Blessed and Exalted, is He Who did not leave out any matter of which the community stands in need, but He revealed it in His Book and explained it to His Apostle (s.a.w.). And He assigned a limit to everything and a proof indicating it. And He specified a punishment for whoever transgresses the limit."

The Imams of Ahl-lul-Bait (a.s.) have, indeed, enriched Islamic legislation with their expositions and elaborations of the Book and the Prophetic tradition. This exposition was a real continuation of Shari`a laws, so it is part of the sunna. The great jurist Shahid Sayyid Muhammad Baqir Sadr

described this fact in these words: "Thus it becomes clear that changing the rules of the Shari`a, through abrogation, is also one of the factors that bring about conflict originating from this factor, and only affects the stipulation emanating from the Prophet (s.a.w.) not those from the Imams (a.s.).

This is so because the period of legislation ended with the close of the Prophetic era and the narrations that emanated from the Infallible Imams (a.s.) were only an elaboration on the Prophet's legislations."

Since the Book and the sunna together are the sources of Islamic legislation, the two other sources i.e., intellect and consensus (ijma') are secondary sources serving as ways to discover the legislation and not, themselves, legislators. The intellect, as a source of legislation, is defined as "an issue perceptible to the intellect while it is able to deduce a Shari`a rule from it. An example of these issues is the intellectual proposition that enjoining a thing entails enjoining its prerequisites (muqaddimat).

Consensus (ijma) has been defined by the Shi'a Imamiyya School as: "The consensus of scholars with legal opinions from among the preceding jurists of the period of occultation, on a certain ruling, while the verbal source specifying the ruling remains unknown. These jurists have met a situation that evokes a state of conviction and a settled belief which detects the existence of a legislative proof possessed by the jurists and those who preceded them."

In addition to these secondary sources mentioned above, some Islamic schools recognized sources, such as, analogy `qiyas', discretion `istihsan', public good `masalih mursalah', teaching of the companions `madhhab al-Sahbi'....etc. A lot of debate has taken place on the weight of evidence `hujjiya' and the nature of these sources.

Both the Imamiyya school and the other Islamic schools, which subscribe to the idea that all forms of analogy are evidence, regarded the analogy in which the basis or cause `illa' is expressed in the clear law `Mansu al-Illa' and analogy in which the deduced law holds a prior position to that of the clear stipulation on which the analogy is based `Qiyas al-Awlawiyya' as evidence. The only point of conflict between the two views is analogy of comparison `qiyas al-Tamsili'; that is, to compare a part of a question to a part of another and the analogy in which the basis or cause is deduced rather than expressed in the clear stipulation.

The Holy Qur'an and the Pure Sunna contain rich and adequate legislative material. In the Qur'an alone there are hundreds of verses directly enacting laws and rules or conveying thoughts, and legislative concepts from which laws can be formulated. Thousands of Prophetic traditions serve as illucidation to those verses and legislative roles. Hundreds of these texts form the general legislative fundamentals that contribute in enriching legislation and expanding its horizons.

To illustrate, we shall review some of these verses, traditions and narrations to observe the special feature of the constituent of Islamic legislation. Allah, the Most High says:

"Surely Allah enjoins justice and the doing good (to others) and the giving to the kindred, and He forbids indecency and evil and rebellion..." Holy Qur'an (Nahl 16: 90)

"...and has not laid upon you any hardship in religion..." Holy Qur'an (Hajj (22: 788)

"...Allah desires ease for you, and He desires not hardship for you,..." Holy Qur'an (Baqara 2: 77)

"Take alms out of their property - you would clean them and purify them thereby..." Holy Qur'an (Tawba 9: 103)

"...(all) good things are made lawful for you..." Holy Qur'an (Ma'ida 5:5)

"Say: My Lord forbids only indecencies, such of them as are apparent and such as are concealed,..." Holy Qur'an (A'raf 7: 33)

"O David, surely We have made you a ruler in the land; so judge between men justly and follow not desire,..." Holy Qur'an (Sad 38: 26)

"O you who believe, fulfil the obligations..." Holy Qur'an (Ma'ida 5: 1)

"...and Allah has allowed trading and forbidden usury..." Holy Qur'an (Baqara 2: 275)

"...and women have rights similar to those against them in a just manner,..." Holy Qur'an (Baqara 2: 228)

"And surely We have honoured the children of Adam, and We carry them in the land and the sea, and We provide them with good things, and We have made them to excel highly most of those whom We have created." Holy Qur'an (Isra' 17: 70)

These verses of the Qur'an carrying ample legislative principles have their counterparts in the pure sunna. A large number of legislative traditions present the bases for legislative principles from which many laws can be formulated. Other traditions and Prophetic statements provide us with legislations and rules that govern individual relations, situations and positions while carrying a general sense suitable for application in identical cases.

Here, we shall mention some traditions that take the form of legislative principles:

The Holy Prophet (s.a.w.) says:

"No one shall harm nor be harmed."

"Obligation has been suspended in my ummah in respect to nine cases: Mistake, forgetfulness, what they do under duress, what they do not know, what they cannot do, what they are forced to do by circumstances, envy, evil omen, and thought over a devilish insinuation concerning creation, as long as nothing is given as evidence." It has been reported from him (s.a.w.) that:

"A Muslim is a brother to a Muslim, he shall not cheat him nor act treacherously towards him nor backbite him. His blood is prohibited, so is his property except by his permission..."

"In Islam, men are equal..."

"Men from their origin in Adam are alike and equal."

"Men are equal like the teeth of a comb."

"Allah has enjoined on the rich (to spend) what will suffice the poor, so if the poor suffer starvation Allah reserves the right to hold the rich responsible..." "Every loan to which a profit accrues is interest (riba)."

"I was not sent to amass wealth, but to spend it."

"Believers shall conduct their affairs according to their terms."

"Everything is lawful to you until you know that it is unlawful."

"There is no obedience to a creature where disobedience to Allah is involved." "The ruler is a shepherd and he is responsible for his flock." "Religion is nothing but love."

"Desire for your brother what you desire for yourself. Dislike for him what you dislike for yourself."

"Surely, your body has a right over you."

Just as the Qur'an and the Prophet's sayings constitute a source for legislation and regulating social life, his confirmation of actions he regards to be in conformity with Qur'anic legislation and his practical life and behaviour provide a wide horizon for legislative material.

These sources deal with such matters as the fitness of the legal rules, his relationship with the governors, army commanders and the community at large, his legal responsibilities, etc. This field of legislation forms the constitutional subject matter in modern legal jargon.

The narrations reaching us from the Imams of the Prophet's household, like the Qur'an and the Prophet's sayings, present copious materials for legislation. These narrations elucidate and serve as a commentary on the Qur'an and Prophetic tradition, sunna. This source material serves as foundations for legislation, addressing social problems and regulating human life with its various spheres. Islamic jurists rely on these fundamentals to deduce rules for novel conditions.

A careful study of the samples of these verses and traditions that run into hundreds of ideological and legislative texts with a fundamental and general nature, not limited by time or space, will reveal the secret behind the eternal aspect of Islamic legislation, its universality and ability to cover social evolution and development and play a leadership role in overall human existence. The law in its capacity as the source of order in human life contributes immensely in man's progress or backwardness according to the nature of the law and its world view.

Law, Ijtihad and Human Evolution

Among the most widespread terms in human existence is "The Law". All people understand the meaning of law and perceive its impact in daily life as a result of their encounter with the laws governing relationships and functions of human activity. The machinery of government and its various activities, the market, societies, parties, trade unions, courts of law, commerce, banks and financial institutions, companies, land tenure, traffic regulations in the cities, etc.; all of these issues are subject to the law which regulates them.

Thus, the law is defined as: "A set of rules which regulates individual behaviour in the society and the respect of which is guaranteed by the supreme authority even by force where necessary. This is the general meaning of the word law."

According to some scholars, the word Qanun (law) is an arabicized word borrowed from Latin. The use of the word spread in Arabic language and Islamic culture after the period of translation, when many works were translated into Arabic from Latin, Greek, Hindu, and other languages. The word "Qanun" is applied to any rule that orders the relationship between two or more things in a permanent, decisive or general way, whether it pertains to nature, thought or the society. Thus, "Qanun" is used in the fields of medicine, physics, logic and chemistry; in regulating social relationships such as international relations where we have international law, commercial

enterprises where it is called commercial law and in family relations, the term law of personal status is used.

