

# Islamic Law and the State

by

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A thesis submitted in conformity with the requirements  
for the degree of LL.M

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University of Toronto

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2011

## Abstract

The concepts of sovereignty and legal personality in Islamic Law and Western Law are fundamentally different. Under Islamic law sovereignty belongs to Allah and the ruler is the agent of the Ummah. His function is to implement, rather than make the law. Western law assigns sovereignty to the state. The state has complete monopoly over the law making process, giving validity to which under Islamic law was the domain of the doctrinal schools. Furthermore, the birth of the nation-state has changed the structure in which traditional Islamic law operated which has now been forcefully restricted in its scope. The concept of *'asabiyya* is different from the concept of nation. The former is a natural phenomenon while the latter has been imposed upon the Ummah. If certain changes are made to the way that the modern state operates, it can function as an administrative tool that serves the Ummah.

## Acknowledgments

My family and friends for their support, and Professors Imran Ahsan Khan Nyazee and Mohammad Fadel for their guidance.

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## Chapter 1

### Introduction

Since the emergence of the Westphalian system of nation-states, the notion of the state's legal personality has developed, solidified and guided both international and domestic legal practice. The question arises; what is the impact on Islamic traditional law, especially its political structure, of the modern concept of the state? Does the law emanate from the state or is it a direct directive from Allah to the Ummah? Finally, is the Ummah the agent of the state, or the state the agent of the Ummah? Does Islamic law grant legal personality to entities other than human beings? If so, what will be the far-reaching implications of this acceptance? If not, then granting legal personality to a State would be against the principles of Islam. What would then be the legal ruling of all transactions carried on by and in such a nation-state? Since we are now dealing with an entity called the state, and not the Khalifah, and this state represents the entire community, then is each communal obligation (*fard kifayah*) transferred to the state and becomes a duty of the state? Furthermore, if we assume that *bay'ah* given by citizens of a state is a contract of agency, by which citizens delegate or transfer their authority to the Khalifah to manage the affairs of the community, what happens when the state steps in?

The purpose of this study is to show why the nature of the modern state should be analyzed in the context of traditional Islamic law. To achieve this purpose, the thesis deals with issues like state personality, sovereignty, immunity, Islamic political theory, the nature of legal relations underlying the state, and the legal validity of the laws that it enacts under traditional Islamic law. The resolution of these issues is important for the progress of Islamic constitutional law in the modern world.

Geographically, the thesis limits its concerns to the experience of British India and Pakistan. For this purpose the methodology used is primarily Hanafi, because that is the doctrinal school followed in that region. Also, while the issue of legal personality has been discussed, it has been kept brief for purposes of space considerations as well as continuity.

# 1 The State As Sovereign and Legal Person in the West

Since we are dealing with the legal personality of the state, outlining the origins of the concept would be helpful because that would illuminate its reasons for existence and its purposes.

The modern state is the product of the religious wars of Europe and the separation of the church and the state.<sup>1</sup> The history of the modern state begins with the Peace of Westphalia, which ended the religious wars of Europe. Signed in 1648, it was an agreement among major European countries to respect the principle of territorial integrity. This led to the ideas of sovereignty, non-intervention and legal equality between states.<sup>2</sup> “Each land would determine its own system of governance but would refrain from interfering in its neighbors’ internal affairs.”<sup>3</sup> The concept of sovereignty was created to shield the state from the church, so that citizens could not appeal to outside powers. “State became the primary institutional agents in an interstate system of relations.”<sup>4</sup> The monarch, as well as his administrative bureaucracy, became the agents of the state.<sup>5</sup> In fact, the term state arose in the sixteen century, meaning “standing” of sovereign.<sup>6</sup>

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<sup>1</sup> Eric Allen Engle, “The Transformation of the International Legal System: The Post-Westphalian Legal Order”(2004) 23:23, *Quinnipiac L.Rev.*, 23. <<http://ssrn.com/abstract=1020475>>

<sup>2</sup> *Ibid.* at 24

<sup>3</sup> *Ibid.*

<sup>4</sup> Wikipedia, *Westphalian sovereignty*, [http://en.wikipedia.org/wiki/Westphalian\\_sovereignty](http://en.wikipedia.org/wiki/Westphalian_sovereignty) (as of Sept. 16, 2011, 13:28 GMT).

<sup>5</sup> Bruce Russett, Harvey Starr, David Kinsella *World Politics: The Menu for Choice*, 9th ed (Boston: Wadsworth, 2010) at 59

<sup>6</sup> *Ibid.*

That the state has legal personality is a widely accepted fact. In fact, some writers call it the first legal person.<sup>7</sup> Pagano, argues that the status of legal person was transferred from states to business organizations, the main difference being that corporations are not bound by territorial limits. He states that the creation of this fictitious immortal species has led to economic development in the West since “ some fundamental conditions for the working of a market economy could only be guaranteed by such a non-mortal entity. Stable jurisdiction required long-lasting setters and enforcers of rules.”<sup>8</sup>

Not only is the personhood of the state recognized, it is now the ultimate “claim” element in international law when it comes to entitlement to statehood in international law.<sup>9</sup> “According to the UN... a State is defined as "a *person* (emphasis added) of international law [which] should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) the capacity to enter into relations with the other States." Much like the use of corporate form to establish a legal fiction, personhood “gives form to an entity which permits other States to recognize that entity as another State.”<sup>10</sup>

The concept of state as a person is now widely accepted. Marxists, realists, neorealists and theorists of international society all seem content to treat the state as a person, despite their different political theories.<sup>11</sup> In fact, while standard textbooks on Public International Law, and many other scholarly treatises deal with the concept of International Legal Personality, they do

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<sup>7</sup> UGO PAGANO “Legal persons: the evolution of fictitious species.” (2010), 6:01, Journal of Institutional Economics, 117. doi:10.1017/S174413740999021X

<sup>8</sup> *Ibid.*

<sup>9</sup> Celia R. Taylor “A Modest Proposal: Statehood and Sovereignty in a Global Age” (1997) 18;3, U. Pa. J. Int’l Econ., 745 at 760

<sup>10</sup> *Ibid.*

<sup>11</sup> Patrick Thadeus Jackson “Forum Introduction: Is the State a Person? Why Should We Care?” (2004) 30:2, Rev. Int’l Stud., 255

so to highlight the role of non-state actors. It seems therefore that state personhood is a given. In the same vein, Janne Elisabeth Nijman's book "The concept of International Legal Personality,"<sup>12</sup> describes in detail the origins of the concept, and presents the ideas of well-known political philosophers such as Leibniz, Hobbes and Kelsen. However, its main concern is the personality of non-state actors such as individuals, organizations and corporations.

The state is often equated to a corporation. The board of directors seems very much like a cabinet and the share like a vote. We must ask here: what is a corporation? A corporation "is that form of human association which is not constituted by its component parts — by its members, its officers, its property, its rules— but is separate from all these."<sup>13</sup> F.W. Maitland who wrote, "The Crown as Corporation"<sup>14</sup> and "Moral and Legal Personality"<sup>15</sup> states that however disinclined a lawyer may be to "allow the group a real will of its own, just as really real as the will of a man, still he has to admit that if  $n$  men unite themselves in an organised body, jurisprudence, unless it wishes to pulverise the group, must see  $n+1$  persons."<sup>16</sup> He thus argues that groups have personalities of their own, distinct from those of their members. He argues that the state is a corporation. However he posits the question at the end: "A critical question would be whether the man who is Postmaster for the time being could be indicted for stealing the goods of the Postmaster, or whether the Solicitor to the Treasury could sue the man who happened to be

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<sup>12</sup> Nijman, Janne Elisabeth. *The Concept of International Legal Personality: an inquiry into the history and theory of international law*, (T.M.C. Asser Press, 2004)

<sup>13</sup> David Runciman "Is the state a corporation?" (2000), 35:1, *government and opposition: an international journal of comparative politics*, 90. DOI: 10.1111/1477-7053.00014

<sup>14</sup> F.W. Maitland "The Crown as Corporation" (1901) 17:0, *Law Quarterly Review*, 131  
<<http://socserv.mcmaster.ca/econ/ugcm/3ll3/maitland/crowncor.mai>>

<sup>15</sup> Frederic William Maitland, *The Collected Papers of Frederic William Maitland*, ed. H.A.L. Fisher (Cambridge University Press, 1911). 3 Vols. Vol. 3. Chapter: *MORAL PERSONALITY AND LEGAL PERSONALITY I*  
Accessed from <http://oll.libertyfund.org/title/873/70329>

<sup>16</sup> *Ibid.*



the Treasury's Solicitor. Not until some such questions have been answered in the affirmative have we any reason for saying that the corporation sole is one

person and the natural man another.”<sup>17</sup> He thus asks questions about criminal liability when the concept of state personality is introduced. This question is dealt with later.

Maitland was building up on the work of Hobbes who outlined the concepts of natural, artificial and fictitious persons and claimed that they were fundamental to political thought.<sup>18</sup> Hobbes would also influence the German pluralist Gierke who stated that collectivities have “original power and personality as distinct from the personalities of their particular members.”<sup>19</sup>

Hobbes regarded the state as a universitas. A universitas “is a corporation considered collectively to form a single entity that is itself capable of action.”<sup>20</sup> A societas, by contrast, “is a partnership based on shared agreement, which is no more than the sum of its members and has no separate identity.”<sup>21</sup>

For Hobbes, the state is the product of a contract between multitudes to submit to a third person, whether that person is natural or artificial.<sup>22</sup> Hobbes’ main concern was a strong state that would withstand the threat of civil war, not one that was formed out of a social contract between the sovereign and the people that was revocable. This would have allowed people to monitor the

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<sup>17</sup> F.W. Maitland “The Crown as Corporation” (1901) 17:0, Law Quarterly Review, 131

<sup>18</sup> Janet Mclean “Review: Personality and Public Law Doctrine” (1999), 49:1, U.T.L.J., 123 at 124

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.* at 126

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.* at 124

state's purposes. In the forthcoming sections we will discuss the relationship of the citizens of an Islamic state with their rulers and compare it with Hobbes' theory.

Influenced by Hobbes', Maitland concluded that the state "has to be understood as a corporation that exists outside the law."<sup>23</sup> This statement would lead to questions about theories of corporation.<sup>24</sup> However, that is beyond the scope of our thesis. Our main concern is how the concept of state personality impacts Islamic law. Runciman's book, while discussing the concept of state personality, focuses on the recognition of other entities within the state, just as most contemporary texts of public international law focus on the recognition of other entities besides it.

Writers in both fields of law lament the lack of a theory of state.<sup>25</sup> Runciman attributes these to the fact that the state was such a successful institution that there was never any need to raise questions about it.<sup>26</sup> Jackson comments that there has been no major effort to theorise what it means for a state to be a person in international relations theory. Furthermore, can agency be

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<sup>23</sup> David Runciman "Is the state a corporation?"(2000),35:1, *government and opposition: an international journal of comparative politics*,90. at 100

<sup>24</sup> For example, Mclean asks: The Crown too, is a fictitious legal person, but who is its author? Once the political sources of such personality are acknowledged, then the content of Crown power is more contestable. If the Crown has sufficient legal personality to enter a lease, why can't it commit a tort? Depending on the underlying rationale for the state, why can't there be special law governing public contracts? Under present law, once statute no longer governs what is bought and sold by the Crown - once democratic engagement is absent - we have little by way of a theoretical base to evaluate such transactions. The common law's view of the state is thin indeed. Janet Mclean "Review: Personality and Public Law Doctrine" (1999), 49:1, *U.T.L.J.*,123 at 144

<sup>25</sup> Janet Mclean "Review: Personality and Public Law Doctrine" (1999), 49:1, *U.T.L.J.*,123 at 144; Patrick Thadeus Jackson "Forum Introduction: Is The State a Person? Why Should We Care?"(2004), (30:2),255 at 256. Mclean states that public and administrative law doctrine does not explicitly acknowledge the state's purpose since legislative purpose has become a proxy for state purpose. The Maqasid al-Shariah, the purposes of Islamic Law define the purposes of the Islamic rule.

<sup>26</sup> David Runciman "Is the state a corporation?"(2000),35:1, *government and opposition: an international journal of comparative politics*,90

meaningfully located in entities other than constitutively independent human beings? Finally, personhood “is an inescapable component of debates about responsibility, and as can be clearly seen in international legal discussions from at least the Nuremberg Trials to the present. If the state is a person, does it follow that only the state as a whole can be held responsible for 'crimes against humanity' perpetrated by its representatives? Or do only individuals bear responsibility for such actions? Is there a difference between 'natural' and 'artificial' persons, and if so, what implications does this difference have?”<sup>27</sup>

The problems with state sovereignty are not only of theoretical but practical consequence as well. Problems with the concept are grounded in history. It has been viewed in the past as a mask behind which rulers hide to justify the cruelty and injustice they inflict on those they rule.<sup>28</sup> Since the holocaust, international politics has shifted to curtailing the powers of the sovereign. European leaders believed that the tragedy occurred due to the lack of the sovereign state's accountability to anyone.

Since then efforts have been to curtail the powers of the sovereign and to make it accountable. The first of these was Universal Declaration of Human Rights 1948, which was signed by a large number of states. Though it was not legally binding, the declaration was the first step to bind states to international obligations with regard to their internal affairs. The concept of sovereignty was kept intact. The later half of the twentieth century saw the signing of multiple other human rights conventions and covenants.<sup>29</sup>

After the Cold War, the Westphalian norm of non-intervention in state affairs was revised. Since 1990, the United Nations and other international organizations have approved of military

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<sup>27</sup> Patrick Thadeus Jackson “Forum Introduction: Is The State a Person? Why Should We Care?”(2004), (30:2),255 at 258.

<sup>28</sup> Dan Philpott, "Sovereignty", *The Stanford Encyclopedia of Philosophy* (Summer 2010 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/sum2010/entries/sovereignty/>>

<sup>29</sup> *Ibid.*

intervention, which states would have previously regarded as illegitimate interference in internal affairs.<sup>30</sup> These operations normally do not have the consent of government of the state they are targeting. Examples include Iraq, Afghanistan, Somalia, Kosovo and Rwanda.

