Freedom of Expression in Islam

Mohammad Hashim Kamali

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This book offers the only detailed presentation available in English of the freedom of expression from both the legal and moral perspectives of Islam. It is informative, in this sense, not only on its particular theme on freedom of expression but also on the cultural tradition of Islam and its guidelines on social behaviour. For the moral teachings of Islam on etiquettes of social interaction and speech are often more far-reaching than its legal rules on the same themes. A detailed examination of the affirmative evidence on freedom of expression in the sources of Sharīᶜah is followed by a similar treatment of the limitations, whether moral, legal, or theological, that Islam imposes on the valid exercise of this freedom.

Notwithstanding the affirmative stance of the Qur'ān and Sunnah on such basic issues as commanding good and forbidding evil (*ḥisbah*), independent reasoning (*ijtihād*), consultation (*shūrā*) and freedom to express opinion (*hurriyyah al-ra'y*) nowhere does one find in the scholastic jurisprudence (*fiqh*) an exclusive treatment of the freedom of expression as a basic right of the individual. The present work is a pioneering attempt in that direction and offers an original treatment of the source materials of Sharīᶜah on its subject. It also contains useful information on the applied laws of Malaysia and other Muslim countries on certain aspects of the freedom of speech.

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MUHAMMAD HASHIM KAMALI
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Part One

PRELIMINARY

I. Introduction

The second chapter in the preliminary part of this volume is devoted to the definition, scope and objectives of freedom of expression in Islam. The main objectives of freedom of expression I have highlighted in this section are vindication of truth, and protection of human dignity. Chapter three addresses the issue of the recognition, or otherwise, of rights in Sharī^{c}ah. This discussion is set against the background of the view which asserts that Islam is a religion of duties, and that the concept of rights, especially of fundamental rights, is foreign to the Sharī^{c}ah.

The rest of this book is basically concerned with two principal themes, namely affirmative evidence in support of freedom of expression, and the limitations, whether moral or legal, which Islam imposes on the exercise of this freedom. These two themes, it may be said, are investigative in their purpose, which is why I should add that a third feature of the volume at hand is its attempt at reassessing certain issues and to highlight the need for a fresh review of the source materials of Sharī^{c}ah, whenever this was deemed to be necessary and desirable.

The section on affirmative evidence in support of freedom of expression draws attention, in the first place, to some of the principles enunciated in the holy Qur'ān, and the normative teachings (i.e. the Sunnah) of the Prophet Muhammad (peace be upon him) which provide the basic authority for this freedom. I have, in this connection, discussed the fact that despite the existence of affirmative evidence in the sources, nowhere does one find, nor indeed would one expect to find, in the scholastic works of the ulema, an exclusive treatment of this freedom, in the way which is now familiar in modern writings on constitutional law. The principles of *ḥisbah*, that is commanding good and forbidding evil, *naṣīḥah*, or sincere advice, *shūrā* or consultation, juristic reasoning or *ijtihād*, and *ḥaqq al-mu^{c}āraḍah*, that is the right to constructive criticism, are all affirmative on the freedom of speech and I have devoted a section to each. My discussion in this part also addresses the subject of *ra'y* (personal opinion), and its historical development, which originates in the basic question of whether and how should the use of personal opinion be regulated in the development of the rules of Sharī^{c}ah. The section on affirmative evidence ends by an exposition of the freedom of association and assembly, which is undoubtedly one of the most important, and yet, neglected aspects of freedom of expression in

Islam. My treatment of the topics discussed in this part is somewhat experimental in that I had no precedent on which to rely. My main concern has been to locate the evidence and present it in a coherent form, as well as to develop new perspectives over issues and to interpret the existing materials in light of relevant hypotheses.

The next section addresses the freedom of religion and explores the extent of this freedom in a system of law which is intertwined with religion and is often coterminous with the dogma and belief structure of Islam. The principal question I have addressed here is whether or not the Sharī^{c}ah subscribes to the freedom of conscience. My conclusion is that the Sharī^{c}ah takes an affirmative stand on freedom of religion despite a certain controversy that has arisen over the understanding of the Qur'ān on this freedom. Some commentators have, for example, advanced the argument that the Qur'ānic declaration that "there shall be no compulsion in religion" (2:256) has been abrogated. This is clearly not the case and I have developed a certain perspective over this. I have also reviewed some of the evidence pertaining to apostasy, its meaning, and its bearing on freedom of religion.

The second of my two themes, namely restrictions on the freedom of expression occupies a much larger portion of this volume. I have attempted to divide these restrictions into two main categories of moral and legal. Violations of the freedom of speech like backbiting, acrimonious talk, exposing the weaknesses of others, and even certain types of lying, obviously fall under moral violations and I have treated them as such. Other violations such as slanderous accusation, libel, insult, sedition, and blasphemy call for legal sanctions. They are clearly justicible and therefore fall under the category of legal prohibitions.

Certain concepts that relate to freedom of expression such as *fitnah* (sedition), *bid^{c}ah* (heresy), and *kufr* (disbelief) have remained somewhat loosely defined and versatile. I also found so much diversity in the treatment of these concepts in early sectarian literature that it was difficult to identify the precise import of concepts, and also to ascertain positions which might be at variance with the correct teachings and principles of Islam. For example, in relationship to *fitnah*, the Kharijites have departed from the mainstream of Islamic teachings on many points and advocated some ideas which were decidedly controversial and others which were uncertain. Also, in the sectarian literature pertaining to *kufr*, charges of heresy and disbelief were sometimes laid on the opponent faction with a certain degree of laxity and self-assertiveness.

The ulema of the leading schools have identified such departures and I have tried to ascertain their positions. In connection with apostasy, blasphemy, and heresy, I have also drawn attention to a certain need to separate and distinguish concepts which are often pervasive and overlapping.

I have attempted, on occasions, to develop a fresh perspective over the source materials of Sharī^{c}ah concerning concepts or issues where evidence warranted such a course. In the absence of any precedent that could be used as a guideline in the selection of themes, in posing questions, and the degree of emphasis that should be given to subsidiary and related issues, I alone take the blame for possible errors. There is, to the best of my knowledge, no exclusive study of freedom of expression in Islam available either in the English or Arabic languages. The task has, therefore, been somewhat daunting as issues tended to criss-cross the boundaries of law, theology, and ethics, so much so that certain themes in my discussion hardly recognised any clear boundaries at all. Although I have, as noted earlier, attempted a division of themes into the various categories of moral and legal and so on, this classification is not intended to be either definitive or exhaustive, as there may be some subjects which could simultaneously be placed under more than one heading. Despite the fact that I have included non-legal themes, this enquiry still maintains a dominantly legal character and departure from this context is only made whenever necessary and warranted.

Appendix I, which appears at the end of this volume, elaborates the discussion in chapter two over *ḥaqq*, its definition and how it relates to the two allied concepts of *ḥukm* and ^{c}*adl* respectively. In appendices II, III and IV I have expounded, as far as my access to information permitted, the applied laws of some countries, including Malaysia, Egypt, and Pakistan. But, my aim in doing so was merely to provide a basis for comparison, and to ascertain the broad outline of modern law on the issues of our concern. Statutory legislation in contemporary Muslim countries is on the whole not explicit on matters such as defining *kufr*, *fitnah*, blasphemy, and *bid*^{c}*ah*. The focus of discussion also tends to vary in Sharī^{c}ah and modern law. *Fitnah* in the juristic literature of Sharī^{c}ah, for example, is as much a religious as it is a political issue, whereas in modern law we find that sedition is almost exclusively a political concept. This would partly explain why my discussion of modern law on some of these subjects tends to be somewhat selective.

One of the principal objectives of this research has been to identify the legal norms and guidelines of Sharī^{c}ah on the issues we

have raised. This has, in turn, entailed an attempt at consolidating the materials in a manner that can be used by a modern student of law. In evaluating the data, I have made suggestions regarding their relevance and application to the lives of Muslims today, and the need, in certain areas at least, for fresh enquiry and solutions. Also, I have proposed an opinion when I was able to formulate one, but there are areas that can still be developed through further research.

Except for certain issues which might require structural changes in order to ensure harmony between the Sharī^{c}ah and modern law, the constitutions and laws of present-day Muslim countries do, on the whole, maintain a certain level of harmony with the principles of Islam. This tendency might have been less prominent in the early years of the post-colonial period, now there is a general awareness to enhance the Islamic identity and origin of the applied law in Muslim lands. The Islamic resurgence movement of recent decades has largely consisted of political demands which generated pressure to bring about a closer identity with their Islamic heritage. But these demands have not yet been translated into specific measures as to where and how this heritage can be utilised into viable alternatives in relationship to specific issues. Constitutional law has naturally been a prime candidate for such an attempt. The demand here has generally been either to establish an Islamic state, or to enhance the Islamic content of the constitution and other laws. How this can be achieved, and which specific areas need to be reformed, and in what way, are questions to which detailed responses are still wanting. This work is an attempt to explore some of the Islamic responses to issues of contemporary concern by not only ascertaining the Sharī^{c}ah guidelines on specific themes, but also by bridging the vacuum that has developed owing to the long-standing prevalence of imitation (*taqlīd*) between the Sharī^{c}ah and social reality. It is often noted, as a result, that social conditions have developed in a certain direction, and given rise to new questions to which the *ijtihād* of the *madhāhib* do not relate in the same way as it might have in the past. The need then arises either to further develop the existing positions in light of prevailing conditions, or failing that, to take a direct approach to the source materials of Sharī^{c}ah in the quest for an alternative solution. These two approaches need not be mutually exclusive. Even in cases where new solutions are needed, the existing body of opinion and *ijtihād* can be of great assistance and may well have contemplated and debated the alternative interpretation that we now find more suitable to our conditions.

NOTE ON TERMINOLOGY

Arab writers are not consistent in the use of terminology for "freedom of expression". While some employ such terms as *ḥurriyyah al-ra'y* (lit. freedom of opinion) and *ḥurriyyah al-qawl* (freedom of speech) others have used alternative terms such as *ḥurriyyah al-tafkīr* (lit. freedom of thought), *ḥurriyyah al-taᶜbīr* (freedom of expression or interpretation), and *ḥurriyyah al-bayān* (freedom of expression). Mahmaṣṣani uses both *ḥurriyyah al-ra'y*, and *ḥurriyyah al-ra'y wal al-taᶜbīr*, that is freedom of opinion and expression. He then explains why this longer phrase is preferable to *ḥurriyyah al-tafkīr* (freedom of thought):

> thought is a hidden phenomenon and a mental activity which is communicated in words, and until then, thought which has not been expressed in words, remains outside the concern of law. It is the external manifestation of thought which we refer to as *ra'y* (opinion). To use the phrase *ḥurriyyah al-ra'y wa al-taᶜbīr* is thus preferable as it leaves no doubt that the thought, idea, or opinion at issue has been expressed and communicated.[1]

Mutawalli too uses *ḥurriyyah al-ra'y* and *ḥurriyyah al-ra'y wa al-taᶜbīr*, while Muḥammad Kāmil Laylah prefers *ḥurriyyah al-ra'y*. ᶜAbd al-Wāḥid Wāfī uses *al-ḥurriyyah al-fikriyyah* (freedom of thought) while ᶜAbd al-Qādir ᶜAwdah and Sayyid al-Sābiq tend to use its other equivalent, *ḥurriyyah al tafkīr*.[2] Faruq al Nabhān has on the other hand used *ḥurriyyah al-ra'y wa al-tafkīr* to imply the basic freedom of opinion and thought, but the freedom to express and propagate them is referred to as *ḥurriyyah al-taᶜbīr*[3]. All of these writers tend to distinguish freedom of expression from freedom of religion, which they consistently treat as a separate category, variously referred to as *al-ḥurriyyah al-tadayyun* (freedom of religion), *al-ḥurriyyah al-ᶜaqīdah* (freedom of belief), and *al-ḥurriyyah al-dīniyyah*. Yet, it is generally acknowledged that freedom of expression in Islam is in many ways complementary to the freedom of religion. That it is an extension and a logical consequence to the freedom of conscience and belief which the Sharīᶜah has validated and upheld.[4]

I have elsewhere elaborated, in a section on freedom of opinion, why the phrase *ḥurriyyah al-ra'y* (lit. freedom of opinion) is used in Islamic scholastic literature for freedom of speech, despite the existence of a more precise equivalent, that is *ḥurriyyah al-qawl*. This is, presumably, because opinion is the most important aspect of free-

dom of expression, and also because the word *ra'y* has a history of its own. *Ra'y* means a considered opinion, often related to, and coextensive with, *ijtihād* (personal reasoning) and it signifies harmony with the norms and principles of Islam.[5]

II. Definition and Scope

1. DEFINITION

Since freedom can apply to competing or even conflicting interests, it tends to defy the idea of a comprehensive definition, which is precisely why there is no clear definition for freedom. There are, of course, many attempts by writers and commentators to define freedom, yet they are all open to some level of uncertainty and doubt. Freedom for whom? Freedom from what? And freedom to do what? To the mystic, freedom has often meant the release from self desire and dependence on the material world. The philosopher and theologian would extend the debate to encompass the relationship between God and man and the extent to which a person can be deemed free. What meaning, if any, can the word "freedom" have in that context?

To the lawyer and the judge, freedom operates within the limits of the law. I shall presently give a definition of freedom from a legal perspective, but bear in mind that it is only an attempt to define a certain aspect of this concept without any claim to comprehensiveness. It should be noted at the outset that the basic notion of freedom, in an objective sense, is common to all legal systems, traditions, and cultures. Whether one talks of freedom in western law, Chinese law, or Islamic law, this must essentially mean the ability of the individual to say or do what he or she wishes, or avoid doing so, without violating the right of others, or the limits that are set by the law.[6] Although I have quoted this definition from an Islamic source, its basic message is nevertheless universal. According to yet another definition freedom of expression means "the absence of restraints upon the ability of individuals or groups to communicate their ideas to others, subject to the understanding that they do not in turn coerce others into paying attention or that they do not invade other rights essential to the dignity of the individual."[7]

Freedom of expression includes freedom of the press and the liberty to communicate ideas in all forms including books, pictures,

signs, and other means of communication. The purpose may be to inform, to persuade, to convince others, to reveal the truth, or to clarify and eliminate doubt. Again, I may add, that I have quoted this second definition from a western legal source, and yet, the concept that it conveys is universal. Thus, the basic notion of freedom and of freedom of expression would appear to strike a common note in all legal traditions, including that of Islam. However, the scope and character of freedom of expression under the Sharī^{c}ah differs widely from other laws in respect of detail, especially with reference to the limits that are imposed by the Sharī^{c}ah and the values that are to be upheld. If I were to characterise the rules of Sharī^{c}ah on freedom of expression, I would say that unlike modern legal discourses on the subject the Sharī^{c}ah does not convey a great deal of awareness about state authority and the political interests of its agencies and institutions. To that extent, the Sharī^{c}ah is egalitarian and substantive in the sense that attention is paid to actual values rather than to institutional interests or the dictates of status quo and power politics. But, being a religious law, the Sharī^{c}ah is only expected to be emphatic on moral and religious values, which might mean imposing restrictions on freedom of expression in areas where this might come into conflict with the principles of Islam. This can, perhaps, be clearly seen in reference to the Sharī^{c}ah rules pertaining to blasphemy, heresy, and disbelief where the dominant concern is to defend the dogma and belief structure of Islam, even at the expense of imposing restrictions on what may, under western law, be seen as personal matters which fall outside the concern of law. The rules of Sharī^{c}ah pertaining to the rights of citizens to criticise the government are, on the other hand, indicative of latitude. By comparison to some of the over-regulated areas of modern law in relationship to such matters as sedition and criticism of government authorities, Sharī^{c}ah rules encourage flexibility and tolerance. Moral advice and encouragement also pervade the bulk of Sharī^{c}ah rules on freedom of expression; the legal rules therein are often less elaborate compared to teachings and recommendations that aim at developing the individual's personality and character.

2. OBJECTIVES

There are basically two objectives that are served by the right to free speech: discovery of truth, and upholding human dignity. Restrictions on freedom of speech by the society and state, and conse-

quently the fear that exposition of facts and ideas may invoke wrath or disfavour naturally inhibits the discovery of truth. The right to free speech is also an integral part of self-development. Imposing restrictions on what an individual may wish to say, write, express, or propagate compromises both his dignity and the desire for personal growth. Of these two objectives which are both recognised and validated in Islam, it is, perhaps, the discovery and vindication of truth on which Islam tends to be more emphatic, but this should only be seen as a general characterisation of Islam and its commitment to the discovery of truth. Even so, it is reasonable to assume that in the event of a direct conflict between the quest for truth and human dignity, the former would normally prevail. This order of priority can, perhaps, be seen in the Qur'ānic text which declares that "God loves not the public utterance of evil speech except by one who has been wronged" (al-Nisā',4:148).

لَا يُحِبُّ اللهُ الْجَهْرَ بِالسُّوْءِ مِنَ الْقَوْلِ اِلَّا مَنْ ظُلِمَ.

Note that this text imposes one major restriction on free speech and that is when it is evil, obscene, immoral, or hurtful to others. But, the text allows this restriction to be dropped if doing so would mean that the victims of injustice can make their voices heard. They may be given this opportunity, free of any restriction, if it serves the cause of justice and truth. A court witness may, for example, reveal faults in the character and personality of another person, or make remarks which might compromise their personal dignity, but this may be done only if it serves the cause of justice. The Qur'ān, in other words, tolerates utterance of hurtful speech in pursuit of a higher objective, which is to establish justice. The quest for justice, at an objective level, may thus continue even at the expense of violating the personal dignity of the individual. The Qur'ānic ideals of justice are, on the other hand, inextricably intertwined with righteousness and truth. But, one is also reminded of the relative nature of this discussion, and in particular of instances where the dignity and freedom of individuals may take precedence over the quest for truth. This is perhaps understood from the Qur'ānic prohibition on espionage and on violating the sanctity of private dwellings (al-Ḥujurāt, 49:12; al-Baqarah, 2:189). The quest for truth and justice, in this instance, is not permitted to disturb the privacy of the individual home, nor may it seek to uncover a person's weaknesses even if doing so would otherwise promote the cause of justice. Ascertaining an order of priority between these values is, on the other hand,

not expected to diminish anything from the validity of each. Freedom of expression and the quest for discovery of truth are both normative values, each in its own right, and as such they are each to be pursued and upheld without detriment to the other. Instances of direct conflict between them are not expected to be frequent as the normal pattern of relationship between these values is that they endorse one another and each functions as an instrument for the realisation of the other.

The basic commitment to truth (*al-ḥaqq*) is expressed in several places in the Qur'ān. *Al-ḥaqq* is one of the Most Beautiful Names of God (*al-asmā' al-ḥusnā*), as well as being one of the principal attributes of the Qur'ān. This is the clear purport of the Qur'ānic text which reads: "this is Our Book that conveys to you the truth" (*bi al-ḥaqq*) (*al-Jāthiyah*, 45:29).

هٰذَا كِتٰبُنَا يَنْطِقُ عَلَيْكُمْ بِالْحَقِّ.

The normative character of *al-ḥaqq* and persistence in its pursuit is vividly portrayed in the Qur'ān where true believers are described as those who "advise one another to truth and perseverance in its cause" (al-ᶜAṣr, 103:3).

وَتَوَاصَوْا بِالْحَقِّ وَتَوَاصَوْا بِالصَّبْرِ.

Several meanings can be listed for *al-ḥaqq*, including for example "just", "real", "right", "obligation", "truth", "certainty" (*al-thubūt wa al-wujūb*),[8] and even "beneficience" and "public good" *(al-khayr wa al-maṣlaḥah)*.[9] Islamic law also distinguishes the *ḥaqq* Allah, that is the Right of God or public right from that of *ḥaqq al-ādamī*, the private or civil rights of an individual. However, of all these meanings, telling the truth most embodies the primary meaning of *al-ḥaqq*. The Qur'ān also advocates the finality of *al-ḥaqq* in the sense of there being no further value beyond the truth once this has been attained: "And what is there after attaining the truth, except misguidance?" (Yunus, 10:32).

فَمَاذَا بَعْدَالْحَقِّ اِلَّا الضَّلٰلُ.

The Qur'ānic stance on the pre-eminence of *ḥaqq* finds ample support in the Sunnah of the Blessed Prophet and in the precedent of his Companions. The following Ḥadīth tells us, for example, that truth must not be hindered by the prospect of invoking the disfavour

of others, or even of causing discomfort to oneself: "Tell the truth even if it be unpleasant."[10]

قُلِ الحَقَّ وَلَوْ كَانَ مُرّاً.

This robust attitude to the advocacy of truth is taken a step further by the Ḥadīth which proclaims that the best form of *jihad* (holy struggle) is to tell a word of truth to a tyrannical ruler."[11]

اَفْضَلُ الجهادِ كَلِمةُ حَقٍّ عِند سُلْطَانٍ جَائِرٍ.

The foregoing evidence obviously implies that both ruler and subjects are committed to the pursuit and discovery of truth. This attitude was, in turn, endorsed and substantiated in the inaugural speeches of the caliph Abū Bakr and his successor ᶜUmar b. al-Khaṭṭāb. Upon assuming the caliphal office, both asked the people to assist them when they were right and to rectify them if they deviated from the truth.

Another way of vindicating the truth may be by correcting an error of judgement. If one acknowledges the premise that to err is an inevitable aspect of human existence, then it should follow that the avenues toward exposing and correcting errors should be open, be it through suggestion, advice, or criticism, and that this cannot be achieved without granting the right to free speech. The Qur'ānic principle of *ḥisbah*, that is commanding good and forbidding evil, and the principle of *naṣīḥah* (good advice), which I have discussed in separate sections, are but some of the avenues that Islam opens in its quest for righteousness and truth.