While the law guarantees an ordered society in civil matters, it also contributes, in no small measure, to development and the evolution of human life if it is based on scientific foundations, and takes into consideration the reality of human existence. On the other hand, if a law is not built on a scientific basis and disregards the social reality it leads mankind to backwardness and retardation.

The Holy Qur'an has employed the terms `shir'ah', `shar", `shari'ah', `minhaj' and `hadd'; all of these mean way or path which regulates different social relationships. It states:

"He has made plain to you the religion which He enjoined upon Nouh and which We have revealed to you..." Holy Qur'an (Shura 42: 13)

"...For every one of you We appointed a law and a law..." Holy Qur'an (Ma'da 5: 48)

"Then We made you follow a course in the Affair, so follow it..." Holy Qur'an (Jathiya 45: 18)

"...These are the limits of Allah, so go not near them..." Holy Qur'an (Baqara 2: 188)

"...and whoever goes beyond the limits of Allah, he indeed wrongs his own soul..." Holy Qur'an (Talaq 65: 1)

The investigation of the sources and rules of Islamic legislation and legislative thought reveals a comprehensive programme and an encompassing organization for human life, covering all the incidents and situations, at the time of revelation, the new developments that result from changes and improve-ments in ways of living and the evolution of science and knowledge. The sources of this all-encompassing feature is the Legislator, Himself. The Omniscient, All-Powerful Lord invested Islamic legislation, via its texts and concepts, with a miraculous power of grasping the needs of mankind. The texts and concepts of the Shari`a covers the changes in ways of living through two main principles: The general, `amm' and the absolute, `mutlaq'.

To be able to appreciate the scientific nature, the precision and the ability of Islamic legislation to cover both the fixed and changing aspects of life, we shall introduce two legislative fundamentals:

- 1- Cases where a rule exists in the Book and the Sunna.
- 2- Permissibility of exercising independent judgement, `ijtihad', and the method of deducting rules, `istinbat'.

1- Cases where a rule exists in the Book and the Sunna:

By exploring the primary legislative sources, i.e., the Book and the Sunna, we learn that numerous forms of expression are used for the laws in these sources. This calls for a scientific method by which the laws can be comprehended and the ground for istinbat is prepared.

The most prominent forms of expressing the laws are the following:

a- A clear and unambiguous stipulation `nass' which carries no generalization and for which no conflicting counterpart exists. Examples of this rule include the forbidding of wine and the obligation of prayer and fasting.

b- A generalized rule which needs explanation.

c- A rule liable to conflict or contradiction with another, like a situation of permissiveness and the forbidding of a single matter or enjoining a thing and forbidding it. These type of conflicts are, in reality, only outward in nature for contradiction does not exist in Islamic legislation.

For this reason, scholars of Islamic jurisprudence have prepared scientific bases for combining the import of those seemingly contradictory narrations. For instance, they explained that enjoining a thing as well as proscribing it at the same time means disliking it `Karahah', considering the prohibition in such case as disliking not forbidding `Hurma', being that another statement carries permissibility in its import.

d- General and absolute rules that act as general legislative principles applicable to limitless areas coming under their domain.

e- The existence of statements specifying the general rule or limiting the absolute. For example, the permissibility of selling, expressed in the words of Allah, the Glorious: "...and Allah has allowed trading and forbidden usury..." Holy Qur'an (Baqara 2: 275), is limited by a number of conditions among which is the permissibility of items for sale. The general rule forbidding interest is specified by narrations, such as the saying of the noble Prophet (s.a.w.): "There is no (prohibition) of interest between us and those with whom we are at war; we can collect interest from them but we will not give it to them."

f- The justified legislation and a unity of criteria for some rules and enactments making their rules to affect other similar issues in human life, like the prohibition of wine, affects all substances producing the same effect as wine i.e., intoxication.

g- Laws which prohibit things that are less abominable, atrocious or harmful than those things

that these laws control, which are more harmful and abominable, for instance, the saying of the Almighty Lord: "Say not 'Fie' to them (parents)..." Holy Qur'an (Isra` 17: 23). This prohibition includes that which is worse than saying a word of contempt, as well as, enjoins the practicing of good and kindness to parents.

h- The existence of texts confirming exemption from obligation in cases in which we are in doubt concerning the existence of any obligation. The scholars of principles of jurisprudence term these statements as the principle of innocence (asl-ul-bara'a).

From the foregoing, we have seen all the cases in which the rule exists or probably exists in the Book or Sunna, expressing that it is not possible to apply the Shari`a law except in the first case, but in all the other cases we cannot know the law except by way of ijtihad and exerting scientific efforts.

2. Permissibility of Ijtihad and Istinbat:

We shall start by defining the term 'Ijtihad' as a concept and a technical term so that its meaning and value in enriching jurisprudence and Islamic law and treating new issues and problems accompanying the realities of life can be understood.

Definition of Ijtihad:

Literal Meaning: Al-Jawhari states in Qamus al-Sihah that: "Jahd and Juhd mean ability. Aljahd: Difficulty. The verb jahada is used to describe an utmost effort in something. And Ijtihad and Taj?hud means to exert one's efforts and take pains."

And Ragib al-Isfahani said: "Jahd and Juhd mean ability and difficulty. And Ijtihad means: Exerting one's ability and bearing troubles and difficulties..." Technical Meaning: The term Ijtihad is a technical expression common among jurists and scholars of principles of jurisprudence, 'usul al-fiqh'. It has a definition, limits of its permissibility, its method and proofs of its legal acceptability. The specialists define Ijtihad as: "The exertion of effort in deriving Shari`a rules. In this sense, to deduce or derive rules from the Shari`a sources is called Ijtihad."

Al-Akhund reported a scientific definition of Ijtihad from other scholars that Ijtihad is: "An aptitude that enables (its possessor) to deduce a secondary legal rule from the source, wether that ability to deduce is actually exerted or a practicable potentiality."

The permissibility of ijtihad and the extent of its legality has been a subject of academic debate for many centuries. The view held by the proponents of ijtihad held sway and the Muslims depend on it in deriving legal rules (Islamic laws) for various cases for which no clear rule occurs in the

Shari`a. We can understand from the definition of Ijtihad that it is the ability, occasioned by knowledge, to deduce or derive the law, the derivation of which needs learned effort. It also alludes to the act of actual deduction of a rule from its Shari`a (legal) proofs.

Therefore, Ijtihad is:

- 1- A scientific practice.
- 2- Derivation of a rule from the legal sources.
- 3- The scope of ijtiḥad is limited to the issues about which no clear and defined rule occurs. As a corollary, it is not permissible to attempt ijtiḥad in the case of a clear rule `nass'.

In view of this, a principle regulating and controlling the process of ijtiḥad and delimiting its scope is established by the following stipulation: "There is no ijtiḥad where there is a stipulation `nass'.

Thus, nass is defined as: "A legal proof whose import is specific to a defined matter and no other import is probable in respect to this proof." 4- From the definition we can realize that the rule issuing from independent judgement is the one susceptible to change. Another ijtiḥad, based on a different understanding of the same proof or dropping this proof for a more appropriate one, can change the first. The new ijtiḥad reaches a different conclusion and rule on the same issue.

Ijtiḥad plays its greatest role in deducing Islamic law with regard to new issues that daily arise in the human society, by deducing new rules from the principles and proofs, which renders the Islamic legislation capable of embracing human evolution in various fields. This capacity to cover new areas is occasioned by the existence of a number of elements constituting the backbone of Islamic legislation. Some of this elements are:

- 1- The Principle of Innocence `asl-ul-bara'a': The absolution from obligation as long as no categorical proof is established to confirm it.
- 2- Bestowing on the legal ruler `hakim al-Shar'i the competence to enact laws, in the light of the Book and the Sunna, suitable for existing situations and conditions in areas where no obligatory rules (enjoining or prohibiting) are found.
- 3- The generality of the text and its embracing of the new occurrences, as the law comprises what governs.
- 4- The absoluteness of the text and its embracing of the new occurrences, which broaden the scope of the absolute aspect of legislation thereby including limitless items.

In this way, the process of ijtiḥad becomes active, within the boundaries of these wider principles, deducing laws and rules for new situations in the areas of worship, politics, economics, social relations, health, food and drinks, etc. These new issues are thus declared as lawful or forbidden or obligatory, and / or make it valid or invalid, etc., as the case may be.