In 2001, a document called Responsibility to Protect was produced at the behest of the U.N. Secretary General Kofi Annan. Its purpose was to revise the concept of sovereignty. The document stated that sovereignty includes the state's "responsibility to protect" its own citizens. An outsider may assume this responsibility when a state commits massive injustice or cannot protect its own citizens.<sup>31</sup>

The European Union is an attempt to fix the problems associated with absolute state sovereignty. Rather than replacing states, it amalgamates important features of sovereignty into a supranational institution in which the member states' freedom of action is restrained.<sup>32</sup> This was done by creating the European Court of Justice, the European Parliament and by appointing a High Representative of the Union for Foreign Affairs. Individual European states are no longer absolutely sovereign.<sup>33</sup>

When it comes to affairs within the state, and its liability to its citizens, the maxim "the King can do no wrong" comes to mind. In England, the King could not be sued in his own court.<sup>34</sup> "No writ would lie against the Crown."<sup>35</sup> With the birth of the nation-state came the concept of

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<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> Duncan Fairgrieve *State Liability in Tort* (New York: Oxford University Press, 2003) at 8

<sup>35</sup> *Ibid.*

sovereignty. Sovereignty and liability were considered mutually exclusive notions.<sup>36</sup> Therefore, the immunity of the administration was the general rule until the middle of nineteenth century. After that, public bodies could incur civil liability and they could be liable for the torts of their servants.<sup>37</sup> The liability of public bodies is the domain of administrative law. Though the notion of rule of law does exist, it has to be kept in mind that the ruler and those who work in the state's administration are servants and agents of the state.

## 2 Islamic Political Theories

The topic of government has received considerable attention from classical Muslim Jurists and historians in the past. These include the likes of Imams Abu Yusuf, al-Baqillani, al-Baghdadi, al-Mawardi, al-Juwayni, al-Ghazali, al-Razi, Ibn Taymiyya, Ibn Khaldun and al-Khunji.<sup>38</sup>

In fact, the earliest discord that arose in the Muslim community was based on who should be the ruler of the Muslim Community, the Ummah, and what were to be his qualifications.<sup>39</sup> On the one extreme were the Kharijīs, who seceded from the Caliph Sayyiduna Ali (RA) because of their disagreement to his proposal at the battle of Siffin (37/657) that the differences arising between him and Amir Muawiya (RA) due to the murder of the previous Caliph, Sayyiduna Uthman (RA) should be submitted to arbitration.<sup>40</sup> They believed that arbitration was a sin against God. The judgment of men could not be a substitute to God's prescription. They advocated that it was an absolute duty upon all Muslims to enjoin the good and to forbid evil, even at the cost of their very lives. If a Muslim committed a sin, even if he was the Imam, he

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<sup>36</sup> *Ibid.* at 9

<sup>37</sup> *Ibid.* at 11

<sup>38</sup> Ann K. S. Lambton, *State and Government In Medieval Islam* (United states, New York, Oxford University Press 1981).

<sup>39</sup> *Ibid.* at 15

<sup>40</sup> *Ibid.* at 22

become an apostate and hence was to be killed. The Imam was only legitimate as long as he was following Divine Law completely. If he did not do so, he was to be removed by force.<sup>41</sup>

On the other extreme were the Shi'is, also known as the Imamiyya. Like the Kharijis they insisted that under certain circumstances it was the duty of the Muslims to rise against illegitimate rulers. They believed that Sayyiduna Ali and his two sons Sadatuna al-Hassan and al-Husayn (Radi Allah anhum) were the true heirs of the Prophet Muhammad (Peace and blessings be upon him) and that they should have been appointed the rulers of the Muslim community immediately after his death instead of the first three rightly guided Caliphs, that is, Sadatuna Abu Bakr, 'Umar and 'Uthman (Radi Allah anhum). They believed that by not doing so the Muslim community had committed a sin.<sup>42</sup>

The Sunni majority on the other hand, saw the insistence of the Kharijis and the Shi'is on rising against an illegitimate ruler as an invitation to civil war. Indeed, due to these two extremist doctrines caused civil war in the early days of Islam. The war of Kharijis against Sayyiduna Ali (RA) and the taking up of arms against the 'Umayyads by the Shi'is to champion the cause of the 'Abbasids were the cause of great bloodshed. The development of the Sunni theory of government was largely in response to these two extremist factions.<sup>43</sup>

From a purely practical point of view, there are various rulings in Islamic laws that imply the existence of a ruler. Only the ruler can implement criminal law punishments, most, of which are the *hudud* (Punishments pertaining to the violation of the rights of God), in Islamic law<sup>44</sup>.

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<sup>41</sup> *Ibid*

<sup>42</sup> *Ibid.* at 29

<sup>43</sup> *Ibid.* at 21

<sup>44</sup> Ann K. S. Lambton, *State and Government In Medieval Islam* (United states ,New York, Oxford University Press 1981) at 198

Furthermore, he is responsible for collecting the *zakah* money (poor due) and for distributing it among the poor. He is also responsible for collecting the various taxes imposed by Islamic law on all the citizens of an Islamic state. Imam al-Ghazali also agrees with this point of view that the requirements of Islamic law implied the existence of an institution that could execute it.<sup>45</sup>

The khilafah (caliphate) is an institution prescribed by the Shariah. Ibn Khaldun, the historian, argued that the validity of the caliphate was based on '*Ijma* (consensus)<sup>46</sup> since the entire Muslim community had established Sayyiduna Abu Bakr (RA) as the Khalifa immediately after the passing away of the Prophet Muhammad (PBUH). Since '*Ijma* is a source of law in the Shariah, the office of caliphate could be termed obligatory.

We have not yet elaborated the correct term for the leader of the Muslim community. Texts on the subject use the terms imam and khalifah interchangeably.<sup>47</sup> The correct term for khalifah is *khalifatu Rasul Allah*, that is, the vicegerent of the Prophet Muhammad (PBUH). In his capacity as the head of the Muslim community, the successor of the Prophet (PBUH) was known as the khalifah.<sup>48</sup> However, as its religious leader he was the imam. Generally the term imam is used in preference to the word khalifah.<sup>49</sup>

The power that the imam holds has been derived from the Prophet Muhammad (PBUH). Muslim jurists have stated that there are various grades of power. The first and the most perfect is the power of God with respect to His creation in its entirety. The second is that of the Prophet Muhammad (PBUH). After him (PBUH) comes the power of the imams, and after that comes the

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<sup>45</sup> Ann K. S. Lambton, *State and Government In Medieval Islam* (United states, New York, Oxford University Press 1981), 113

<sup>46</sup> *Ibid.* at 167

<sup>47</sup> *Ibid* at 15

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

power of the *qadis* (judges) and other officials.<sup>50</sup> Since the authority of subordinate officials is derived from the ruler, without a legally valid imamate, their appointments would not be valid. In fact, without the existence of such an institution, no judgment, no contract or testament would be valid.

For example, in Islamic law a marriage contract is not valid without the consent of the woman's guardian. The guardian derives his authority from the ruler. This is because of the Hadith that the sultan is the guardian of one who does not have a guardian. If the ruler's authority were invalid, what would be its affect on the contract of marriage?<sup>51</sup>

However, Muslim Jurists recognized that to hold that no public function was valid because the rulers did not qualify under the Sharia would deal a blow to the social order.<sup>52</sup> This became an increasingly bigger problem in the last centuries of the Islamic empire, where the Muslim community had split up in to various states ruled by those who held power through force. Later Muslim jurists tried to accommodate these realities by presenting theories that would give validity to the rule of de facto rulers. These included the likes of al-Mawardi and al-Ghazali. Since the government in al-Ghazali's time was the result of military power, the caliph was whoever who had the allegiance of the holder of that military power.<sup>53</sup> The caliph/imam only constituted one of the components of the imamate. "He had no power and could not therefore exercise functional authority, but no government act was valid unless performed directly or

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<sup>50</sup> *Ibid.* at 95

<sup>51</sup> Mohammad Fadel "Reinterpreting the Guardian's Role in the Islamic Contract of Marriage: The Case of the Maliki School" (1998). *The Journal of Islamic Law, Reinterpreting the Guardian's Role*, Vol. 3, pp. 1-26, 1998. Available at SSRN: <http://ssrn.com/abstract=1221202>

<sup>52</sup> Ann K. S. Lambton, *State and Government In Medieval Islam* (United states ,New York, Oxford University Press 1981) at 116

<sup>53</sup> Imran Ahsan Khan Nyazee, *Outlines of Islamic Jurisprudence*, Third Edition (Rawalpindi, Pakistan , Federal Law House, 2005) at 376



indirectly by him.”<sup>54</sup> On the other hand the fact that the sultan held actual power did not legitimize his government, and therefore he needed the imam.

Ibn Jama’ went one step further and held that the holder of the power was the caliph.<sup>55</sup> This was the beginning of the end of the theory of the caliphate, the main concern of which was the continuation of authority from the Prophet Muhammad (PBUH).<sup>56</sup>

Ibn Jama’ and his contemporary Ibn Taymiyyah were writing at a time when the caliphate had come to an end. Since the khilafah had been practically destroyed, Ibn Taymiyya set out a new theory of government without presupposing the existence of a state from the earliest times of Islamic history.<sup>57</sup> He called the time of the four Rightly Guided Caliphs a continuation of the Prophet’s (PBUH) He retains al-Ghazali’s principle of coercive power (*shawkah*), the purpose of which was that a “large number of divergent opinions were gathered in one person.” Ibn Taymiyyah recognized the contractual nature of the relationship between the ruler and his subjects. He was the agent (*wakil*), the guardian (*wali*) and partner (*sharik*) of his subjects.<sup>58</sup> Ibn Taymiyyah was not the first person to hold that the ruler was the agent of the Ummah. In the past, Imam Abu Yusuf<sup>59</sup> and al-Baqillani<sup>60</sup> had also held that this was the relationship between

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<sup>54</sup> Ann K. S. Lambton, *State and Government In Medieval Islam* (United states, New York, Oxford University Press 1981) at 114

<sup>55</sup> Ann K. S. Lambton, *State and Government In Medieval Islam* (United states, New York, Oxford University Press 1981) at 139

<sup>56</sup> Imran Ahsan Khan Nyazee, *Outlines of Islamic Jurisprudence*, Third Edition (Rawalpindi, Pakistan, Federal Law House, 2005) at 376

<sup>57</sup> *Ibid.* at 378

<sup>58</sup> Ann K. S. Lambton, *State and Government In Medieval Islam* (United states, New York, Oxford University Press 1981) at 149  
Imran Ahsan Khan Nyazee, *Outlines of Islamic Jurisprudence*, Third Edition (Rawalpindi, Pakistan, Federal Law House, 2005) at 379

<sup>59</sup> Ann K. S. Lambton, *State and Government In Medieval Islam* (United states, New York, Oxford University Press 1981) at 58

<sup>60</sup> *Ibid.* at 76.

the ruler and his subjects. Ibn Khaldun and Imam Abu Yusuf had held that the caliph was the guardian (*wali*) and trustee (*amin*) of the Muslims.<sup>61</sup>

Since the jurists were dealing with rulers who held authority by force, they interpreted the law according to the circumstances of their times. The only jurist who mentioned any sort of separation of power was Khunji who stated that the *ahl al hall wal 'aqd* (those of loose and bind) could be a limitation of the ruler's absolute power.<sup>62</sup> He did this by removing religious affairs from the "competence of the ruler, except so far as the appointment of the main religious officials and the execution of their decisions was in his hands."<sup>63</sup>

Since the Muslim community had come to be ruled not by Rightly Guided Caliphs and the Sunni jurists did not want the damage caused by civil war, they accommodated the theory of the caliphate to validate the *de facto* rule of those who held power. Al-Baqillani held that if a ruler committed acts of disobedience he was to be deposed. However, he did not specify how this was to be done. In this regard, Ibn Khaldun gave a view that continued the Sunni tradition of avoiding violence, while exerting the Ummah to find better rulers. He states:

"He (God) commands such activities (resistance to rulers) to be undertaken only when there exists the power to bring them to a successful conclusion."<sup>64</sup> In the modern world, where institutions have evolved immensely and democracy is the preferred form of government in many states in the world, we can say that it is quite possible to appoint rulers that follow the rule of law and if they do not, to depose them without the threat of violence. In fact, this should enable the Ummah to go back to the original position of the Sunni jurists that it is a *fard kifaya*

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<sup>61</sup> *Ibid.* at 150

<sup>62</sup> *Ibid.* at 118

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.* at 170

(communal obligation) upon the Muslims to appoint a qualified ruler that can govern their affairs.<sup>65</sup>

Ibn Taymiyyah's theory is practical because it focuses on the realities of our world-the Muslim Ummah has been divided in to various states and there is no one whose person fulfills all the qualifications that Muslim Jurists have set out for the Caliph. For example, it would be practically impossible to find someone from the Quraysh who could qualify as a leader for the entire Muslim community. At the same time his theory has some problems. Professor Nyazee identifies this by stating while Ibn Taymiyyah solves the problem of multiplicity of states, it creates another one: If the period of the rightly guided caliphs was not a state, but a continuation of the Prophet's mission, it cannot be imitated according to Ibn Taymiyyah.<sup>66</sup> This creates practical problems for the implementation of Islamic law in Muslim states.

It is submitted that this problem can be solved focusing on the contractual aspect of the rule of the Rightly Guided Caliphs. The Rightly Guided Caliphs were inspired personalities that derived their moral authority from the Prophet Muhammad (PBUH)- they were of the ten companions who had been given tidings of heaven and there are various *ahadith* on their merits, sometimes with entire chapters of *hadith* books dedicated to them, showing that they were approved by the Prophet Muhammad (P.B.U.H) as guides for the Ummah. Since their moral probity was acknowledged by the Prophet (PBUH), their caliphate had elements of the Prophetic mission to it. However, this was not the same as being governed by the Prophet Muhammad (PBUH) himself, and the Caliphs recognized this. For example, the Prophet Muhammad (PBUH) dismantled all the idols in the *Ka'bah* as a part of his prophetic mission. However, during the era of the Rightly Guided Caliphs, especially Sayyiduna 'Umar, many treaties were concluded with

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<sup>65</sup> *Ibid.* at 183

<sup>66</sup> Imran Ahsan Khan Nyazee, *Outlines of Islamic Jurisprudence*, Third Edition (Rawalpindi, Pakistan , Federal Law House, 2005) at 380

non-Muslims that would not be coerced in the matters of religion.<sup>67</sup> The Caliphs had moral authority, but their legal power was derived from the contract of bay'ah. This view has practical implications because it explains the various rulings held by the Hanafi School of law with regards to the affairs of Muslims with non-Muslims.<sup>68</sup> According to their view this leads to the conclusion that Muslims can live peacefully with non-Muslim states while following the precepts of Islamic law.

Also, it gives practical legal validity to the authority of the ruler. The Muslims appoint someone as their agent and guardian, who represent them in their international affairs and take care of their interests.

Furthermore, there are *ahadith* that point out that various individuals derive their authority from the Sultan. If we focus on the fact that it is the contract of *bay'ah* that gives authority to the ruler, this should solve the problem of delegated authority.