Freedom of expression also complements human dignity. For the essence of character and personality is reflected in a person's opinion and judgement. Individuals can have but little dignity if they are denied the right to give opinions and voice their feelings in matters that concern them. The Qur'ān declares that dignity, in the broadest possible language, is the natural right of every human being: The Qur'ānic dictum that "We bestowed dignity on the progency of Adam" (al-Isrā', 17:70),

لَقَدْ كَرَّمْنَا بَنِيْ اٰدَمَ،

clearly transcends all the racial, social, or religious barriers that divide the humanity. It is a general and absolute declaration and there is no evidence anywhere in the Sharīᶜah to qualify the broad

and universal terms of this statement. Further affirmation of the normative character of this text is found in a passage where the dignified status (*al-ᶜizzah*) of the believers is stated next to that of God Most High and of the Prophet Muhammad (al-Munāfiqūn, 63:8). Also found in the Qur'ān are numerous references to the grace and dignity that is bestowed on the community of believers, so much so that their collective judgement and consensus (*ijmā'*) stands next to the will of God and is recognised as a source of His Sharīᶜah.

The Sharīᶜah entitles the individual to say what he or she pleases provided that the words so uttered do not incur blasphemy, backbiting, slander, insult and lies, nor do they seek to give rise to depravity, corruption, hostility, and sedition. In the affirmative sense, the Sharīᶜah encourages freedom of expression in a variety of ways including *ḥisbah*, the promotion of good and prevention of evil, *naṣīḥah*, sincere advice, *shūrā*, consultation, *ijtihād*, personal reasoning, and the freedom to criticise government leaders.

The dignity that is attached to the upright character (*ᶜadālah*) of an individual is a mark of his or her distinction in the eyes of God and fellow human beings. In all juridical matters, whether a person is a court witness, a judge, a head of state, a qualified scholar (*mujtahid*), a trustee of charities, a guardian, or a custodian of the person or property of others, each must pass the test of *ᶜadālah*. In this sense, the Sharīᶜah obviously contemplates a society whose affairs are administered by upright individuals. Indeed, according to a Ḥadīth, Muslims are presumed to be upright and just unless proven otherwise.[12] Therefore, it comes as no surprise that the Sharīᶜah takes a serious view of any attacks on the honour and good name of upright citizens. Slanderous accusation (*qadhf*) is one of the handful of prescribed offences (*ḥudūd*) for which a mandatory punishment has been enacted in the Qur'ān (al-Nūr, 24:4). Even when the slanderous accuser (*qādhif*) is duly tried and punished, he is never to be admitted as a witness in the court of law. For the offence he committed may well have inflicted irreparable damage on the good name of his victim.

3. ROLE AND SIGNIFICANCE

Freedom of expression has often been characterised as a barometer by which to measure the democratic quality of a government and its commitment to the rights and liberties of its citizens. It is, perhaps, equally true to say that the endeavours of a people in safeguarding this freedom, and the way they balance its use against its possible abuse, is an index of their cultural refinement. The degree of toler-

ance that a society encourages on the part of its members to enable everyone to say what they have to say, and for the rest to show sensitivity in receiving it, is not just a question of legal finesse but reflects the liberality and latitude of a society's collective conscience. Only in secure and tolerant atmosphere where thoughtful contribution and constructive criticism is gracefully received and appreciated by the community and its leaders, can such contributions be positively encouraged and utilised.

A government which grants and protects their citizens' right to freedom of expression can also ascertain their wishes, views, and attitudes in public affairs. It is only to be expected that free speech may bring contentious issues out into the open and stimulate differences of opinion, but this may also be the only way to facilitate a meaningful consensus over issues. In this sense, constructive free speech is, to a large extent, a question of attaining the correct balance of values, and of the necessary incentives and disincentives at various levels of interaction in society. But public participation in government necessitates that every citizen has the assurance that he can say what he has to say without incurring anger or being oppressed by the ruling authorities. This need for openness is even more pronounced in regards to minority opinions and views that might appose the majority or the government in power. For a government which only wishes to explore the views of its supporters is a dictatorship. On the other hand one which encourages impartiality inspires confidence and becomes the vehicle by which society attains its aspirations.

Freedom of speech is also a powerful instrument when used to combat injustice and to expose the misconduct of rulers and leaders who exceed the limits of their authority. In this sense, freedom of expression plays an important role in enabling the public to monitor the conduct of its government. For it is through such freedom that errors and malpractices in public affairs are discovered. Thus, free speech plays a distinctive role in nurturing a well-informed and vigilant society one that is more likely to exercise good judgement in matters which concern it, including the choice and election of leaders. As Ibn Qayyim al-Jawziyyah points out, freedom of expression (*ḥurriyyah al-ra'y*) can be utilised for the realisation of benefit (*maṣlaḥah*), or for the prevention of evil (*mafsadah*) which may come to light and then be made secure through the exercise of this freedom.[13] ᶜAwdah has similarly observed that when freedom of speech is exercised within its legitimate framework, it leads to progress and encourages affection, fraternity, and respect among

fellow citizens. It is also a means by which the ruler and his subjects can cooperate (*taᶜāwun*) to attain benefit, and to combat evil, discrimination and prejudice.[14]

Apart from some exceptions, the history of Islamic government has, on the whole, failed in enforcing the norms of Sharīᶜah on freedom of expression. A glance at history shows, as Fārūq al-Nabhān points out, that the rights of non-Muslims in regards to freedom of belief, and of all citizens in regards to freedom of expression, have been subject to oppressive governmental practices. However, the same author adds, that such practices were politically motivated, and that they had "nothing to do with Islam and could not in any form be validated by the norms and principles of Islam.[15] The Qur'ānic attitude as regards to freedom of enquiry in the pursuit of knowledge and the exchange of information is indicated by its prolific use, of such expressions as *yaᶜqilūn* (those who exercise their intellect), *yatafakkarūn* (those who think), *yaᶜlamūn* (those who know), *yatadabbarūn* (those who ponder), and *yafqahūn* (those who understand). As these expressions show, the Qur'ān obviously encourages enquiry and investigation. Thought, judgement, opinion, and knowledge, as the Qur'ān suggests, must be expressed and communicated and only then can they serve effectively as the means by which to promote faith in God and benefit to mankind.

4. RESTRAINTS

It is inconceivable that any society would have attempted or achieved total and unrestrained rights to free speech for a certain amount of restriction goes hand in hand with the facts of life. Society's perception of the right to free speech is liable to change in accordance with changing conditions, for what we consider to be acceptable today may have been quite out of the question a century or even a generation ago.

A great deal of the inhibitions and restrictions that are imposed on freedom of speech are extra-legal. Public opinion determines, to a large extent, the acceptable limits of such freedom and rejects what is unacceptable or excessive. And yet, public opinion is not a free agent as it reflects a combination of moral, religious, cultural, and legal influences. Legal rules provide a good indication of the vision of a society and the standards by which it regulates the conduct of its members. But the law often intervenes only when freedom of speech violates the rights of others, the general objectives of the law, or the dictates of public policy and interest. The far

wider range of restraints that society and culture impose are, from a strictly legal standpoint, a matter of choice. These would fall, from the viewpoint of the Sharī^{c}ah, under the general principle of original permissibility, or *ibāḥah*. Compared to other legal systems, it is probably true that Islamic law concerns itself more extensively with moral and spiritual guidance, but even so, no one would expect the law to offer exhaustive guidance on freedom of expression, as public opinion, moral attitudes, and custom all play a significant role in determining the scope and dimension of this freedom.

An adequate understanding of the principles of Sharī^{c}ah on freedom of expression inevitably brings us into contact with the conditions of Arab society and its vision as to the types of freedom it could visualise and accept. Although it is true that Islam has not been shaped by the dictates of social reality, it has, nevertheless, taken into consideration both the reality and potential of the society in which it came into being. Nowhere is it claimed that the divine principles and objectives of Islam are totally isolated from the realities of Arab society or from the stage of world history to which they were immediately associated and exposed. The ulema have also tried, on the whole, to interpret the general principles of the Qur'ān and Sunnah in light of the socio-political conditions of their time.

From its very inception Islam attempted to open a dialogue with those who refused to accept it. The Qur'ān explicitly stated that the Blessed Prophet must conduct his campaign through sound reasoning and persuasion. Furthermore, the Qur'ān has encouraged rational argumentation in religious matters, and it consistently recommended investigation and inquiry into almost all aspects of creation. In other words, the Qur'ān takes for granted the validity of an individual's right to freedom of speech. Muslim writers[16] on the subject have consistently stated that Islam not only validates freedom of expression but it also urges Muslims not to remain silent nor indifferent when expressing an opinion which is likely to serve the cause of truth, justice, or be of benefit to society. A look at the passages which are often quoted in support of this position would indicate that the Qur'ānic message is to simultaneously create a right, as well as a duty, for the individual to pursue the recommended values of Islam. The Qur'ān, for instance, not only permits *ḥisbah* (commending good and forbidding evil), *ijtihād* (personal reasoning), and *shūrā* (consultation) etc., as a matter of right for every eligible person to practice, but it also makes them their duty to do so. Here, we note a difference of style and approach between the Sharī^{c}ah and statutory law in that the Sharī^{c}ah does not seek to

separate the dual concepts of right and obligation from one another in the same way as is the case in modern statutory law.

III. Rights and Fundamental Rights

The question I propose to discuss has often been raised but has not been addressed by writers in the field. This is the question of the recognition or otherwise of rights, as opposed to obligations, in Islamic law. The next, and naturally related question, is whether distinguishing fundamental rights as a separate category from the general body of rights is sustainable under the Sharī^{c}ah. These, and certain other issues of methodological significance, have not been addressed in the works of Muslim jurists and are, as such, lacking in precedent. The present analysis advances a perspective over *ḥaqq* (right) in Islamic law; although it is not essential to the main theme of this book, yet from the viewpoint of methodology and comparison with some of the well-established features of modern constitutional law, it warrants consideration. My analysis of right in Islamic law is continued in Appendix one where I discuss some of the details over *ḥaqq* and its relationship with *ḥukm shar^{c}i*, (law or value of *Sharī^{c}ah*) and ^{c}*adl* (justice) respectively.

1. A PERSPECTIVE OVER *HAQQ*

Western commentators have generally held that there is no recognition in Islam of the idea of right and liberty, fundamental or otherwise, that is inherent to the human person. Thus according to Schact, "Islamic law is a system of duties, of ritual, legal and moral obligations, all of which are sanctioned by the authority of the same religious command."[17] Hamilton Gibb has also commented that "the Islamic theory of Government gives the citizen as such no place or function except as taxpayer and submissive subject."[18] This line of argument is taken a step further by another commentator who stated that "no such abstractions as individual rights could have existed in Islam.... In such a system the individual cannot have rights and liberties ... has only the obligation."[19] It is not my purpose to enter into polemics, but merely to record a viewpoint which is clearly not borne out by the evidence I have examined in the following pages.

At the outset it is noted that rights and duties in Islamic law originate in the Qur'ān and in the authentic Sunnah of the Prophet.

The juristic manuals of Sharī^{c}ah often speak of *ḥukm shar^{c}i*, that is a ruling, typically communicated in the form of a command or a prohibition, which regulates the conduct of a legally responsible individual (*mukallaf*). These may convey a variety of concepts, including legal rights and obligations. Although the nature of these communications and the language in which the *ḥukm* is conveyed may tend toward obligation rather than right, a closer examination of *ḥukm* reveals that a mere propensity in the style of communication does not negatively affect the substance and validity of rights in Sharī^{c}ah. An insight into the language of the Qur'ān and Sunnah would confirm that Islam has its own perspective on *ḥukm* and on the allied subjects of rights and liberties. Also, in the Qur'ān and Sunnah there is no formal distinction between fundamental rights and other rights, or for that matter, between constitutional law and ordinary law. This is indicative of a certain outlook: in expounding the *juris corpus* of the law, the source materials of Sharī^{c}ah reflect the influence of *tawḥīd*, of the unity in source and origin of all knowledge, and of a tendency to turn away from approaches that may interfere with the holistic and unitarian philosophy of this principle. Since the Sharī^{c}ah subscribes to the overriding authority of divine revelation, the sense of mission and duty to God and to society admittedly acquires a certain prominence in the concept of *ḥukm* over the idea, so to speak, of an individual's right or his claim *vis-a-vis* God. It is a question largely of the pattern of relations between the lawgiver and the recipient of the law, which is inspired by the ideal of unity and integration rather than a duality of their respective interests. For after all, modern constitutional law, and constitutionalism as such, championed the rights of the citizen in face of the ever-expanding power of the state, which was on the whole, viewed as a menace to individual rights and liberties. On the other hand, Islamic law does not proceed from a position of conflict between the respective rights or interests of the individual and state, which are realised through the implementation of the *aḥkām* of Sharī^{c}ah. When the state succeeds in doing this, it satisfies the basic purpose of its existence, including the rights of the individual. In doing so, both the individual and state obey the *ḥukm* of Sharī^{c}ah and gain the pleasure of God. Thus the duality of interest which is often evisaged in modern constitutions does not present the same picture in the Islamic theory of government.

Islamic law operates on the premise that God commanded humanity to act toward His own illustrious self, and toward his or her fellow men, or to refrain from acting, in certain ways. Individuals must wor-

ship and obey God, there being no room in their pattern of relationships for anything other than submission to His will. But then we say that God has expressed His will and *ḥukm*, which has bestowed upon human beings certain rights as an expression of His divine grace. Commentators who were persuaded to deny the place and reality of rights in the Sharī^{c}ah have not shown awareness of this perspective in their arguments, and have advanced a superficial discourse which confuses a certain outlook that Islam maintains on rights and duties with the affirmative substance of the Sharī^{c}ah on this theme. For centuries, Muslim jurists and scholars have consistently spoken of the virtues of submissiveness to God and of obeying His *ḥukm* and law. But they have, inspite of this, never hesitated to speak of the rights of individuals, and of the safety and sanctity of their lives and properties. They are equally effusive over the interests and benefits of people being the ultimate objective of Sharī^{c}ah; these scholars have in other words never entertained any doubts in the centrality of people's rights to the whole concept of *ḥukm*. They were admittedly somewhat less elaborate in advancing theories on the definition and philosophy of law, but that has probably been due partly to an attitude of piety and unquestioning submission to the will of the divine Lawgiver. It would appear that this general outlook has been taken by some commentators to mean a negation of the idea of right. This bias in favour of obligation over right can be found in varying degrees in almost any legal system, and Islamic law is no exception. For obligation has a stronger foundation than right, and it carries a binding force which is lacking in the concept of right. But the reality of right, and its existence and significance in Islamic law is undeniable; it is merely the form in which concepts are communicated, a certain outlook over the same reality rather than a denial of that reality.

2. A PERSPECTIVE OVER FUNDAMENTAL RIGHTS

The origin of fundamental rights is traceable to the works of European writers of the seventeenth and eighteenth centuries, particularly Locke and Rouseau, who wrote on natural law, and the economic theory of *laissez faire*. Somewhat vague and imprecise notions of natural rights were taken by settlers to the American continent where they were refined and articulated in the constitution of the United States and its subsequent amendments. American judges expounded and further refined these rights for almost a century and a half, and these developments influenced the constitutions of some European states and of Japan after each of the two World Wars. In

1948 the General Assembly of the United Nations approved a list of about thirty human rights which included the most important fundamental rights and liberties.[20]

The distinction between fundamental rights and other rights tends to be changeable in both contents and attributes as it reflects the values and outlook of a particular society through its various stages of historical and cultural development. For example, with reference to Western jurisprudence we note that Blackstone does not mention freedom of speech in his discussion of personal liberties, and his classic passage on freedom of the press occurs in the section which deals with wrongs and libel. The nearest reference of Blackstone's to free speech is in his treatment of "Right of Persons" when he mentions the right to petition the King or the Houses of Parliament for the redress of grievances.[21] In his classic study of the constitution, Dicey has acknowledged that English law took little notice of such concepts as "freedom of speech" and "liberty of the press". He wrote that "Freedom of discussion is ... in England little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written."[22] The implications of this statement regarding the publication of minority or unorthodox opinions were almost totally ignored.

Writers on modern constitutional law have identified a number of methods by which to distinguish fundamental rights from other rights. The most obvious of these, in the context of western law and also perhaps in the constitutions of Muslim countries, is to refer to the constitution and ascertain whether the right in question is expressed and recorded as such. In countries where the constitution is unwritten, fundamental rights can still be identified by reference to rules, conventions, and judicial precedent which may have identified certain rights to be of primary importance to the structure and content of the legal system.[23]

To designate a right as fundamental often means that the court has decided either that the right is politically essential to the existence of society, or that it is essential to individuals and to their dignity and self-respect. Thus there are two sorts of fundamental rights which often overlap: those which are founded on basic human dignity, and those which are based on considerations of social policy. As a matter of principle, we respect the right of a person not to be killed, or his right of privacy and speech, and we respect rights which maintain the integrity of a political system, such as freedom of assembly and freedom of the press as matters of social policy. If a right is respected on principle, it may be restricted only for very

compelling reasons, but rights that are founded in social policy may be overridden or changed on the grounds of social and political desirability. However, a certain order of importance is ascertained in each category. Thus, the right to life may take priority over privacy, and the right of a police officer to carry weapons may be seen as an ordinary social right in comparison to freedom of assembly and freedom of the press. When rights of the first category conflict with those of the second, it seems proper that the court give priority to the former. For it would seem that social and political utility should not be bought at the price of respecting individuals.[24]

A right may also be called fundamental when it legally embodies a right which is basically a moral right or value. Such rights are often considered fundamental when the moral principles that give rise to them are considered to be basic principles of the moral system in question. Thus, Western jurisprudence has entertained many different philosophical perspectives, including utilitarian, individualist, and the social contract theories of law. By combining these, attempts have been made to ascertain the basic value structure of the law, what it may regard to be fundamental to the system, and in what order of priority.[25] We may note here in passing that most of these theories have aspects in common with the influences that determine the Sharī'ah approach to the evaluation of rights. For instance, muslim jurists have almost unanimously considered *maṣlaḥah* as an objective or philosophy of the Sharī'ah and one which is strongly utilitarian– notwithstanding the fact that *maṣlaḥah* in Islam is subservient to a set of divinely-ordained values.[26]

Another area where the Sharī'ah may have aspects in common with Western legal theories is in the category of rights which are founded in the fundamental principles of morality. The principal difference, however, which distinguishes the Sharī'ah from secular jurisprudence is that the former subscribes to the overriding authority of divine revelation as the determinant of basic moral and legal values. Under Sharī'ah, a right is fundamental if it is founded in the clear injunctions and foundational principles of the Qur'ān and Sunnah. Admittedly, there are no categorical pronouncements in these sources which would identify fundamental rights as a separate category. But, there are a set of principles in the Qur'ān, which are in turn reiterated and upheld in the Sunnah and the consensus of scholars, which are fundamental to Islam and to its legal system. These tenets and principles carry an overriding influence and permeate, as I shall presently elaborate, almost every level of legal thought and its development in Islam.

A formal distinction between fundamental rights and other rights in the Sharīᶜah can be made with reference to the Qur'ān, which is by unanimous consensus the most authoritative source of Islamic law. A right which is founded in a clear Qur'ānic injunction, such as the right to life, to property, to privacy, the right of movement, the right of parents over their children, the right to justice, the right to personal dignity and honour, and equality before the law, and so forth, may be classified as fundamental legal rights. The Qur'ān also expounds certain norms and principles which give the Sharīᶜah its distinctive identity and have a far-reaching influence on its rules and doctrines. Thus, the Qur'ānic principles of *ḥisbah*, the promotion of good and prevention of evil, of *amānah* trust, *taᶜāwun* cooperation in good work, and so forth, may well provide textual authority for the identification of many a fundamental right whether concerning an individual, the community, the environment, and whether it be within or beyond a nation's territorial boundaries. In numerous instances, the Qur'ān is also expressive of such principles as *rafᶜ al-ḥaraj* (removal of hardship) which is in turn substantiated by the Sunnah. And, in addition, the Sunnah elaborates on a variety of other themes in almost every legal area. These may or may not directly embody a fundamental right, but they may well provide authority for the identification of a particular right as basic or fundamental. It is also noted that the Qur'ān and the Sunnah provide authority, as I shall presently elaborate, on all the five essential values of life, religion, intellect, property and lineage. Many of these norms and principles have been identified and articulated by Muslim jurists in the form of legal maxims (*qawāᶜid kulliyyah*) which express the objectives of the Sharīᶜah on an impressive variety of themes and which could be utilised as guidelines for an Islamic theory of fundamental rights. Some efforts have already been made by individuals and organisations, such as the ulema of Egypt and Pakistan, the Islamic Council of Europe, among others, but there is scope for further research in order to enhance both the range and the identification of fundamental rights in the Sharīᶜah.

In his 1975 study of human rights and fundamental freedoms in the Arab Middle East, Luca has concluded that "the Koranic text has a stronger hold on the mind of the Arabs than declarations contained in their formal constitutions."[27] It would be no exaggeration to generalise the substance of this statement with regard to other Muslim countries and to proceed on the assumption that the Qur'ān has a profound influence on the thoughts and conduct of Muslims everywhere. The Qur'ān can best be characterised as a stable source

of authority and influence which is partly open to interpretation, but whose definitive injunctions and basic value structure are not changeable. Therefore, the continuity of values is the dominant feature of the Qur'ān. It would follow then, that the basic notion of fundamental rights and their identification in the Qur'ān and the Sunnah is not only acceptable, but recommended, in so far as this would articulate the essentials of the Sharīᶜah in this area and give them a concrete expression which could be utilised as a basic indicator of the place of a particular right, norm, or principle, in the general scheme of Qur'ānic values.