When a mujtahid encounters a new subject or issue, he starts the process of ijtiḥād by studying the substance of the individual laws to ascertain whether a clear ruling can be obtained for the matter at hand. Where such a rule is easily obtained, like the prohibition of wine or the obligation of prayers, he confirms the ruling for the new question. But if the rule is not obtained, then he turns to the general and absolute rulings which comprise the limitless matters of the laws, like:

"Anything which its effect is similar to the effect of wine, is unlawful" or "any act without which an obligatory act cannot be fulfilled is, itself, obligatory" or "no one shall harm nor be harmed" or "and never Allah will make for the infidels a way (to triumph) against the believers." Holy Qur'an (Nisa' 4: 141) and "fulfil the contracts" Holy Qur'an (Ma'ida 5: 1) and "and those who fulfil their promise when they make a promise" Holy Qur'an (Baqara 2:177) and "everything is (allowed) absolute except where a prohibition is declared" , and "what leads to an unlawful act is itself unlawful", or "every loan that attracts a benefit is usury".

If the question at hand does not come under individual rulings or the general and the absolute, then, the mujtahid resorts to the principle of innocence and deduces that we are free from any obligation. In this way, all the new areas are grasped by the Islamic legislation. It is worthy to mention that the said principle also is confirmed by proofs from the Book and the Prophet's Sunna.

With this explanation, the process of ijtiḥād and the steps necessary for deducing laws become clear. Islamic scholars have founded the field of principles of jurisprudence and laid down its general laws in a scientific method that caters to the work of deduction `istinbat'. They defined this field as "the study of the common constituents encountered in deducing legal rulings."

Similarly, these scholars developed rules in Islamic jurisprudence `Qawa'id al-Fiqhiyya' such as the rule of obligation `Qa'idatul Izzam', the rule of "no harm" `Qa'idatu al-Dharar', the rule of actual control over or possession of a thing `Qa'idat al-Yad', the rule of validity of a Muslim's deeds `Qa'idat Siḥat Amal al-Muslim', and the rule of liability `Qa'idat al-Dhaman', etc.

The two rules `Qawa'id al-Usuliyya wal Fiqhiyya' represent the legal principles that prepare the ground for deducing legal rulings. These principles serve the purpose of enriching Islamic legislation in a permanent way by supplying the prerequisites of istinbat.

The aspect of ijtiḥād, that is relayed to the issue of the fixed and variable among the laws of ijtiḥād is that of understanding; i.e., to understand the content of the texts, its import and aim. This is true both in the cases of specified individual situations or comprehensive general or absolute formulations. It should be noted that the scientific methodology in natural and social sciences is based on two fundamental issues:

1- Identifying the individual happening.

2- Identifying the general law applicable to individual issues, irrespective of time and space.

In fact, a science studying any aspect of human life is nothing other than a set of general principles and laws that are applicable to individual cases sharing similar conditions and situations, although not specified by time or space.

This definition of science is not only applicable to fields like medicine, physics, chemistry, psychology, and sociology, but, also to Islamic jurisprudence and legislation. The fact that some questions in Islamic jurisprudence are not covered by individual proofs and not by proofs of general or absolute meaning, signifies that concerning such questions, Islamic legislation does not prescribe hard and fast obligations and man shall be free to act as he wishes. The ruling will, therefore, be innocence and exemption from any responsibility.

Primarily, innocence `bara'a' is upheld as long as no proof of obligation is established, just as permissibility of all things is held sway until proof of prohibition is confirmed. By considering what Islamic legislation declared lawful through individual and general enactments, what is permissible according to the principle of lawfulness, and that about which man is exempted and his possible slip overlooked through the principle of innocence, we would conclude that large fields of man's existence are left for him to act according to his discretion.

Here, he can specify his course of action whether in collective organization and legislating for the good of the state, or issues affecting individual life. These areas are susceptible to variation and change subject to the bases of the rules and benefits in regard. We shall discuss these bases and acquiring benefits later on in, among other topics, the section on secondary laws.

It is important to note that unlawful matters are a limited few in Islamic legislation, and the purpose of prohibiting them is to protect humanity. They include prohibition of adultery, sodomy, wine, murder, theft, interest, hoarding, injustice, environmental pollution, backbiting, fraud, deceit, carrion, blood, etc. Thus, Allah, the Glorious states:

"Say: (O Our Apostle Muhammad) Come you! I will recite (unto) you what your Lord has forbidden to you..." Holy Qur'an (An'am 6: 151)

Legislation Between Subjective And Objective

The issue of law is of fundamental importance in human existence. A few questions arise in this regard. Who is entitled to enact and enforce this law and mete out punishment for its violation? What is the basis on which legislation is founded?

To answer these questions, let us have a look at the Islamic method of legislation. A perusal of this system, and of legislative thought, will establish the fact that Islam holds the view that the process of legislation should be based on scientific objectivity in specifying the issues involved in this process. Thus, the prohibition of alcohol, adultery or hoarding, the imposition of duty, keeping promises, abiding by terms of contracts and declaring, as invalid, contracts concluded under duress, the obligation to respect the human personality and to preserve the family, are all issues that must be scientifically and conscientiously defined, just the way questions in physics and medicine are defined.

In addition to this scientific identification, the process of legislation requires absolute justice and that the legislator be elevated above personal urges in their entirety, for they invariably render man unable to comply with scientific findings. This weakness and the interference of sick, spiritual conditions, natural urges, selfish desires and interests have a serious influence on the human lawmaker. As a result of this complex situation, the law takes the form of an expression of the legislator's will and a portrait of his personality. Instead of having scientific objectivity as its foundation, the law becomes a reflection of the whims, caprices and selfish interests of the lawmaker.

In this regard, Allah, the Glorious, addresses His Beloved Prophet, Muhammad (s.a.w.) saying:

"Then have We set you (O Our Apostle Muham-mad!) on a (definite) course of Law, so follow it, and follow not the vain desires of those who know not." Holy Qur'an (Jathiyah 45: 18)

A true knowledge of the issues pertaining to human behaviour, his economic, social, political, spiritual, health and other conditions, can only be attained after a complete grasp of all branches of knowledge and science; be they social, natural or biological, through experimentation, discovery and a careful study of all the relevant issues. This will enable man to appreciate the harmony and relationship that exists between all the aspects of his life, apart from grasping them individually.

To elucidate on this point, we shall give an example. Islam is law encourages that the child be shown love and compassion and given the chance to play during the period of childhood. The Shari`a frowns on ill treating or hurting the child, because that All-Knowing Legislator is conversant with his nature and with how our treatment of the child affects his behaviour later in

life. Studies in criminal psychology reveal that lack of love and compassion and ill treatment during childhood is among the most important factors responsible for aggressive and rebellious tendencies, crime and maltreating others.

In the same vein, child psychology confirms that play and freedom during the childhood years contributes in freeing one from anxiety and fear, which are among the conditions endangering a complex personality that invariably turns into a threat to society. It has also been established that licentiousness, hoarding, alcoholism and drug abuse are among the most dangerous anti-social behaviours that throw materialistic man into related diseases, crime and economic woes.

A perusal of the above mentioned statistics, pertaining to sex related diseases, crime, economic problems and psychological illness, confirms that the ignorance of the law-makers is the paramount reason for the condition that man is suffering from. It is also patent enough that man's knowledge of the harm or usefulness of his various actions does not result in enacting laws accordingly. What bars him from acting upon this knowledge and certainty is the influence of his personality, the result of which is legislation based on ignorance, selfishness, personal inclinations and corrupt desires.

Thus, positive law is far from being objective for it is no more than an enunciation of what the person of the human legislator, who is subject to influences of ignorance, selfishness and psychological conditions, harbours. It is true that sometimes the legislator achieves the desired goal in objectivity in certain enactments, but, respecting them definitely requires that the enforcer act out of an inner urge to the same effect. Such pure motives cannot be found except where true belief in Allah, the Glorious, the next world and its recompense exists.

From the foregoing, it is quite obvious that man stands in need of those indispensable qualities in order to attain a blissful life through scientific legislation, absolute justice and successful execution of the law. No doubt, this cannot be achieved except through the Islamic alternative alone, since the Law-giver, in this case, is free from ignorance, injustice and personal urges.

The Interplay of System, Law and the Conditions in Which it is Applied Among the questions studied, in the relationship between time, space and the setting to which the law and system applies, is the question of the comprehensiveness of Islam, the way it covers all problems and situations and its ability to present multiple solutions to a single problem. This is seen in many areas in such a way that these multiple solutions allow for a choice from among various Islamic alternatives.