Since we live in an era of democracy, it is possible to have such a contract between the ruler and his subjects. While the ruler is bound by his contract to protect the Muslims and to represent them in their affairs, the Muslims are bound on their end to obey their rulers as long as they are fulfilling their end of the contract. This is what Ibn Taymiyyah terms *mubayyah*.<sup>69</sup>

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<sup>67</sup> Muhammad Mushtaq Ahmed "Notions of Dar al-Harb and Dar al-Islam in Islamic Jurisprudence" (2008) 47:1 Islamic Studies 5, at 35

<sup>68</sup> *Ibid.*

<sup>69</sup> Ann K. S. Lambton, *State and Government In Medieval Islam* (United states, New York, Oxford University Press 1981 at 148

Also, it is possible to develop a mechanism for the removal of rulers since institutions have developed in the modern world to make this possible without the threat of civil war.

## 2.1 Ibn Khaldun: Mulk and 'Asabiyya

The problems that Ibn Taymiyya's theory creates can be solved using the format and logic that Ibn Khaldun provided to explain Islamic history. His political theory builds on a fundamentally Sunni foundation, but like Ibn Taymiyyah, the concept of *Tajdid al Bay'ah* (renewal of the caliph's *bay'ah* from the time of the Rightly Guided Caliphs). At the same time it offers a balanced approach compared to the all or nothing stance advocated by Western theorists when it comes to the role of religion in government. In this regard the efforts of Muhammad Mahmoud Rabi' should be acknowledge, whose work focuses solely on Ibn Khaldun's political theory for the first time in the English language.

Ibn Khaldun identified three types of political systems: The Caliphate, *mulk siyasi* and *mulk tabi'i*.<sup>70</sup>

The caliphate is a system of government where rule is based on the Shariah, the norms of which are accepted as the ultimate sovereign power. According to Ibn Khaldun this was the ideal system and it was the criterion against which he juxtaposed *mulk siyasi* and *mulk tabi'i*. Civilized life required recourse to ordained political laws that the population accepted. These laws would

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<sup>70</sup> Mohammad Mahmoud Rabi, *The Political Theory of Ibn Khaldun* ( Brill, Leiden , Netherlands, 1967) at 145

have the most utility if they guided people on matters related to their life in this world as well as the next. Only the Shariah could perform this two-fold function.

“If they (political norms are ordained by God through a lawgiver who establishes as (religious) laws, the result will be a political (institution) on a religious basis, which will be useful for life in both this and the other world.” <sup>71</sup>

He discussed in length the Shariah as a factor of worldly change. For example, the Arab nomads were primitive and incontinent. When they adopted Islam, its ideals aided them in leaving their backward habits and submitting to the divinely guided rule so that they could lead a more civilized existence and have a powerful government. Adopting these ideals created in them a spiritual restraint that operated from within their own selves and terminated their weaknesses. Under this rule, the people are subject to the norms of the Shariah, not the unbridled power of an unjust and ruthless monarch.

Even though secular rule was the common feature of the two types of *mulk* he analyzed, viewed them very differently as far as their viability and legitimacy were concerned. *Mulk tabi'i*, that is, unbridled kingship, knows no power other than that which the tyrannical autocrat has monopolized.<sup>72</sup> The *mulk* (sovereignty) is based exclusively on the absolute will of an individual who suffers some the same weaknesses as any other human beings. This form of governance serves the interests of the ruler alone and is detrimental to the interests of the people.<sup>73</sup>

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<sup>71</sup> Muhammad Mahmoud Rabi, *The political Theory of Ibn Khaldun* ( Brill, Leiden, Netherlands,1967) at 141

<sup>72</sup> *Ibid.* at 142

<sup>73</sup> *Ibid.*

*Mulk siyasi* on the other hand is a form of kingship in which secular political laws are supreme. Unlike *mulk tabi'i*, this form of governance has both advantages and disadvantages.<sup>74</sup> The advantages are that the people are subservient to rational laws and not to the absolute rule of a human being. Furthermore, applying laws based on secular reasons gives stability to the rule, something lacking in *mulk tabi'i*. The disadvantage in this type of rule is the purpose it strives for- looking after only the worldly needs of the people. For Ibn Khaldun, this is reprehensible because it does not cover the religious aspects of human life that secure happiness in both this world and the next.<sup>75</sup>

Ibn Khaldun arrived at the concept of *mulk* before the rise of the nation-state and its “concomitant phenomenon” of sovereignty.<sup>76</sup> *Mulk*, as a concept of supreme or sovereign power was not related to race or religion. This supreme power, in its function as a tool to realize an end, has to be controlled by some sort of norm. The standard that Ibn Khaldun puts forward for the success of these tools in achieving their desired ends is accepting the supremacy of the Shariah, or if the form of government is *mulk siyasi*, the supremacy of codified rational laws.<sup>77</sup> *Mulk tabi'i* on the other hand, cannot succeed in its purpose of sustaining its oppressive rule for long. This is an inevitable result of this type of kingship.

Ibn Khaldun's approach was novel because he not only recognized that the Shariah, as the divine foundation of the Caliph's authority, but also power based on secular forces could be supreme power. This approach puts him “mid-way between the European ecclesiastical theorists of the divine right- with their postulate of a mandate of God as the foundation of the King's authority and the later thinkers, starting with Bodin and Hobbes, who based sovereignty on temporal

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<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.* at 143

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.* at 144

grounds.”<sup>78</sup> Although he favored the Caliphate, as a form of government in which Shariah was supreme, he also recognized other forms of government. He even preferred *mulk siyasi*, rule based in rationally codified laws, over *mulk tabi’i*, that is, unbridled kingship. In this way, Ibn Khaldun’s approach is original even compared to the Muslim jurists that preceded him. The jurists prior to him had focused mainly on the Caliphate as a form of governance. Ibn Khaldun not only rationalized the developments of the Caliphate, but also dealt with the concept of *mulk*.<sup>79</sup>

Like the Sunni jurists before him, Ibn Khaldun considered the installation of the Caliph a community duty. He also believed, like them, that giving *bay’ah* to a certain person meant making a covenant to render obedience to him in his new capacity as the leader (Imam) of the community. In this regard, the stance of Ibn Khaldun as well as al-Ash’ari is different from the Shi’a doctrine that based the authority of the imam upon his inherent right as a descendent of Sayyiduna Ali (RA), rather than upon a covenant. They believe that the Prophet Muhammad (PBUH) himself designated him. They call this process of designation *al-Nass*.<sup>80</sup>

Ibn Khaldun tackled the question of what changes affected the bases of Muslim power from Caliphate to Kingship, that is how the basis of political power changed from *‘aqd* (covenant), to *‘asabiyya*.<sup>81</sup> The way that the Rightly Guided Caliphs received *bay’ah* from the people was exactly like a deal. “When the people like to express their consent and to endorse the choice of a caliph, they shake hands with him to announce the conclusion of a covenant between them. Once they demonstrate their approval and consent, they become equally bound by the covenant and

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<sup>78</sup> Muhammad Mahmoud Rabi, *The political Theory of Ibn Khaldun* (Brill, Leiden, Netherlands, 1967) at 145

<sup>79</sup> Muhammad Mahmoud Rabi, *The political Theory of Ibn Khaldun*, (brill, Leiden, Netherlands, 1967) at 163

<sup>80</sup> *Ibid*, at 127

<sup>81</sup> *Ibid*, at 130



must render their obedience to the Caliph.”<sup>82</sup> He considered it to be something like the action of a buyer and seller.<sup>83</sup>

Thus the Caliph was installed and his political authority was considered legitimate if mutual consent was expressed by shaking hands, which confirmed the conclusion of the Covenant. After this Ibn Khaldun analyzed the changes that affected this procedure severely. He stated that a new era began after the Fitna<sup>84</sup> and that power shifted as a rule to the force of ‘asabiyya.<sup>85</sup> That is, the foundation of political power had shifted from consent to compulsion.<sup>86</sup> A significant example of this change was wazi’ “restraint.” “A change became apparent only in the restraining influence that had been religion and now came to be the ‘asabiyya and the sword.”<sup>87</sup> In the time of the Rightly Guided Caliphs, the covenant was the basis of authority. Since this procedure was considered an article of faith, the Omayyad and Abbasid rulers did not alter its form. However, they changed the essence of the contract, which they made meaningless by resorting to force as the new basis of political power.<sup>88</sup> They coerced people to approve the hereditary appointment of their successors. By adopting the illegal method of coercion, both the nature of the contract of

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<sup>82</sup> *Ibid*

<sup>83</sup> *ibid*

<sup>84</sup> The Fitna is the civil war that erupted after the death of the third Rightly Guided Caliph, Sayyiduna Uthman. It was fought between Sayyiduna Ali’s (RA) forces and the Omayyad Syrian forces in Iraq. It led to permanent splits within the Muslim community. The community split into three parties, the Khawarij (seceders), the Shi’a (the partisans of Sayyiduna Ali, radi Allah anhu) and the Sunnis (the orthodox Muslims). The Khawarij regarded themselves as spiritual successors of those who had assassinated Sayyiduna Uthman (RA). They seceded from the community because they considered Sayyiduna Ali (RA) to be in error first, for not supporting the murderers of Sayyiduna Uthman and second, because he agreed to stop the war against the Omayyads, and accepted arbitration which they rejected because in their view arbitration was a divine prerogative of Allah alone and not of any human being.

The Shi’a were those attached to Sayyiduna Ali’s (RA) leadership based on his special relationship to Prophet Muhammad (PBUH). They adhered to him (RA) after the arbitration and extended their loyalty to his descendents. This developed into a full-fledged sect later in time.

The Sunnis, the Orthodox Muslims, on the other hand, were those who sided with Muawiya at the time of the Fitna for fear of the destructive extremism of the Khawarij. They gradually consolidated their doctrine against the Khawarij and Shia and rallied the majority of the Ummah. *See Ibid* at 84

<sup>85</sup> *Ibid* at 130

<sup>86</sup> *Ibid* at 131

<sup>87</sup> *Ibid*

<sup>88</sup> *ibid*

bay'ah'a, as well as its validity became controversial. Ibn Khaldun gave the example of at least one leading jurist who had objected to this method of extracting a covenant without consent:

“The Caliphs used to exact an oath when the contract was made and collected the declarations (of loyalty) from all the Muslims.... It was as a rule obtained by compulsion. Therefore, when Malik pronounced the legal decision that a declaration obtained by compulsion was invalid, the men in power (at the time) disliked (the decision) and considered it an attack upon the declarations (of loyalty).... The Imam (Malik), as a result, suffered his well-known tribulations.”<sup>89</sup>

Thus, the Omayyad 'asabiyya had replaced the 'ahd that gave legitimacy to the Caliphate. A question that we have not resolved yet is what is meant by 'asabiyya. In the past, 'asabiyya has been translated as the “sense of solidarity”, “group loyalty”, “esprit de corps” and “group feeling”.<sup>90</sup> There are three types of 'asabiyya. The 'asabiyya that results from blood ties is stronger than that originating from alliance and client-ship.<sup>91</sup> It is an effect of living under badawa, that is, primitive culture. However, it is also the vehicle that transforms this very mode of living into a complete different one under hadara, that is, civilized culture. In primitive culture, 'asabiyya is a unified and strenuous power, with the capacity to defend the group. It presses its claims against other 'asabiyyas, curbing internal differences and compelling a change to another more advanced way of life. The goal of 'asabiyya is royal power and a life of ease. While 'asabiyya is the result of a primitive way of life under the badawa, it acts as an instrument of transition, affecting the very way of living by ending it and changing to a new and civilized way of living under hadara.<sup>92</sup> “The interaction between, and substitution of, causes and effects continues under civilized culture which- as a cause this time- exerts a damaging influence on all aspects of 'asabiyya. Yet, after luxury, corruption and injustice reach their peak, a remaining

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<sup>89</sup> *ibid* at 131

<sup>90</sup> *ibid* at 59

<sup>91</sup> *ibid* at 50

<sup>92</sup> *Ibid* at 52

solid branch of the ‘asabiyya may act again as a cause of change in inter-group power conflicts, though on a minor scale, and install a new ruler.”<sup>93</sup>

Ibn Khaldun’s concept of ‘asabiyya does not imply racial tendencies. Those who are entitled to leadership in a group acquire power because they are the heads of the most fierce, brave and primitive branch of the group, rather than because they belong to a certain race or because they have noble blood. While a rule can be established with the help of ‘asabiyya on a merely secular basis, it cannot survive if moral values are lost and political virtues are abandoned.<sup>94</sup>

In this way, Ibn Khaldun’s work was different from that of his predecessors. He did not make the “excessive theoretical concessions” that they made to justify the rule of Muslim kings. Instead, he sanctioned “only the political developments of the Caliphate which occurred in the early phases of the two successive dynasties, the Omayyad and the Abbasid. The reason he gave was that their rule did not violate altogether the ordinances of the primary sources, and still carried some religious manifestations of the “Well Guided Caliphate.” Beyond these two periods, Ibn Khaldun did not legitimize the later deterioration of the Caliphate and criticized the rulers for abandoning the Religious Law and misusing luxury and power.”<sup>95</sup> Ibn Khaldun, unlike his predecessors did not justify Amir Muawiya’s actions by raising the excuse of preserving the unity of the ummah. Instead, he spoke about Amir Muawiya’s need to keep the unity of the power group, that is, the Omayyad, as it was emerging at the time as the most powerful ‘asabiyya of the tribe of Quraish.<sup>96</sup> This rule still had elements of the Caliphate, and on this basis was justified.

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<sup>93</sup> *Ibid* at 161

<sup>94</sup> *Ibid* at 162

<sup>95</sup> *Ibid* at 165

<sup>96</sup> *Ibid* at 164

Ibn Khaldun's work was also different from that of Ibn Taymiyya. His political theory solves some of the problems inherent in Ibn Taymiyya's. Both did not believe in the concept of renewal of the *bay'ah* and stated that the caliphate had ended after the four Rightly Guided Caliphs. However, Ibn Taymiyya stated that the Rightly Guided Caliphate was an extension of the Prophetic mission. If this is true, then that form of governance cannot be imitated. Ibn Khaldun, on the other hand, placed the authority of the Caliphs in the contract of bay'a, rather than on the continuation of the Prophetic mission. This explanation allows for a replication of that system of governance in which the Shariah is supreme, and the ruler is the servant and agent of his people.

Since the era of the Rightly Guided Caliphs was the only one that was not based on kingship, it would be possible to construct modern institutions under Muslim rule based on that ideal, even though it would never be possible to find rulers with the same degree of moral probity. The ideal would be very close to that of a democracy.

In general Ibn Khaldun viewed 'asabiyya favourably. The concept is linked to this fundamental question: why should we be loyal to the state? Can it be argued that the modern phenomenon of nation-states is an extension of this concept? That is, has the nation-state widened the scope of 'asabiyya? Since 'asabiyya involves the transfer of loyalties, should our loyalties be similarly transferred to the nation-state? The answer is that 'asabiyya is a natural phenomenon. The nation-state, on the other hand, is something that has been imposed on the Ummah from the top by the West. In fact, the phenomenon of the nation state is the cause of disunity amongst the Ummah, because it has replaced religion with race as the source of brotherhood. How colonialism brought about the concept of the nation-state and changed the structure of Islamic law completely is dealt with later.