With reference to a parallel subject, namely considerations of public interest, or *maṣlaḥah*, we note that the ulema have classified them into the three categories, *ḍaruriyyāt* (essential interests) *ḥājiyyāt* (complementary interests) and *tahsiniyat* (desirabilities). The essential *maṣālih* (pl. of *maṣlaḥah*) are defined as interests which are essential to life and when disregarded this leads to the collapse of normal order in society. There are five, and according to a minority opinion, six, essential *maṣālih*, namely life, religion, intellect, property, and lineage. To this, some ulema have added a sixth, namely dignity (*ᶜirḍ*) but, according to the majority this is subsumed, under "life". These interests must be protected at all costs as society cannot afford to expose them to danger or collapse. To protect these *maṣālih*, and to promote and develop them further, is one of the basic duties of an Islamic government. Next in order of importance comes the complementary interests, which are followed by the desirabilities and embellishments. These categories are often interrelated and open to judgement, and they vary in reference to the circumstances in which they are evaluated. What may seem a complementary interest in one setting, may well belong to a higher or a lower class of interests in another. The means and methods of protecting the essential values may differ according to circumstances, but the basic structure of these values is not changeable. Some writers have drawn a parallel between the essential interests (*al-maṣaliḥ al-ḍarūriyyāh*) of Islamic law and "fundamental rights" of modern constitutional law. Muhammad ᶜImārah's *Al-Islam wa Ḥuquq al-Insān, Ḍarūrāt la Ḥuqūq* (Islam and Human Rights, Necessitities, Not Rights) is perhaps the most explicit of such attempts. The author equates the idea of necessity with that of essential rights, but he also suggests that the recognition of a basic value structure in the Sharīᶜah would justify all measures that seek to protect these values and facilitate their proper development. There is, thus, no objection to terminology or classification– call them what you will–the point

is that the Sharī^{c}ah advocates them and validates their protection. On the subject of basic rights, ^{c}Imārah's is a slightly different perspective to that of the majority of scholars. The general approach is to ascertain the place and validity of each of these rights in the sources of the Sharī^{c}ah as values in their own right, rather than to be subsumed under a particular juristic doctrine such as *maṣlaḥah*. Nonetheless, we can utilise this three-fold classification of *maṣāliḥ*, as a basis to classify fundamental rights and liberties along similar lines. Obviously, there is no shortage of basic authority in support of these rights in Sharī^{c}ah.[28]

There is already a legacy of experience and precedent in constitution-making available in contemporary Muslim countries, which is generally predicated on the binary division of rights and liberties into either constitutional or ordinary. But since constitutionalism is a Western phenomenon which was closely imitated, in the post-colonial period, by newly emerging Muslim States, many of these countries are lacking in their attempts to forge a link with their Islamic heritage. The foreign origin of this experience does not necessarily forbid, nor make reprehensible, these endeavours; it merely imperils the task of coherence and integration. Much of the same constitutional classification of rights may be retained or formulated in light of the Sharī^{c}ah guidelines. Indeed to do so is highly desirable as it would develop harmony and coherence in the legal and cultural experiences of contemporary Muslims.

NOTES

1. Mahmassani, *Arkān Ḥuqūq al-Insān fi al-Islam*, p. 141 and passim; Mutawalli, *Mabādi Niẓām al-Ḥukm fi al-Islam*.
2. Laylah, *Al-Nuẓum al-Siyāsiyyah*, p. 1122 and passim; Wāfi, *Ḥuqūq al-Insan fi al-Islam*, p. 114 and passim; ^{c}Awdah, *Al-Tashrī^{c} al-Jinā'i*, II, 29; al-Sayyid al-Sābiq, *^{c}Anāṣur al-Quwwah fi al-Islam*, p. 143 and passim.
3. Al-Nabhān, *Niẓām al-Hukm*, p. 239.
4. Cf. Mahmassani, *Arkān*, p. 142; al-Nabhān, *Niẓām*, p. 234 ff.
5. Cf. Section on *ḥurriyyah al-ra'y* below.
6. Cf. Mahmassani, *Arkān*, p. 72.
7. David H. Bailey, *Public Liberties*, p. 27. See also Wan Abdul Manan, "Freedom of Expression: views from Academia," paper presented at the Malaysian Bar Council Seminar in commemoration of World Human Rights Day, Kuala Lumpur, Dec. 10. 1989, p.1.
8. Cf. Macdonald, "Hakk", *The Encyclopedia of Islam*; Said, "Precepts and Practice of Human Rights in Islam", p. 63.
9. Cf. Ḥammād, *Ḥurriyyah*, p. 433 ff.
10. Al-Suyūṭi, *Al-Jāmi^{c}al-Saghīr* I.111; Ḥammād, *Ḥurriyyah*, P.7.
11. Abu Dāwūd, *Sunan, K. al-Malāḥim, b. al-amr wa al-Nahy* II, 438.

12. Al-Bayhaqi, *Al-Sunan al-Kubrā*, X, 155. The Ḥadīth provides to the effect: "Muslims are upright in relationship to one another:.

الْمسلمونَ عُدولٌ بَعْضُهُمْ عَلىٰ بَعْضٍ .

13. Ibn Qayyim, *Iʿlām*, III, 147.
14. ʿAwdah, *Al-Tashrīʿ al-Jinā'i*, II, 34.
15. Al-Nabhān, *Niẓām al-Ḥukm*, p. 237.
16. Note for instance Mahmassani, *Arkān*, p. 142; and Mutawalli, *Mabādi*, p. 280.
17. Schacht, "Law and Justice" in P.M. Holt ed. *The Cambridge History of Islam*: II, 541.
18. Gibb "Constitutional Organisation" in M. Khadduri & H. Liebesney eds., *Laws in the Middle East*. p. 12.
19. Henry Siegman, "The State and Individual in Sunni Islam," *The Muslim World* 54 (1964), p. 23.
20. Cf. Universal Declaration of Human Rights, December 10, 1948 U.N.G.A, New York. The Declaration consists of a Preamble and 30 Articles. The text of Declaration also appears in Khan, *Islam*, pp. 4-10.
21. Barendt, *Freedom of Speech*, p. 29.
22. Dicey, Introduction Ch. VI.
23. For example, in English law the right to vote and the right to issue a writ of *habeas corpus* are both fundamental rights "as a matter of practice and history" as they are necessary for the proper working of the constitution: see Bridge *Fundamental Rights*, p. 8.
24. Cf. Murphy, *An Introduction to Jurisprudence*, pp. 88-98.
25. Bridge n. 28 at 9 ff thus expound Kant, Kelson, Hart and Rawlsian theories on the philosophy of law.
26. For a discussion on *Maṣlaḥah* see M.H. Kamali "Have We Neglected the Sharīʿah Law Doctrine of *Maṣlaḥah*?"
27. Luca "Discrimination in the Arab Middle East".
28. See for details Kamali, "An Annlysis of Right," *AJISS* 10 (1993), 340-67.

Part Two

AFFIRMATIVE EVIDENCE

I. Introductory Remarks

This chapter enquires into some of the principles and institutions of the of Sharīᶜah which provides the basic evidence in support of freedom of expression. Since the compendia of *fiqh* do not treat freedom of speech and expression in the same manner as we find in modern constitutional discourse, the relevant data of *fiqh* on this theme has consequently remainded scattered and underdeveloped. Thus, the Sharīᶜah evidence on freedom of expression is found under a variety of topics including the Qur'ānic principle of *ḥisbah* (commanding good and forbidding evil) which takes for granted the basic freedom of individuals to formulate and express their own opinions. Another topic of interest here is *naṣīḥah* (sincere advice) which is a manifestation of fraternity among Muslims, and it may be given to anyone, including the ulema and government leaders. Similarly, the Qur'ānic principle of consultation (*shūrā*) entitles community members to be consulted in public affairs, and their leaders are entitled to solicit counsel from those who are capable of giving it. In addition, the doctrine of *ijtihād*, as well as the citizen's right to criticise government leaders (*ḥaqq al-muᶜāraḍah*), are all premised on the recognition in the Shariᶜah of the fundamental freedom of speech and expression. I have addressed each of these topics in the following pages. Yet a perusal of my discussion may leave the reader askance as to whether, and why, some of these topics such as *ḥisbah* and *naṣīḥah* are treated, in the scholastic works of the *fiqh*, as moral categories which have not been translated into practical legal rules. This may be true, but even so it does not provide a conclusive argument that the attitude taken by the jurists of the past must prevail indefinitely. We only need to take note that the juristic expositions of the *fuqahā'* on these issues came into being long before the onset of constitutionalism and its allied concepts of fundamental rights and liberties. The juristic discourse of the *fuqahā'* is conveyed in a language which they felt was suitable to the prevailing conditions of their time. Surely now, the task of the contemporary student of Sharīᶜah is to address the issues in the manner and form that they present themselves today. However, such differences of approach are not neccessarily expected to lead to disputes over basic principles. For Muslim society in its changing phases of development is within its rights to elevate some of the moral and religious teachings of the Qur'ān, the Sunnah, and those of the ulema of the *madhāhib* into positive laws for purposes of enforcement. Fur-

thermore, it is a known fact that a substantial part of the Sharī^{c}ah, especially its teachings which fall under the categories of recommendable, permissible, and reprehensible (*mandūb, mubāḥ, makruh*) consist of moral guidance which may be turned into legal provisions if this would benefit the people. It is also known that the Sharī^{c}ah combines in its corpus, in additional to legal rules, moral teachings which tend to support and supplement one another and often merge into unified formulae. There is often, for example, a relationship between strict compliance to a legal duty and the Islamic concept of moral excellence (*taqwā*). Thus, the moral teachings of Islam have been taken a step beyond and have been given a place in the *juris corpus* of the Sharī^{c}ah. It is partly for this reason that the present study, although dominantly juristic, is not confined to the legal subject-matter of the Sharī^{c}ah. This relationship between law and morality acquires special significance in the area of freedom of speech, which by its nature extends beyond the scope of formal legal rules. It is, therefore, neither advisable, nor in keeping with the holistic approach of Sharī^{c}ah, to confine the scope of this study to legal subjects alone. For such an attempt would not only be out of character with the Sharī^{c}ah but would also alienate the rich reservoir of moral teachings which could provide the basis of legislative reforms on various aspects of the freedom of expression.

II. The Qur'ānic Principle of *Ḥisbah*

Commanding good and forbidding evil (*amr bi al-ma^{c}rūf wa nahy^{c}an al-munkar*) is a cardinal Qur'ānic principle which lies at the root of many an Islamic laws and instituttions. As an epithethical description of Islam itself, this principle is the supreme objective of the Sharī^{c}ah, and the ethical core of governmental political power. Accordingly, the citizens are, in so far as their conditions and capabilities permit, entitled to speak and to act in pursuit of what in their enlightened judgement seems good, or they can forbid, whether in words, acts, or silent denunciation, any evil which they see being committed. This Qur'ānic principle, also known as *ḥisbah*, lays down the foundation of some of the basic liberties that form the principle theme of many modern constitutions. Although *ḥisbah* is much wider in scope and cannot, therefore, be confined to freedom

of speech alone, it is nevertheless no exaggeration to say that this freedom is of central importance, indeed the *sine qua non*, of *ḥisbah*. For without freedom of speech it would be inconceivable to command good or to forbid evil. The wider scope and implications of *ḥisbah* are treated in considerable detail in the works of jurists and theologians, and since a full treatment of *ḥisbah* falls beyond my immediate purpose, I shall confine this discussion to the relevance of *ḥisbah* to freedom of expression. However, a brief word about the manner in which the ulema have treated *ḥisbah* will, perhaps, justify my remarks as to why I make a point of being eclectic in the treatment of this principle. Al-Ghazāli characterises *ḥisbah* as the greatest pole of the faith (*al-quṭb al-aᶜẓam fi al-dīn*), and the most important objective of all of God's revealed scriptures and Messengers. Therefore, as this is the essence of all religion, a total neglect of *ḥisbah* would bring about the collapse of religion, and widespread corruption and ignorance.[1] In Ibn Qayyim al Jawziyyah's assessment, *ḥisbah* constitutes the basic objective of all governmental authority (*jamīᶜal-wilāyāt*) in Islam. He regards it as a collective obligation (*farḍ kafā'i*) which everyone must participate in to the extent of his or her ability.[2]

With all the prominence it has commanded, however, *ḥisbah* has not been treated as a principle of positive law in the Sharīᶜah in the sense that its neglect carries no legal sanctions. It is instead treated as a normative principle of Islam which provides moral argument and the foundation for the bulk of the detailed rules of the applied Sharīᶜah in its various branches.[3] Part of the reason for this may be that *ḥisbah* is broad enough to comprise the whole of the Sharīᶜah, which is why it is almost impossible to reduce it to concrete and specific rules. It is, therefore, treated as an integral part of religion, as a moral theme and guideline, as a philosophy and objective rather than a concrete rule of positive import. There is only in one situation where *ḥisbah* becomes an individual obligation (*farḍ* ᶜayn*i*) and that is when there is only one person in the entire community, or when a single individual witnesses evil being committed. Only in these situations does *ḥisbah* become the personal responsibility of the individual concerned, and in all other capacities, *ḥisbah* remains a collective duty (*farḍ kafā'i*) of the community as a whole.

Whether collective or individual, *ḥisbah* has been generally characterised as an obligation. On the whole, the classical expositions of ulema on this subject do not address the question as to whether or not *ḥisbah* also constitutes an individual's right, funda-

mental or otherwise, or whether it can be designated as a collective right of the community as a whole. This question of the recognition, or otherwise, of fundamental rights in Islamic law has already been raised and discussed. Suffice it here to say that Islamic law recognises both rights and obligations, including fundamental rights, notwithstanding the fact that the ulema have not treated the latter as a separate category. In many cases, the question of separation between rights and obligations in the Sharī^{c}ah tends to be a matter mainly of perspective and style rather than substance. This is, to a large extent also true of *ḥisbah*, which although it has been charac-terised as an obligation, it is quite obvious, nevertheless, that it entitles every Muslim to speak for a good cause or to disapprove and criticise a bad one. This dual characterisation of *ḥisbah*, both as a right and a duty, has found explicit recognition in the recent Universal Islamic Declaration of Human Rights, a publication of the Islamic Council of Europe. This document refers to *ḥisbah* as simultaneously constituting "the right and duty of every person" to speak for and defend the rights of others, and the rights of the community when these are being threatened or violated.[4] This is further supported by Ḥammād who observes that "*ḥisbah* being a pillar of the faith and a cardinal principle of Sharī^{c}ah offers a basis which is sufficiently authoritative to validate freedom of expression in political and governmental affairs."[5] Zaydān is even more emphatic in saying that a correct understanding and implementation of "the principle of *ḥisbah* necessitates the freedom of the individual to formulate and express an opinion."[6] To Muṣṭafā al-Sibā^{c}i, the primary focus of *ḥisbah* is the well-being of society for it lays down the foundation of what he calls social liberty (*al-ḥurriyyah al-ijtimā^{c}iyyah*). "It confers upon those who are capable to form an opinion, the liberty to express that opinion, or even to criticise others on an issue of social concern." Al-Sibā^{c}i adds that whoever witnesses an evil action which violates the Sharī^{c}ah, or the standard of decent conduct and approved custom, then it is up to that individual to prevent or denounce it to the extent of his or her capability.[7]

Commanding good and forbidding evil is the principal theme of a number of *āyāt* in the Qur'ān. The following excerpt is often quoted by the ulema as the principal Qur'ānic authority on *ḥisbah*:

> Let there arise (*waltakun*) from among you a group that calls others to good work, they command good and forbid evil. These are the successful ones (*mufliḥūn*). (al-^{c}imrān, 3:104 and 110; al-Ḥajj, 22:41)

Al-Ghazāli has observed that since this *āyāh* begins with a command (*waltakun*), it conveys an obligation (*wājib*) which is, however, a collective obligation of the entire community. This is also indicated in the same text, especially where it reads: let there arise "from among you," meaning that the obligation is fulfilled only if a section of the community acts upon it. Performing *ḥisbah* as the *āyāh* once again indicates, leads to success (*falāḥ*) in both this world and the Hereafter.[8] It is best, therefore, if the whole of the community observes *ḥisbah*, but if it is observed by only some members, these may be either men or women or both. This is backed up by the Qur'ānic passage which states that; "The believers, both men and women, are friends and protectors (*awliyā'*) of one another. They enjoin good and they forbid evil" (al-Tawbah, 9:71). Thus, it is understood that successful implementation of *ḥisbah* requires a collective effort by the entire society. If implementing certain aspects of *ḥisbah* requires an active role to be assigned to women alone, or through cooperation between men and women, then the Qur'ān authorises this. Furthermore, it is interesting to find in the Qur'ān that *ḥisbah* occurs side by side with the first pillar of the faith (i.e. belief or *imān*). The Qur'ānic references to *ḥisbah* are also explicit to the effect that in *ḥisbah* lies great benefit to mankind, and that a society which loses sight of the essence of *ḥisbah* is bound to find itself in a losing battle with the forces of corruption and evil. Clearly this is the message of the Qur'ānic *āyāh* which declares; "verily man is in loss except for those who have faith and act righteously and who advise each other to the pursuance of truth, perseverance, and patience" (al^{C}Aṣr, 103:2-3).

The Blessed Prophet instructed the believers to carry out *ḥisbah* in accordance with their ability and to the extent which circumstances permitted them. *Ḥisbah* may, thus, be implemented in at least three varieties, as we read in the following Ḥadīth:

> If any of you sees something evil, he should set it right by his hand; if he is unable to do so, then by his tongue, and if he is unable to do even that, then (let him denounce it) in his heart. But this is the weakest form of faith.[9]

مَنْ رَأَى مِنْكُمْ مُنْكَرًا فَلْيُغَيِّرهُ بِيَدِهِ، فَإِن لَمْ يَسْتَطِع فَبِلِسَانِهِ، فإن لَم يَسْتَطِعْ فَبِقلبِهِ وذٰلِكَ أَضْعَفُ الإِيْمَانْ.

It is interesting to note that the first of the three varieties of *ḥisbah* specified in this Ḥadīth is entirely practical, that is to act upon evil by one's physical action (*taghīr bi al-yad*). However, it is only logical to expect that a verbal attempt to denounce or correct the wrong which is observed precedes the actual attempt, and that the verbal attempt is, in turn, preceded by disapproving thoughts. This is the natural order of human responses to events, but the Ḥadīth here does not necessarily conform to this order, as it prescribes a sequence which is almost the reverse. However, this is a familiar feature of the rulings (*aḥkām*) of Sharīᶜah as they often contemplate the external manifestation of thought, and they may for this purpose set a certain order of priority which differs with the natural pattern of human response. Note also that the Ḥadīth cited above uses the words *man ra'ā* (any one who sees), instead of using words such as "knows" or "hears". Again this contemplates the external nature of the evil being committed, and the ability of the person witnessing it to change it in some way.[10]

Forbidding evil, which is only one of the two aspects of *ḥisbah*, constitutes the principal theme of this Ḥadīth. Again this is reflective of the familiar norm of Sharīᶜah that priority should be given to the prevention of evil over the attraction of benefit. The three steps that are indicated in this Ḥadīth bring *ḥisbah* within reach of virtually every individual who witnesses evil being uttered or committed. Prevention is obligatory (*wājib*) when a person observes a *ḥarām* being committed, but it is commendable (*mandūb*) if it aims at preventing something which is reprehensible (*makrūh*). There is also a difference between *munkar* (evil) and *maᶜṣiyah* (sin, or violation) in that the former is wider in scope than the latter. If, for example, a child is seen to be committing an evil act, it may not qualify as *maᶜṣiyah* but it may still qualify as *munkar*, which would consequently fall within the scope of *ḥisbah*.[11]

There are four degrees of *ḥisbah* which also specify, in the way they are given, the correct order of priority in attempting *ḥisbah*. These are as follows: Firstly, informing or making known, either verbally or in writing (*taᶜrīf*) to the person who is committing a wrong of the enormity of his conduct. If this proves insufficient, then one proceeds with the second step-kindly admonition (*waᶜẓ*) to invoke the fear of God in the person and to appeal to his reason and better sentiment. If this still proves ineffective, then the third step authorises the use of harsh words. These may involve a threat but may amount neither to accusation nor to insult. Words and phrases which are expressive of denunciation such as "O tyrant" or `O ignorant' (*yā ẓālim, yā jāhil*) or "Don't you fear God!" may be used. The fourth and

last stage of *ḥisbah* consists of expressing anger or the use of force, but these are permitted only when absolutely necessary and to the extent that they may prevent evil. However, the use of threat or force must aim precisely at preventing evil, and not in order to punish the perpetrator.[12] The only three exceptions where the four degrees of *ḥisbah* are not applicable are made in regards to one's father, husband, and the head of state, to whom only the first two degrees are applied. This is further explained by saying that subjecting the Imam to anger is likely to incite sedition (*fitnah*). But harsh words may be used even to the Imam, and in some cases it is recommended (*mandūb*) if there is no fear of inciting *fitnah*. However, if the evil arising out of such *fitnah* is likely to harm others, it must be avoided. But, according to the majority of ulema, it is permittted to use harsh words to the head of state and other officials if the harm that is feared only concerns the person himself. But the ultimate purpose must always be the removal of evil (*izālah al-munkar*) and *ḥisbah* should not be attempted if it is likely to give rise to a greater evil.[13]

While commenting on the Ḥadīth earlier quoted, al-Ghazāli observes that fear of death, injury, or loss of property are legitimate excuses to relieve a person of the duty of carrying out *ḥisbah*, in which case the *ḥisbah* may be confined to a tacit disapproval only. But it is not permissible under any circumstances to assist, in the name of *ḥisbah*, the perpetrator of evil either in words or in action. Also, the evil which is to be prevented, or denounced, must also be so obvious that there remains no need to resort to interpretation or *ijtihād*. The question as to exactly what amounts to good (*maʿrūf*), or to evil (*munkar*) is to be determined with reference to the Sharīʿah, in particular to those rules that pertain to the protection of the five values namely of life, faith, intellect, property and lineage.[14]

Furthermore, the Māliki jurist, Al-Qarāfi, records the following three conditions which must be observed in the implementation of *ḥisbah*. Firstly, the person who bids good or forbids evil must act from a position of knowledge as an ignorant individual who is not sure of his grounds may neither enjoin good nor forbid evil. Secondly, one must be reasonably sure that the attempt at prevention of evil does not give rise to a greater evil. Thirdly, one must act on the basis of definite probability (*al-ẓann al-ghālib*) that the attempt to enjoin good or to forbid evil is likely to achieve the desired result. The absence of either of the first two conditions renders *ḥisbah* unlawful (*ḥarām*) which must be avoided, but the absence of the last condition downgrades *ḥisbah* from an obligation into a mere permissibility (*mubāḥ*).[15]

III. Sincere Advice (*Naṣīḥah*)

The dictionary meaning of *naṣīḥah* is "sincere advice, friendly admonition, and friendly reminder."[16] *Naṣīḥah* (also *munāṣaḥah*) is a Qur'ānic concept which occurs in a number of places in the Holy Book especially where references are made to the purpose and function of prophethood. Thus we read in passages where the prophets Noah, Ṣālleḥ, Hūd and Shuᶜayb, may peace be upon them, all informed their people that the nature of their mission was to warn, and to be *nāṣiḥ* (i.e. one who gives *naṣīḥah*). The Prophet Noah said to his followers that "I give to you sincere advice", and "I am to you an honest adviser - *nāṣīḥun amīn*" (al-Aᶜrāf, 7:61 and 68: note also *ayat* 79 and 93 in the same sura).