The social setting under which we live has a direct bearing on how we specify the law relevant to our situation instead of an alternative one. For instance, Islam permits both private collective

ownership, promotes cooperatives, accepts economic freedom and allows the freedom of market forces and mechanism. The state is given the right of interfering in the economy and directing it, while the responsibilities of the individual and the community are defined, in such a way, that they become self-reliant,

and the state is not over-burdened with problems within the capacity of the individual or group. At the same time we encounter other legislations and concepts charging the state with responsibility toward the individual and the community, bestowing on it a big role and making it a great obligation on the state to cater to the individual and group.

As we study this phenomenon in Islamic legislation, we shall realize that there is neither contradiction nor conflict, rather, it represents comprehensiveness and prudence on the part of the law. The wide range of Islamic law allows the community to conduct its affairs according to its settings. The situation at hand, the nature of the present need and the interests of the community, together, are the factors that help in selecting the type of law to be applied.

The burden is better used of specifying which law governs on the community through its scholars, thinkers and political movements, and the state, because of its scholarly ability and competence in specifying legislative choices, and the right to act on anyone of them among the legal alternatives is procured by the custodian of the Islamic legislation and system.

For example, the individual and the market are allowed to direct economic activities where the state, through the studies conducted by its economic commission, scientifically confirms that market economy is in the interest of the community. On the other hand, the state interferes in the economy by directing its activities where economic interest of the community entails the adoption of a centralized economy. Thus, various choices are open to the Islamic state.

Islam and New Developments

In order to elucidate on the timelessness of Islamic legislation and thought, its relevance to every time and place and the fact that it covers new developments, it is necessary to define the following terms:

1- Appurtenance of the Legislation:

Each law undertakes the regulation of a given field, such as thought, security, economy, politics, social issues, etc., which the scholars of Islamic jurisprudence call law appurtenance 'muta'alliqat' of the rule. Thus, laws usually regulate various human activities, needs, relationships and

positions. By subjecting man's activities, and his needs, toward scientific study based on psychology, medicine and sociology, we can classify them all into four fundamental divisions:

a- Moral Needs, Psychological Feelings and Activities: Such as, security, love, stability, beauty, anxiety, fear, grudge, aggression, anger, ugliness,... etc.

b- Mental Activities and Needs: These include unveiling the unknown, acquiring knowledge and sciences, understanding the universe and life and what relates to the last two such as knowing the Creator and His worship,...etc.

c- Material Needs and Activities: Such as, food, the need for a spouse, shelter, clothing, treatment,..etc.

d- Social and Political Needs...etc.

Therefore, a scientific and objective system and legislation is that which satisfies, regulates and reforms these natural needs of man. This is so because they are needs attached to his very existence irrespective of time or space. To be in conformity with them and satiate them is to act according to truth and justice. The twin values of truth and justice are, themselves, constant and never change or vary. What changes is the desired type and amount of human needs to be fulfilled before truth and justice can be said to be achieved.

When human activities and needs are subjected to study and analysis in the light of modern sciences, it will be realized that man remains the same in his fundamental needs and urges for food, shelter, spouse, medicine, security and psychological conditions; such as, love and hatred, stability, fear, aggression, thinking, ...etc. No change, whatsoever, has taken place in him, from his creation to the end of his life on this earth. What is subject to change is rather the ways and methods of satisfying those personal urges, whether they are beneficial or harmful.

This analysis shows us that the needs of man are not, in themselves, susceptible to variation but the methods and ways by which he lives his life are subject to change and substitution. For instance, at the beginning of his existence on the earth, man was feeding on leaves, fruits and animals which he gathered or hunted from the natural and unadulterated world. He made his clothes from animal skin and some leaves, while his feet were the means of transport. Then, the means of procuring food, manufacturing clothes and transportation evolved, reaching its advance stage in our present time, and it will continue developing and becoming more sophisticated.

Then, what shall remain constant is the obligation of satisfying the bodily needs of man which shall be taken care of by the law and system in conformity with the permanent principles of truth and justice.

The religion of Islam sheds more light on the principle for answering those needs. Allah, the Most high declares:

"For you it is ordained that you shall not be hungry in it, nor (shall you be) naked, and that you shall not be thirsty in it, nor shall you feel the heat of the sun." Holy Qur'an (Taha 20: 118-119)

This is an established right of man, notwithstanding the fact that the verses were addressed to a particular person and on a particular occasion. All laws, enactments and systems revolve around this point. Therefore, the legitimate powers can issue the necessary laws, instructions and procedures, apart from the laws and concepts existing in Islamic legislation, to protect these human rights at all times and places. The natural needs of man; such as, security, stability and protection from all forms of fear, are unalterable material and psychological wants.

The Holy Qur'an explains the permanent principle concerning security and tranquility regarding life, property and honour in the form of a question asked by the angels. They were surprised that a creature who would spill blood and corrupt the earth would be sent as a vicegerent on it. This is recorded by His saying, exalted is His name:

"(Recollect O Our Apostle Muhammad) When said your Lord unto the angels: `Verily I (intend to) appoint a vicegerent in the earth' they said, `Will You (O Our Lord) appoint therein one who will cause mischief and shed blood, while we celebrate by Your praise and hallow You alone?'" Holy Qur'an (Baqara 2:30)

And the Almighty added:

"That he who slays any one (man), without (that being for) murder, or for mischief in the land, (it shall be) as though he has slain mankind as a whole." Holy Qur'an (Ma'ida 5: 32)

And He said:

"So let them worship the Lord of this House, (He) Who fed them against hunger, and secured them against fear." Holy Qur'an (Quraish 106: 4)

And He said "And indeed We have honoured the children of Adam, and We carry them in the land and on the sea and We provided them with sustenance of good things, and We have exalted them over most of those whom We have created, by (high) decree of exaltations." Holy Qur'an: (Bani Israel 17: 70)

And the Holy Prophet (s.a.w.) also said: "The blood, property and honour of every Muslim is prohibited to any other Muslim". He also said: "It is not permissible to take someone's property except with his consent". These declarations establish the legislative foundations for the necessity to ensure the security of man's life, property and honour (reputation and personal integrity).

These principles represent the constant aspect which never changes while the means and methods of ensuring security are never evolving. In the present age, the issue of security is a complex question, the study of which is taken up by scholars, agencies and institutions. Because of the complexity of this issue, strong measures are taken, employing available technology to ensure the existence of peace and tranquility.

Therefore, Islam, in its legislative capacity, considers it part of establishing truth and justice to ensure that man enjoys security; being a permanent value. The ways and methods of ensuring security are the aspects susceptible to variation, and it is not the duty of legislation to specify them, rather human intellect is responsible for choosing the appropriate means. In this regard, the shari'a urges the intellect to think, investigate and develop the means of livelihood. It also bestowed the legitimate ruling power, in all ages, the competence necessary for issuing instructions and procedures to preserve security, with the condition that such instructions and enactments do not contradict the timeless values of truth and justice.

So, this is how the Constant and the Changeable (part of the shari'a) deals with the whole human activities.

2- Legislation and Islamic Concepts:

Under this topic, it will be noticed that Islamic legislation and concepts serve two fundamental purposes in the life of man, they are:

- a- Conforming, at times, with and regulating the existing needs and activities.
- b- At other times, opening up new horizons and topics, thereby promoting the evolution of human activities.

From what we grasp about the permanent and absolute standard, Islamic legislation and concepts, in their various areas, are based on the twin standards of truth and justice, which, as explained above, are constant and never changing. For this reason, the Holy Qur'an has defined man's fundamental needs from the legislative point of view, basing its reasoning on these two standards. It considers the fulfillment of these needs a right necessitated by justice, for his life and the nature of his existence are closely associated with them.

This is elucidated by the Holy Qur'anic verse relating the divine address directed to Adam (a.s.) which represents a charter of livelihood rights acknowledged for the human species by divine justice.