Since we have dealt with some of the preliminary problems related to having an Islamic form of government in the modern world, we can now focus our attention on the primary goal of our thesis: The Islamic state as a legal person.

### 3 The State and Traditional Islamic Law

#### 3.1 The Classification of Rights in Islam

A discussion on legal personality is meaningless without a discussion on the distribution of rights within the framework of Islamic law. Before we begin discussing the state's legal personality in Islam, it is important to set forth how Islamic law assigns rights. In fact, the entire structure of Islamic law and its classification are based on the distribution of rights.<sup>97</sup> The following classification is based on Professor Nyazee's work.

Rights in Islamic law are of the following kinds:

1. The right of Allah (*haqq Allah*)
2. The right of the individual (*haqq al-'abd*)
3. The right of Allah mixed with the right of the individual, which are further divided into two categories:
  - Where the right of Allah is predominant.
  - Where the right of the individual is predominant.

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<sup>97</sup> Imran Ahsan Khan Nyazee, *Outlines of Islamic Jurisprudence*, 3d. ed. (Rawalpindi, Pakistan, Federal Law House, 2005) at 103

4. The collective rights of the individuals or of the Muslim community, also known as the right of the ruler (*haqq al-sultan*), or the right of the state (*haqq al-sultanah*).<sup>98</sup> The right of Allah is independent of the right of the state.<sup>99</sup>

These rights affect the legal rules laid down by Islamic law. They are subdivided as follows:

1. Rules that relate to the right of Allah are of eight kinds:
  - Pure worship: These include belief in Allah, prayer, zakah (poor-due), fasting, pilgrimage to Makkah also known as hajj and jihad.
  - Pure punishments: These are the hudud punishments. Their basic function is deterrence.
  - Imperfect punishments: An example is that a murderer is not allowed to inherit from his victim.
  - Those vacillating between worship and a penalty: These are primarily expiation (*kaffarat*) made for different reasons.
  - Worship in which there is an element of financial liability: An example is sadaqat al-fitr, a payment made before 'Id al-fitr following Ramadan.
  - Financial liability in which there is an element of worship: This includes 'ushr, a ten percent charge levied on the produce of land.
  - Financial liability in which there is an element of punishment: The example for this is the kharaj tax.

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<sup>98</sup> Imran Ahsan Khan Nyazee, *Outlines of Islamic Jurisprudence*, 3d. ed (Rawalpindi, Pakistan , Federal Law House, 2005) at 104

<sup>99</sup> *Ibid.*

- Those that exist independently. These are of three types: Those initially laid down as a rule; those imposed as an addition to a rule; and those that are associated with the initial rule. Examples include the *khums* levied on cattle, minerals and treasures-troves.

2. Rules in which the right of Allah is mixed with the right of the individual, but the right of Allah is predominant. This includes the *hadd* penalty of *qadhaf*. The Shafi'is consider it a pure right of the individual.

3. Rules in which the right of Allah is mixed with the right of the individual but the right of Allah is predominant. The primary example for this category is the *qisas* punishment, that is, retaliation for injuries caused to the human body or culpable homicide that amounts to murder.

4. Rules relating to the right of the individual alone. In the words of Professor Nyazee, “ This category includes almost everything is not included in the above categories and is beyond reckoning. The important point to consider is that al-Sarakhsi does not mention ta'zir or discretionary penalties. The reason is that the discretionary penalties fall within the category of the rights of the individuals, when these are considered collectively, that is, they are the right of the state. The Hanafi jurist al-Kasani clearly states that all ta'zir relates to the right of the individual.”<sup>100</sup>

This classification is related to obligation creating rules (*hukm taklifi*). The jurists did not mention the right of the ruler in this classification because they left it to the rulers to sub- classify their rights. Acts related to the right of Allah are distinct from the right of the ruler. In fact, even the ruler or state owes rights to Allah.<sup>101</sup>

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<sup>100</sup> Imran Ahsan Khan Nyazee, *Outlines of Islamic Jurisprudence*, 3d. ed.(Rawalpindi, Pakistan , Federal Law House, 2005) at 107

<sup>101</sup> *Ibid* at 107

The distinction between the right of Allah and the right of man has some other consequences as well in the practical application of Islamic law in courts. If the judge (*qadi*) makes an erroneous judgment and the right violated is that of Allah, the damages are paid from the public treasury (*bayt al-mal*). This is because the *qadi* acts on behalf of the Ummah, who are collectively responsible for the damages caused by his judgment.<sup>102</sup>

On the other hand, if a right of man is violated by an erroneous judgment and the damage is replaceable, the beneficiary has to make good the damage.<sup>103</sup> He does so by restoration of the claim or restitution of the object. If the damage is irreplaceable, the beneficiary is to make a compensatory payment to the victim. The *qadi* may not be called to account for the damage in any of these cases.<sup>104</sup>

### 3.2 The Concepts of Capacity and Legal Personality in Islamic Law

The question of personality is linked to that of capacity in Islamic law. Capacity is called *ahliyah* in fiqh. *Ahliyah* is defined as “the ability or fitness to acquire rights and exercise them and to accept duties and perform them.”<sup>105</sup> There are two types of capacity. They are called *ahliyat al-wujub*, the capacity for acquisition (of rights) and *ahliyat al-ada'*, the capacity for execution.<sup>106</sup>

<sup>102</sup> Ulrich Rebstock “A Qadi’s Error” (1999) 6:1 Islamic law and society 1, at 24

<sup>103</sup> al-Sarakhsi, *Al-Mabsut*, v.11 at 85

قاضيا هو فکان { به أخطأتم فيما جناح عليكم وليس { تعالى الله قال شرعا موضوع والخطأ ، الخطأ عن معصوم غير لأنه بحق قضاؤه كان إن ذلك بغرم له المقضي أخذ الخطأ تبين إذا ولكن ، فعل فيما جان غير ظاهرا الشرع أمر موافقة على المال بيت في فضمانه تعالى الله بحق كان وإن ، دالعبا

<[http://islamport.com/d/2/hnf/1/12/512.html?zoom\\_highlightsub=%22%C8%ED%CA+%C7%E1%E3%C7%E1%22+%DE%D5%C7%D5](http://islamport.com/d/2/hnf/1/12/512.html?zoom_highlightsub=%22%C8%ED%CA+%C7%E1%E3%C7%E1%22+%DE%D5%C7%D5)>

<sup>104</sup> *Ibid*

<sup>105</sup> Imran Ahsan Khan Nyazee , *Islamic Law Of Business Organization: Corporations* (Islamabad, Pakistan, Islamic Research Institute Press, 1998)

<sup>106</sup> Imran Ahsan Khan Nyazee , *Islamic Law Of Business Organization: Corporations* (Islamabad, Pakistan, Islamic Research Institute Press, 1998)



*Ahliyat al-wujub* is the ability of a human being to acquire rights and obligations. Related to this is the concept of *dhimma*, which is a sort of imaginary container that holds both *ahliyat al-wujub* and *ahliyat al-ada*. It is the balance sheet of a person that shows his assets and liabilities in terms of his rights and obligations.<sup>107</sup> The term *dhimma* corresponds to the term *personality* in law. It is the “trust” that God offered to the mountains but they refused. It was man who accepted it.<sup>108</sup> Thus in its literal meaning it is a covenant and in its technical meaning it is a “legal attribute by virtue of which a human being becomes eligible for acquiring rights and obligations.”<sup>109</sup>

*Dhimma* or personality grant *ahliyat al-wujub* in Islamic law and they require ‘*aql* (intellect) for the grant of *ahliyat al-ada*’ (capacity for execution).<sup>110</sup> According to Imam Al-Sarakhsi capacity is associated with *dhimmah* and that is something specific to a human being.<sup>111</sup> Imam Al-Ghazali also said that even if intellect is given to an animal, there could be no obligation for or against it because obligation is based on the attribute of *dhimma*. This is something that an animal does not possess.<sup>112</sup> The concept is explained as follows:

“The intellect is merely to understand the *khitab*, while obligation is based upon an attribute that is called *dhimmah* (personality), so much so that if the existence of ‘*aql* is assumed without this attribute, like the mounting of intellect on to an animal other than a human, no obligation for against it can be established.”

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<sup>107</sup> *Ibid*

<sup>108</sup> *Ibid*

<sup>109</sup> *Ibid.* at 91

<sup>110</sup> *Ibid.* at 92

<sup>111</sup> *Ibid.* at 93

<sup>112</sup> *Ibid.* at 93

Based on the above passage, Professor Nyazee concludes that the jurists are acknowledging “some kind of unsound dhimmah” for animals other than humans, even if they are not willing to assign complete workable capacity to them.<sup>113</sup>

The question for us is that how do we then assign legal personality to a non-human, such as the state, under Islamic law? Professor Nyazee suggests a new principle based on traditional Islamic law. The old principle stated, “A sound dhimmah is required for the performance of duties expected of a Muslim, and these duties can be understood and performed by human beings alone, because they also pertain to the hereafter.” On the other hand the new principle states, “As long as purely religious duties are not expected of a person or organization, a limited dhimmah may be assigned to a non-human with no liability for understanding the khitab of ‘ibadat, but only when some form of human intelligence is present to direct the acts of the artificial personality.” It was for this reason, as we shall examine further, that Muslim jurists did not attribute legal personality to institutions such as the waqf (religious endowment) and the bayt al-mal (public treasury), that is, because they are created for religious purposes.

The question that arises for us is that, what about the Islamic state? In Islamic law, the ruler is responsible for the administration of some purely religious duties. Some of these are directly related to the rights of Allah. These are rights that cannot be altered, suspended or pardoned by the ruler, because that is outside his jurisdiction. His function is merely to establish and execute them in the required manner. He is responsible to Allah for them in his personal capacity. Some of these are acts of pure worship, such as the collection and distribution of zakah (poor-due) and the waging of jihad. Others include the execution of *hudud* penalties, the levying of *‘ushr*, *khums* and *kharaj* taxes and the administration of certain imperfect punishments, such as ensuring that the murderer does not inherit from his victim.

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<sup>113</sup> *Ibid.*

Furthermore the ruler is responsible for performing the *furud kifaya* (communal obligations to Allah) of the Muslim community as its trustee. If a ruler is not performing the responsibility entrusted to him, or cannot be made effectively liable for performing religious obligations of the entire community, then does this mean that the entire community is sinful? Consequently, if a legal person cannot be liable for religious duties, how can the idea of an Islamic state co-exist with the idea of the state with fictitious personality? Who do we assign the responsibility and the corresponding liability of not administering the rights of Allah? Furthermore, how do we do this in a manner that conforms to the principles of Islamic law?

Additionally, Islamic law assigns rights to individuals that cannot be suspended or taken over by the state, such as the right of the heirs to punish or pardon the murderer under the qisas penalties. If the state is the sole source of law, it can tamper or change it as it pleases without any liability.

Another problem that arises is that the modern state is considered sovereign in its own right. It was created specifically to counter any supranational authority, in particular the religious authority of the Pope in Christian Europe.<sup>114</sup> This was done by agreeing to respect the principle of territorial integrity and by encouraging nationalism whereby legitimate states corresponded to nations, that is, groups of people that were united by way of language and culture. Therefore the purpose of the modern state seems to be anything but religion. How can we expect such an institution to be adhering to any religious authority in a manner that does not tamper with the structure of Islamic law? These issues will be taken up after discussing the waqf and the bayt al-mal, Inshallah.

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<sup>114</sup> Eric Allen Engle, "The Transformation of the International Legal System: The Post-Westphalian Legal Order"(2004) 23:23,Quinnipiac L.Rev,23. <<http://ssrn.com/abstract=1020475>>

### 3.2.1 The Waqf: Trust the State?

A waqf is a charitable trust or endowment. The argument in favour of artificial personality for the waqf is that it can own property. Under traditional Islamic law, the waqf does not hold collective property. This is because the waqf is the property itself. According to Imam Abu Hanifa the waqf is the suspension of property with in the ownership of the person making it. This is called habs al-‘ayn ‘ala milk al-waqif in Arabic. <sup>115</sup>His disciples call it a suspension of the property by assigning the ownership to Allah. In both cases, the property cannot be sold or gifted or inherited because of its suspension. <sup>116</sup>

Since the waqf exists with the existence of the property, it ceases to exist when a natural force destroys the property. Legal personality on the other hand is independent of the property itself, whether it is a legal person that owns it or it is a corpus. A waqf seems similar to a corporation because it can outlive its founder. However, it is not a self-governing legal entity because it lacks the required capacity. Its administrator is required to follow the founder’s directives and because of this the waqf cannot turn into a corporate entity. <sup>117</sup>

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<sup>115</sup> *Hashia Rad al-Muhtar* v.6. 302

<sup>116</sup> Imran Ahsan Khan Nyazee , *Islamic Law Of Business Organization Corporations* (Islamabad, Pakistan, Islamic Research Institute Press,1998) at 97

<sup>117</sup> Timur Kuran “The Absence of the Corporation in Islamic Law: Origins and Persistence”(2005) 53:4 785  
<<http://www.jstor.org/stable/30038724>>

The waqf was actually one of the institutions fundamentally responsible for delaying the acceptance of the corporate form in the Muslim world.<sup>118</sup> The social services offered by the waqf had large setup costs, for example the construction of a congregational mosque and in some cases a madrasah (school) and the institution itself was expected to last indefinitely. Therefore the resources that might have otherwise stimulated a movement to incorporate were absorbed by the waqf. Thus, a waqf is not a legal person and it has no capacity in Islamic law. The same rules apply for any argument favoring the personality of the mosque, because the mosque is also a waqf.