Naṣīḥah is to be distinguished from reprimand (*tawbīkh*), as the two may have aspects in common and may be liable to confusion and overlap. According to al-Ghazāli, the principal difference between *naṣīḥah* and *tawbīkh* is that the former is confidential and courteous, whereas the latter is open and tactless. Here, al-Ghazāli's observation is in harmony with that of Imam al-Shāfiᶜi who observed that when a person advises his brother confidentially, he has given him *naṣīḥah*, but if he preaches to him openly, he has ridiculed and belittled him.[17] Both of these views may be seen as commentaries on the Ḥadīth which says that "one who gives advice is a trustee."

اَلْمُسْتَشَارُ مُؤْتَمَن.

According to yet another Ḥadīth, "when one of you gives advice to his brother, isolate him (from) the company of others."[18]

اِذَا اِسْتَشَارَ اَحَدُكم اَخاهُ فَلْيَشِرْ اليه.

The essence of *naṣīḥah* in Islam is to encourage a vigilant but caring attitude on the part of the believers who are expected to maintain and protect the moral and religious values of Islam. Thus, the individual is entitled to give sincere counsel to others when he is convinced of the essential benefit of his advice. *Naṣīḥah* is generally seen as an integral part of *ḥisbah* with the only proviso that the emphasis in *nāṣiḥah* is laid on the first of its twin aspects, namely the *amr bi al-maᶜrūf* (enjoining good) rather than on forbidding evil. In this way, *nāṣiḥah* takes for granted the right of every individual

to form an opinion or an advice in which he or she sees a benefit, and the right to convey it in confidence to others, be it a fellow citizen or a government leader. In addition, the opinion or advice may be given in social, political or personal affairs, but as Ḥammād points out freedom of expression in political affairs (*ḥurriyyah al-ra'y al-siyāsi*), is a distinctive feature of *naṣīḥah*.[19]

The Centralitty of *naṣīḥah* to the promotion of good and prevention of evil is once again confirmed in a Ḥadīth in which *naṣīḥah* is declared to be the essence of religion, and a necessary ingredient of the fraternity (*ukhuwwah*) that Islam encourages among the believers. *Naṣīḥah* is also the antidote of *ghiybah* (backbiting), in that when a Muslim observes a fault on the part of another, or a benefit that he envisages for him, the matter should be communicated between them. However, this should be done with a certain tact and courtesy that is becoming the spirit of fraternity. As an example, it is reported that on one occasion the Blessed Prophet told his Companions that "religion is *naṣīḥah*," which invoked the inevitable question "to whom, O Messenger of God?" To this the Prophet replied, "To God, to His Book, to His Messenger, to community leaders, and to the generality of the believers."[20]

اَلدِّيْنُ اَلنَّصِيْحَةُ، قُلْنَا لِمَنْ يَا رَسُوْلَ اللهِ، قَالَ للهِ
وَلِكِتَابِهِ وَلِنَبِيِّهِ وَلِأَئِمَّةِ الْمُسْلِمِيْنَ وَعَامَّتِهِمْ.

While commenting on this Ḥadīth, al-Nawawi, the author of *Riyāḍ al-Ṣāliḥīn*, quotes al-Khattābi to have said that the phrase *al-dīn al-naṣīḥah* (religion is *naṣīḥah*) means that *naṣīḥah* is the sustainer of religion and a pillar thereof (*qiwam al-dīn wa ᶜimāduh*). For example, when it is said "*al-hajj ᶜarafah*" (ḥajj is *ᶜarafah*) which means that *ᶜarafah* is a pillar, that is the *sine qua non*, of the *ḥajj*.[21] Another commentary maintains that this Ḥadīth stresses the significance of *naṣīḥah* which is declared to be the embodiment of Islam itself. As *naṣīḥah* to God, to His Book, and to His Messenger means to have faith in them and to give good counsel in their cause, *naṣīḥah* to community leaders and the generality of its members means to assist them in righteousness and give them sincere counsel in the spirit of promoting good and forbidding evil.[22]

The link between *naṣīḥah* and true belief in Islam is once again the focus of attention in the following Ḥadīth, as Jarīr b. ᶜAbd Allah reported: "I came to the Prophet and declared that I pledge myself to

you and embrace Islam (*ubāyiᶜuka ᶜala al-Islam*). The Prophet then said that "on the condition that you offer *naṣīḥah* to the faithful... I then pleaded this in my oath of allegiance."[23]

We also read in a Ḥadīth that *naṣīḥah* is a right of every Muslim over his or her fellow believers. The Ḥadīth in question begins by saying that "There are six rights that all Muslims have over one another." These consist of such rights as responding to one's greeting (*salām*), visiting the sick, and so on. Then the Ḥadīth ends as follows: "when you are asked for *naṣīḥah* then you must give it."

إِذَا اِسْتَنْصَحَكَ فَانْصَحْ لَهُ.

Furthermore, al-Maqdisi quotes Imam Aḥmad b. Ḥanbal to have said that *naṣīḥah*, like *ḥisbah*, is a collective obligation (*farḍ kafā'i*) and, as such, it may be given even if it is not solicited or asked for. This view is supported by another Ḥadīth in which there is a reference to the leader or head of state who is required to give *naṣīḥah* to his subjects. It states that he must exert himself in this direction, and if he fails, he would not be a companion to those of his subjects who enter paradise.[24] This Ḥadīth, according to Imām Ibn Ḥanbal, does not specify that *naṣīḥah* should be given only when it is solicited. The obvious reading of the first of the two Ḥadīths, however, does specify this condition, but, the conclusion has, nevertheless, been drawn that *naṣīḥah* does not depend on asking, and that Muslims should give it at their own initiative.[25] This ruling is apparently based on an analogy between *naṣīḥah* and *ḥisbah*. As both are collective obligations neither must depend on a particular request, otherwise they would lose much of their significance and rationale. Furthermore, the first of the two Ḥadīths begins by the phrase, *ḥaqq al-Muslim* (the right of a Muslim). From this context, it is understood that *naṣīḥah* in this particular Ḥadīth embodies a right to be claimed, as opposed to an obligation which requires fulfilment even without such a claim. However, it still remains to be said that the Ḥadīth under discussion might have only identified the best form of *naṣīḥah* which naturally must be one that is requested or solicited by its recipient. It is further suggested that the precedent of the Companions, especially that of the Pious Caliphs, indicates that members of the community, both men and women, and their leaders, have given and received *naṣīḥah* in an atmosphere of informality and openness both in the mosque, in the street, and also in the presence of others. This precedent would lend support to the conclusion that there is no compelling reason to lay down any particular procedure for *naṣīḥah*.[26]

The Sharīᶜah does not regulate the manner in which *naṣīḥah* is given, as in all cases this must remain a matter for the good conscience and sincerity of the individual. The only guidance that is found in the Sunnah has been conveyed with a view to identifying the best form of *naṣīḥah*, rather than laying down a particular procedure for giving it. It is thus recommended:

(a) That *naṣīḥah* must not partake in exposing or exploring the privacy and personal weaknesses of the people (*tatabbuᶜ al-ᶜawrāt*).

(b) That it is given in the best possible form, being aware of the suitability of the occasion, the time, and place.

(c) That it is founded in certainty, and not in speculation, estimation, and suspicion;

(d) That it is given to the extent necessary and that excess is avoided; and

(e) That it is in harmony with the guidance of the Qur'ān and the Sunnah.

Furthermore, according to the terms of another Ḥadīth, "when someone wishes to give *naṣīḥah* to a person in authority, then let him not declare it openly but let him take his hand and speak to him in privacy. If it is accepted, the purpose is achieved, otherwise the donor of *naṣīḥah* would have fulfilled his duty."[28]

مَنْ اَرَادَ ان يَنْصِحَ لِذِىْ سُلْطَانٍ فَلَا يَبْدَه عَلا نِيَةً وَلٰكِنْ يَأْخُذْ
بِيَدِهِ فَيَخْلُو به، فَاِنْ قَبِلَ منه فَذَاكَ وِالاّ كانَ قَد اَدّى الَّذِى عليه.

To the leaders of the Muslim community, both heads of government and ulema, *naṣīḥah* means assisting them in righteousness, courteously reminding or alerting them to their duties, and to bring them closer to the people. To the generality of Muslims, *Naṣīḥah* means offering them sincere advice and guidance concerning their benefits in this world and the Hereafter both in words and in action, and for liking or disliking that which one would like or dislike for oneself.[29] In this connection, it is interesting also to quote the following report that al-Maqdisi has recorded. Ibn al-Mubarak was once asked: "What if, in my presence, a bankrupt comes to do business with a merchant. If I know that he is bankrupt, but the

merchant is unaware of this, should I reveal the facts to the merchants?" Ibn Mubarak answered this query in the affirmative and quoted the following Ḥadīth: "None of you is a (true) believer unless you love for your brother that which you would love for yourself."[30]

لَا يُؤْمِنُ اَحَدُكُمْ حَتَّى يُحِبُّ لِاَخِيْهِ مَا يُحِبُّ لِنَفْسِهِ.

There is no value in advice which is devoid of sincerity (*ikhlāṣ*), and it is even worse if the advice is based on hypocricy (*riyā'*), in which case it would amount to a sin.[31] Moral courage and conviction are required to make *naṣīḥah* effective and this can only be achieved when the donor's conscience is not burdened with fear of authority, or fear of losing a material advantage. The greatest source of inner strength is faith in God, and the belief that He alone controls the destiny of everyone. The following Ḥadīth is once again expressive of this concern on the part of the Blessed Prophet, who is reported to have said: "When you see my community to be afraid of telling a tyrant, 'O tyrant', then it is not worth belonging to it anymore.[32]

اِذَا رَأَيْتَ اُمَّتِيْ تَهَابُ اَن تَقُوْلَ لِلظَّالِمْ يَاظَالِمْ فَقَدْ تُوُدِّعَ مِنْهَا.

The Sunnah of the Prophet also impresses upon the believers not to neglect *naṣīḥah*, and that it must, at no time, be brought to a stand-still. Thus we read in this Ḥadīth, which begins on a striking note:

> "Let no one humiliate himself or herself." The Companions who heard this asked; "How does one do that, O Messenger of God?" Then the Prophet said; "When someone sees an occasion in which he should speak out for the sake of God, but he does not, then God Most High will tell him on the Day of Judgment: what stopped you from speaking on that issue? And when the person answers; "from fear of people," then God says: you should have feared Me and put Me above fearing others.[33]

لَايَحْقِرُ احدُكم نَفْسَـه. قَالُـوا يَا رَسُـوْلَ اللهِ كَيْـفَ يَحْقِـرُ اَحَـدُنَا نَفْسَـهُ؟ قَالَ يَرَىٰ اَمْرًا للهِ عَلَيْـهِ مَقَالَ ثُـمَّ لَايَقُـوْلُ فِيْـهِ، فَيَقُـوْلُ اللهُ عَـزَّوَجَلَّ يَـوْمَ الْقِـيَامَةِ: مَا مَنَعَـكَ اَنْ تَقُـوْلُ فِيْ كَذَا وَكَـذَا، فَيَقُـوْلُ خَشْـيَةَ الـنَّاس، فَيَقُـوْل، فَاِيَّايَ كُنْـتَ اَحَـقُّ اَنْ تَخْشَـىٰ.

Imām Aḥmad b. Ḥanbal is reported to have held that Muslims are not bound by an obligation to give *naṣīḥah* to non-Muslims (i.e. *dhimmis*) but to Muslims only. This conclusion is said to be based on a Ḥadīth which reads to the effect that "every Muslim is required to partake in *naṣīḥah* - *al-nuṣuḥ li-kulli Muslim*". The terms of this Ḥadīth, it would appear, are not categorical on the conclusion which precludes the *dhimmis* from the purview of *naṣīḥah*. What is clear in this Ḥadīth is the conclusion, as al-Maqdisi points out, that *naṣīḥah* is a collective obligation of all Muslims. As to the other conclusion, which precludes the *dhimmis* from the scope of *naṣīḥah*, al-Maqdisi merely records the reported view of Imām Ibn Ḥanbal, but ends it by the phrase "and God knows best," which is usually invoked when the speaker is not certain of his grounds. In the view of the present writer, there is no conclusive evidence to confine the scope of *naṣīḥah* in this way. On the contrary, my understanding of the evidence I have reviewed suggests no such limitation on *naṣīḥah*, except perhaps in matters which have a direct bearing on the creed (*ᶜaqīdah*) of Islam.

IV. Consultation (*shūrā*)

Being one of the salient principles of government prescribed in the Qur'ān, *shūrā* requires the head of state and government leaders to conduct community affairs through consultation with community members. However, the Qur'ānic provisions on *shūrā* are primarily concerned with laying down the basic foundation of *shūrā* as a principle of public law, but the details as to its manner of implementation and the subject matter on which consultation must take place are left out. The Qur'ān provides no instruction on whether all

community affairs should be determined through consultation, or whether *shūrā* applies to government affairs alone. But, this absence of specific detail has actually given *shūrā* the unfettered flexibility of being applicable to all circumstances, and to all matters that are of concern to the community. The general language of the Qur'ānic provisions on *shūrā* has also led to the conclusion that *shūrā* is an integral part of Islam and that it must, in principle, permeate every sphere of public, and even personal, life of Muslims. We also find in the Qur'ānic text that the requirement to carry out consultation occurs side by side with references to the pillars of Islam, such as profession to the faith (*īmān*), obligatory prayer (*ṣalāh*), and legal alms (*zakāh*). This has, once again, been taken as evidence that *shūrā* should be treated on a similar basis, and be given an equally prominent place in regulating the social and political affairs of Muslim societies. Thus, according to al-Bahī, the Qur'ānic provisions on *shūrā* are conveyed in terms which not only comprise the affairs of government but also relations within the family, between neighbours, between partners in business, between employer and employee, and virtually all spheres of life where it is deemed to be of benefit to the people.[34]

The following text, one of the two Qur'ānic passages concerning *shūrā*, occurs in the form of praise to the early community of believers for their diligence in conducting their communal affairs on the basis of *shūrā*:

> Those who respond to the call of their Lord, they establish the prayer, they consult their affairs among themselves and they spend of what we have granted them of sustenance ... (al-Shūrā, 42:38).

وَالَّذِيْنَ اسْتَجَابُوْا لِرَبِّهِمْ وَاَقَامُوا الصَّلٰوةَ وَاَمْرُهُمْ شُوْرٰى بَيْنَهُمْ وَمِمَّا رَزَقْنٰهُمْ يُنْفِقُوْنَ.

In this text, the fact that consultation occurs side by side with the three pillars of the faith has been taken to mean that it is an obligation of a similar order. It is interesting to note that this particular text is a Makki *āyah* which was revealed before the Islamic state had come into existence. Later, when an Islamic government was established in Madinah, consultation was conveyed in the form of a Qur'ānic command and this laid the textual foundation of *shūrā* as a

principle of Islamic government. The Prophet-cum-head of state was then ordered to:

> Consult them (the Companions) in (community) affairs. When you have reached a decision, then place your trust in God (and implement it) (āl-ᶜImrān, 3:159).

وَشَاوِرْهُمْ فِي الْأَمْرِ فَإِذَا عَزَمْتَ فَتَوَكَّلْ عَلَى اللهِ.

Al-Ṭabari characterises consultation as one of the *ᶜazā'im al-aḥkām*, that is a fundamental principle of Sharīᶜah which is essential to the substance and identity of the Islamic government.[35] Ibn Taymiyyah held a similar view by observing that God Most High has commanded the Prophet Muhammad to consult the community, despite the fact that he was the recipient of divine revelation. This Qur'ānic command is, therefore, all the more emphatic with regard to the subsequent generations of Muslims who no longer have the Prophet among them, nor do they have direct access to revelation.[36] Muḥammad ᶜAbduh has also held that consultation in this *āyah* is not just a recommendation, but an obligatory command addressed primarily to the head of state to ensure that it is properly implemented in government affairs.[37] Asad, Zaydān, al-Bahī, Mawdudi, and ᶜAwdah, among others, have all concurred with this conclusion. Further support for this interpretation is found in the Sunnah of the Prophet and the precedent of his Companions.[38] According to a report, Abū Hurayrah, is reported to have said: "I have not seen anyone to be more diligent in consulting the Companions than the Prophet s.a.w. himself".[39]

مَا رأيْتُ أَحَداً أَكْثَرُ مَشْوَرَةٍ لاَ صْحَابِهِ مِنَ النَّبِيِّ صَلَى اللهُ عَلَيهِ وَسلَّمَ.

In another Ḥadīth, the Prophet is reported to have told his two principal advisors, Abu Bakr and ᶜUmar that, "If the two of you agree upon a counsel, I shall not oppose you."[40]

لَوْ اِجْتَمَعْتُمَا فِيْ مَشْوَرَةٍ مَاْ خَا لَفْتُكُمَا.

Similarly, on a number of occasions, the Blessed Prophet in the context of both private and public affairs, solicited counsel from the Companions, and at times he gave it preference over his own views.[41]

In Arabic usage, the root word from which *shūrā* is derived (i.e. *shāra*) literally means extracting honey from the honeycomb. The juridical meaning of *shūrā* is obviously related to its literal roots in that it consists of extracting an opinion (*ra'y*) on a particular issue.[42] One who deliberates a matter in association with others is often exercising *ijtihād* based on a considered opinion (i.e. *ijtihād fi-al-ra'y*), and as such it may be right or it may be erroneous. But since *shūrā*, unlike *ijtihād* by an individual jurist, consists of a collective *ra'y*, it is more likely to be right. The strength of *shūrā* also lies in the fact that consultation brings people closer together, and it provides them with an opportunity to voice their views on matters of common concern. In this way, *shūrā* prevents disunity and division among people.[43] But consultation can only be meaningful and effective when the participants enjoy total freedom to express their views. Maḥmūd Shaltūt and al-Sibā^{c}i merely reiterate this truism when they say that the Qur'ānic principle of consultation takes for granted the freedom of speech and expression for those whose counsel is being solicited.[44] ^{c}Abd al-Karīm Zaydān is even more emphatic when he writes that "it would be totally in vain, and would make no sense to say that government in Islam is bound by the principle of consultation, and yet it should have the liberty to deny the participants of *shūrā* the freedom to express an opinion."[45]

As for the subject-matter of *shūrā*, and whether it should apply to all matters or be implemented on a selective basis, al-Qurṭubi is of the view that consultation has a role to play in both religious and temporal affairs, but he adds that the consultant in religious matters must be well versed in the religious sciences. However, in temporal matters on which counsel is being sought, the consultant need only be wise and capable in order to give sound advice.[46] The jurists have generally held that *shūrā* applies to both religious and temporal affairs on which no clear injunction is found in the text of the Qur'ān and the Sunnah. Should there be guidance available in these sources on a particular issue, consultation would be redundent and it would not be allowed to override textual injunctions. Although the substance of this principle is generally accepted, it would, nevertheless, be less than accurate to say that *shūrā* has no role to play regarding matters which have been regulated in the Qur'ān and the Sunnah. For in such cases *shūrā* could still operate, in a subsidiary capacity perhaps, in order to facilitate the correct interpretation and understanding of the textual ordinances (*aḥkām*), and to determine proper methods for their enforcement. In this sense, it may be said

that *shūrā* has a role to play in all communal affairs both within and outside the textual rulings of the Sharī[C]ah.[47]

Some ulema have attempted to single out certain themes such as warfare, as the proper or even the exclusive subject matter to which *shūrā* is applicable, however, this would suggest that *shūrā* is not a requirement in other areas of government.[48] The correct response to such views can be ascertained in the Qur'ānic text (āl [C]Imrān, 3:159) in which consultation is conveyed in the form of a general command and it has not been qualified in any way. A general and absolute ([C]*ām, muṭlaq*) command, according to the rules of Islamic jurisprudence (*uṣūl al-fiqh*), must remain so unless there is evidence to warrant specification (*takhṣīṣ*) or qualification (*taqyīd*) of the original command. There is no compelling reason to specify the subject matter of *shūrā* in any way other than what has already been stated, and that is that *shūrā* must not conflict with the definitive injunctions of the Sharī[C]ah.[49] In sum, the scope and subject matter of *shūra* need not be restricted in any way, and as such it entitles every citizen, man, woman, Muslim or non-Muslim to express an opinion on matters of public concern.[50] The government is, in turn, under duty to solicit such counsel from everyone, especially in matters on which there is disagreement in the community. All who are concerned, and who have a view should be enabled to voice their opinions together with the grounds on which they are founded. Action should then be based on that opinion which is closest to the Book of God and the Sunnah of His Messenger.[51]

Furthermore, the Qur'ānic provisions on *shūrā* not only necessitate the setting up of one or more representative assemblies as an integral part of government, but also that its consultative decisions are implemented by the head of state. The precise detail as to whether this leader should have powers to veto the decisions of the state consultative assembly (*majlis al-shūrā*), and whether the exercise of such powers should itself be regulated by certain procedures are, as Abū Ḥabīb has aptly observed, matters which remain open to *ijtihād*. This similarly applies to the subject matter of *shūrā* as to whether it should be specified by the provisions of the constitution or other laws to ensure an even distribution of tasks and powers within the various organs of the state. Therefore, the detailed guidelines on these, and other aspects of consultation, may be determined through consultation itself, and through the application of *ijtihād* which derives its inspiration and guidance from the Qur'ān, the Sunnah and the precedent of the Pious Caliphs.[52] The participants of *shūrā* must enjoy the freedom to express an opinion and, if necessary,

to criticise the government for the *maṣlaḥah* and benefit of the community. Being a principle of the Islamic faith which is described in the Qur'ān as an attribute of the Muslim personality, consultation should by no means be confined to government affairs alone. In this capacity, *shūrā* should be seen as a distinctive feature and hallmark of Muslim culture, and as a model for its socio-political development.