Allah, the Glorious, declares:

"For you it is ordained that you shall not be hungry in it, nor (shall you be) naked, and that you shall not be thirsty in it, nor shall you feel the heat of the sun." Holy Qur'an (Taha 20: 118-119)

And the Qur'an proclaims that Islamic law is based on truth and justice:

"And with truth have We sent it down and with truth it has come down; and We sent not you (O Our Apostle Muhammad!) but as a Giver of glad tidings and as a Warner." Holy Qur'an (Isra' 17: 105)

"And We created not the heavens and the earth and what is between them two but with truth." Holy Qur'an (Hijr 15: 85)

"Verily, Allah enjoined justice and benevolence (to others)." Holy Qur'an (Nahil 16: 90)

It is very clear that truth and justice are permanent values on which all systems and human behaviour and transactions are based. Thus, it is man's right to have his material needs fulfilled. To give this right is justice, while depriving it is a form of injustice. It is also among his rights to live in peace, security, stability and honour, and to secure these is justice, while failing to fulfill these needs is obvious injustice. We also read in Islamic law that establishing equality between possessors of rights when giving them their rights, is also part of justice that must be executed in its capacity as a permanent principle.

Thus it becomes manifest that change only affects subjects such as means and methods like means of medical treatment, transportation, education, security, production, ...etc. All of these subjects are not a product of any social school or lawful legislation, but they are the result of man's scientific endeavour, his desire to refine his living conditions and ensure comfort, irrespective of the type of thought and the kind and level of social system involved.

The role of law and, the sociological school concentrates on encouraging the exercise of thought, and regulates and supports its realization. Similarly, Islam attaches great importance to answering the needs of man and working toward their fulfillment and regulation. Islam urges man to seek knowledge, to work for the betterment of life and illuminate his thoughts with knowledge and science. It also opens a section of its sacred legislation, which is the free legislative zone, flexible laws, etc.,

about which we shall throw more light on subsequent chapters, Allah willing . All these provisions open up the horizons of Islam for the acceptance of new developments, changes and various human innovations capable of serving humanity and securing its interests. It is, therefore, a thought and legislation which caters to the permanent requirements pertaining to human existence, psychologically, mentally and physically, in accordance with the level of means and methods at his disposal for all times and places.

An Analytical Study of Religious Law and its Criterion

Before starting a study and analysis of religious law it is necessary to present its scientific definition, so that our study and analysis can take a complete form. Definition of Rule: The great jurist, Sayyid Shahid Muhammad Baqir Sadr defined rule as: "A legislation emanating from Allah, the Most High, for the purpose of regulating and directing human life."

Allamah Sayyid Muhammad Taqi al-Hakim, transmitted another definition of rule, which is: "A legal considering pertaining to the deeds of the bondsmen (of Allah) either directly or indirectly."

Scholars of Islamic jurisprudence have studied the religious law and resolved the principles, constituting it, into three elements. These are:

1. Criterion 'milak', (the benefit or harm, calling for the enactment of the law).
2. Will (the will of the law maker which appertains the criterion).
3. Consideration (a verbal formulation of the will of the law maker which signifies the criterion).

Now, let us look into the criterion of the law, for its relation with the Constant and Changeable part of the Islamic law. 1-The Criterion (milak) of the Law:

Literal Meaning: It is recorded in Mu'ujam-ul-Wasit that: The milak of an issue is its constituents and epitome or its essential elements. It is said that 'the heart is the milak of the body'.

Technical Meaning: Scholars of Islamic jurisprudence have studied the issue of milak or criterion, defined it and founded legislative concepts on this definition. From the literal meaning they extracted the technical one. Therefore, the milak of religious law is its constituent and spirit. We can analyze the course of decreeing of rules and their enactment by the Legislator - i.e., explaining the legal philosophy of legislation - as follows:

Islamic legislation is founded on a scientific principle denoting that in every act, intention, word or issue there is essential benefit or harm. This is the principle of essential beauty and ugliness. Thus,

drinking alcohol, adultery, injustice, gambling, abnormal sexual relations, stealing, usurpation, chaos, lying, fraud, hoarding, interest, rancor, etc., are in, themselves, harmful practices, i.e., there is essential harm in them. On the other hand, justice, truthfulness, trustworthiness, prayer, love and respecting others, order, security, marriage, commerce, agriculture, seeking knowledge, medical treatment, etc., are deeds that ensure benefit and public interest, i.e., they are, in themselves beautiful.

This benefit or harm is what is known in Islamic jurisprudence as criteria of rules 'Milakat al-Hukm'. 2- Will:

The Exalted Lawmaker considers the different issues, questions and practices with complete knowledge, wisdom and justice. If He finds some benefit in a particular thing, He wills it and decrees a rule proportionate to the amount of such benefit in order to ensure it. This rule may take the form of obligation or permissibility or desirability. If He finds that a particular practice, issue or question is harmful He abhors it and enacts a law prohibiting man from performing it, in proportion to the degree of its harmfulness. This law may be one of forbidding 'tahrim' or undesirability 'karahah'.

In this way, legislation always depends on the criteria and the will of the Lawmaker, which He reveals through legislative discourses (verbal expression), and takes the same direction as the criteria. Example: The saying of Allah, the Most High: "Forbidden unto you is the Dead (that which dies of itself) and blood, and flesh of swine." Holy Qur'an (Ma'ida 5: 3), and His saying:

"lawful have been made for you the good things." Holy Qur'an (Ma'ida 5: 4), and His saying "Verily, Allah enjoined justice and benevolence (to others)." Holy Qur'an (Nahil 16: 90), and like His saying: "and for the women shall be similar rights (over men) in fairness." Holy Qur'an (Baqara 2: 228), and like the saying of the Holy Prophet (s.a.w.): "The ruler is a shepherd and (he) "Verily, Allah enjoined justice and benevolence (to others)." is responsible (for the affairs) of his flock".

So the will of the Lawmaker is founded on the following fundamentals:

- a- A complete knowledge of the issues He is enacting for, being conversant with their beneficial or harmful aspects.
- b- Wisdom: It means to assign a thing to its rightful place. It implies that the knowledgeable one acts upon his knowledge without vanity.
- c - Justice: The third element the will of the Law maker has to depend on, so that the enactment will ensure the benefits and ward off harm, is justice. Knowledge alone will not suffice for a legislator to be desirous of establishing goodness and benefit so long as he is not a just one who does not act on injustice and tyranny in the course of legislation.

3 - Consideration (I'tibar):

This denotes a formulation in the form of a decree by which the Lawmaker reveals his will. By this formulation, the will of the legislator, which alludes to the criterion of legislation, is known. Such formulation includes prohibition, obligation and permissibility.

Shahid Sadr has undertaken the analysis of the rule denoting responsibility `hukm al-Taklif' and threw more light on the position of the criterion vis-à-vis the rule. He said: "When we analyze the process of the rule denoting a responsibility such as obligation - just as any master obliges in the customary way - we will find that the rule passes through two stages. The first one is the stage of 'firmness' `thubut' and the second is that of confirming `ithbat' and manifesting. In the first stage the master specifies what the deed possesses of benefit - and this is what is known as milak - till he perceives that this benefit reaches such a level as to create a ' will' concerning that deed, proportionate to the degree of the perceived benefit.

Thereafter, the master articulates his will through a decree in the form of a consideration. Then, the deed is regarded as a responsibility on the obligatee `mukallaf'. Therefore, in the stage of affirmation (thubut), there is criterion `milak', will `iradah' and consideration `I'tibar'. `I'tibar' is not a necessary element of the stage of affirmation, rather it is normally used as an act of formulation customary to legislators and men of intellect, and legislators follow their course in this matter".

This explains the principles of the rule and that the criteria of laws are the reason behind enacting them. And these criteria decide the permanent and the variable among the laws.

As it is quite evident, the criterion or benefit is the backbone of law which the will of the legislator aims at. This will is formulated into a legislative articulation addressing the obligatee. At the stage of receiving the laws by the obligatee, the role in comprehending the "consideration' in preparation for executing the law is manifested. We shall study this issue later - Insha Allah - to remove the vagueness, as regards to what is human and what is divine, in Islamic legislation.

Unity of Criteria

Being conversant with the meaning of 'criteria' (milak), it is beneficial to point out that a lot of issues have a combined criterion although religious law is represented only by some of these

issues under a specific topic and a given title. In this case, is it possible to consider the criterion as basis for expanding the area covered by this law, by encompassing other situations of the same criterion but unspecified by the lawmaker, or not?

Studies by jurists and legal experts have answered this question in the affirmative. They consider unity of criteria as an acceptable basis for similar application of the law just as they regard a joint cause 'illah', that is mentioned in the text, a foundation for including other conditions sharing the same cause.