The trust was an important element in discussions about the state's legal personality in common law. However, this was so because of completely different reasons. One of the main concerns about accepting the state as a legal person in western jurisprudence was that this would mean that the state would the institution granting legal validity to collectives and communities. It was feared that the state might become too powerful and take away validity from these organizations at will. There was a fear that this would infringe the rights of individuals. In the views of some scholars the corporate form was actually developed in the west to avoid problems like these. Maitland and the British pluralists viewed the trust, a unique invention of common law at least in Western jurisprudence, as an alternative to the corporate form.<sup>119</sup> In his view corporate personality was not the only device that could protect and control associations. The trust was a rival method. This was because it enabled moral persons to create a legal identity of their own and to claim the recognition that should be given to them. At the same time they had to ask for the permission of no one except their members.<sup>120</sup> The trust was thus a device to protect associations from their "natural predator" that is, the sovereign.<sup>121</sup>

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<sup>118</sup> *ibid*

<sup>119</sup> Frederic William Maitland, *The Collected Papers of Frederic William Maitland*, ed. H.A.L. Fisher (Cambridge University Press, 1911). 3 Vols. Vol. 3. Chapter: *TRUST AND CORPORATION I*  
 Accessed from <http://oll.libertyfund.org/title/873/70330> on 2011-09-16

<sup>120</sup> Roger Scruton & John Finnis "Corporate Persons"(1989) 63:0 Proceedings of the Aristotelian Society, Supplementary Volumes 239 < <http://www.jstor.org/pss/4106920>>

<sup>121</sup> *Ibid.* at 260

The concerns regarding the freedom of association were rooted in the history of Europe. The Pope was the most powerful authority and in the time of Pope Innocent IV ecclesiastical bodies were directed to resolve the question of whether certain groups could be excommunicated.<sup>122</sup>

The situation in pre-modern Muslim lands was quite the opposite.<sup>123</sup> Rulers were concerned with the unity of the Ummah and wanted to avert factionalism. Due to this they were willing to grant de facto recognition to guilds and religious minorities, even though this was done on a selective and limited basis. There were no great obstacles to the treatment of traders as groups. Furthermore, the concept of limited liability, as we shall explore later on, already existed in Islamic law. All these factors led to the concept of corporate personality entering Muslim lands much later- there was no need to develop it.

### 3.2.2 Bayt al-Mal: Ruler as Agent of the Ummah

An analysis of the state's legal personality involves discussing the personality of collectives. As far as the personality of collective property is concerned, the most prominent example is that of

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<sup>122</sup> Janet Mclean "Review: Personality and Public Law Doctrine" (1999), 49:1, U.T.L.J. 123 at 29. There was a struggle between church and empire. The main issue was whether groups could have their own will and intention, and therefore moral personality. Two theories arose out of this, the fiction and concession theories. According to the fiction theory, groups were allowed to hold property and to contract. However, they were not allowed to undertake moral obligations. According to the concession theory only the state could create and legitimate such bodies. All associations were considered conspiracies except if they derived their powers from the state. Power was delegated to these associations from above and everything was subject to royal charters and licenses. This theory served the claims of emerging nation-states against rivals such as religious organizations. There was a fear in Europe that the state would become too powerful and would not allow individuals to form associations.

<sup>123</sup> Timur Kuran "The Absence of the Corporation in Islamic Law: Origins and Persistence"(2005) 53:4 785  
<<http://www.jstor.org/stable/30038724>>

the Bayt al-Mal, the public treasury in Islamic law. The bayt al-mal, according to Islamic law, is a co-ownership (sharikat al-milk) of the members of the Muslim community (the Ummah). The ruler administers it as the agent of Ummah.<sup>124</sup>

Those who state that the bayt al-mal is a legal person argue that it has financial independence and legal rights and it is independent in its legal capacity from the ruler and its administrators.<sup>125</sup> Also, they read statements in classical legal texts like “the treasury is the heir of one who dies intestate,” to mean that the bayt al-mal has legal personality.

It is important to note that collective property does not equal to legal personality. According to the accounting or mercantile notion of the firm, the fact that the accountant treats a partnership as a single entity for recording debit and credit entries does not mean that the partnership is a legal person. Accountants used to assign partnerships an imaginary personality-in the terms of Islamic law, an imaginary dhimmah- to the firm. This was before the modern corporation was born.<sup>126</sup>

The bayt al-mal is only a corpus.<sup>127</sup> It is a fund with no personality of its own. It is managed, or held, by the ruler on behalf of the Ummah, who are all co-owners in the property. There is a relationship of agency between each member of the Ummah and the imam. This relationship is

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<sup>124</sup> Imran Ahsan Khan Nyazee , *Islamic Law Of Business Organization Corporations* (Islamabad, Pakistan, Islamic Research Institute Press, 1998) at 101

<sup>125</sup> Mahmoud M. Sanusi “The Concept Of Artificial Legal Entity And Limited Liability in Islamic Law” (2009) *Malayan Law Journal* 2009:3 LVIII-LXIV

<sup>126</sup> Imran Ahsan Khan Nyazee , *Islamic Law Of Business Organization Corporations* (Islamabad, Pakistan, Islamic Research Institute Press, 1998) at 70. On a side note, it can also be said that the existence of a group or association of people does not mean that legal personality exists. Hobbes, while maintaining that the state was in his view a universitas, a corporation that collectively formed a single entity itself capable of action, also recognized the existence of a societas. This was a partnership the basis of which was a shared agreement and it was no more than the sum of its members. It had no separate identity. (McLean, Runciman)

<sup>127</sup> Imran Ahsan Khan Nyazee , *Islamic Law Of Business Organization Corporations* (Islamabad, Pakistan, Islamic Research Institute Press, 1998) at 101

established through the contract of bay'ah and due to this he is held personally responsible and not protected with the cover of a corporation sole.

Due to the fact that the bayt al-mal is a mal 'ama or mal mushtarak the fuqaha waive the hadd penalty in case a member of the Ummah steals something from it.<sup>128</sup>

Since the thief is considered a part owner of the bayt al-mal, or at least a shubh (mistake/doubt) of such an ownership is created the hadd penalty of cutting off his hand cannot be imposed. If the bayt al-mal was a legal person, or had a specified owner, there would have been no shubh.

Similarly, since the bayt al-mal is the collective property of the Muslims, it is used to pay the expenses of the Laqit (Foundling).<sup>129</sup> In Hanafi fiqh if the murderer is one who does not have an

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<sup>128</sup> Take for example, the following passage from Imam Al-Sarakhsi's *Al-Mabsut*:

قال ( ولا يقطع السارق من بيت المال حراً كان أو عبداً ؛ لأن له فيه شركة أو شبهة شركة ، فإن مال بيت المال مال ر حاجته ، وفي الكتاب روي عن علي بن أبي طالب رضي المسلمين ، وهو أحدهم ، فإنه إذا احتاج يثبت له الحق فيه بقدر الله عنه أنه أتى برجل قد سرق من المغنم فدرأ عنه الحد وقال إن له فيه نصيباً ، ولأنه ليس لهذا المال مالك متعين ووجوب القطع على السارق لصيانة الملك على المالك ، ولهذا لا يقطع بسرقة مال لا مالك له

Al-Sarakhsi *Al-Mabsut* vol. 11 428

<[http://islamport.com/d/2/hnf/1/12/515.html?zoom\\_highlightsub=%22%C8%ED%CA+%C7%E1%E3%C7%E1%22+%DE%D5%C7%D5](http://islamport.com/d/2/hnf/1/12/515.html?zoom_highlightsub=%22%C8%ED%CA+%C7%E1%E3%C7%E1%22+%DE%D5%C7%D5) >

<sup>129</sup> Al-Kasani, *Bada' al-Sana' I fi Tartib al-Sharai'* kitab al-Laquit, 14/70

<[http://islamport.com/d/2/hnf/1/17/969.html?zoom\\_highlightsub=%C8%ED%CA+%C7%E1%E3%C7%E1+%D6%E3%C7%E4](http://islamport.com/d/2/hnf/1/17/969.html?zoom_highlightsub=%C8%ED%CA+%C7%E1%E3%C7%E1+%D6%E3%C7%E4)>



‘aqilah, such as a foundling or a dhimmi (non-Muslim citizen of the Islamic state) who converted to Islam, following the previous principle, his ‘aqilah is the bayt al-mal in zahir ar-riwayah. This is so that the Muslim community can help these individuals and the bayt al-mal is their property and that is his ‘aqilah. Additionally, if this person were to die, his inheritance would go to the bayt al-mal, and if he had any payments or fines due, they would also be paid from the bayt al-mal, if he does not have any inheritor.<sup>130</sup> If the bayt al-mal were a legal person, these individuals would have no right in it. The personality or dhimma involved in these transactions is that of the ruler, who is the agent of the Ummah. Note that Imam Abu Hanifa’s ruling is that the blood money should be paid from the offender’s property.<sup>131</sup>

Rad al-muhtar mentions the responsibility of the Jama’at al-Muslimeen (Muslim community) to help these people.<sup>132</sup> Does this mean that the Ummah is a corporation aggregate? To clarify what we mean, there are several instances in fiqh literature where the Muslim community is mentioned as a single entity. Take for example, the concept of *Dhimma al-Muslimeen*. The Prophet (PBUH) said:

{ ذمة المسلمين واحدة يسعى بها أدناهم }<sup>133</sup>

The term refers to the conference of *aman* (protection) to a non-Muslim by a Muslim.<sup>134</sup> In case of brigandage where the victim is a *Musta’min*, the offenders are made liable by way of Ta’zir

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<sup>130</sup> Rad al-muhtar. (28/434)

<[http://islamport.com/d/2/hnf/1/25/1547.html?zoom\\_highlightsub=%E5%CF%ED%C9+%22%C8%ED%CA+%C7%E1%E3%C7%E1%22](http://islamport.com/d/2/hnf/1/25/1547.html?zoom_highlightsub=%E5%CF%ED%C9+%22%C8%ED%CA+%C7%E1%E3%C7%E1%22)>

<sup>131</sup> Badai al-Sanai’ (6/307)

<[http://islamport.com/d/2/hnf/1/16/861.html?zoom\\_highlightsub=%22%C8%ED%CA+%C7%E1%E3%C7%E1%22+%DE%D5%C7%D5](http://islamport.com/d/2/hnf/1/16/861.html?zoom_highlightsub=%22%C8%ED%CA+%C7%E1%E3%C7%E1%22+%DE%D5%C7%D5)>

<sup>132</sup> Rad al-Muhtar (28/435)

<sup>133</sup> Taby’in al Haqaiq Sharh Kanz al-Daqa’iq. (9/291)

<[http://islamport.com/d/2/hnf/1/18/1069.html?zoom\\_highlightsub=%22%D0%E3%C9+%C7%E1%E3%D3%E1%E3%ED%E4%22](http://islamport.com/d/2/hnf/1/18/1069.html?zoom_highlightsub=%22%D0%E3%C9+%C7%E1%E3%D3%E1%E3%ED%E4%22)>

<sup>134</sup> Al-Sarakhsi, al-Mabsut (12/302)

<[http://islamport.com/d/2/hnf/1/12/521.html?zoom\\_highlightsub=%22%D0%E3%C9+%C7%E1%E3%D3%E1%E3%ED%E4%22](http://islamport.com/d/2/hnf/1/12/521.html?zoom_highlightsub=%22%D0%E3%C9+%C7%E1%E3%D3%E1%E3%ED%E4%22)>

and imprisonment. This is because they violated the *dhimmah al-muslimeen*.<sup>135</sup> Essentially this is a contract of protection between Muslims and non-Muslims. It does not imply legal personality for the Ummah. Each and every member of the Ummah is responsible for taking care of non-Muslims who seek their protection, or who have contracted peace with the Ummah, unless giving protection to a non-Muslim would be injurious to the Muslims. The Muslims delegate their affair to the ruler (imam) as their agent, and he is responsible to administer the contract in a way that the rights of non-Muslims who have a truce with Muslims, as well as those of Muslims are not harmed in any way.

The question arises; does Islamic law provide any immunity for the ruler? If there were no immunities rulers would be afraid to undertake public interest measures. By way of example, what happens when a ruler, in the course of exercising his duty lawfully sentences someone to a hadd or ta'zir punishment and the offender dies. Take the case of someone whose hand the ruler orders to be amputated because he has committed theft. If the person dies due to his wounds, this would be a graver punishment than was intended. Is the ruler liable for the injury caused? According to the Hanafi school of thought, neither the imam is liable for the damages, nor will they be paid from the bayt al-mal. This is because the act of ordering the amputation was a permissible/ lawful act. Imam Abu Hanifa himself however held that the Imam would be liable because his right was to exact the punishment of amputating the hand, but he instead killed the offender. Analogy would demand *Qisas* (retaliation) from the imam, but due to the presence of shubh (mistake/doubt) the penalty is warded off and the imam is held liable to pay the *diyyah*. However, the *diyyah* cannot be taken from him because of necessity. This is because if *daman* (compensation) were made obligatory on the rulers, they would refrain from establishing the hudud penalties due to the fear of having to pay compensation.<sup>136</sup>

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<sup>135</sup> Fath al-Qadeer. (12/346)

<[http://islamport.com/d/2/hnf/1/27/1695.html?zoom\\_highlightsub=%22%D0%E3%C9+%C7%E1%E3%D3%E1%E3%ED%E4%22](http://islamport.com/d/2/hnf/1/27/1695.html?zoom_highlightsub=%22%D0%E3%C9+%C7%E1%E3%D3%E1%E3%ED%E4%22)>

<sup>136</sup> al-Kasani *Badai al-Sanai* vol.17,39

In the Shafi'i school of thought however if the ruler punishes someone for a lawful *Ta'zir* and the offender, *diyyah* becomes obligatory and is paid from the bayt al-mal. This is because the *Ta'zir* was to discipline the offender and the punishment was exacted for the benefit of the Muslims. The bayt al-mal is the collective property of the Muslims and therefore the compensation is paid from it.<sup>137</sup>

It is acceptable for the ruler and the judge's salaries to be paid from the *bayt al-mal*. This is because they work for the Muslim Ummah and they have freed themselves exclusively to work for them and so their compensation is also from the collective property of the Muslims. Gifts to the judge are also given to the *bayt al-mal*. If the judge receives a gift that is not permissible for him to accept, it is obligatory to return it to its sender<sup>138</sup>. If the sender cannot be found, the gift is transferred to the *bayt al-mal* and it is given the ruling of a *luqta* (found item).<sup>139</sup>

All the cases that we have mentioned demonstrate that the *bayt al-mal* is not a legal person. If the bayt al-mal were considered a legal person, it would not be possible to expend its resources in the way that the *fuqaha* have outlined. The bayt al-mal is the collective property of the Muslims and its resources are used for the collective benefit of the Muslims. Furthermore, the rulers and government servants are servants of the Ummah, and it is for this reason alone that they are

<[http://islamport.com/d/2/hnf/1/17/993.html?zoom\\_highlightsub=%22%C8%ED%CA+%C7%E1%E3%C7%E1%22+%DE%D5%C7%D5](http://islamport.com/d/2/hnf/1/17/993.html?zoom_highlightsub=%22%C8%ED%CA+%C7%E1%E3%C7%E1%22+%DE%D5%C7%D5)>

<sup>137</sup> Akmal al-Din al-Babarti *al-Inayah sharh al-Hidaya*. Vol.7,311

<[http://islamport.com/d/2/hnf/1/8/356.html?zoom\\_highlightsub=%22%C8%ED%CA+%C7%E1%E3%C7%E1%22+%CA%DA%D2%ED%D1](http://islamport.com/d/2/hnf/1/8/356.html?zoom_highlightsub=%22%C8%ED%CA+%C7%E1%E3%C7%E1%22+%CA%DA%D2%ED%D1)>

<sup>138</sup> Ibn Abedin Sahmi *Hashia rad al-muhtar* vol.5,513

<[http://islamport.com/d/2/hnf/1/23/1261.html?zoom\\_highlightsub=%E5%CF%ED%C9+%22%C8%ED%CA+%C7%E1%E3%C7%E1%22](http://islamport.com/d/2/hnf/1/23/1261.html?zoom_highlightsub=%E5%CF%ED%C9+%22%C8%ED%CA+%C7%E1%E3%C7%E1%22)>

<sup>139</sup> Ibn Nujaym al-Misri *Bahr al-Raiq Sharh Kanz al-Daqaq* vol.17,404

<[http://islamport.com/d/2/hnf/1/3/152.html?zoom\\_highlightsub=%E5%CF%ED%C9+%22%C8%ED%CA+%C7%E1%E3%C7%E1%22](http://islamport.com/d/2/hnf/1/3/152.html?zoom_highlightsub=%E5%CF%ED%C9+%22%C8%ED%CA+%C7%E1%E3%C7%E1%22)>

allowed to be paid compensation from the bayt al-mal, and damages for any lawful exercise of power by them are paid from it.