V. Personal Reasoning (*ijtihād)*

Literally, *ijtihād* means striving or self-exertion in any activity which entails a measure of hardship. *Ijtihād* is defined as the total expenditure of effort by a jurist to deduce, with a degree of probability, the rules of Sharī^{c}ah from the evidence and indications that are found in the sources. The sources of Sharī^{c}ah, namely the Qur'ān and the Sunnah, may expound the rule that is wanting for a particular issue by the direct application of their words, in which case there is no room for deduction by means of *ijtihād*. However, if they only provide indirect indications, it is for the *mujtahid* to interpret the text, and to deduce by the application of his reasoning and judgement, the ruling which offers the necessary solution.[53] *Ijtihād* is validated by the explicit authority of Sunnah, in particular the well-known Ḥadīth of Mu^{c}ādh b. Jabal, and by the implied authority of a number of *āyāt* in the Qur'ān.[54] In classical jurisprudence, *ijtihād* is evaluated as a collective obligation (*farḍ kafā'i*) of the entire community which is fulfilled even if it is exercised by only some of its members. Therefore, it is not merely a right of every knowledgable individual to carry out *ijtihād*, but also his or her responsibility to do so. What is important is not necessarily the result, but the endeavour itself which, according to the explicit terms of the following Ḥadīth, merits a reward even if the result turns out to be erroneous. "When a judge/*mujtahid* exerts himself and gives a right decision he will have a double reward, but if he errs in his judgement, he will still merit a reward."[55]

إِذَا اجْتَهَدَ الْحَاكِمُ فَاَصَابَ فَلَهُ اَجْرَانِ وَاِنْ اَخْطَاَ فَلَهُ اَجْرٌ.

This Ḥadīth is explicit on the point that the efforts of the *mujtahid* may lead to correct results or to erroneous conclusions. In either case, he is entitled to an opinion despite any opposition or disagreement by other equally qualified *mujtahids* over the same issue. For the truth or falsehood of the results that have been reached may

neither be obvious nor immediately ascertainable. The fact that this Ḥadīth grants a reward for an attempt at *ijtihād* would obviously imply that disagreement in *ijtihād* is tolerated, and may even prove beneficial, which is perhaps why it merits a reward.[56] It is further understood from the implied meaning of the same Ḥadīth that everyone who is capable of formulating an informed opinion and judgment over an issue is encouraged to give it, and that they should not withhold their contribution on grounds of a mere possibility that it might be erroneous.[57] This encouragement has, to a large extent, borne fruit which can be seen in the wealth and diversity of opinion in the various spheres of Islamic learning including the Qur'ān exegesis, and the emergence and development of various schools of law, theology, philosophy and sufism. As al-Bahī points out, the word *ijtihād* in the terminology of *fiqh* is another term for difference of opinion (*ikhtilāf fi al-ra'y*).[58] Ever since the time of the Companions, ulema and scholars have not ceased to disagree in their opinion and *ijtihād*, and this would in turn, testify, as Zaydān points out, to the broad consensus that disagreement in *ijtihād* is acceptable.[59]

To ensure propriety in the exercise of *ijtihād*, the ulema of *uṣūl al-fiqh* have laid down certain conditions such as the qualifications that the *mujtahid* must possess, and a set of rules which are designed to ensure the integrity of *ijtihād*, and to discourage indulgence in arbitrariness or unfounded criticism of others. The theory of *ijtihād* is explicit, once again, on the point that the result of *ijtihād* is binding on no one but the *mujtahid* himself. This would clearly suggest that he must only be guided by his true conviction and belief in the conclusion that he has arrived at. For otherwise, as al-Bahī has rightly observed, there would be no point in making the *mujtahid* bound by his own *ijtihād*.[60] When *ijtihād* fulfils all of its necessary requirements, then the result it has arrived at is inviolable, and its validity is not affected by opposition and criticism until the truth is established through unanimity and consensus. In the meantime, no one is entitled to attack the integrity of its author. On the contrary, the effort and self-exertion of the *mujtahid* in attaining a true and correct solution to a problem merits commendation and reward. Only in one case, that is when a decisive consensus of learned opinion, or *ijmāᶜ*, declares the *ijtihād* in question invalid, or when the result of such an *ijmāᶜ* clearly refutes the validity of an individual *ijtihād* does the latter lose its claim to validity. In this case the *ijmāᶜ* itself commands adherence and prevails over individual opinion. But even then, it is only for practical purposes that the individual *ijtihād* loses its merit. Provided that

the *mujtahid* has acted in good faith, and in compliance with the requirements of *ijtihād*, his integrity remains intact. The fact that the Sharīᶜah validates *ijtihād* and defends its integrity, as Mahmassani points out, is a tangible result of the freedom of expression and belief in Islam.[61] The *mujtahid* who is capable of exercising his own *ijtihād* is not, according to the theory of *ijtihād*, permitted to follow the opinion or *ijtihād* of others unless he agrees with it and is convinced of its veracity and truth.[62] This ruling also requires that judicial decrees must originate in the personal *ijtihād* of the judge (*qāḍi*), and when this is not the case, and the *qāḍi* issues a decision which disagrees with his own judgment, his decision is liable to review. When for example, the judge conforms to the wishes of another person of influence, or when he adopts the *ijtihād* of another person contrary to his own beliefs, his decision becomes liable to review and may be reversed. For the judge-cum-*mujtahid* must always act upon his true conviction and only issue a decision which he believes to be upright and valid.[63]

The inviolability of *ijtihād* acquires special significance in regards to judicial decisions which are founded in the personal judgment and *ijtihād* of the judge. According to an Islamic legal maxim, *ijtihād* is not reversible by its own equivalent (*lā yunqaḍ al-ijtihād bi-mithlih*). When a judge renders a decision which is based on his sound reasoning and *ijtihād*, neither the same, nor any other judge is entitled to reverse it by means of fresh *ijtihād*. For the two instances of *ijtihād* are deemed to carry equal force and there is, in theory, no basis for one to justify reversal of the other provided that both are sound and appropriate (*sā'igh, maqbūl*) in that they are each in accord with the requirements of *ijtihād*. For if one were to be allowed to set aside the other, merely on grounds of a difference of opinion, then there is no reason, as al-Āmidi expounds, why the second and the third in the series should not be subject to reversal as well. But, it is obvious that accepting such a proposition would lead to a chain event (*tasalsul*) that would violate public interest (*maṣlaḥah*) as it would prevent the termination of disputes among people, cause confusion, and undermine public confidence in court decisions.[64] The substance of this argument is equally applicable to the *ijtihādī* decisions of the head of state and those who represent his authority.

Further evidence as to the reality of the freedom of expression in *ijtihād* comes from the fact that all of the leading imams of jurisprudence are on record to have discouraged others from imitating their opinion, or *fatwā*, without looking into the grounds in which they

were founded. This is indicative, as Ghazawi points out, of their deep respect for scholarship, and the right of other *mujtahids* to freedom of expression.[65] Needless to say that without this freedom *ijtihād* would be totally unfeasible.

The development of two different scholastic traditions in the formative stages of Islamic legal history toward the end of the first century *Ḥijrah*, namely the *Ahl al-Ra'y* (partisans of personal opinion), and Ahl al-Ḥadīth (partisans of Ḥadīth), is further proof of substantial support, in the ranks of the ulema, for the use of personal opinion, or *ra'y*, in the development of Sharī^{c}ah. *Ijtihād bi al-ra'y*, or *ijtihād* which is founded in considered personal opinion, became the distinctive feature of the *Ahl al-Ra'y*, especially among the Ḥanafis who relied extensively on the use of *ra'y*, analogical reasoning (*qiyās*), and juristic preference (*istiḥsān*). These were the more disciplined and regulated methods of *ijtihād* which were developed in order to ensure propriety in the exercise of *ra'y* as a means of developing the Sharī^{c}ah. Despite the initial resistance which it encountered from the partisans of Ḥadīth, the basic validity of *qiyās* was generally accepted. This was also the case, to a large extent, with regard to juristic preference (*istiḥsān*), consideration of public interest (*istiṣlāḥ*, or *maṣlaḥah*), and presumption of continuity (*istiṣḥāb*). The essential validity of these, as various manifestations of *ijtihād*, was recognised and as a result, they were all integrated into the legal theory of *uṣūl al-fiqh*. The common ground between these various doctrines is that they are all rationalist in content and rely largely on opinion (*ra'y*). Once again, they all share the basic notion that the ruler, the scholar, and *mujtahid* have not only the right, but are responsible to exert themselves for the benefit of the people, and for the fulfilment of the legitimate needs of society in all reasonable ways that are acceptable to the Sharī^{c}ah, even if no specific authority could be found in their support.

The subject matter in which *ijtihād* is exercised may fall under one, or the other, of the following two categories:

(a) Temporal matters which are not of immediate concern to religion. In this area, as Khallāf has rightly observed, "the individual enjoys total freedom of expression and may express an opinion as he pleases provided that it does not amount to slander, hostility and sedition."

(b) In religious and legal matters, the *mujtahid* may express an opinion if the matter in question has not been expressly regulated by the clear text. The only condition that needs to be

observed here is that *ijtihād* in juridical matters must not violate the basic principles and objectives of Sharī^{c}ah.[66]

It is commonly observed that ever since the establishment and crystallisation of the *madhāhib* from the beginning of the fourth A.H/eleventh A.D century, *ijtihād* has come to a standstill. The closure of the door of *ijtihād* has become a familiar, although somewhat disputed phrase, to describe the end of *ijtihād* and the beginning of indiscriminate imitation (*taqlīd*). A climate of opinion began to prevail that the Sharī^{c}ah had been thoroughly explored, and all questions had been exhaustively investigated and settled, that from then onwards, it was the duty of the subsequent generations of scholars to follow the law as was expounded by the leading Imams, and therefore to avoid embarking on fresh *ijtihād*. The claim concerning the so-called closure of the door of *ijtihād* may be exaggerated, as it is often said that *ijtihād* has never been totally abandoned, but even so, there seems to be little doubt that *ijtihād* has been steadily declining. Was this then a voluntary self-restraint that the ulema of the past chose to impose so as to curb the diversity of schools and sects in the vastly expanded territory of the early Abbasid state?[67] Was the closure of the door of *ijtihād* in other words, a circumstantial development in response to an historical situation, or a manifestation of the normative principles of Sharī^{c}ah? The answer is likely to be the first, for according to one observer, "after the so-called closure of the door of *ijtihād* whatever limits that were imposed on *ijtihād* were due to the change of circumstances and not of principles."[68] Thus, it would follow that the alleged closure of this gate has no bearing, in principle, on the validity of the freedom of every scholar and *mujtahid* to carry out *ijtihād* in their search for solution to new problems.[69]

VI. Freedom to Criticise

The people are granted, under the Sharī^{c}ah, the freedom to criticise and monitor government activity (*ḥurriyyah al-mu^{c}āraḍah*, also known as *ḥurriyyah naqd al-ḥākim*), by means of sincere advice, constructive criticism, and ultimately by refusal to obey the government which is guilty of violating the law. This is a corollary of the Qur'ānic principle of *amr bi al-ma^{c}rūf wa nahy ^{c}an al-munkar* (commanding good and forbidding evil) which entitles, indeed commits, the individual to

criticise, change, or rectify transgression and evil when he or she witnesses or anticipates its occurrence. "*Muᶜāraḍah* is a fundamental principle of the Islamic system of government", writes ᶜAfīfī, "which entitles the individual to tell the truth and expose transgression even when this entails opposing the ruling authorities."[70] In the Qur'ān and the Sunnah, the textual authority for this right is the same, as can be quoted in support of *amr bi al-maᶜrūf wa nahy ᶜan al-munkar*, also known as the principle of *ḥisbah*.[71] The Qur'ān, as already discussed in the foregoing section on *ḥisbah*, is so emphatic on the value of this principle that it is elevated into an integral part, and a requirement of the Muslim faith. It is the central theme of a number of *āyāt* in the Qur'ān, and the Sunnah elaborates it and regulates its detailed implementation. The Qur'ān thus places both men and women on an equal footing in regards to *ḥisbah* and *muᶜāraḍah*, and each and every citizen is entitled to denounce and disapprove transgression, be it on the part of a government leader, a fellow citizen, or indeed anyone who is engaged in criminality and evil.

Muᶜāraḍah is also validated by the Sunnah of the Prophet and by the clear precedent of his leading Companions and the orthodox caliphs. Thus, it is reported that upon signing the treaty of Hudaybiyah with the Quraysh of Makkah, ᶜUmar b. al-Khaṭṭāb was critical of some of the clauses of this treaty which he felt were unfavourable to the Muslims. ᶜUmar consulted the more senior Companion, Abu Bakr, on the matter but he was still dissatisfied and went on to express his sharply critical view of the treaty to the Prophet, who is on record to have listened to ᶜUmar's views and responded to his criticism.[72] Elsewhere, we read in a Ḥadīth where the Prophet proclaimed that "the best form of *jihād* is to utter a word of truth to a tyrannical ruler."[73]

أَفْضَلَ الْجِهَادِ كَلِمَةُ حَقٍّ عِنْدَ سُلْطَانٍ جَائِرٍ.

In his inaugural speech following his election to office, the first caliph, Abu Bakr, is on record to have said: "O people, I have been entrusted with authority over you, but I am not the best of you. Help me if I am right and rectify me when I am wrong."[74] This quote is widely considered to invite constructive criticism of the government, and to encourage the people to remain vigilant over the activities of their political leaders. As Abu Ḥabīb has observed, the basic attitude which Abu Bakr maintained in this speech was that self-criticism was not only beneficial for healthy growth, but was also a necessary attribute of responsible government.[75]

Numerous instances of *muᶜāraḍah* have been recorded in the precedent of the second caliph, ᶜUmar b. al-Khaṭṭāb. Following the precedent of the first caliph, Abu Bakr, ᶜUmar also asked the people, at his inaugural speech, to "rectify any aberration" they might see in him. A man from the audience addressed the caliph saying that "if we see deviation on your part, we shall rectify it by our swords". Upon hearing this the caliph praised God that there was someone who would remedy the situation in the cause of righteousness.[76] Another report concerns the subject of dower (*mahr*). Apparently, the caliph in a public speech warned the people against exaggerated sums being given as dower. However one woman, Fatimah bint Qays, disagreed and quoted a Qur'ānic text (al-Nisā', 4:20) in support of her argument, to which ᶜUmar responded that "a woman is right, and ᶜUmar is mistaken."[77]

According to another report, a man came to ᶜUmar and addressed him somewhat impudently saying, "fear God, O ᶜUmar". Someone who was present reminded the man that he was exceeding the limits of propriety in the presence of the caliph, but ᶜUmar responded by saying that "It will be no good if they (the people) did not remind us so and it will be no good if we did not listen to them."[78]

In al-Sibāᶜi's assessment, the precedent of Abu Bakr and ᶜUmar b. al-Khaṭṭāb indicates clearly that they recognised the citizen's freedom to criticise government leaders. The fact that they listened to such criticism and often responded to it is proven by historical evidence.[79] According to another observer, the freedom of speech, opinion, and expression which the Muslims experienced in the earliest stages of their history represent an inspiring example which has hardly been surpassed in the subsequent periods of Islamic government.[80] Based on these and other instances of *muᶜāraḍah* which took place during the period of Khulafā' Rāshidūn, it is concluded that "Islam entitles the citizen to monitor the activities of the head of state and state officials in respect of all that they do, and also all they might neglect doing."[81] Muḥammad Khiḍr al-Ḥusayn is even more emphatic. He observed that Islam has made it "an obligation of the community" to monitor the conduct of the head of state and his officials with a view to rectifying those who deviate, and alerting those who might be neglecting the duties to which they are entrusted.[82] "It is only natural to say", writes al-Qāsimi, "that *muᶜāraḍah* cannot materialise unless there is freedom of speech." This goes hand in hand with freedom of opinion (*ḥurriyyah al-ra'y*), and it cannot operate in a system of government which does not safeguard constitutional liberties. But whenever there is such freedom, then *muᶜāraḍah* serves as a natural

instrument of the freedom of opinion.[83] The right to criticise must not be confused, as one observer points out, with opposition merely for the sake of opposition, nor should it be taken so far as to institutionalise opposition in the form that is known, for example, of present-day political parties. An opposition party is often committed to opposition for its survival, and this reality of contemporary politics tends to encourage criticism verging on imbalance. This form of opposition is discouraged in Islam on the authority of the Ḥadīth which instructs the Muslims as follows: "Let no one of you be turned into a tail (*imm^{c}ah*): that is a person who does good work or embarks upon evil only when he sees others doing the same."[84] Participation in good work is normally encouraged, whether it is self initiated or by following the example of others, but even so, if good work is motivated merely by a desire to comply with others, it can have little educational value. It is *imm^{c}ah* when someone praises or denounces another without reason merely because he sees others doing the same. This is, as Khalīl points out, particularly demeaning and unworthy of the dignity of man as the motivation does not originate in true conviction and belief. For *imm^{c}ah* occurs when a person says something he or she does not believe, and believes something but does not say so.[85] The correct guidance is to be found in the second portion of the Ḥadīth just quoted, which continues to instruct the believers as follows:

> "Make up your minds. Let everyone join others in good deeds and avoid participation in evil conduct."

لَا تَكُوْنُوْا اِمَّعَةً تَقُوْلُوْنَ اِنْ حَسُنَ النَّاسُ اَحْسَنَّا وَاِنْ ظَلَمُوْا ظَلَمْنَا. وَلٰكِنْ وَطِّنُوا اَنْفُسَكُمْ اِنْ اَحْسَنَ النَّاسُ تُحْسِنُوْا وَاِنَ اَسْاؤوا فَلَا تَفْعَلُوا.

Consequently, a heightened sense of individual responsibility is of central importance to the proper exercise of *mu^{c}āraḍah*. Indeed, the success of any critique, written or verbal, lies in the sincerity of its author. According to the clear instruction of another Ḥadīth, "every one of you is a shepherd (*rā^{c}ī*) who is responsible for that which is in his custody ...."[86]

كُلُّكُمْ رَاعٍ وَكُلُّكُمْ مَسْئُوْلٌ عَنْ رَعِيَّتِهِ ...

In other words, everyone is accountable, no one is beyond criticism and all criticism should partake in the essence of *naṣiḥah*.

Furthermore, freedom to criticise must not be used as a means to disunify, to confuse, or as self-aggrandisement. In its legitimate use, this freedom should serve as a torchlight by which to find the truth, and to search for the right course of conduct to bring benefit (*maṣlaḥah*) to the community as a whole. And lastly, freedom to criticise must not be based on suspicion. Indeed, Muslims are specifically instructed both in the Qur'ān and the Sunnah to avoid indulgence in both suspicion and doubt.

There are at least three conditions which need to be met in order to ensure that the criticism is valid. These are as follows:

(a) It is necessary to establish the facts and ascertain the grounds on which criticism is based. General authority for this requirement is found in the Qur'ān where in an address to the believers it is said that "If a transgressor (*fāsiq*) comes to you with any news, ascertain the truth, lest you harm people unwittingly and then you regret what you have done" (al-Ḥujurāt, 49:6).

يَاَيُّهَا الَّذِيْنَ اٰمَنُوْٓا اِنْ جَآءَكُمْ فَاسِقٌ بِنَبَاٍ فَتَبَيَّنُوْٓا اَنْ تُصِيْبُوْا قَوْمًا بِجَهَالَةٍ فَتُصْبِحُوْا عَلٰى مَا فَعَلْتُمْ نٰدِمِيْنَ.

Thus, the Qur'ān requires that facts must be investigated first before reaching any conclusion which may well prove to be unfounded and regrettable. The substance of this text is also confirmed a few verses later in the same sura where the believers are asked to "avoid suspicion (*ẓann*) for the most part, for some (varieties of) suspicion are sinful" (al-Ḥujurāt, 49:12).

يٰاَيُّهَا الَّذِيْنَ اٰمَنُوا اجْتَنِبُوْا كَثِيْرًا مِّنَ الظَّنِّ اِنَّ بَعْضَ الظَّنِّ اِثْمٌ.