A clear example of this can be seen in the letter of Imam Ali (a.s.) to Malik al-Ashtar where he declared that the criteria for forbidding the hoarding of foodstuffs is the need for it, or that hoarding will cause distress or harm to people's lives. The Imam elucidated on the reason for prohibiting such practice, saying: "Behold - along with this - that most of them are very narrow minded and awfully avaricious. They hoard goods for profit and fix high prices for goods. This is a source of harm to the people and a blot on the officers in charge. Stop (people) hoarding because the Holy Prophet (s.a.w.) has prohibited it."

Based on the principle of the unity of criteria, the jurist declared that the hoarding of items, whose hoarding will result need or harm or distress, unlawful, although the narrations 'hadith' on the prohibition of hoarding mentioned foodstuffs only. Since the criterion for prohibition was that the people stood in need of the foodstuffs or would be inflicted with harm as a result of hoarding, and also, since need, distress or harm is regarded as the criterion for that legislation, so, whenever it is present in respect to goods, benefits and services, prohibition comes up for discussion.

Instances of Changes In Rules As A Result of Changes In Criteria

While studying the laws, whose essence revolve round the issue of criteria, we encounter legislative terms established by the Glorious Lawmaker in consistence with the principles of knowledge, justice and wisdom. These terms explain the areas of change and permanence of a law dependent on the change or permanence of the criterion. They are:

- 1- Concession 'rukhsah and Incantation 'azimah'.
- 2- Initial and Secondary rules 'ahkam al-Awwaliy was Thanawiy'.
- 3- Giving priority to the 'more issue command' in case of a clash between two issues.

To define and specify, those areas are under the:

- 1- Competence of the state.
- 2- Competence of the obligatee himself.

The glorious Legislator, through His knowledge, justice and wisdom knows that the relationship between the law, the obligatee and the appurtenance would be affected by contingencies and new developments, and based on those contingencies the interests or benefits would change. This, in turn, causes a variation in the law in the light of those contingencies and developments.

We shall introduce the more prominent areas in which one law changes into another after the change in the benefit, which constitutes its backbone and necessitates enactment.

1- Concession and Incantation:

The book Mukhtar Sihah al-Lugha reports: "To resolve `azama' on something is to intend to bring about the act and resolve on the same."

"Concession `rukhsah' of an affair is the opposite of insistence on it." These are the definitions of rukhsah and azimah (emphatic formulation) in their literal sense. As for their technical meanings as rendered by the scholars of jurisprudence; Amadi said: "Azimah literally means tender and this meaning is taken from the strong obligation or promise taken by the heart on a matter... but in the field of divine law, azimah means what is binding on a bondsman as a result of the obligation imposed by Allah, the Most High, such as worship, khums and the like."

He defined rukhsah as: "The rules enacted for the situations of an excuse although the reason for prohibition exists." Azimah is also defined as: "General rules enacted by Allah in their capacity as original laws, such that they do not specifically accept a particular condition or a particular obligatee."

Rukhsah is also defined as: "What is enacted of the laws, as an alliviation for the obligatee, in special cases which necessitate this alliviation." The terms rukhsah and azimah have been mentioned by the Noble Messenger (s.a.w.) in what pertains to legislation, like his (s.a.w.) saying: "Allah likes this concession `rukhsah' to be availed of just as He dislikes that (people) should commit sin."

He also declared: "Allah likes that (people) should avail themselves of His concessions just as He likes that His determined rules `aza'im' be abided by." A study and analysis of the principles of classifying laws into 'determined' and 'concession' reveals that Islamic law has treated the subject of fixed and variable laws.

The rules, in Islamic law that denote responsibility are:

- a. Obligation
- b. Prohibition

They are the two rules of obligations, called azimah.

The Permissible `Mubah': It comprises the 'absolute' permissible, the desirable and the disliked.

There is a concession `tarkhis' i.e., permission for leaving out a responsibility and the obligation or prohibition is dropped, like the exemption of the old who find it difficult to fast and permission to drink alcohol when a person who drinks it compelled by circumstances, or under duress as long as the excuse last.

This shows that Islamic law has taken into consideration the conditions of a person or group and the contingencies that necessitate a change in rules affecting individuals or groups, so long as the casual factors remain. This means that the conditions under which a law is applied, and its influence on the applier, play a role in the constancy, or otherwise of the law.

Thus, the change will be relative in nature and limited by the causes of the changing. It is not an absolute change which is, in reality, an abrogation (replacing one law with another in toto), rather it is a process by which acting on a law is suspended while a changeover to another is effected till the causes of this suspension expire.

This is a result of the fact that the criteria is subject to the benefits or harms existing in the essential nature of the act, like taking alcohol and fasting. Drinking alcohol is an essentially harmful practice and its harmful relationship with the human body and mind can never change. For this reason its prohibition can never change, either. However, a concession is granted to one under duress to drink alcohol so as to arrest a more dangerous situation. Such a situation could be excessive thirst that could lead to death, in which case, one is allowed to partake in only that amount of alcohol necessary to deliver him from imminent death.

Allah, the Most High, states:

"And whoever is forced to it without the desire (for it) nor to transgress (the limits) then it is no sin on him." Holy Qur'an (Baqara 2: 173)

2- Initial and Secondary Laws:

Among the topics on legislation which are related with the criteria and the changing of rules is the question of initial and secondary rules. This topic represents a wide area of addressing the issue of change on the subject of general living conditions, politically, economically, and individually, concerning worship, ...etc. The classification of real laws `ahkam al-Waqi'iyah', into initial and

secondary rules, is a direct consequence of putting into consideration the criteria of laws and what may affect their appurtenances, subjects, and conditions, which in turn, guarantee the regulation of the laws and specify man's duty, vis-à-vis contingencies and new developments. A change in the situation calls for a change in the law.

To make the discussion more perspicuous, let us define the initial and the secondary rules. Allamah Sayyid Muhammad Taqi al-Hakim defined the initial real law `hukm al-waqi'iy al-awwaliy' as: "The rule assigned to a thing initially with regards to its original nature, i.e., without considering any contingency that might affect it, like most of the real and conventional, and likewise, those that denote responsibility."

And he defined secondary real law as: "What is assigned as a rule, taking into consideration certain conditions that might surface and necessitate a change in the initial law. For instance, drinking water in its initial law is only permissible `mubah', but where it acts as a means of saving life, it becomes obligatory; and likewise, trades which serve to regulate our living are regarded as general obligations `wajib al-Kifa", but, where only a particular individual or group can pursue those trades, they turn into individual obligation `wajib al-Aini' on the said individual or group."

After these two definitions, he commented on replacing an initial law with a secondary one saying: "The realities of many of the initial laws change as a result of secondary effects. An obligation may change into a prohibition, a prohibition into permissible into desirable and so forth. This reality shows the flexibility of Islamic laws and how they conform to different situations."

The study and analysis of this legislative principle - the principle of changing the law from a particular verdict to another - taking into view the contingencies that change the criteria (benefit and harm), reveals the capability of Islamic legislation, to take care of a situation and its new developments, thereby specifying the meaning of the fixed and the variable laws in Islam. A practical example, whereby a change in criteria leads to a change in the verdict from permissibility to obligatory...is this:

Islamic legislation holds the sale of goods and currencies permissible in an initial rule, and regards it obligatory where it is required to ward off an economic ill, and thirdly, considers it prohibited in case it causes harm to the economy of the nation. To make it more concrete, the exporting of gold, currencies and merchandise is a permissible act, although Islamic law will declare it unlawful when it turns detrimental to the economy and financial position of the community.

Thus, Islam laid down the legislative principle based on which an initial rule changes into a secondary rule. The alteration of the permissible to the obligatory and, then, to the prohibited, and vice versa, based on contingencies affecting the situation, is a proof of the existence of the

fixed and variable laws in the Islamic legislation. When these new conditions are removed, the initial rule reverts and its violation is not allowed, because the benefit or interest now lies in acting on the initial rule. An example of this is foreign investments, as they are permissible in the initial rule, while they would be prohibited where they result in political and economic subjugation by a foreign power.

3- Rivalry and the Giving of Priority to the More Important Over the Important:

Rivalry 'tazahum' is a technical term which means: "The mutual contradiction of two laws as a result of the practical inability of an obligatee to discharge his obligation with respect to both of them."