## 4 The Impact of Modern Institutions on Islamic Law

It has been argued in the past that the concept of sovereignty was a revolutionary one in the Muslim world. With the rise of the corporate nation-state also came the idea of popular sovereignty. The people were now the source of all power, and the state gained legitimacy from their will or consent.<sup>140</sup> The ruler's power was limited through that of the people, but was the power of the people absolute? If all the people want to change a law democratically, would that be morally permissible? For example, if an entire population wants to implement a law that goes against the fundamental rules of the Shariah, would that be permissible? Furthermore, does a majority decision decide the content of morality? Under these circumstances, is the Shariah just a "sort of natural-law code"<sup>141</sup> that restricts the scope of majority decisions?

To state that the transition from an Islamic empire to a nation-state was revolutionary<sup>142</sup> would be an understatement. This is because this transition changed the entire structure of Islamic law. The empire gained its legitimacy from divine law; the ulama (scholars) led it, and the sultan as

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<sup>140</sup> Nathan Tarcov "Popular Sovereignty (in Democratic Political Theory)" (1986) Leonard Levy, ed., *Encyclopedia of the American Constitution*, vol 3, p. 1426, 1426

<sup>141</sup> Gerrit Steunebrink "Sovereignty, the nation state, and Islam"(2008) 15:1 Ethical Perspectives: Journal of the European Ethics Network 7 at 22.

<sup>142</sup> Gerrit Steunebrink "Sovereignty, the nation state, and Islam"(2008) 15:1 Ethical Perspectives: Journal of the European Ethics Network 7

caliph protected it.<sup>143</sup> When the modern state was created, a national people set up its law and the ruler gained his legitimacy from the constitution.<sup>144</sup> Thus, the modern concept of sovereignty brings about a fundamental change in the Islamic world. Political authority becomes superior to religious authority.<sup>145</sup> In this situation, the state held on to the primacy of legislation.

Since the idea of sovereignty was revolutionary, even the idea of Islam as state religion seemed strange. Only individuals can have a religion, not the state. Under the Islamic empire this meant that the sultan/ruler was personally guaranteed that Islamic law would be applied.<sup>146</sup> The empire did not officially recognize Islam as the state religion. This was not because the law applied was not Islamic. Rather, it did so because it was not a modern state. The author hypothesizes that this may also be due to the fact that Islamic law was not familiar with the concept of corporate personality.<sup>147</sup> Only the head of the state had rights and duties since he was a natural person, and not the state.<sup>148</sup>

In a section titled “Sharia no longer exists”, Stuenkel argues that the Shariah as a system of law ceased to exist with the birth of the modern state and emergence of the concept of sovereignty. The reformation of government changed the structure of Islamic law itself. The Shariah was an institution driven by religious scholars. It set limits on the profane authority of rulers who could only develop laws within the domain not covered by the Shariah. Thus, it served as a system of checks and balances.

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<sup>143</sup> *Ibid.* at 23.

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.* at 33.

<sup>146</sup> *Ibid.* at 23.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

Is it possible to reconcile between submission to the will of Allah and the concept of a modern state? The modern state is a legal person, an entity that cannot be given any religious duties. Furthermore, since it is possible in the modern state to dispense with rules of law if the majority of the people decide so, how do we ensure, or how do we create a system in which the principles of Islamic law cannot be violated? Is it the constitution of the modern state that provides the grund norm that validates all laws, or is it the Quran? <sup>149</sup> If the Shariah's aim is to provide laws that are in the interest of Man, does this mean that human beings have the right to make laws that they deem to be in their interest?<sup>150</sup>

Furthermore, if in the pre-modern Islamic empire there was no constitution that gave the ruler legitimacy, which institution did? Who was responsible for ensuring that the Shariah was enforced and that the ruler was administering his government according to the dictates of Allah and His Prophet (PBUH)? Since the concept is at its very core related to that of ijtihad, understanding how law was declared valid in the past requires an explanation of Hart's rule of recognition.<sup>151</sup> According to him, the rule of recognition is one that provides the criteria by which we judge the validity of other rules.<sup>152</sup> Law is not made valid merely by the external statement of the parliament that it has been enacted; rather the actors within the system must internalize it.<sup>153</sup> The answer lies in the development of the doctrinal schools, that is, the Madhahib (sing. Madhhab).<sup>154</sup> The followers of the school internalize the law by having faith in one school and its founders.<sup>155</sup> A central feature of the doctrinal school was the creation of an

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<sup>149</sup> Imran Ahsan Khan Nyazee, *Theories Of Islamic Law: The methodology of Ijtihad* (Pakistan, Islamabad, Islamic Research Institute Press, 1994) at 38

<sup>150</sup> *Ibid.*

<sup>151</sup> *Ibid.* at 296

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.* at 298

<sup>154</sup> *Ibid.* See also: Wael Hallaq, *Introduction to Islamic Law* (U.S.A, University press Cambridge 2009) at 34

<sup>155</sup> Imran Ahsan Khan Nyazee, *Theories Of Islamic Law: The methodology of Ijtihad* (Pakistan, Islamabad, Islamic Research Institute Press, 1994) at 298

axis of authority around which an entire methodology of law was constructed.<sup>156</sup> What follows in this section is primarily Professor Hallaq's description of the system.

The question of how these doctrinal schools gained authority rests on why did they come into being at all? The formation of the schools started taking shape in the form of study circles in the last decades of the seventh century, in which pious scholars debated religious issues and taught students. The production of legal doctrine began in these study circles exclusively. Therefore, legal authority was knowledge-based rather than political, social or even religious. This epistemic authority was the defining feature of Islamic law. "A masterly knowledge of the law was the sole criterion in deciding where legal authority resided; and it resided with the scholars, not with the political rulers or any other source." If a Caliph did participate in legal life actively, it was because of his recognized personal knowledge of the law, rather than his political office or military power. Therefore, legal authority in Islam was personal and private.<sup>157</sup> It resided in the persons of the individual jurists, whether they were laymen or caliphs. This competence in religious legal knowledge was known as *ijtihad*.<sup>158</sup>

The concept of *ijtihad* gave Islamic law one of its unique features. There was, for every possible event or case, and for every specific set of facts anywhere between two and a dozen opinions, if not more. A different jurist held each of them. No single legal stipulation had a monopoly, unlike the situation in the modern state where only one legal ruling applies. Thus, legal pluralism is a characteristic of Islamic law. This is so not only because it acknowledges local custom and takes it into account, but also because it offers a wide range of opinions on one and the same set of facts. This gave Islamic law two of its fundamental features. One was flexibility and adaptability to different regions and societies. The other was an ability to change and develop over time, first

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<sup>156</sup> Wael Hallaq, *Introduction to Islamic Law*, (U.S.A, University press Cambridge 2009) at 34

<sup>157</sup> *Ibid* at 34

<sup>158</sup> *Ibid*

by opting for opinions that were more suitable than others to a particular circumstance and second, when the need arose, by creating new opinions.<sup>159</sup>

Under Islamic rule, therefore, legal authority did not reside in the government or ruler, and this was the primary reason for the rise of the doctrinal school. It was transferred to the individual jurists who were vigorous in their own study circles.<sup>160</sup> In other imperial civilizations law as a legislated system was often “state”-based. However, in the Islamic world ruling powers had nothing to do with the production and promulgation of law or legal knowledge until the advent of modernity. Therefore there was a need to secure law in a system of authority that was not political, more so since the ruling political institutions and their objectives were considered highly suspect. Since the study circles consisted of nothing more than groups of legal scholars and their students, they did not have the capacity to produce a unified legal doctrine that would provide an axis of legal authority. This was because even though each region had its own pronounced, practice-based legal system there still existed in it, a great variety of study circles in each. Within each such circle scholars disagreed on a wide range of opinions.<sup>161</sup>

The development of personal schools was the primary step towards providing an axis of legal authority. This was because the teaching and application in courts and fatwas of a single, unified doctrine of a leading jurist who was the founder of a school allowed for some doctrinal unity. However, an axis of authority was still needed because the great number of personal schools was only slightly more effective than the multiple study circles. These schools were still too numerous, probably being more than two dozen in number and were too divergent doctrinally. Additionally, the leader’s doctrine was not always applied to the core since it was subjected to

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<sup>159</sup> *Ibid* at 27

<sup>160</sup> *Ibid* at 35

<sup>161</sup> *Ibid* at 36



the discretion and sometimes even reformulation of the judge applying it.<sup>162</sup> Therefore juristic and doctrinal loyalty was still needed.<sup>163</sup>

By the eighth century, the jurists had not only formulated the law but also administered it in the name of the ruling dynasty.<sup>164</sup> The community of jurists was basically juristically independent and it had the capacity to steer a course that would fulfill its mission in a manner that it saw fit. It also served as the ruler's link to the masses and helped him in his bid for legitimacy. "As long as the ruler benefited from this legitimizing agency, the legal community benefited from financial support and an easily acquired independence."<sup>165</sup>

In such circumstances, perhaps rallying around a single juristic doctrine was the only way for a personal school to attract loyal followers and consequently to attract political or financial support. This support included not only financial favours but also prestigious judicial appointments that ensured great salaries as well as social and political influence. Considerations such as these explain why scholars rallied around outstanding figures that became absolute mujtahid-imams or master-jurists so that their personal schools became doctrinal entities. This was a way to secure law in a source of authority that was an alternative to the authority of the body politic. In other words, this construction came to fill a gap that Muslim rulers had left untouched. Consequently, in contrast to other cultures where it was the ruling dynasty that promulgated the law and enforced it as well as constituted the locus of legal power, under Islam the doctrinal legal school produced the law and provided its axis of authority. In short, "juristic doctrinal authority resided in the collective, juristic doctrinal enterprise of the school, not in the ruler or in the doctrine of a single jurist."<sup>166</sup>

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<sup>162</sup> *Ibid*

<sup>163</sup> *ibid*

<sup>164</sup> *ibid*

<sup>165</sup> *ibid*

<sup>166</sup> *Ibid* at 37

The doctrinal legal schools are a fundamental feature of the Shariah. After their formation, no jurist could operate independently of them. They continued to function this way until they were dissolved by modern reforms.<sup>167</sup>

While the ruling class did have some influence on legal scholarship, especially due the fact that it financed madrasas that were created as waqfs, the content of the law and its application was never compromised by any political accommodation.<sup>168</sup> “It was the the ruler that had to bow down to the dictates of the Shari’a and its representatives in governing the populace. As a moral force, and without the coercive tools of a state, the law stood supreme for over a millennium.”<sup>169</sup> The caliph did appoint and remove judges and even defined the limits of their jurisdiction. However, he could not influence the content of the law and how it was to be applied.<sup>170</sup>

The early caliphs viewed themselves as being subject to the law as much as any one else, and they acted with in its framework.<sup>171</sup> With the dawn of the second century of Islam, differences started arising between the ruling elite and the legal scholars. This was because the legal specialists insisted that human conduct must be driven with piety, which the ruling elite increasingly came to lack with the passage of time, as they submitted themselves to a life of luxury. Due to this there were various instances in Islamic history where legal specialists refused to work for the government as judges or otherwise, because they saw the ruling elite’s source of income as suspect. The legist’s loyalties were not to the government but rather to the Shariah and the civil population. However, the ruling class needed the legal scholars, and the legal scholars

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<sup>167</sup> *Ibid* at 37

<sup>168</sup> *Ibid* at 38

<sup>169</sup> *Ibid*

<sup>170</sup> *Ibid* at 8

<sup>171</sup> *ibid*

needed it. The rulers needed legitimization, which only the legal scholars could provide, and the legal scholars needed financial resources to continue their work, which only the ruling class could provide, which is why some jurists did accept judgeship. Furthermore, the jurists were the rulers' link to the masses, since they were one of them. They interceded on behalf of the non-elite and also represented the ideal of piety. The later caliphs came to grips with the reality that sheer force would not grant them the legitimacy they were striving to attain. It lay with the legal scholars who were the locus not only of legitimacy, but also religious and moral authority.<sup>172</sup> Hence, both learned to cooperate with each other, and to negotiate their relationship when there was a conflict.<sup>173</sup> However, whenever there was conflict between the ruling class and the interests of the Shariah, it was the Shariah that reigned supreme. The points of friction that arose from the elite were not directed to the law itself, rather to its application by the legal specialists. However, since the caliph's office was regarded as upholding the sacred law and its highest standards of justice, the caliphs themselves felt the responsibility to act according to these expectations. "Inasmuch as the law in and of itself possessed authority, the caliph and his office were seen not only as another locus of the holy law, but also as its guarantor and enforcer. As a rule, the caliphs and their provincial representatives upheld court decisions and normally did not intervene in the judicial process."<sup>174</sup>

The Islamic legal system and its institutions continued as such until the advent of colonialism and the rise of the nation-state. After this, the institutions that were so fundamental to Islamic law were dismantled. Instead, the legal system that replaced it was structured to serve the interests of the colonialists.<sup>175</sup> These interests were mainly economic. In India, for example, the British structured the legal system in a way that would accommodate an open economic market. The legal system was the tool that established and set the tone of economic domination. Furthermore, the British wanted to reduce the economic costs of controlling the country. The

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<sup>172</sup> *Ibid* at 43

<sup>173</sup> *Ibid*

<sup>174</sup> *Ibid* at 44

<sup>175</sup> *Ibid* at 85

best way to do so was to maximize the role of law. “Law was simply more rewarding than brute power.”<sup>176</sup>

The legal system was redesigned. British judges would consult local qadis and muftis regarding issues of Islamic law. Ordinary Muslim judges were placed on the lowest rung of judicial administration. It was assumed that local norms could be incorporated into a British institutional structure of justice.<sup>177</sup>

In practice the British were struck by the staggering plurality of Islamic law. Which is why they stopped consulting local experts, whose loyalty they doubted anyway. In order to control the great mass of juristic opinion, they created codes to deal with the law that they saw as inconsistent and unsystematic. Furthermore, they commissioned the translation of a handful of classical Islamic legal texts, so that the law could be more accessible to British judges. These translations helped in codifying Islamic law for the first time in history, which was now divorced from its Arabic roots. Furthermore, Islamic law was gradually transformed into a state law, “where the legal and judicial independence of the socially grounded legal profession was displaced by the corporate and extra-social agency of the modern state.”<sup>178</sup> At the same time the law being changed to resemble English law.<sup>179</sup>

British perceptions of governance had a great impact on Anglo-Muhammadan law.<sup>180</sup> These perceptions were heavily derived from the interaction between law and the modern state. By way of example, under Islamic law of homicide the victim’s next of kin have private, extra-judicial

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<sup>176</sup> *Ibid* at 85

<sup>177</sup> *Ibid*

<sup>178</sup> *Ibid* at 86

<sup>179</sup> *Ibid*

<sup>180</sup> *Ibid*

privileges. They have the power to decide whether to met out punishment or not. The British held that this right was the exclusive prerogative of the state, which was the only institution that had the legitimate right to exercise violence. In their opinion, under Islamic law criminals escaped punishment too often, something that would not happen under an efficient state discipline. Islamic law, Hastings complained, was “found on the most lenient principles and on an abhorrence of bloodshed.”<sup>181</sup> Thus, its British counterpart gradually replaced Islamic criminal law.<sup>182</sup> The effects of such changes in criminal law continued after the birth of Pakistan, an issue that shall be addressed in the forthcoming section.