Therefore, suspicion over the saying and conduct of others which is not substantiated by evidence should be avoided. Obviously, the text here does not forbid all suspicion, and therefore *ẓann*, which is based on proper or reasonable grounds may be sufficient for criticism. This kind of suspicion is often referred to as *ẓann al-mubāḥ* (permitted speculation) which represents the probability of truth.[87]

The conditions to ascertain the grounds of criticism are further qualified in that they must be within the capacity of the investigator. In this regard, the Qur'ān provides that "God does not burden a person with what is beyond his capacity" (al-Baqarah, 2:286).

لَا يُكَلِّفُ اللّٰهُ نَفْسًا اِلَّا وُسْعَهَا .

Therefore, when a person has carried out an investigation to the extent of his ability and understanding, then this is normally sufficient evidence on which to base criticism. This may be illustrated by the Qur'ānic example where the Prophet Moses criticised his teacher, Prophet al-Khiḍr, for deliberately breaking a barge which belonged to a poor family, and was their only means of earning a living. As the Qur'ān records the episode, Moses told al-Khiḍr, "did you break it so as to drown its passengers? Truly a strange thing you have done!" (al-Kahf, 18:71).

قَالَ اَخَرَقْتَهَا لِتُغْرِقَ اَهْلَهَا لَقَدْ جِئْتَ شَيْئًا اِمْرًا.

But this, it is said, was a fair criticism which was based on proper grounds, that is the observation of an apparent transgression, despite Moses's ignorance of the real truth which was only known to al-Khiḍr. He then informed Moses of the fact that there was a King who usurped all the barges he could find, so he (al-Khiḍr) bore a hole in it to save it from being seized. In this instance, the whole truth was not known to Moses, and yet his criticism was founded on proper grounds.

(b) The critic must be convinced of the moral uprightness of his opinion. For unless a person believes that what he says is the truth he must not say it, otherwise he becomes either a hypocrite or a liar – both of which are forbidden. With regard to the first, the Qur'ān declares that "the hypocrites will find themselves in the lowest reaches of hell", and for the second, the Qur'ān admonishes the believers to "refrain from telling lies". (al-Nisā', 4:145; and al-Ḥajj, 22:30).

– اِنَّ الْمُنٰفِقِيْنَ فِى الدَّرْكِ الْاَسْفَلِ مِنَ النَّارِ.

– وَاجْتَنِبُوْا قَوْلَ الزُّوْرِ.

However, if a person believes he is right in expressing a critical opinion, and yet the opposite is found to be the case, then he is not to be blamed. Similarly, if a person exerts himself in establishing the grounds pertaining to the object of his critique, but in doing so reaches the wrong conclusion, he is not to be blamed either provided he believed that it was correct. This is the purport of the Ḥadīth which declares:

> One who argues in a wrong cause and he knows it to be such–shall remain afflicted with the wrath of God until he ceases and withdraws from it.[88]

مَنْ خَاصَمَ فِيْ بَاطِلٍ وهُوَ يَعْلَمُ لَمْ يَزَل فى سَخَطِ اللهِ حَتّى يَنْزِعَ.

By way of divergent implication (*mafhum al-mukhalafah*), it is understood from this Ḥadīth that a person who did not know that he was engaged in a wrong cause is not to be taken to task.[89]

(c) Criticism must be proportionate to its object. This means that the words used and the manner of criticism is suitable to the occasion. It imust be neither too harsh nor too feeble, however, it must also be courteous and effective. From the quantitative angle, the question arises as to whether a single criticism would suffice as opposed to repeated and sustained criticism. In principle, preseverance is permitted especially when the critique is a courteous invitation to what is deemed to be good and beneficial. For as we read in the Qur'ān, man does not–or at least should not–dislike invocation to good (*duᶜa' al-khayr*), (Fuṣṣilāt, 41:49).

لَا يَسْئَمُ الْاِنْسَانُ مِنْ دُعَآءِ الْخَيْرِ.

And, even when the critique disapproves of something that partakes in *munkar*, perseverance is recommended until it bears fruit. This is also the purport of the previously mentioned Ḥadīth which concerns the three stages of *ḥisbah*, that is the commanding of good and forbidding of evil: One who sees an evil being committed, let him change it by his hand, but if he is unable to do so, then let him change it by his words, but if he could not do

that, then let him denounce it in his heart, but this is the weakest form of faith.[90]

The above Ḥadīth encourages persistent effort even if this means changing the method by which the combating of evil is conducted. The main point of the Ḥadīth, however, is that if people have conviction and faith then they should not turn a blind eye to wrongdoing whenever it is within their capacity to change or prevent it. This Ḥadīth also implies that the method, style, and intensity of combating a *munkar* should be determined in proportion to what is required in light of the surrounding circumstances. This would naturally involve, to some extent, an assessment in advance of the situation, speech, or conduct which is to be made the target of criticism. Consequently, the determination of the correct method and style of criticism involves a certain measure of personal judgment on behalf of the critic and his *ijtihād*.

A proper exercise of the right to criticism contemplates, and proceeds upon, another principle of Sharīᶜah, namely the principle of validity (*aṣl al-ṣiḥḥah*). The gist of this principle is that Islam protects people's dignity by ensuring that their words and deeds are given full credit of being valid and true unless there is clear evidence to suggest otherwise. It is to this principle that we now turn.

PRESUMPTION OF VALIDITY (*AṢL AL-ṢIḤḤAH*)

It is presumed that the words and deeds of a Muslim are valid unless the opposite is known to be the case. For example, when a person makes a speech, enters a transaction, or performs an act of worship, but he doubts as to whether these were valid, under the presumption of validity, it will be presumed that the words and deeds in question were sound and lawful unless evidence is established to the contrary. Thus, according to the Shāfiᶜi jurist, Tāj al-Dīn al-Subkī: "The norm to us (*al-aṣl ᶜindanā*) is that when an act manifestly conforms to the Sharīᶜah, it is to be judged valid. Therefore, no consideration is to be given to suspicion (*al-tuhmah*) in the *aḥkām* of Sharīᶜah, for this is unreliable and infirm. The *aḥkām* of Sharīᶜah contemplate obvious causes (*al-asbāb al-jalliyyah*) and they do not refer to hidden meangins (*al-maᶜāni al-khafiyyah*). The norm, therefore, is one of validity until the contrary is proven."[91]

Al-Subkī continues that Imam Abu Hanīfah has taken the view that an act which has become the object of suspicion should be deemed invalid on the grounds that this gives rise to a conflict

between validity and invalidity (*al-ṣiḥḥah wa al-fasād*) in which case the latter should prevail.

The Shāfiᶜi position is representative of the majority and also that of the Shīᶜah Imamiyyah. Validity thus prevails over suspicion. The substance of this presumption is also endorsed by another legal maxim, recorded in *The Majallah* (Art. 74), which provides that "suspicion commands no credibility" (*lā ᶜibrah li al-tawahhum*). For basic authority on the presumption of validity we refer to the holy Qur'ān, quoted earlier,which states that a person should "Avoid suspicion for the most part, for some (varieties) of suspicion are sinful," (al-Ḥujurāt, 49:12). This text clearly forbids indulgence in unfounded suspicion, that is thinking the worst of motives behind the acts and sayings of others. In another passage, the Qur'ān directs the believers as follows: "And speak fairly to the people" (al-Baqarah, 2:83).

وَقُوْلُوْا لِلنَّاسِ حُسْنًا...

This text is also self-evident on the point that the gift of speech, and the freedom to utilise it, must always aim at achieving courtesy and elegance in dealing with others. The Qur'ān thus addresses the hidden and the manifest aspects of human conduct. Both of these must be positive, and human relations are to be courteous and trustful–becoming of the dignity that God Most High has bestowed upon mankind.

Further evidence to support the presumption of validity can be found in the Ḥadīth, where the Blessed Prophet has instructed the Muslims to "give the best interpretation to what you hear, and something your brother might have said, until you exhaust all possibilities in that direction."[92]

اِذَا بَلَغَكَ عَنْ اَخِيْكَ شَيٌّ فَا حمِلهُ عَلٰى اَحْسَنِهِ حَتّٰى لَمْ تَجِدَلَهُ مَحْمَلاً.

ᶜAlī b. Abu Ṭālib merely reiterated the substance of this Ḥadīth in one of his sayings when he advised the believers in the following terms:

> "Make the best of the affair of your brother until you find evidence that would persuade you away from doing so; suspect not the worst of what your brother might have

said while you can still find a way to give it a favourable interpretation."[93]

The presumption of validity is not to be confounded with another presumption of Islamic law, namely that of continuity (*istiṣḥāb*), for the two are different despite their apparent similarity. The principle of *istiṣḥāb* presumes continuity of *status quo ante* until there is evidence to establish a change. *Istiṣḥāb*, in other words, denotes that facts, or rules of law and reason whose existence or non-existence had been proven in the past, are presumed to remain so for lack of evidence to establish any change.[94] The presumption of validity differs from *istiṣḥāb* in that the former is not concerned with linking the past with the present. In other words, this presumption is concerned mainly with validation rather than with establishing the continuity of status quo. Unlike *istiṣḥāb* which is concerned with linking two situations with one another, the presumption of validity has often no basis on which to operate other than an optimistic or favourable judgement, which is passed in a situation of uncertainty and which gives the benefit of doubt on the side of validity and goodwill.

Suspicion may also arise regarding whether a person is the lawful owner of a certain object or property which he has in his possession, or whether he has procured it through unlawful means. To answer this type of question, it will be assumed that under the presumption of validity, it is lawfully owned. In this case, a mere doubt will not be permitted to interfere with the integrity of character or the legality of acts of the individual concerned. Indeed, if doubts and suspicions of this kind were to be given credit then credibility and confidence in everyday business transactions would be seriously undermined.[95]

To give another example, when a person donates generously to a charitable cause, it is possible that some people may interpret this action adversely and suspect selfish motives, such as a desire for power and fame on the part of the donor. Similarly, when someone opposes a particular idea, or a plan, or simply criticises another person, the critic could be suspected of dishonorable motives, and yet if given a positive interpretation, the criticism could be seen in a favourable light which is precisely what the principle of validity would recommend.[96]

This principle has an important role to play in encouraging social harmony and trust by advising that good and positive should be highlighted in preference to pessimism and doubt. But, this only so when there is no evidence to suggest that evil motives are at work.

Also, the principle of validity gives the benefit of doubt to acts and words which may arouse suspicion, but which are actually the result of an error of judgement without devious intentions.

Furthermore, the principle of validity advises us not to allow doubt to interfere with the integrity and soundness of acts of devotion. ᶜAli b. Abu Ṭālib has once again been quoted to have said that "surrendering to doubt is a sign of feeblemindedness." This he said, as the report has it, in response to a question concerning a person who kept repeating his ablution and prayers on account of recurring doubts that they were in some way defective. ᶜAli b. Abu Ṭālib attributed his suspicions to the work of Satan, which merely debilitated the capacity of this person to be efficient and alert.

The question still arises as to whether the principle of validity should apply to everyone, even to words and deeds that originate in persons of dubious and questionable character. How are we to defend ourselves against the harm of those who hide their evil intentions? In response to this it is suggested that the principle of validity advocates justice and moderation, and it warns against drawing hasty conclusions which are founded on nothing more than suspicion. The principle of validity does not seek to interfere with sound reasoning, and indications of context and circumstance. We naturally perceive or expect good and evil in a corroborative context, although we are at times surprised against our expectations as we possess no infallible safeguards against error and miscalculation.[97] The principle of validity advises moderation in that one must not judge words and acts that one encounters from the vantage– point of suspicion and prejudice. It also encourages an awareness that there may be hidden aspects to an act or speech and that judgement should not be based always on appearance, but should await investigation and insight. The principle of validity does not neccesarily tell us to pass a favourable judgement with regard to what we observe, but it does recommend that we avoid passing a negative and unfavourable judgement while there is still a possibility for a favourable verdict. This is precisely the position that the jurists have taken, whereby a person is not under duty to presume beneficience in the words and acts of others, but that a judgement to the contrary should be reserved until doubt or the possibility of a good interpretation is eliminated. This may be illustrated by reference to a situation where a person utters some words while passing by and the audience cannot make out whether they were an insult or a greeting. The principle of validity in this situation does not support the conclusion that the words uttered were words of insult,

nor does it require the addressee to presume them to be a greeting and therefore to return it in kind. All that is advised here is that a negative judgment should be withheld as there is still a possibility, however slight, of a favourable interpretation to be sustained. And finally, the presumption of validity maintains that even when an act or speech appears to be evil, there may be an explanation, and until that avenue has been explored, one should reserve judgment. It is possible, for example, that a person who utters an apparently objectionable speech actually believes it to be true, in which case there is a difference between voicing a deliberate evil, and harmful speech which originates in an error of judgement. If for example a man is seen to be eating during daytime in Ramadan, this is admittedly a sinful act, yet it is permitted for the traveller and for those who are sick. Hence, before passing a judgement, one ought to investigate as to the presence of a lawful excuse. In this way, the principle of validity seeks to promote goodwill and trust in society, and it also protects the individual against unfounded suspicion, misinterpretation, and against people jumping to unwarranted conclusions.[98]

VII. Freedom to Express an Opinion (*Ḥurriyyah al-Ra'y*)

Freedom to express an opinion is probably the most important aspect of freedom of speech in that the latter may comprise other verbal varieties such as a simple narration of facts, or comedy and fiction. To express an opinion on any matter implies a level of involvement, commitment, and competence which may or may not be the case in the factual narration of an event. This may partly explain why in the Islamic scholastic tradition, the phrase *ḥurriyyah al-ra'y* (lit. freedom of opinion) is used, for "freedom of speech", in preference to *ḥurriyyah al-qawl*, which is the more precise equivalent. The fact that scholars and jurists have consistently used this phrase for freedom of speech is perhaps indicative of the significance of *ra'y*, or personal opinion, as being the most important aspect of this freedom.

Ra'y has been classified into the three main categories of being either praiseworthy, blameworthy, or doubtful, and these are then sub-divided into various other types. The principal varieties of the praiseworthy opinion to be discussed here are *ra'y* which elaborates

the Qur'ān, the Sunnah and the opinion of the Companions, *ra'y* which consists of *ijtihād*, and *ra'y* which is arrived at as a result of consultation. The blameworthy opinion is also divided into three types, namely *bidᶜah* (pernicious innovation), *hawā* (caprice), and *baghy* (transgression). Here, I shall only address the recommended or praiseworthy varieties of *ra'y* as I have discussed the blameworthy forms in a separate section of this work.

Ra'y is defined as an opinion on a matter which has not been regulated by the Qur'ān or the Sunnah. It is a considered opinion arrived at as a result of deep thought and self exertion by an individual in order to explore and search for knowledge of a subject on which there may only be signs or indications of some kind. But the signs that do exist are such that may lead the investigator to different conclusions. There is an element of arbitrariness attached to *ra'y*, in the sense that it is self-inspired and unrelated to the text of the Qur'ān, the Sunnah and definitive *ijmāᶜ* (consensus of opinion). In the usage of the Arabs, *ra'y* is applied to things which are not seen, but are known through the application of reason, intuitive judgment, and the light of one's heart. Matters which are regulated by definitive factual or rational knowledge, and matters on which all the signs are bound to concur, such as the number of days in a week, or the virtue of telling the truth, are thus excluded from the proper application of *ra'y*. Thus, no one is expected to give or formulate an opinion over factual or rational matters which require no deliberation or thought. It is also clear from the foregoing that *ra'y* is founded on signs and indications (*amārāt*). Hence, when a person says something about a matter pertaining to the realm of the unseen on which there are no signs whatsoever, his saying is not to be regarded as his *ra'y*. In this sense, *ra'y* is preliminary to knowledge in that it must take its lead from signs which are open to investigation and rational conclusions.[99]

A person may express an opinion, arbitary or otherwise, and so long as he does not violate the law concerning blasphemy, sedition, and so on, he is free to advance an opinion. Just as the law tolerates an arbitrary opinion, the latter has a role to play in the development of ideas, and the quest for knowledge and truth. Often a sound opinion is invoked and stimulated by a weak, provocative or misguided one. The *juris corpus* of *fiqh* is the embodiment of both *ra'y* and authoritative tradition, but only the latter is deemed to provide criteria on which to judge the propriety of the former. As already noted, *ra'y* has a limited role *vis-a-vis* the clear ordinances of divine revelation. But when no such guidance is available in the sources, or

when the existing guidance is no more than a sign which is open to interpretation and inference, then the matter is open to *ra'y*. The veracity of *ra'y* is always judged by its proximity to the letter and spirit of the *nuṣūṣ*. Consensus of opinion (*ijmāᶜ*) is the only recognised method for establishing the validity of *ra'y*. Apart from *ijmāᶜ*, which is usually slow to materialise and retrospective, there is no method for a prompt evaluation of *ra'y* other than *ra'y* itself. In this case, the sound *ra'y* declares the arbitrary *ra'y* as invalid or weak. This process of sifting through the accuracy and veracity of *ra'y* is integral to decision–making and *ijtihād*. Thus, the weak and erroneous opinion has a role to play in the evolution of correct *ijtihād*. Perhaps it was in view of this truism, that the Blessed Prophet declared in a Ḥadīth, already quoted in our discussion of *ijtihād*, that the mere effort of a competant scholar or *mujtahid* at attaining the truth is worthy of reward, whether or not he actually succeeds in his goal.[100]

In the scholastic context of early juristic thought, *ra'y* became increasingly associated with liberality and extrapolation in personal preferences. This was the main charge which the partisans of Ḥadīth (i.e. Ahl al-Ḥadīth) laid against their counterparts, the partisans of opinion, or the Ahl al-Ra'y. This somewhat negative connotation of *ra'y*, however, underwent a gradual change due mainly to sustained effort by the Ahl al-Ra'y, the Ḥanafīs in particular, who maintained that Islam never discouraged recourse to reason and personal opinion provided that these did not violate any of its principles and objectives. To substantiate their efforts, the proponents of *ra'y* devised methodologies and guidelines on the correct use of *ra'y* in the forms of analogical reasoning (*qiyās*), juristic preference (*istiḥsān*), blocking the means (*sadd al-dharā'iᶜ*), and presumption of continuity (*istiṣḥāb*). These and other principles of *uṣūl al-fiqh*, such as the priority given to the opinion of the Companions (*fatwā al-ṣaḥābi*), in preference to the opinion of other *mujtahidun*, aimed at establishing a closer identity between *ra'y* and the laws and principles of the Qur'ān and Sunnah.[101] Disagreements over the use of *ra'y* between the Ahl al-Hadith and the Ahl al-Ra'y is a matter of orientation, rather than a total rejection by either side of the basic validity of *ra'y*. The only sectarian movement on record which denies the validity of recourse to *ra'y* is the Bāṭiniyyah or the Taᶜlīmīs. As al-Ghazāli explains: The Taᶜlimiyyah are called by this name because of their doctrine which forbids personal reasoning and intellectual exercise in the form of *ra'y*. They call instead for total reliance on the instructions of the infallible Imam, as they affirm that the only way to acquire knowledge is through instruction, teaching, and *taᶜlīm*.[102]

There is ample evidence in the sources which validates recourse to personal opinion. The Qur'ān (al-Shūrā, 42:38), thus, authorises consultation (*shūrā*) in public affairs, which essentially consists of the personal opinion of its participants. The Qur'ān also enjoins the Muslims that matters upon which they disagree must be referred for decision-making to the *'ūlu al-amr* (al-Nisā, 4:59), as these are persons of knowledge and authority who are capable of forming an opinion and judgment. This is confirmed further in al-Nisā' (4: 83) which validates inference and deduction of the rules of law from the sources, by recourse to reasoning and *ra'y*. Furthermore, the Ḥadīth of Muᶜadh b. Jabal (q.v., below) provides specific authority for ra'y in juridical matters and the settlement of disputes. The Sunnah of the Prophet, and the precedent of his Companions leave no doubt on the point that judges and governors were appointed to distant places with the understanding that they would rely on their personal *ra'y* and *ijtihād* in matters on which they could not find any guidance in the Qur'ān and the Sunnah.[103]

Furthermore, we note that on numerous occasions the Qur'ān invites the people to investigate and explore the world around them and to draw rational conclusions, not in the manner of blind imitators who follow and accept what others have said, but through intelligent analysis and judgement. Thus, we read in the Qur'ān (al-Baqarah, 2:266) that "Allah reveals to you the signs so that you may think."

كَذٰلِكَ يُبَيِّنُ اللّٰهُ لَكُمُ الْاٰيٰتِ لَعَلَّكُمْ تَتَفَكَّرُوْنَ.

Elsewhere in the text we are challenged with the question; "Do they not consider the kingdom of the heavens and the earth and the creations of Allah?" (al-Aᶜrāf, 7:185).

اَوَلَمْ يَنْظُرُوْا فِيْ مَلَكُوْتِ السَّمٰوٰتِ وَالْاَرْضِ وَمَاخَلَقَ اللّٰهُ مِنْ شَيْءٍ.

While commenting on these and similar other passages in the Qur'ān, Abu Zahrah observes that the Qur'ān encourages rational enquiry into the world around us, and that "this would not be possible without the freedom to express one's opinion and thought".[104] To this we may add the rider, that the Qur'ān values rational endeavour, accompanied by sincerity, in the quest for truth and justice. No intellectual enquiry may begin on the premise of denying the fundamental truth of montheism (*tawḥīd*) and of clear guidance which is enunciated in the divine revelation.[105] Provided that these values are observed, rational enquiry and the quest for truth must be main-

tained even in the face of hostility from the masses. For these people may be uninformed, and may themselves be in need of enlightenment. This is the purport of the Qur'ānic *āyah* which proclaims that once clear guidance has been given, a mere conjecture, even if promoted by the masses, should not be allowed to obstruct it (al-Anᶜām, 6:116).

Notwithstanding the fact that obedience to lawful government is a Qur'ānic obligation, the very text which prescribes this duty (al-Nisā', 4:59) follows on to provide, in an address to the believers that "should you dispute over a matter, then refer it to God and to the Messenger."