This, in reality, is the clash existing between two obligations, or an obligation and a prohibited action, with regard to time, place or the ability of the obligatee, in such a way that he could not be able to discharge both duties, together, in that particular period of time, place or by the power at his disposal. Therefore, he has no recourse but to act according to either one of the two laws. This kind of clash, in the view of legislative concepts, turns into a conflict between laws, and the obligatee's duty is to give priority to the more important criteria of the two laws. Shahid Sadr elucidates more on the way of resolving the clashes between the laws, saying:

"The way of resolving the clashes between laws is to give priority to the one with the more important criterion, over the other." Among the example of the hukm of a clash between two rules, is the clash between performing prayer and that of rescuing a drowning man or the wounded, whom it is feared might bleed to death unless immediate help is rendered. In this case, rescuing the drowning or wounded is given priority over prayer. And also like the clash between performing Hajj and Jihad, where the most important among the two is given priority over the other. In most cases, Jihad is preferred over pilgrimage, because of the necessity of defending and protecting the faith, interests and the nation.

These instances show that the principles of resolving a contradiction discards one of the duties i.e., it discards the obligation or prohibition in respect to the less important rule, as long as the obligatee is busy with the more important one.

Another area in which laws are subjected to the phenomenon of change is that of equality between the level of benefit and that of harm in a given activity, whether it is political, economic or otherwise. This fact is formulated into a jurisprudential principle which states: "To ward off harm is more important than deriving benefit." This legislative principle refers to situations in which the law changes due to a change in the criterion.

When a practice, the exercising of which is initially permissible or obligatory, is affected by new conditions under which a benefit and a harm are simultaneously caused by exercising it, it comes under the principle of 'warding off harm is more important than deriving benefit'. In this case, permissibility or obligation depends on whether the action will bring about detriment.

Similarly, it becomes obligatory to refrain from a practice which is initially obligatory, where a harm equivalent to the benefit occurs, if it is done. For instance, there could be a benefit in severing political ties with a country which treats the Islamic nation badly, by engaging in propaganda attacks, but, on the other hand, cutting ties with that country is militarily detrimental to the said Islamic country. In this case the benefit and harm is weighed, thus, the principle of 'warding off harm is more important than deriving benefit' is applied.

Fundamentals of Legislation and Implementation Laws

"He it is Who fashions you in the wombs (of your mothers) as He likes, There is no God but He, the All-Mighty, the All-Wise. He it is Who has sent down to you (O Our Apostle Muhammad) the Book of it there are (some) verses decisive these are the Basis of the Book, and others are ambiguous; But those in whose hearts there is perversity, they are after that which is ambiguous therein seeking to mislead and seeking to interpret (to suit their selfiish motives) while none knows its (hidden) interpretation except Allah and those firmly rooted in knowledge, say they: We believe in it, all is from our Lord but none mindes save those endowed with (wisdom)." Holy Qur'an (Al-e-Imran 3: 6-7)

These two verses discuss about creation and legislation, calling our attention to the fact that the Creator of man Who knows the nature of his bodily, psychological and ideological constitution, is the One Who decreed the laws that regulate his life. He is completely conversant with man, his conditions and various aspects of his life, with respect to creation and legislation. The Almighty, by His omniscience, justice and wisdom, decreed that legislation be based on a set of general fundamentals of thought, known in the Qur'an as the 'Mother of the Book' `Ummul Kitab' i.e., a set of fixed principles on which the entire thought and legislation is built. Therefore, the Qur'an differentiates between the fundamental principles, which serve as the bedrock of legislation and are fixed and unchangeable,

on the one hand, and the legal details for executing those principles, on the other. The substance for those general principles forms the fundamental subject matter, the spirit and purpose of the detailed laws. Some western researchers such as Montesque referred to those fundamental principles as the spirit of the law while some Islamic researchers called them 'purposes of Islamic law `maqasid al-Shari`a.'

One of the classifications of objective legislation and studies by the jurists divides legislation into fundamental law, i.e., the constitution and general law. This classification, to a large extent, approaches the principle explained by the Qur'an in the above mentioned text. It points to the permanent which does not change, and the laws that can be affected by change. Another example is the Lord's address to Adam (a.s.), as the representative of the human species, which conveys the charter of rights to livelihood. This charter represents the permanent, fundamental idea of legislating man's livelihood. Allah said:

"For you it is ordained that you shall not be hungry in it, nor (shall you be) naked, and that you shall not be thirsty in it, nor shall you feel the heat of the sun." Holy Qur'an (Taha 20: 118-119)

The Almighty Allah spells out that the provision of food, clothing and shelter is a natural right of man, and that that principle is permanent; never accepting any change. For the execution of this principle, various laws, concepts and ethical values have been enacted. These include the laws on the religious taxes of zakat and khums, prohibition of amassing wealth, hoarding and manipulation of prices. In addition, the government is bestowed with the competence to issue the necessary procedures for executing that noble principle practicably for the benefit of mankind. Within the area of competence enjoyed by the Islamic government is the process of charging extra taxes, interference in economic activities, such as banning the practice of hoarding, and the controlling of prices, wages, insurance, etc.

While looking into the studies and analysis of the criteria of law, we have seen how variation and change occur through the agents of relaxation of laws, secondary laws, clash of laws, etc. From these facts, we realize that there exist fundamental enactments that are permanent and other legislations for the execution of those fundamental principles. Some laws, in the latter group, are susceptible to change under certain standards and conditions already described.

Among the fixed legislative principles is what is carried by the holy verses on the rights of women:

"And of His signs is that He created for you from yourselves, mates that you may dwell (inclined) unto them, and caused between you love and compassion." Holy Qur'an (Rum 30: 21)

"but deal kindly with them (women)." Holy Qur'an (Nisaa' 4: 19)

"Let him with abundance spend of him abundance." Holy Qur'an (Talaq 65: 7)

"And for the women shall be similar rights (over men) in fairness." Holy Qur'an (Baqara 2: 228)

For the purpose of executing those fixed principles, Islam enacted laws that serve as legal

formulations of those principles. Some of these implementation laws are subject to modification and that occurs when their prerequisites and criteria change as a result of external contingencies and conditions.

From these Qur'anic texts we can deduce that there are fundamentals and pivotal principles on which laws and concepts are based. These pivotal issues are called Ummul Kitab. They are the pivot and revolving around them are the rules and enactments, either permanent or variable, that play the part of executing the substance and the purpose the fundamental principles. As such, we find that the Prophetic sunna (tradition) consists of three kinds of enactments in the area of practical execution. They are:

- 1- Governmental Legislations (these emanated from the Prophet (s.a.w.) in his capacity as the ruler)
- 2- Initial Rules
- 3- Secondary Rules

The State and the Vacant Zone of Legislation

In Islam, the Islamic state represents the highest power in the community. It is a political power charged with the application of Islamic law, on the platform of the society as a whole. Because of this, it has been granted enough legal authority and competence to enable the government to undertake the practical application of Islam and leading the ummah in accordance with its principles. This competency can be divided into:

- 1- Application of Islamic law and system in different areas.
- 2- Competence in enforcing the law. The Islamic state has the power to compel individuals to abide by the laws and system of Islam, including the application of force, in a legal way, for the execution of Islamic legal will.
- 3- Legislative Competence: Surely, the Legislator of Islamic laws and enactment is Allah, the Most High, and the Book of Allah, 'the Noble Qur'an', and the pure Prophetic tradition are the custodians of the law and legislation. However, the Islamic state is bestowed with a level of competence that must be employed in the light of the Book and the sunna. We shall mention the salient features of that competence, here:

a. Islamic legislation has granted the Islamic state the authority to apply the more important law, in case of clash, between obligatory duties, and in a case of equivalence of good and harm as they affect the social set up, where the state specifies either obligation or prohibition. Competence in

this case, rest on the ability to determine the subject and choosing the more important over the less important.

b. The Islamic state has been granted the competence to specify responsibility and enforce it in respect with a general obligation, which can only be discharged by a particular individual or group. This general obligation, therefore, changes to a personal one to be discharged by the said individual or group. Such cases include medical treatment, defence, administrative duties and other works of a general nature.

c. Suspending an initial rule and changing over to a secondary one when social conditions necessitate it. d. Filling up the vacant legislative zone: Shahid Sadr has discussed about the vacant zone, and competence of the Islamic State, in a clear and adequate manner. For a better understanding of the vacant zone a concise introduction is not out of place.

Analysis of the legislative areas, in Islam, make it clear that there are questions, subjects and situations, whose rules have been explained and specified by the shari'a in a definite way, while other areas are left unspecified, thereby leaving the duty of determining the appropriate laws and rules, for those regions, on the shoulder of the state 'waliy-ul-amr', who will fill that gap by specifying the laws after considering the existing conditions. This is the reason why Shahid Sadr chose the name vacant zone 'mantiqat al-Faragh', for this area of Islamic legislation. The scholars of other Islamic schools of jurisprudence discuss the matter under the title Masalih al-Mursalah.