Furthermore, the adoption of the doctrine of stare decisis (precedent) added more rigidity to the law.<sup>183</sup> This doctrine had not evolved in Islamic law because the qadi was not deemed sufficiently qualified to make law, unlike his British counterpart. The Shariah assigned legal expertise to the mufti and the author-jurist. The qadi could formerly choose from the wide array of opinions available to him. However, when the doctrine of binding precedent was introduced, this option was no longer available to him. Thus Islamic law was divorced from the linguistic and legal interpretation that had permitted it to accommodate various cultures through out the world, and hence, to reign supreme.<sup>184</sup> Furthermore, the higher court that Anglo-Muhammadan lawyers were forced to follow was the Privy Council, which sat in London, hence divorcing the law from the real and geographical concerns of the natives as well.<sup>185</sup>

By the dawn of the twentieth century, Islamic law had been reduced to the law of personal status in the vast majority of Muslim countries.<sup>186</sup> The institution of waqf had been virtually destroyed to suit colonial economic interests. Even the institution of family law was no longer in the same

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<sup>181</sup> *Ibid* at 87

<sup>182</sup> *Ibid*

<sup>183</sup> *Ibid* at 88.

<sup>184</sup> *Ibid*

<sup>185</sup> *Ibid*

<sup>186</sup> *Ibid* at 115

form that it used to be. Its substance had been severed from the methodology by which it had operated. This is because conserving its methodology would have meant conserving the linguistic and legal interpretive system as well as the human and institutional bearers of this complex tradition. This could only be done with the conservation of the system that “produced the entire sociology of legal knowledge, including the institutions of waqf and madrasa.”<sup>187</sup>

However, these institutions because of their independence stood in the way of the state.<sup>188</sup> They were an impediment to centralization, whether it was fiscal, legal, or otherwise.<sup>189</sup> Therefore, “it was both essential to and an inevitable consequence of the ways of the nation-state that personal status had to be severed from its own, indigenous jural system, its own ecological environment, so to speak.”<sup>190</sup>

This divorce was brought about through the use of various devices that comprised of both interpretive and administrative techniques.<sup>191</sup> For example, the doctrine of *Darura*, that is, necessity, which was limited to allowing the subject to violate the law to save his life such as by eating prohibited food when starving, when extended to the realm of legal theory. The scope of the concept was widened so much that the entire law was redefined within utilitarian principles of necessity.<sup>192</sup>

The second device was procedural, by means of which it became possible to exclude certain claims from enforcement, thus making the substantive provisions of Islamic law

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<sup>187</sup> *Ibid* at 116

<sup>188</sup> *Ibid*

<sup>189</sup> *Ibid*

<sup>190</sup> *Ibid*

<sup>191</sup> *Ibid*

<sup>192</sup> *Ibid*

inconsequential.<sup>193</sup> For example, to cancel the effects of child marriage, bureaucratic offices were directed not to register any contract the parties to which had not reached the age of majority.<sup>194</sup>

The other devices included the use of *Takhayyur* (selection) and *Talfiq* (amalgamation).<sup>195</sup> The former required the gathering together of opinions from various schools to form a single code. The latter meant fusing elements of one opinion from various places within and without the school. Traditional Islamic law had forbidden both jurists and state authorities from resorting to such devices. The use of these devices restructured Islamic law in its entirety.<sup>196</sup>

The fourth device was what is called neo-ijtihād, a method of interpretation largely free from traditional legal interpretation. The devices of *Takhayyur* and *Talfiq* rest on this approach.

The final device is the new interpretation of the principle *al-asl fī al-ashia al-ibaha*, that is, the original rule for all things is permissibility. This means that any law that does not contradict the Shariah may be deemed lawful.<sup>197</sup> The prohibition of child marriage and unilateral divorce by the husband are considered to belong to this category. Furthermore, some institutions such as the Council of Islamic Ideology in Pakistan have a practice of stating that where there is no direct evidence from the Quran and Sunnah to show that the law is prohibited, it will be accepted as valid.<sup>198</sup> This approach further divorces the texts of Islamic law from the structure and foundation on which it stands.

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<sup>193</sup> *Ibid*

<sup>194</sup> *Ibid*

<sup>195</sup> *Ibid* at 117

<sup>196</sup> *Ibid*

<sup>197</sup> *Ibid* at 117

<sup>198</sup> Imran Ahsan Khan Nyazee, *Outlines of Islamic Jurisprudence*, Third addition (Pakistan , Federal Law House ,2005) at 174

By using these devices, the state absorbed the Islamic legal traditions into its well-defined structures of codification.<sup>199</sup> Plurality of opinion is one of the defining features of the Shariah. This plurality led to legal change as well as flexibility in the application of Islamic law. Litigants, especially women could take refuge in any school and the qadi was able to apply any opinion from within that school to accommodate a particular situation.<sup>200</sup> Codification, however, eliminates all such possibilities and the judges and litigants are left with a single formulation and a single mode of judicial application.<sup>201</sup> “Unifying and homogenizing the law is one of the primary concerns of the modern state.”<sup>202</sup>

Furthermore, codification, by its very nature eliminates one of the fundamental features of Islamic hudud laws, which is the concept of *shubh*, that is, mistake/doubt in the mind of the offender. This concept is responsible for the warding off of the *hadd* penalties, which since they are a right of Allah, cannot be pardoned by the ruler. If the law is codified and clarified, this device will fail to operate. This would lead to further rigidity in Islamic law.

It may be argued that codification produces certainty in the law.<sup>203</sup> As a response, the existence of doctrinal schools brings about enough certainty that litigants know what to expect. At the same time the law is flexible enough to accommodate their particular circumstances. Without going into too much detail, the main question is whether there is one right answer in law. If everybody is right then there is flexibility. In Islamic law, all schools are considered right. If all of them are right, then they all lead to the one goal.<sup>204</sup>

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<sup>199</sup> Wael Hallaq, *An Introduction to Islamic Law* (U.S.A, University Press Cambridge, 2009) at 118

<sup>200</sup> *Ibid*

<sup>201</sup> *Ibid*

<sup>202</sup> *Ibid*

<sup>203</sup> Imran Ahsan Khan Nyazee, *Theories Of Islamic Law The methodology of Ijtihad* (Pakistan, Islamabad, Islamic Research Institute Press, 1994) at 296

<sup>204</sup> This paragraph is the result of a recent discussion with Professor Nyazee.



In the words of Professor Hallaq:

“The engineering of these devices and their orchestration to produce particular effects was the work of the modern state, the appropriator and possessor of the law. That this institution was the most central and commanding project ever to enter the world of Islam is nothing short of a truism. As the primary and leading institution of European modernity, it constantly defined, redefined and influenced nearly every entity with which it came in to contact. Whether incorporated into the Muslim world by imposition or mimesis, its defining, constitutive and fundamental features were nearly identical everywhere. It claimed the exclusive right to wage war outside and, with the same exclusivity, to exercise violence within its own domains; it declared itself sovereign while developing systematic mechanisms of surveillance and discipline; it lived on nationalism as the body lives on circulated blood; it appropriated the exclusive right to make and enforce law; and in all of this it was the big father of the citizen. As a man was head of the family, the state was the head of society. The nation-state thus combined among its attributed the power to rule and subdue, and the right and duty to defend, promote, and claim possession of the nation, nationhood, nationality, and their subject- the citizen.”<sup>205</sup>

“One of the most salient features of the nation-state is its totalistic appropriation of the domain of law, an appropriation that presupposed centralization and bureaucratization of the legal system. There was no room for judges’ law-making, otherwise a defining attribute of the British case law system. Case law is a diffused phenomenon, lacking in concentricity, a clear voice of authority and a textual homogeneity that can pronounce the laws of the state in an authoritatively clear and unmistakable fashion. A strong colonialist regime (and later nationalist governance) thus required the code, the statute and the act as tools of total control. Even the British engaged in this

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<sup>205</sup> Wael Hallaq, *An Introduction to Islamic Law* (U.S.A, University Press Cambridge, 2009) at 118

form of legislation in their legal reconstruction of the colonies.”<sup>206</sup> Thus, the state has acquired a complete monopoly over law making. The only area it has left is the ‘ibadat (acts of worship). Even in this category it controls subjects like zakah.<sup>207</sup>

The code not only embodied the objectives of the nation-state, but was also the primary means by which Oriental legal systems were re-engineered.<sup>208</sup> Law was a part of the nation, and therefore it had to be national, becoming the primary embodiment of the nation-state’s will and ambitions.

Even with the end of the colonial-era and the rise of nationalism in Muslim countries, the basic structures introduced by the colonial masters were kept in place. This is because the nationalist elite needed modernist structures not only to challenge Western colonization but also to rule their own populations efficiently.<sup>209</sup> While the main objective of the colonials was economic subjugation, the nationalist elite aimed at total rule. Since law was the exclusive domain of the state, even though the law was substantively and substantially that of the Shariah, at the end it was the state that decided the scope to which, or whether at all it was applicable. “This is precisely the meaning of sovereignty, and sovereignty is no one else’s business but the state.”<sup>210</sup>

In this sense the claims of Western scholars like Steunebrink that the nation-state allows the Shariah to become total are baseless.<sup>211</sup> He argues that this was not the situation that obtained

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<sup>206</sup> *Ibid* at 119

<sup>207</sup> Imran Ahsan Khan Nyazee, *Theories Of Islamic Law The methodology of Ijtihad* (Pakistan, Islamabad, Islamic Research Institute Press, 1994) at 292

<sup>208</sup> Wael Hallaq, *An Introduction to Islamic Law* (U.S.A, University Press Cambridge, 2009) at 119

<sup>209</sup> *Ibid* at 141

<sup>210</sup> See Wael Hallaq, *An Introduction to Islamic Law* (U.S.A, University Press Cambridge, 2009) at 122. The book also explains how the nation-state has curtailed the rights that Islam gives to women.

<sup>211</sup> Gerrit Steunebrink “Sovereignty, the nation state, and Islam”(2008) 15:1 *Ethical Perspectives: Journal of the European Ethics Network* 7 at 35. He argues that since the traditional structure of Islamic law with its checks and balances has been destroyed the state gives the Shariah a chance to become total.

under the Islamic empire. The Shariah never permeated all aspects of life.<sup>212</sup> This assumption is based on a misunderstanding of Islamic law; the structure of it has already been discussed. Furthermore, the Shariah cannot become total in a nation-state because the legitimacy of law has shifted from the domain of religion to that of the state. Whereas, it was the scholars of the doctrinal schools that decided questions of legitimacy, it is now the state, whose capacity itself, being a fictional person incapable of performing religious duties, is doubtful according to the dictates of Islamic law. Furthermore, since the nation-state has restructured and replaced the fundamental institutions associated with the Shariah, divorcing its textual sources from its methodology and legal system there is little to prove that there is a place for Islamic law in the Western concept of a nation-state at all.

Problems related to sovereignty and the nation-state have continued to cripple the Muslim world. After gaining independence and adopting modernity, Muslim states were forced to depend on a capitalist economy as well as technology. This led to dependency on Western countries economically and otherwise. Adopting modern institutions led Muslim states to new pitfalls rooted in colonialism. “The state- the most overpowering project of modernity- has therefore come to the Muslim world to stay, in effect creating this most fundamental dilemma for Muslims around the world: if Islamic law governed society and state for over twelve centuries, and if the rule of law had a significance beyond and above the modern state’s concept of such rule, then how is that sacred law accommodated by the irretrievable fact of the state, in effect the maker of all laws? This is the question that permeates the fabric of all the discourse and practice of politics and law in today’s Muslim world.”<sup>213</sup>

It is notable that even Christian thinkers struggled with the concept of sovereignty. The Catholic scholar Jacques Maritain, who was the principal interpreter of the works of Thomas Aquinas in the twentieth century, stated that only God is sovereign and the best political order was one that

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<sup>212</sup> *Ibid.* at 17.