فَإِنْ تَنَازَعْتُمْ فِيْ شَيْءٍ فَرُدُّوْهُ إِلَى اللهِ وَالرَّسُوْلِ.

Obviously, this Qur'ānic text anticipates the possibility of disputes arising between the ruler and his subjects, and it affirms that the duty of obedience does not overrule the right of the citizens to take issue with their leaders and the government.

Disputation, or *jadal*, in its positive sense, is clearly permitted in the Qur'ān. Indeed it is one of the major Qur'ānic themes which occurs on no less than twenty five occassions where the sacred text expresses humanity's inclination, as rational beings, towards argumentation.[106] On one such occasion, the Qur'ān refers to the narrative of a woman, Kholah bint Thaᶜlabah, wife of Aws b. Thābit, who complained to the Prophet about the abuse and insult she suffered at the hands of her husband. The Qur'ānic passage that was consequently revealed: Allah heard the speech of the woman who disputed with you concerning her husband; she complained to Allah and Allah heard your conversation, (al-Mujādalah, 58:1).

قَدْ سَمِعَ اللهُ قَوْلَ الَّتِيْ تُجَادِلُكَ فِيْ زَوْجِهَاوَ تَشْتَكِيْ إِلَى اللهِ وَاللهُ يَسْمَعُ تَحَاوُرَكُمَا.

Consequently, the woman was granted the right to separate from her husband by a form of separation which is referred to as *ẓihār*. This particular *āyah* recognised the right of the individual, a woman in this case, to argue her problem with the Prophet-cum-head of state and there are words in this *āyah*, such as *tujādiluka* (disputes with you), *tashtakī* (complains), and *taḥāwurakumā* (your conversation) which suggest that the plaintiff expressed herself forcefully on the occasion. This is perhaps borne out by the fact that the whole of

the sura which begins with this passage bears the title, *al-Mujādalah* (disputation).

The root word *jadal* can take two forms: commendable, and reprehensible–the later meaning I have discussed elsewhere under abuses of the freedom of speech. The commendable *jadal* is normally based on sound reasoning and is intended to rectify an error or violation that one witnesses. Take, for example, the situation when a person hears someone speaking in a manner which distorts the principles of the faith. If the listener attempts to expose the defects of such a speech, by recourse to sound argumentation and reasoning, in order to advocate and establish the truth, then this is a commendable act. To remain silent when one has the ability and resources to rectify an aberration is not recommended. However, this is on condition that the argumentation is conducted in accordance with Qur'ānic guidance. It must be "in the best form," and complies with the instruction to "argue not with the followers of the scripture except in the best way unless they are entrenched in transgression", (al-Nahl, 16:125; al-ᶜAnkabut, 29:46).

- وجَادِلْهُمْ بِالَّتِىْ هِىَ اَحْسَنُ ...

- وَلَاتُجَادِلُوْآ اَهْلَ الْكِتٰبِ اِلَّا بِالَّتِىْ هِىَ اَحْسَنُ اِلَّا الَّذِيْنَ ظَلَمُوْا مِنْهُمْ.

The Qur'ān, thus, encourages sound and courteous debate when it is likely to be beneficial, but if the audience is so hostile and arrogant that polite reasoning and persuasion is not likely to achieve their purpose, then according to the latter Qur'ānic text argumentation should not be attempted and efforts should be made to solve the problem in other more effective directions.[107]

Argumentation with regard to worldly affairs which have no direct bearing on religious principles is also encouraged if it is likely to benefit the people or to prevent possible harm to them. Thus, when a person is indulging in speech which violates public interest, influences people and misleads them, then it is the duty of anyone who knows of the matter to expose its defects by recourse to sound reasoning and disputation. For the protection of the people against harm is the duty of everyone who is able to do so. Thus, the commendable *jadal* in both of its two varieties aims at rectifying a

manifest distortion of the principles of religion, and protecting the people against any possible harm.[108]

Furthermore, there is a third variety of commendable *jadal*, which is used for the advancement of knowledge, either in the sphere of the religious sciences or in other disciplines such as logic and literature. Discussion and debate, which aim at exploring academic themes are subject to the same Qur'ānic guidance which applies to other forms of *jadal*. They must be conducted with courtesy and elegance, and they must aim at the discovery of truth, and steer away from exposing the weaknesses of others.

On a more general note, the Qur'ān and the Sunnah are replete with moral encouragement and guidance on the proper use of speech. Oral excellence and courtesy towards others is a central feature of Islamic ethics which is often equated with correct guidance (*hidāyah*). The Qur'ān enjoins believers to "speak to the people in good words" (Al-Baqarah, 2:83), and asks them to "guide others to be pleasant in speech and lead them to the path of God", (al-Ḥajj, 22:24).

- وَقُوْلُوْا لِلنَّاسِ حُسْنًا...

- وَهُدُوْآ اِلَى الطَّيِّبِ مِنَ الْقَوْلِ وَهُدُوْآ اِلٰى صِرَاطِ الْحَمِيْدِ.

While the Holy Book compares pleasant or righteous speech (*kalimah ṭayyibah*) to a tree which is firm and healthy in both foundation and foliage (Ibrāhīm, 14: 24), the Sunnah resembles it to charity that every one can afford to give.[109] Moreover, the recurrent Qur'ānic theme which encourages courteous and elegant speech (*qawlan maᶜrūfan*) when addressing one's parents (al-Isrā', 17:23), the indigent (al-Nisā', 4:8) the ignorant (al-Nisā', 4:5) and the people at large (al-Baqarah, 2: 83, al-Isrā', 17:53; al-Naḥl, 16:125; al-ᶜAnkabūt, 29:46) all confirm the truism that, at best, the law can penalise blatant abuse of the freedom of speech. Nurturing the proper use of this freedom and attaining beauty and excellence in speech is largely a matter of developing good moral and cultural standards. In addition, the Qur'ān calls upon the wisdom and good judgment of the believer when he or she speaks, (al-Aḥzāb, 33:70). For example, there may be instances where expressing a true opinion, or even telling the truth may fail to achieve a good purpose. The speaker is,

therefore, urged to be mindful of the end result and the goal that his speech is likely to obtain.[110] In fact, there are instances where the Sunnah permits silence in regards to truth or even allows the telling of a white lie if it would serve a higher objective, such as saving a person from imminent danger. Lastly, freedom of opinion and speech is subservient to the general principles of justice as can be seen from the following text: "And when you speak, then speak with justice, even if it be against those who are close to you," (al-Anᶜām, 6:153).

وَإِذَا قُلْتُمْ فَاعْدِلُوا وَلَوْ كَانَ ذَا قُرْبَى.

The Qur'ānic guidance here applies equally to a witness in the court, to the judge himself, to the head of the family, and to the people at large who are asked to be honest and fair when they speak to, or about, one another.

Varieties of Ra'y

Although the nature of *ra'y* and the very diversity of its scope and subject matter defies the idea of a predetermined framework, the ulema have nevertheless attempted to divide *ra'y* into the following four types: valid or praiseworthy opinion (*al-ra'y al-ṣaḥīḥ*), void opinion (*al-ra'y al-bāṭil*), blameworthy or objectionable opinion (*al-ra'y al-madhmūm*), and opinion whose validity is in doubt (*al-ra'y fi mawḍiᶜ al-isthibāh*).[111]

Al-ra'y al-ṣaḥīḥ is one which is which is in accord with authoritative precedent and the approved opinion of past ulema who have acted in harmony with such *ra'y* and accepted it in principle in their own *fatwā* and *ijtihād*[112]. Its harmony in other words with the accepted norms of Sharīᶜah is not in question. Of necessity, the test here is retrospective in that past authorities of proven validity are taken as the criteria on which to evaluate a fresh opinion that may well be focusing on a vision of the future. It is to be noted, however, that an opinion of this type may initially be uncertain and doubtful. Only when all doubt as to its propriety is eliminated and resolved, can it be classfied as valid. The main process for this form of refinement, known to the classical methodology of Islamic thought is *ijmāᶜ*, and once an opinion is accepted and supported by this it becomes authoritative and valid beyond question. *Ijmāᶜ*, in other words, puts the final seal of approval on an opinion which might have been disputed but which no longer remains open to question. In modern times, legislation and judicial decisions of higher courts

provide for a similar process in that once a proposal or opinion is adopted by proper legislative or judicial authorities, its validity is, for practical purposes at least, no longer debateable. Collective and consultative resolutions by professional and representative bodies also enhance the authority and weight of an otherwise isolated opinion. Likewise, public opinion and the press may, in contemporary societies, serve the purpose of identifying the direction of a possible consensus in favour of, or against, a doubtful opinion whose validity cannot be readily ascertained by reference to the *nuṣūṣ* or *ijmāᶜ*. On the same subject is this quote from a well-known saying of the leading Companion, ᶜAbd Allah b. Masᶜūd: "what the Muslims deem to be good is good in the sight of God."[113]

مارآهُ المُسلمونَ حَسَنًا فهو عِنْدَاللهِ حَسَنٌ.

In other words, if there is consultation among experts or with public and representative bodies, and then if the resultant opinion incorporates the views of those who are competent in the matter–the community leaders and the *ahl al-shūrā*–then this would enhance the weight and authority of that opinion, and would bring it in line with the Qur'ānic principle of consultation.

At the opposite pole of valid opinion stands the void opinion (*al-ra'y al-bāṭil*) which is of no account and carries no authority at all. Ibn Qayyim writes of this on a somewhat retrospective note saying that; "It is an opinion which is clearly in discord with the approved precedent of the ulema of the past. They would have denounced it in principle and refused to give it any recognition in their juridicial decisions and *fatwā*."[114]

Ibn Qayyim al-Jawziyyah divides the valid *ra'y* into four types, namely the *ra'y* of the Companion (*fatwā al-ṣaḥābi*), *ra'y* which interprets and clarifies the *nuṣūṣ* (*al-ra'y al-tafsīrī*), consultative *ra'y* and *ra'y* which consists of *ijtihād* (*al-ra'y al-ijtihādi*).

The ulema are, on the whole, in agreement on the special status and authority that the *fatwā* of the Companions enjoys in religious and juridical matters. The Companions are generally held in high esteem as they were knowledgeable of the Qur'ān, and of the teachings of the Prophet. Opinions that they formulated and advanced are, on the whole, considered to be close, in order of authority, to the Sunnah of the Prophet. In support of his own view, Ibn Qayyim quotes Imam al-Shāfiᶜi's statement that "the *ra'y* of the Companions commands greater merit and is preferable to our own opinion."[115] He then goes on to cite several examples where the *ra'y* of the Companions on certain issues

was upheld and corroborated by the revelation of the Qur'ān; "a blessing and a privilege that is unparalleled and unique". Thus, the conclusion is drawn that the *fatwā*, or the opinion of a Companion is *sui generis* and that any attempt to equate it with that of the generality of ulema is "devoid of substance and ill-conceived".[116]

The second type of valid *ra'y* is one which seeks to interpret the *nuṣūṣ*, clarify their meaning, and facilitate the deduction of legal rules from them. This type of *ra'y* is designed to promote a clear understanding of the Qur'ān and the Sunnah, and seeks to derive guidance from them on matters affecting the life of the community. The hallmark of such an opinion is the sincerity, knowledge, and devotion of its author to the promotion and understanding of the Qur'ān and the Sunnah.[117]

The third variety of valid or praiseworthy opinion is the consultative *ra'y* which is arrived at, not by a single individual, but through consultation among people, especially those who are competent to give counsel. God Almighty has praised "this *ummah* for their diligence at consultation in community affairs; the Messenger of God has practiced it, and it is one of the best forms of *ra'y*."[118]

The fourth type of praiseworthy opinion is one which is arrived at through the correct procedures that is characteristic of *ijtihād*. The proper method for anyone who attempts to give an opinion on a matter is to look into the Book of God first. If he fails to find the necessary guidance, then he looks into the Sunnah of the Prophet, and the precedent of his Companions. But, if he still does not find the guidance he seeks then he formulates his own opinion and judgement in the same way as the Companions are known to have attempted in many issues. This is, in fact, the procedure laid down in the Ḥadīth of Muᶜādh b. Jabal, which is standard authority on *ijtihād*. An opinion so formulated and expressed may be correct or otherwise, or it may appear at the time to be correct but may become contrary in the course of time. The principle to apply here is that which is expounded in a letter of the Caliph ᶜUmar b. al-Khaṭṭāb when he was instructing his judges: "The mere fact that you have made a certain decision must not deter you from changing it, if it becomes clear to you that it was erroneous in the first place. For truth is timeless; nothing must overrule it and it is far better to return to the truth rather than persist in falsehood."[119] The principle quoted here would seem to be generally applicable to all decisions, judicial or otherwise, and it clearly rejects the notion which sacrifices truth at the altar of consistency, and of the so-called credibility of judicial office. But, the point that is most emphasised in all of this

is sincerity and devotion to the cause of truth and justice, for this is the essence of beneficience in any praiseworthy opinion. "Anyone who exerts himself with the intention of gaining the pleasure of God and benefit to the people will be counted as one of the *muḥsinūn*, as goodwill and sincerity in telling the truth embodies the highest value in *taqwā*."[120]

As for *ra'y* whose validity is open to doubt, it is equivalent to a conjecture (*ẓann*). This type of *ra'y* is accepted as a basis of judicial decision and legal opinion (*fatwā*) in cases of emergency, or where no better alternative may be known to exist. Unless it is adopted into a court decision, a doubtful opinion or a conjecture does not bind anyone. The ulema have neither approved it nor have they denounced it, but have left open the choice to either accept it or reject it.[121] But, since we do not always have the necessary knowledge of, nor access to, truth, a considered opinion which may amount to no more than a probability or a conjecture is sometimes accepted as a basis of decision making. This is done in order to avoid indefinite suspense and delay that the quest for knowledge and truth may entail. In the sphere of judicial decisions, however, there are checks and balances, especially with regard to the rules that govern admissibility of evidence, which are designed to minimise the possibility of error. Therefore, decisions and opinions which are formed in conformity with correct procedures are deemed to be valid, even if they partake in a measure of speculation or individual bias of a tolerable sort.

From the viewpoint of its subject matter and relative value, *ra'y* is once again divided into three types. Firstly, there is the *ra'y* on a juridical, or *shar^{c}i*, matter which is validated and accepted only on the strength of the *shar^{c}i* proof on which it is founded. This is regardless as to whether it is advanced by one person or by a multitude. Secondly, there is the *ra'y* which concerns specialised matters which require technical knowledge. The people at large are not expected to be in a position to form an enlightened opinion on these affairs, and only expert opinion is to be taken into account, and then the value of that opinion is determined on an informed basis. And thirdly, there is the *ra'y* on matters of a practical nature which require public participation and compliance, such as electing the head of state, and opinions on public, constitutional, and municipal affairs which concern the community as a whole. On matters of this nature, the preferred opinion is that of the majority of the people whose action and participation is of central importance to the opinion concerned.[122]

VIII. Freedom of Association

The right to peaceful association naturally follows as an integral part of the freedom of speech and expression. The Sharī^{c}ah takes an affirmative stand on both of these rights and encourages association in pursuit of lawful objectives. The holy Qur'ān enjoins mutual assistance and cooperation for valid purposes, but forbids cooperation in transgression and sin.[123]

In our discussion of fundamental rights, we noted that the ulema have not treated these as a separate category from other rights. This is also true of the freedom of association in that we do not find an exclusive treatment of this in the scholastic works of the ulema. Thus, the Sharī^{c}ah evidence on freedom of assembly and association has remained unconsolidated and has to be located under a variety of topics. However, the basic evidence is embodied in the same principles of the Qur'ān and the Sunnah which authorise freedom of speech and expression. Thus, the Qur'ānic principle of *ḥisbah*, that is commanding good and forbidding evil, the principle of *naṣīḥah* (sincere advice), and *shūrā* (consultation) can equally be quoted, *mutatis mutandis*, as the basic authority in the Sharī^{c}ah for freedom of association. *Shūrā* is the Islamic equivalent of democracy, but in comparison the latter is individualist in orientation, whereas *shūrā* is more community oriented. For it contemplates consultative judgment and decision, taken as a result of contact and association with those who may have something to say and contribute an opinion. And then, the doctrine of *ijtihād* (personal reasoning by the qualified jurist), as well as the citizens right to voice a constructive criticism over the conduct of government (*haq al-mu^{c}āraḍah*) are all premised on recognition in Sharī^{c}ah of the fundamental freedom of speech, expression, and association.

Ḥisbah, is by far the broadest of all the principles referred to above. All of these, be it *naṣīḥah*, *mu^{c}āraḍah*, *shūrā* or *ijtihād* may be deemed, each in their respective capacities, to partake in the general concept of promoting good and of preventing evil. *Ḥisbah* is, of course, like *naṣīḥah* and *ijtihād*, a collective obligation (*farḍ kafā'i*) of the community as a whole. These are matters of common concern, and hence are a fit subject on which the members of the community should associate and communicate with one another. We also note that the Qur'ānic principle of *shūrā* can only be implemented as a result of consultation among community members.

Both Muhammad Asad and 'Abd Allah al-ᶜArabi have observed that the basic recognition of freedom of speech and opinion in the Sharīᶜah requires that the people must also be accorded the freedom to group together, if they so wish, in pursuit of their common objectives. The Sharīᶜah thus entitles the people to organise themselves in parties, groups, and associations if they deem this to be a more effective way of realising their legitimate interests.[124] ᶜAbd al-Ḥamīd al-Anṣāri has observed that in our own time, realisation of the objectives (*al-maqāṣid*) of Sharīᶜah, and securing the various benefits (*al-maṣāliḥ*) of the community; be it the essentials (*al-daruriyyah*) on which the life of the community depends, the complementary benefits (*al-ḥājiyyah*) which seek to remove hardship, and the embellishments (*al-taḥsīniyyah*), which aim at securing the desirable that these require the formation of political parties.[125] To this it may be added that although setting up political parties may be classified under the general category of unrestricted benefits (*al-maṣāliḥ al-mursalah*), it is one which may constitute a means to securing some of the higher categories of *maṣāliḥ*, in which case it would partake in the *sharᶜi* value of the latter and, thus, be elevated to a higher category of *maṣlaḥah*.

Some commentators have, however, advanced a view which forbids the formation of political parties in an Islamic state. It is, thus, suggested that the basic ground of unity among Muslims is their common allegiance to Islam itself, hence there is no need for further levels of unification and alliance. According to Kamal Wasfi, "Islam does not subscribe to any alliance other than unity in faith which is sufficient for the Muslims. When a section of the Muslim community enters a partisan alliance, it is bound to isolate others, and this would consequently lead to disunity."[126] The soundness of this view may be questioned, however, in that it tends to indulge in a measure of generalisation. Unity in faith does not necessarily forbid differences of opinion on details and matters which may not have a bearing on the essentials of dogma. It is equally possible that people who subscribe to the same principle may differ in the details and methods of its implementation. Surely, the correct view should be that only harmful alliances which aim at destroying unity are to be censured, but not those which pursue beneficial objectives and aim at rendering service to the community.

The opponents of political parties have also quoted in support of their position Qur'ānic passages which are emphatic on unity and which warn the believers against divisiveness and separation. Some of the passages thus referred to convey the following:

- And cling to the rope of Allah all together and avoid separation. (al-ʿImrān, 3: 103)

وَاعْتَصِمُوْا بِحَبْلِ اللهِ جَمِيْعًا وَّلَا تَفَرَّقُوْا.

- As for those who divide their religion and break up into sects, you have no part in them in the least. (al-Anʿām, 6: 159)

إِنَّ الَّذِيْنَ فَرَّقُوْادِيْنَهُمْ وَكَانُوْا شِيَعًا لَّسْتَ مِنْهُمْ فِيْ شَيْءٍ.

- Obey Allah and His Messenger, and let not yourselves fall into disputes, lest you lose heart and your power departs ... (al-Anfal, 8: 46).

وَاَطِيْعُوا اللهَ وَرَسُوْلَهُ وَلَاتَنَازَعُوْا فَتَفْشَلُوْا وَتَذْهَبَ رِيْحُكُمْ.

Some Prophetic traditions on the theme of unity such as "the hand of Allah is with the community"

يَدُاللهِ مَعَ الجَمَاعَةِ.

are also quoted. But the relevance of all this to the formation, or otherwise, of political parties is doubtful. It may well be said, for instance, that forming a party which commits itself to enhancing unity among people would derive positive support from the Qur'ān and the Sunnah. It is, therefore, avoiding disunity which the Qur'ān advocates. This being the case, the issue is not over the formation of any party as such. Moreover, the proponents of political parties have been able to quote certain other passages in the Qur'an in support of their position as we shall later elaborate.