Despite some disparities in analysis, interference and articulation, the fundamental, common idea in this discussion is this; that there exist areas in which the law is not specified. Thus, law making is left in the hands of the legal ruler who exercises his judgement according to existing interests and benefits, although this judgement is subject to change and substitution in accordance with the coming conditions and situations. This legislative topic comes under the fixed and the variable aspects of Islamic jurisprudence.

Shahid Sadr based his reasoning on the indisputable theological fact that the Messenger of Allah (s.a.w.) possessed, in addition to his social personality, a prophetic personality, in view of the fact that he received revelation from Allah, the Most High, and conveyed the divine message. The Prophet (s.a.w.) had a third personality, which is that of the ruler, since he exercised authority over the Muslims. The laws, rules and position taken by the Messenger of Allah (s.a.w.) have been studied on this basis. We can classify what emanated from him into two parts:

1- What comes from him in his capacity as the Prophet and a conveyer of Allah's message. Such laws are permanent, no change or substitution affects them, except as a result of contingencies like necessities, harm, clash, etc. This comes to an end with the termination of the contingency.

2- What comes from him (s.a.w.), in his capacity as the ruler and guardian of the Muslims, by judging and protecting their common interests within the conditions that existed during his time, such as government administration and issues bordering on the economic life of the people. These practices of the Noble Prophet (s.a.w.) were not of a fixed nature, rather they were subject to change and substitution. This is so because the Prophet (s.a.w.) received this competency as any ruler would. His duty was to select rules and practices appropriate for establishing what was beneficial in areas not specified by divine legislation. This competency naturally shifts to the one who succeeds the Prophet (s.a.w.) in administrating state affairs, with the condition that he must be suitable for this great responsibility in the view of Islamic laws.

Shahid Sadr discusses the subject of the 'vacant zone' when he evaluates the Islamic school of economics, saying:

"...the Islamic school of economics is comprised of two parts: One of them is completed by Islam in a finalized manner, accepting no change or substitution. The second represents the 'vacant zone' in this school, the filling of which rests on the state or the guardian (of the Muslims) who will fill it according to the requirements of the overall purpose of the Islamic economics in every age....". He continues on the 'vacant zone' saying:

"...the Great Prophet (s.a.w.) has filled that vacuum with what the purpose of the shari'a required, in the area of economic activity, in the light of the conditions under which the Islamic society was existing. When he undertook that work, he did not do it in his capacity as a Prophet, conveying the divine law which is fixed for all times and places, in which case his act of filling that vacuum would have represented permanent legislative articulations. Rather, he filled the gap with his judgements as a guardian ruler charged by the shari'a with the responsibility of supplying the missing laws to fill the gap considering the circumstances."

Then, he wrote in another place concerning the legislative 'vacant zone' and the substitutes in independent judgement, the competency of the government and the state in filling up that vacuum, and choosing a substitutional independent judgement, and likewise its relationship with the fixed and variable, as follows:

"Islamic law is the source of legislation in the sense that it acts as the source from which the constitution is derived and in its light the laws in the Islamic Republic are enacted, and this is in the following ways:

First: The Islamic laws that are known to be permanent by way of absolute juristic clarity are regarded, to the extent to which they touch on the social life, as a fixed part of the constitution, whether they are clearly asserted in the constitutional document or not.

Secondly: Any position of the Shari`a that carries more than one interpretation is regarded as falling into the region of numerous substitutes of a constitutionally legal exercising of independent judgement. The choice of a particular substitute is referred to the legislative authority that the community exercises according to the general good.

Thirdly: In the case of the absence of a decisive position of the Shari`a in prohibiting or declaring an obligation, the legislative authority, representing the Ummah, has the right to enact the laws it regards to be in the interest of the nation, with the condition that they do not contradict the constitution. The area to which these laws belong to is called 'vacant zone'.

This zone covers all the conditions in which the Shari`a gives the obligatee the choice to assert his position. Here, the legislative authority reserves the right to impose on him a specific stand, in conformity to what it judges to be of public interest, with the condition that this act does not contradict the constitution." "These laws consist of two types of elements. One of them is the permanent element and they are the laws stipulated in the Book and the Sunna, of what is related to economic life. The other type is the set of flexible elements. They are those elements that are derived - according to the nature of a given stage and condition - from general Islamic indicators which fall within the circle of permanent elements. Therefore, some permanent elements serve as general indicators and form the basis for specifying the flexible or unstable elements required by the nature of a given stage."

The study and analysis of the concept of the vacant zone in the view of Shahid Sadr leads to the fact that this legal principle subscribes to these points:

1- There are definite enforceable laws enjoying absolute juristic clarity to the effect of prohibition or obligation, and there are other areas where Islam did not specify any enforceable laws, rather the obligatee is given the right to choose.

2- The Islamic State (the leader of the Ummah) is the one bestowed with authority to enact the laws for filling those vacant areas, according to the situation at hand. These laws are subject to change according to the existing social conditions.

3- The basis for defining the nature of such laws is the public interests.

These three elements constitute the pillars of this theory. On analysis of the theory of public good 'masalih mursalah' or the theory of istislah (deem useful), we find that, based on the view of some scholars who subscribe to it, there is much conformity with the theory of the vacant zone.

Allamah Sayyid Muhammad Taqi Hakim, in elucidating the meaning of masalih mursalah, reports from the authorities on this theory, saying:

Al-Taukhi defined it by saying: "It is the cause that leads to the purpose of the legislator, in worship or custom". What he meant here by worship is: "What the Lawmaker meant to be His right", and by custom he means "what the Lawmaker intends for the benefit of the bondsmen and the regulation of their livelihood and conditions."

After this presentation, he summarizes their views in defining al-Irsal in the following words:

"They have differed in defining al-Irsal. What some of them appear to be saying is that its meaning is non-depending on the legal text and that the intellect is left alone in discovering it. Others assert that al-Irsal is the non-depending on a specific text and that it comes under general texts of the Shari`a. Based on the disparity in defining irsal, the definition of masalih mursalah also varies.

Ibn Burhan defines this term as "what is not affiliated to a general or specific principle." Ustaz Dawalibi is of the view that masalih mursalah falls in the category of laws covered by a general principle. While talking about istislah, he said: "Istislah, in its actual sense, refers to a type of rule based on opinion which is based on the people's interest, and this occurs in every issue whose rule is not defined in the Shari`a, and there is no similar case in the Shari`a so that analogy could be exercised. Rather, a certain rule is extracted based on general principles of the Shari`a which states that any matter without a benefit is of no use, as far as Shari`a is concerned. And an instance of such principle is the saying of Allah, the Most High: Holy Qur'an "Verily, Allah enjoines justice and benevolence (to others)." (Nahil 16: 90), or the saying of the Holy Prophet (s.a.w.): "No one shall harm or be harmed."

Thus, it is clear to us that a legal theory is discussed under two different titles- by two different groups of scholars - and they are 'mantaqat al-Faragh and 'Masalih al-Mursalah', and arrive at similar conclusions. The conclusion is that there is an area in which the Legislator did not specify a clear rule and the affair is left to the living generation to judge the benefits thereof.

This topic is among the most important topics of the fixed and variable aspects of the Islamic legislation, which remain flexible and open, to cover the results of development and change in human life.

Among the instances of open and flexible rules, is the field of terms and contracts which covers a wide area in the life of mankind. Islam has given the people the chance to conclude deals and contracts and use different terms in their daily transactions, based on the civil realities, with the condition that those terms do not contradict fixed Islamic principles.

Among such instances is that Islamic legislation provides that divorce is in the hand of the husband and also he can appoint a proxy to divorce the wife on his behalf. Thus, the jurist infer

from these provisions that a man can appoint his wife as a proxy so as to divorce herself. As she can also make it a condition in the marriage contract that he should give her the right of divorce in accordance with the terms and situations established in the contract. From this, we can understand, briefly, the meaning of fixed and variable aspects of the Islamic legislation and Islam's ability in grasping the needs of life, such as, human fundamental needs, like food, clothing, shelter, medication, security....etc., and the variable needs; such as, means and methods of executing the permanent needs or new developments and situations that accompany man's life.

Praise be to Allah, the Lord of the Worlds.

Endnotes

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