<sup>213</sup> Wael Hallaq, *An Introduction to Islamic Law* (U.S.A ,University Press Cambridge, 2009) at 141

recognized this. In his view, Christianity should not be combined with capitalism. Man is a spiritual and material being that has a relationship to God. Therefore, his morals, as well as social and political institutions must reflect this.<sup>214</sup> He stated:

“It is my contention that political philosophy must get rid of the word, as well as the concept, of Sovereignty: not because it is an antiquated concept, or by virtue of a sociological-juridical theory of “objective law”; and not only because the concept of Sovereignty creates insuperable difficulties and theoretical entanglements in the field of international law; but because, considered in its genuine meaning, and in the perspective of the proper scientific realm to which it belongs — political philosophy — this concept is intrinsically wrong and bound to mislead us if we keep on using it — assuming that it has been too long and too largely accepted to be permissibly rejected, and unaware of the false connotations that are inherent in it.”<sup>215</sup>

## 4.1 Pakistan as an Islamic State

Pakistan was created in 1947 to serve as a homeland for the Muslims of the sub-continent after gaining independence from the British. Pakistan’s identity was distinctly Islamic and its reason for coming into existence was asserted as being purely religious. Its founders however were anti-colonial nationalists. The Objectives Resolution declared Allah as the sole sovereign of the universe. While sovereignty belonged to Allah, it was delegated to the State of Pakistan. This declaration was problematic from its very beginning. It betrayed the tension between the sovereignty of Allah and that of the state.<sup>216</sup> Due to this, the legal history of Pakistan has been marked by a serious strain that the claim of “delegated sovereignty” implies. Its founders were

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<sup>214</sup> Willaim Sweet, "Jacques Maritain" Edward N. Zalta (ed.), (*Fall 2008 Edition*) *The Stanford Encyclopedia of Philosophy*, UR=<<http://plato.stanford.edu/archives/fall2008/entries/maritain/>>

<sup>215</sup> Dan Philpott, "Sovereignty", *The Stanford Encyclopedia of Philosophy* (*Summer 2010 Edition*), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/sum2010/entries/sovereignty/>>

<sup>216</sup> Wael Hallaq, *An Introduction to Islamic Law* (U.S.A, University Press Cambridge, 2009 ) at 148

modernist and their ideals were primarily Western, due to which they promoted the administrative, bureaucratic and political institutions of the nation-state. While the Objectives Resolution advocated a Western system of governance, it also stated, “Muslims shall be enabled to order their lives...according to the teachings and requirements of Islam as set out in the Holy Quran and the sunna.”<sup>217</sup>

Since the birth of Pakistan the ulama advocated that the laws of Pakistan should be reviewed so that anything in them that was repugnant to the teachings of the Shariah was struck down. The idea was that the Shariah should be applied in accordance with the principles of the traditional doctrinal schools.<sup>218</sup>

When the first constitution was finally promulgated, it had an article that later became known as the repugnancy provision. The effects of this article on the application of Shariah in Pakistan were long lasting and the article was carried on to the Constitution of 1973, which is the one being followed in Pakistan to date. Article 198 of the Constitution stated, “no law shall be enacted that is repugnant to the Injunctions of Islam as laid down in the Holy Quran and Sunna.” However, this article was restricted by clauses 2 and 3, which required that if any law was contrary to the Shariah, a temporary advisory committee submit a proposal to the National Assembly. However, they precluded the courts from hearing any cases that bore on Article 198.<sup>219</sup>

The dilemma became obvious in *Zia ur Rahman v. The State*. The prime minister pardoned some criminals who had been convicted for the crime of murder. Under Islamic law, murder is not a crime against the state. Rather, it is a mixed right of the individual and Allah, with the right of

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<sup>217</sup> *Ibid*

<sup>218</sup> *Ibid*

<sup>219</sup> *Ibid* at 148

the individual being predominant. Only the family of the victim can pardon the offender. The court held that the Objectives Resolution is a supra-constitutional instrument. However, in *State v. Zia-ur-Rahman* it was held that is not a supra-constitutional instrument. Rather its status is that of a preamble, and it was incorporated as such.<sup>220</sup> It was inserted in the Pakistan Constitution of 1973 in the form of Article 2A by President's Order no.14 of 1985.

Until Zia ul Haq came in to power, the courts continued to interpret the law according to the common law case method. Furthermore, the repugnancy provision was left dormant. With Zia began the process of Islamization.<sup>221</sup>

Zia ul Haq was also responsible for the creation of the Federal Shariat Court in 1980. Its task was to adjudicate on which laws were in contravention to the Shariah. Once such a law was found, it would cease to have any effect. The Federal Shariat Court had limited jurisdiction. It could neither adjudicate on constitutional matters, nor did it have jurisdiction over the fiscal law, procedural law and law of personal status. It was also structurally limited because the Supreme Court could reverse its decisions. Furthermore, since the judges of the Shariat court were not ulama, their decisions were not always consonant to the ordinances that General Zia had promulgated, neither were they consistent with the traditional rules of the Shariah.<sup>222</sup>

With time, members of the ulama class were appointed as judges of the Federal Shariat Court. Furthermore, in 1998 the Enforcement of Shariat Ordinance was promulgated which declared

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<sup>220</sup> Imran Ahsan Khan Nyazee, *Theories Of Islamic Law The methodology of Ijtihad* (Pakistan, Islamabad, Islamic Research Institute Press, 1994) at 39

*State v. Zia-ur-Rahman*, PLD 1972 lah. 382

<sup>221</sup> Wael Hallaq, *An Introduction to Islamic Law* (U.S.A, University Press Cambridge, 2009) at 149

<sup>222</sup> *Ibid* at 150

that the Shariah was the “supreme source of law in Pakistan and the Grundnorm for guidance of policy-making by the state.”<sup>223</sup>

The Peshawar Shariat Bench challenged the limitations on the jurisdiction of the Federal Shariat Court. It interpreted these exclusions as bearing on the Shariah itself and not on the state’s legislative pronouncements on personal status.<sup>224</sup> It ruled that the orphaned child was not entitled to his or her parent’s share that the parent would have gotten were they alive. Thus, section 4 of the Muslim Family Law Ordinance was repugnant to the Shariah. The government appealed this decision and the higher court overturned it, stating that the Peshawar Bench did not have the jurisdiction to decide on the matter and only the legislature, including the Council of Islamic Ideology, which is its advisory body, was competent to determine it.

In March 2000 the Federal Shariat Court held that section 4 would not have any effect. It decided that it was for the legislature to find a solution for the orphaned grandchildren. It agreed with the Council of Islamic Ideology that the aunts and uncles of these children should be required to provide for these children as if they were members of their own families. However, the court stated, that the moral and social conditions of Pakistani society were not ready for the imposition of such an obligation. Instead of imposing a duty of care upon the relatives, it required a mandatory will. This ruling seems to be based on the belief that since the moral community no longer exists, placing a duty of care would lead to a social outcry.<sup>225</sup>

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<sup>223</sup> *Ibid.*

<sup>224</sup> *Ibid*

<sup>225</sup> *Ibid* at 151

## 4.2 Conclusions

To conclude, the following remarks can be made about Islamic law and its interaction with the nation-state. First, the Shariah in its traditional form was not just a judicial system and a legal doctrine, but also a systematic practice that was related to the world around it.<sup>226</sup>

While the substance of the Shariah gave direction to social morality, it did not impose itself upon it coercively. As far as procedure was concerned, the courts were pre-capitalist and non-bureaucratic.<sup>227</sup>

The Shariah's legal pluralism gave it flexibility. Furthermore it was a system embedded in the social order by which it was created, by the order itself.<sup>228</sup> Due to this Islamic law not only provided a link between metaphysics, theology and the material world, but also infused legal norms with in a social order, largely by way of mediation rather than imposition. The process of adjudication was therefore tied to the world around it.<sup>229</sup>

Furthermore, Islamic law was not engaged in transforming society, or managing or controlling it, unlike the modern state. The separation between political realities and the legal system allowed the mediation of "the agency of custom and social morality."<sup>230</sup>

Since the Shariah's task was explicating doctrine, individual opinions of jurists did not form law in the way that we understand the concept today.<sup>231</sup> The law today is primarily a code and a

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<sup>226</sup> *Ibid* at 163

<sup>227</sup> *Ibid*

<sup>228</sup> *Ibid* at 165

<sup>229</sup> *Ibid*

<sup>230</sup> *Ibid*



statement of the will of the sovereign. Traditional Islamic law was an exercise in interpretation. It did not involve the state or its coercive power. This was because there was no state in the first place. The Shariah was not subject to change by legislation. Therefore, it did not express the interests of the dominant class, unlike the situation we find in the modern nation-state.<sup>232</sup> Under the Shariah, the rule of law was a much more positive phenomenon compared to what it is in its modern form.<sup>233</sup>

In the nation-state the Shariah has been reduced to a body of texts devoid of any social context, at the same time being subjected to a type of politics that it had nothing to do with in pre-modern times.<sup>234</sup> This transformation of the Shariah has occurred due to its clash with the concept of a modern state.<sup>235</sup> This is because now the state is the master of the laws. It has destroyed the traditional institutions in which the Shariah operated. The Shariah became a type of positive law that was the result of the state's will. The forces behind this transformation were codification, centralization, bureaucratization and homogenization, to name a few.<sup>236</sup> These devices ensured complete compliance and militarization, which are the primary support of the modern state.<sup>237</sup> These procedures helped divorce the Shariah from its anthropological past, stripping it of its relevance.<sup>238</sup>

Whereas in the past the Shariah remained outside the clutches of dynastic rule, with its codification it was transplanted within the state structure, thus subjecting it to a political process

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<sup>231</sup> *Ibid* at 166

<sup>232</sup> *Ibid*

<sup>233</sup> *Ibid*

<sup>234</sup> *Ibid*

<sup>235</sup> *Ibid*

<sup>236</sup> *Ibid* at 168

<sup>237</sup> *Ibid* at 168

<sup>238</sup> *Ibid*

that it had largely remained outside of before, thus making it the core of political tension in the world.<sup>239</sup> In the modern world, law is the state's tool of political strategy, used for reengineering the social order.<sup>240</sup> Law cannot exist without the state and the state is not considered sovereign if it cannot make its own law.<sup>241</sup> In this scenario, Islamic law cannot be implemented without the agency of the state.<sup>242</sup> Due to these factors, when the Shariah is advocated in the modern world, what comes to mind is a powerful ideology that aims at transforming the social order.<sup>243</sup> The Shariah has become an element of a moralizing state, something that it was not in its pre-modern context.<sup>244</sup>

## 5 Islamic State: An Oxymoron?

Based on the issues discussed in this thesis, the following conclusions can be made:

- The nation-state was born as a result of the religious wars of Europe between the princes and the Pope.
- It was created with the purpose of avoiding external, particularly religious, influence, whether in law making or otherwise.
- Thus, the nation-state is sovereign in its own territory.
- It is the maker and validator of all laws in the territory under its rule.

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<sup>239</sup> *Ibid* at 169

<sup>240</sup> *Ibid*

<sup>241</sup> *Ibid*

<sup>242</sup> *Ibid*

<sup>243</sup> *Ibid*

<sup>244</sup> *Ibid* at 170

- The ruler is the agent of the state.
- Any contract that exists between the people and the state is purely theoretical.
- Since the Second World War, systematic efforts have been made to curtail the sovereignty of the state.
- The rulings of Islamic law imply the existence of a ruler.
- The ruler gains his authority through the contract of bay'ah.
- He is the agent (*wakil*), guardian (*wali*) and (*sharik*) of the Muslim community, who delegate their affairs to him.
- The effects of this contract permeate all aspects of government, from the immunity and liability of the ruler and judges, to the operation of the *bayt al-mal*.
- The era of the Rightly Guided Caliphs had elements of the Prophetic mission, however the element of Divine Punishment was taken away. To believe otherwise would have a negative impact on how Islamic law theory views the relation of Muslims with non-Muslims. Furthermore, it would also mean that their era and its

institutions could not be imitated. Instead, while the Caliphs derived their moral authority from their association with the Prophet, peace be upon him, their legal authority was the result of the contract of bay'ah.

- Under Islamic law, the ruler is responsible not only for enforcing the rights of individuals, but also the rights of Allah, to whom he is personally responsible.
- The rights of Allah are immutable and cannot be suspended.<sup>245</sup>
- The rights of Allah are really the rights of the poor.<sup>246</sup>
- Only human beings are the subjects of Islamic law, thus even if legal personality is granted to a non-human, religious duties cannot be expected of it.
- Islamic law does not recognize a separate legal personality for the Muslim community, nor its collective property, the bayt al-mal. To do so would be a great blow to the rights of individuals under Islamic rule.
- The *waqf* is a suspension of property. In fact, since this institution is entirely independent of the state, its existence was responsible for delay in the entry of the concept of legal personality in the Muslim world. Colonials had to dismantle it to

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<sup>245</sup> Imran Ahsan Khan Nyazee “Shar’iah Bill of Rights for the New Millenium” (2001) Advanced Legal Studies Institute < <http://www.scribd.com/doc/47867444/Shariah-Bill-of-Rights>> at 5

<sup>246</sup> Imran Ahsan Khan Nyazee “Shar’iah Bill of Rights for the New Millenium” (2001) Advanced Legal Studies Institute < <http://www.scribd.com/doc/47867444/Shariah-Bill-of-Rights>> at 5

enable the Western system of governance to operate. That contemporary Muslims are using the concept to demonstrate that Islamic law recognizes legal personality is baffling.

- The modern concept of sovereignty makes political authority superior to religious authority.
- Under traditional Islamic law, legal authority is the domain of the doctrinal schools. It does not reside with the ruler or government.
- The advent of colonialism and the rise of the nation-state have fundamentally changed the structure of Islamic law.
- Under the Hanafi concept of *wakalah*, only the party managing the business can be sued.<sup>247</sup> The title in goods always passes to the principal rather than the agent. Since the rights of performance belong to the agent, the principal cannot be sued for performance.<sup>248</sup> This means that since the ruler is the agent of the Ummah, the Ummah as the principal stays in the background. The ruler is liable for criminal behavior. He does not have immunity, unless there is a genuine error in official capacity. An example of this is the case of Sayyiduna Umar (RA) who required a pregnant woman to attend his court. Since he had a reputation for being very strict, she became so fearful that she suffered a miscarriage. On the advice of Sayiduna Ali (RA) he paid damages to her for the injury he had caused.<sup>249</sup> The situation in Pakistan, on the other hand is completely

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<sup>247</sup> Imran Ahsan Khan Nyazee, *Islamic Law Of Business Organization Corporations* (Islamabad, Pakistan, Islamic Research Institute Press, 1998) at 180

<sup>248</sup> Imran Ahsan Khan Nyazee, *Islamic Law Of Business Organization Corporations* (Islamabad, Pakistan, Islamic Research Institute Press, 1998) at 24

<sup>249</sup> Abd al-Qadir Awdah *al-Tashri' al-Jina'i al-Islami* vol.2, 117

different. Articles 248 (2) and (3) of the constitution prohibit the initiation or continuation of any criminal proceedings against the president during his office. Under the Islamic rule the Ummah as a whole is responsible for the establishment of the rights of Allah, and the ruler is the their enforcer. The authority granted to the state under western law is difficult to justify because it is not responsible to Allah Almighty. However, the Caliph is answerable to him.

- The state can be given legal personality under Islamic law as an administrative tool and as an agent of the Ummah.<sup>250</sup> This will satisfy the requirements of International law. However, it cannot be given religious duties. The ruler will be the agent managing the Ummah.

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<[http://islamport.com/w/sys/Web/3794/617.htm?zoom\\_highlight=%C7%E1%CA%DA%D2%ED%D1+%DA%E3%D1](http://islamport.com/w/sys/Web/3794/617.htm?zoom_highlight=%C7%E1%CA%DA%D2%ED%D1+%DA%E3%D1)>

<sup>250</sup> Imran Ahsan Khan Nyazee “Shar’iah Bill of Rights for the New Millenium” (2001) Advanced Legal Studies Institute < <http://www.scribd.com/doc/47867444/Shariah-Bill-of-Rights>> at 6







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