Those who are opposed to the formation of political parties have further added that one of the distinctive features of the Islamic state during the lifetime of the Prophet (s.a.w.) and the Pious Caliphs, was that the people enjoyed freedom of expression and the liberty to voice opposing opinions. The caliphs were also easily accessible; government leaders consulted the citizens, and together they discussed and deliberated over public affairs. This was done successfully without the need to establish a particular party, either for, or

against, the government. Since the opportunity was granted for all members of the community to take part in such discussions, they participated when they had something to say without feeling the need to align themselves with any party.[127] It is further added that references to parties in the Qur'ān, in particular the chapter which carries the title al-Aḥzāb (the parties, 33: 20-21 e.g.) are expressive of disapproval of the alliances that were formed in opposition to the Blessed Prophet. And then it is suggested that much of the subsequent history of partisan activities has generally been divisive and has brought disunity and conflict among Muslims.[128]

But this line of argument is by no means conclusive. The reference, for example, to parties in surah al-Aḥzāb, as already indicated, is to parties that were formed for the very purpose of challenging the authority of the Blessed Prophet. Also the early experience of partisan activities, the Shīᶜah and the Kharijites, among others is no proof against the validity, in principle, of parties for beneficial purposes. On the other hand, it is suggested by the advocates of freedom of association that Islam validates formation of political parties and associations: And that many of the general principles of public law in Islam such as *shūrā*, justice, freedom, equality, and *ḥisbah* are politically oriented and require the formation of political parties that can commit themselves to the enforcement of these principles.[129] Furthermore, some of these principles such as *shūrā* can only be effectively inplemented if there is a majority opinion either for, or against, a proposition, which has to be identified. On the whole, the formation of parties is conducive to this purpose, and it tends to facilitate organisation and discipline. Moreover, in view of pluralism and the complexity of public life in our own time, the sheer size of cities, their inhabitants, and the growth of governmental and non-governmental organisations, it has become exceedingly difficult to know which individuals need to be consulted. Today, public life necessitates organisation, lobbying, pressure groups, and assciations and this might mean that direct access to government leaders may not be as effective today as it might have been in the early days of Islam.[130] We need to identify the locus of responsibility and our commitment to a set of objectives, otherwise there is always the risk that consultation may not yield the desired result. Political parties and organisations are, on the whole, more effective in making *shūrā* purposeful; they also tend to have means at their disposal and are, therefore, more capable in combating a threat to freedom of speech, especially when the speech happens to be critical of the government in

power. They can, for example, in the last resort, declare no confidence in a government that persistently ignores sincere advice (*naṣīḥah*) and is entrenched in misguided authoritarian methods. How can an individual act in conformity with the Ḥadīth that, "the best form of *jihād* is to tell a word of truth to a tyrannical ruler", if he has no assurance and support for his safety and the cause which he pursues! Even when the government permits openness and respects freedom of speech, affirmative action, including the formation of political parties, is still necessary to ensure progress in pursuit of valid objectives. Indeed, it is stated that freedom of speech, and *amr b. al-maᶜrūf* would hold little weight if they did not accede to the people's right to form political parties; and, that this by itself, is a test of a government's respect for freedom of expression.[131]

Furthermore, we find evidence in the Qur'ān to the effect that differences of opinion and disagreement are natural to social life. Note, for example, the text which provides: "Had thy Lord willed, He would have made mankind into one nation, but they never cease to disagree" (Hūd, 11: 118).

وَلَوْ شَآءَ رَبُّكَ لَجَعَلَ النَّاسَ أُمَّةً وَّاحِدَةً وَّلَا يَزَالُوْنَ مُخْتَلِفِيْنَ.

The Qur'ānic vision here is clearly one of pluralism which, in turn, is premised on the freedom of personal opinion and thought, and the differences of ability and experience among individuals and nations. The message here is further substantiated in another passage which reads, to the effect: "O mankind, We created you from a male and a female and made you into tribes and nations so that you may know one another. Surely the noblest of you in the sight of Allah is the most upright and God–fearing among you" (al-Ḥujurāt, 49:13).

يٰٓاَيُّهَا النَّاسُ اِنَّا خَلَقْنٰكُمْ مِّنْ ذَكَرٍ وَّاُنْثٰى وَجَعَلْنٰكُمْ شُعُوْبًا وَّقَبَآئِلَ لِتَعَارَفُوْا اِنَّ اَكْرَمَكُمْ عِنْدَاللهِ اَتْقٰكُمْ.

When peoples and nations differ in experience and outlook then they can benefit from knowing one another, as this diversity and difference can lead to enrichment and beneficial exchange between them. And yet, the pluralistic vision of life on earth is not meant to interfere with the basic unity of the origin and creation of humanity "from a male and a female". Pluralism, in reality, means allowing

and tolerating differences; for this is a fact of human existence, and "a right therefore of those who differ that no one forbid them, or make them believe in something different".[132]

In response to a question as to the permissibility, or otherwise, of political parties, Ibn Taymiyyah has held the view that parties which invited the people to truth and beneficience, (*khayr wa ḥaqq*) and worked for the realisation of benefit to the people were lawful. He added that this was the proper understanding of the Qur'ānic text which in reference to the true believers says that "They are the party (*ḥizb*) of Allah and truly the party of Allah shall achieve felicity", (*al-Mujādalah*, 58:22).

أُولٰئِكَ حِزْبُ اللهِ اَلَا اِنَّ حِزْبَ اللهِ هُمُ الْمُفْلِحُوْنَ.

In contradistinction with this, the Qur'ān has designated the Party of the Devil (*ḥizb al-shayṭān*) to those who were hostile to God and to His Messenger, those who disobeyed the Prophet, and those who were engaged in conspiracies against him (al-Mujādalah, 58:19).

أُولٰئِكَ حِزْبُ الشَّيْطٰنِ اَلَا اِنَّ حِزْبَ الشَّيْطٰنِ هُمُ الْخٰسِرُوْنَ.

As Ibn Taymiyyah added, a party of this kind, or, indeed, any party or association that defied the teachings of Islam, fell within the meaning of *ḥizb al-shayṭān* and was, therefore, clearly forbidden.[133] Furthermore, Muhammad al-Ghazāli has stated that Islam permits political parties provided they do not seek to destroy the unity of the *ummah*, but he added, that these were unlawful if they aimed at dividing the *ummah* and sowing the seeds of disunity among Muslims.[134]

The history of the scholastic developments of the *madhāhib* is premised on the validity of disagreement and of pluralism in matters which are open to interpretation and *ijtihād*. The Blessed Prophet declared that if a person attempts *ijtihād* with the purpose of gaining the truth, but does not actually attain this end, then this is still an act of merit. But if the truth is realised then, he or she merits a double reward.[135]

In Islamic juridical discourse, *ijtihād* is another name for juristic disagreement and plurality of views on matters which have not been determined by the Qur'ān and the Sunnah. As al-Awa points out, "the history of Islam from the political and social angle is the his-

tory of parties and groups".[136] Ever since the era of the Companions, factions, parties, and sects have never ceased to emerge, and no one has denounced them for the mere fact of being a party. The critics of such partisan developments have always looked at the ideas, activities, and objectives of the parties in question, and have evaluated them accordingly. Furthermore, the fact that a distinctive discipline of Islamic learning, namely the *ᶜilm al-ikhtilāf* (science of disagreement), has flourished in the midst of the scholastic teachings of the *madhāhib*, is itself testimony to the reality of pluralism and tolerance in the history of Islamic scholarship.

While both the Qur'ān and the Sunnah validate freedom of expression, interpretation, and *ijtihād*, they also enjoin cooperation (*taᶜāwun*) in good and beneficial works as one of the cardinal teachings of Islam. In order to be effective, cooperation may well require unity and organisation and on this theme the Qur'ān explicitly addresses the believers to "cooperate with one another in the pursuance of virtue and beneficience, but cooperate not in fostering hostility and transgression" (al-Ma'idah, 5:2).

وَتَعَاوَنُوْا عَلَى الْبِرِّ وَالتَّقْوٰى وَلاَ تَعَاوَنُوْا عَلَى الْاِثْمِ وَالْعُدْوَانِ.

The text here is related to our preceding themes in the sense that cooperation in good work (*al-birr*), like *ḥisbah*, is a broad concept which could apply to all forms of beneficial cooperation, whether in the form of a political party, a professional association, or a workers' union which aims at ensuring fair practices in trade and the equitable treatment of workers.

Among the instances of illicit cooperation that amount to transgression and violation of fair trade is when producers of essential commodities stop selling their goods in order to push up the prices. This form of cooperation among producers or suppliers is detrimental, even hostile, to the public, and the government is therefore within its rights, as Ibn Qayyim al-Jawziyyah points out, to compel the suppliers to offer their goods against a fair market price (*qīmah al-mithl*). The government would, in this case, be only acting in accordance with the dictates of justice which Almighty Allah has demanded. The same would apply to the suppliers of essential services, such as transport workers, or funeral managers, who might decide, in collaboration among themselves, to stop their services in pursuit of a demand for higher prices. In this case, they may also be compelled by the market controller (*wālī al-ḥisbah*) to offer their services for fair market prices.[137]

We also find a specific passage in the Holy Qur'ān which the commentators have quoted as authority for the formation of political parties. The text at issue is in the form of an address to the believers:

> Let there arise from among you a group (*waltakun minkum ummatun*) that invite others to good work (*khayr*); enjoining what is right (*al-maᶜrūf*) and forbidding what is wrong. They shall indeed be granted success (Al-ᶜImrān, 3:104).

وَلْتَكُنْ مِّنْكُمْ أُمَّةٌ يَّدْعُوْنَ اِلَى الْخَيْرِ وَيَأْمُرُوْنَ بِالْمَعْرُوْفِ
وَيَنْهَوْنَ عَنِ الْمُنْكَرِ وَاُولٰئِكَ هُمُ الْمُفْلِحُوْنَ.

The text here requires that the community should set up one or more parties for the expressed purpose of conducting *ḥisbah*; and to effectively take upon itself the responsibility of devising ways and means of securing the moral and material benefits of its members. As will be noted, the emphasis in this text is laid on the formation of a party, and not on the excution of *ḥisbah*. Indeed, the passage begins on this note, and this is the only new element which differentiates this quote from a number of other Qur'ānic passages on the subject of *ḥisbah*. The principal theme of the text under consideration is, therefore, that at least one party must be formed among Muslims to take responsibility for the tasks that are spelled out in the subsequent portion of the *āyah*. The word "*ummah*" here means a party, a multitude or *jamāᶜah*, and not the larger community of Muslims that the word is normally used for. This level of distinction in the meaning of *ummah* is once again supported by the wording of the text which requires that there must be a party of Muslims, not that the Muslims must become a party.[138] Furthermore, the text begins with the phrase "*waltakun*" (let there be) which is a command, therefore, creating an obligation, according to the majority of ulema, for the community at large to create such a party.[139]

The party in question needs to be a political party which represents the community and exercises its authority to monitor the government and take its officials to task. By way of elaboration, it is understood that invitation to *khayr*, which is one of the two themes of the text under consideration, can be undertaken by an association, a party, or an organisation and it need not necessarily be political in character. But the second theme of the *āyah*, which is to implement *ḥisbah*, implies that the party in question must be a political party. For, one of the most important aspects of *ḥisbah* is to encourage accountability in govern-

ment. Officials who indulge in deviation and evil must be taken to task, and this can only be done by a political party.[140]

We also note that the text under discussion does not stipulate that there should be one party or more. The formation of at least one party is a requirement, but there is no indication in the text against the setting up of more than one political party. This is because the word "*ummah*" occurs in the form of an indeterminate noun, which validates a concept and not a particular number. The grammatical usage here is similar to the Ḥadīth, which I quote once again on the subject of *ḥisbah*. It provides in an address to the believers that "If anyone of you sees something evil he should set it right by his hand, but if he is unable to do so, then by his tongue, and if he is still unable to do that, then let him denounce it in his heart: but this is the weakest form of faith". [141] This particular Ḥadīth has also invoked many comments which may have bearings on our discussion, but I shall not go into detail, and suffice by saying that the word evil (*munkar*), therein, occurs in the singular but its meaning is not confined to a single form of evil. The word "*ummah*" in the Qur'ānic text I quoted likewise applies to any party, one or more, without any qualification. It is, therefore, equally valid to form one party or a number of parties, but the collective duty (*farḍ kafā'i*) of the community to do so is discharged by the formation of one. If one party is formed and there are individuals in the community who wish to set up a second party, in pursuit of valid objectives, no one has the authority to stop it.[142]

In the Qur'ān, there is further recognition of pluralism in the sense that some people understand and eagerly follow correct guidance when it is given to them, but there are others, as has always been the case, who do just the opposite, and there are still others who might take a middle course.

> Then We allow some of Our servants whom We have chosen to inherit the Book (and be its custodians). But there are among them some who may harm their own souls, some who follow a middle course, and some who vie in performing good deeds with God's permission (Fāṭir, 35:32).

ثُمَّ اَوْرَثْنَا الْكِتٰبَ الَّذِيْنَ اصْطَفَيْنَا مِنْ عِبَادِنَا فَمِنْهُمْ ظَالِمٌ لِّنَفْسِهٖ وَمِنْهُمْ مُّقْتَصِدٌ وَمِنْهُمْ سَابِقٌ بِالْخَيْرٰتِ بِاِذْنِ اللّٰهِ.

It is only natural to expect that people are endowed with different abilities and talents, and their differences of vision and experience may well be reflected in their commitment to certain causes. Those who are enlightened and devoted are, therefore, in a position to lead others, and they can appeal to the good conscience of the people and also muster their support for the right cause. This is the subject of yet another Qur'ānic passage which is as follows:

> If a group of people from every division devoted themselves to the teaching of religion and warned their folk when they return to them, so that they learn (how) to guard themselves (against evil) (al-Taubah, 9:122).

فَلَوْ لَا نَفَرَ مِنْ كُلِّ فِرْقَةٍ مِّنْهُمْ طَآئِفَةٌ لِّيَتَفَقَّهُوْا فِى الدِّيْنِ
وَلِيُنْذِرُوْا قَوْمَهُمْ اِذَا رَجَعُوْٓا اِلَيْهِمْ لَعَلَّهُمْ يَحْذَرُوْنَ.

As this Qur'ānic quote shows, teaching, warning, and reminding is very much the task of those who are devoted to a cause they consider worthwhile and beneficient. To carry this out effectively and be able to protect the community against harm, they may form groups, committees, and associations for the promotion and advancement of religious knowledge, or for similar other beneficial objectives.

After the Blessed Prophet's migration to Madinah, and the formation of the state of Madinah, the Qur'ān addressed him to consult the community in affairs of their common concern (āl-Imrān, 3:159). This shows that *shūrā* was meant to be a general principle of Islamic government, and a requirement to which even the Prophet himself had to comply. Since *shūrā* is based on a free exchange of opinion over issues, and because people tend to vary in their views, especially over matters on which no clear injunctions are found in the sources, then it is only natural that they should be able to marshall themselves behind plans and ideas which they consider beneficial. Issues of constitutional concern, the type of government, its policies, and objectives in socio-economic, educational, and cultural spheres, and approaches that could be taken toward legislation, and so forth, can be the basis of unity and success, or of divisiveness and defeat: But these all depend on effective organisation, good leadership, and public support. Therefore, to put all of this in just one context, namely that of religious belief, and say that Muslims are expected to be united in Islam, and that the idea of party organisation

and association is unacceptable - is to over-simplify matters.[143] If we look at the history of Islam, then a passive attitude, even in matters of the faith, or one which is oblivious of the importance of effective and purposeful leadership, could hardly be supported by the normative example and precedent of Islam.

The Qur'ān encourages openness in associating with others, and it disapproves of secret talks and conference in matters of public concern. The text quoted below also provides some guidance as to what constitutes the legitimate basis of forming an assembly or association.

> There is no good in most of their secret conferences (*najwāhum*) save those that are charitable, promote welfare, and strengthen peace, who so ever does that, seeking the pleasure of Allah, We shall soon bestow on him a great reward (al-Nisa', 4:114).

لَاخَيْرَ فِيْ كَثِيْرٍ مِّنْ نَّجْوٰهُمْ اِلَّامَنْ اَمَرَ بِصَدَقَةٍ اَوْمَعْرُوْفٍ
اَوْاِصْلَاحٍ بَيْنَ النَّاسِ وَمَنْ يَّفْعَلْ ذٰلِكَ ابْتِغَآءَ مَرْضَاتِ اللهِ
فَسَوْفَ نُؤْتِيْهِ اَجْرًا عَظِيْمًا.

This text approves of three types of associations, namely those which promote charitable work, secure welfare, and develop peaceful relations in society. The Qur'ān commentators elaborate by saying that of the three virtues stated in this passage, it is the last which is highest in order of merit. Therefore, associations that aim at promoting friendly relations among people are highly recommended, especially when a rift which leads the people to corruption is feared to be taking place. There are a number of *aḥādīth*, as al-Alusi elaborates, which are emphatic on the merit of attempting to bring people closer together at a time when they are moving apart.[144] In turn, the promotion of public welfare applies to associations and societies which promote knowledge in all fields, including arts and sciences, as well as those which aim at peaceful settlement of disputes, and the advancement of peace among mankind at any level–domestic, national or international.[145]

Conspiracies are severely condemned in the Qur'ān; all associations and assemblies must be for promoting lawful benefits. This is the subject of the following passage, which addresses the believers to the effect:

> When you confer together in private, confer not for the commission of sin, wrongdoing, and disobedience to the Messenger, but confer for the promotion of virtue and self-restraint... The holding of secret counsels for evil purposes proceed from Satan (al-Mujadalah, 58:9).

يٰٓاَيُّهَا الَّذِيْنَ اٰمَنُوْٓا اِذَا تَنَاجَيْتُمْ فَلَا تَتَنَاجَوْا بِالْاِثْمِ وَالْعُدْوَانِ وَمَعْصِيَتِ الرَّسُوْلِ وَتَنَاجَوْا بِالْبِرِّ وَالتَّقْوٰى وَاتَّقُوا ... اِنَّمَا النَّجْوٰى مِنَ الشَّيْطٰنِ.

Furthermore, when people gather together for a common purpose, they should observe order and discipline. The Qur'ān associates discipline here with faith and knowledge, and elevates to distinction those individuals who are mindful of these principles in public gatherings. This is the subject of the next *āyah* in the same chapter:

> When you are told to make room in the assemblies, then spread out and make room. God will help you to do so (Allah's earth is spacious) and when you are told to rise up, rise up. God will elevate in rank those of you who believe, and those who have been granted knowledge (al-Mujadalah, 58: 11).

يٰٓاَيُّهَا الَّذِيْنَ اٰمَنُوْٓا اِذَا قِيْلَ لَكُمْ تَفَسَّحُوْا فِى الْمَجٰلِسِ فَافْسَحُوْا يَفْسَحِ اللّٰهُ لَكُمْ وَاِذَا قِيْلَ انْشُزُوْا فَانْشُزُوْا يَرْفَعِ اللّٰهُ الَّذِيْنَ اٰمَنُوْا مِنْكُمْ وَالَّذِيْنَ اُوْتُوا الْعِلْمَ دَرَجٰتٍ.

Participants in public assemblies and associations are, thus, required to respond to reasonable requests made of them in the interest of order and peace. People who use public places must also take care that no undue inconvenience is occasioned to others using the same, nor should anyone be exposed to risk or injury in public assemblies. In a commentary on the preceding Qur'ānic text it is also stated that even when a great leader comes to an assembly, the participants are not to press forward without discipline, as this would cause inconvenience to him and may be detrimental to pub-

lic order. Nor is it allowed to shut out other people who have an equal right to be in the assembly.[147]

On the basis of yet another Qur'ānic *āyah*, when people are gathered together for a purpose they ought not to depart without the leader's permission:

> True believers are those who believe in Allah and in His Messenger, and when they are with him on a matter requiring collective action, they do not depart until they have asked for leave ... So when they ask thy leave for any of their affair, grant them leave ...(an-Nur, 24:63).

إِنَّمَا الْمُؤْمِنُونَ الَّذِينَ آمَنُوا بِاللهِ وَرَسُولِهِ وَإِذَا كَانُوا
مَعَهُ عَلَى أَمْرٍ جَامِعٍ لَّمْ يَذْهَبُوا حَتَّى يَسْتَأْذِنُوهُ...
فَإِذَا اسْتَأْذَنُوكَ لِبَعْضِ شَأْنِهِمْ فَأْذَنْ...

Assemblies must, therefore, observe correct discipline from beginning to end. They should be purposeful and terminate only when the purpose is achieved, and it is the leader's responsibility to determine when the meeting should come to an end and when the participants should disperse.

I conclude that the Sharī^{c}ah validates the formation of both political parties, and non-political association that aim at securing benefit for the community. This is perhaps true of all affirmative action in pursuit of such objectives that are upheld in Islam. If the objective in question is one that partakes in the accredited interests (*maṣāliḥ mu^{c}tabarah*), which are those that have been clearly recognised by the Sharī^{c}ah, then the *shar^{c}i* value of the means toward their realisation is elevated in order of merit to the same level as the value which they pursue. The merit or demerit of a party, association, or society is, therefore, to be judged on the basis of the objectives that each of these seeks to realise. If a party or association wants to protect and promote any of the five essential values of Sharī^{c}ah; namely life, faith, property, intellect, and lineage, there should be no question of validity, in principle, and all affirmative action in their pursuit is presumed to be valid. The statement of objectives that a party or association may issue can also be evaluated in light of the general goals of Sharī^{c}ah (*maqāṣid al-Sharī^{c}ah*), and the unrestricted interests (*al-maṣāliḥ al-mursalah*) of

the community. The latter, however, are by definition unrestricted, and cannot be predicted in advance as these interests are ascertained in light of circumstances, new developments, and issues that need to be considered as, and when, they present themselves.[148]

Any party or association that is established in pursuit of questionable, partisan, or prejudical objectives which create disunity and conflict is likely to be covered by the legal rules that apply to *fitnah* and sedition. Activities of this nature are deemed to constitute an offence, and would, therefore, fail to qualify under the Sharī^{c}ah criteria of validity.

IX. Freedom of Religion (*al-Ḥurriyyah al-diniyyah*)

One of the manifestations of personal liberty is the freedom of the individual to profess the religion of his or her choice without compulsion. Everyone must also have the freedom to observe and to practise their faith without fear or interference from others. Freedom of religion in its Islamic context implies that non-Muslims are not compelled to convert to Islam, nor are they hindered from practicing their own religious rites. Both Muslims and non-Muslims are entitled to propagate the religion of their following, as well as to defend it against attack or seditious provocation (*fitnah*), regardless as to whether such an action is launched by their co-religionists or by others.[149]

Freedom of religion acquires special significance in the Sharī^{c}ah, a system of law which recognises no clear division between legal and religious norms. Since the creed of Islam lies at the root of many a doctrine and institution of the Sharī^{c}ah, the freedom of whether or not to embrace and practice Islam is the most sensitive and controversial of all areas of individual liberties.[150] However, this alone should not necessarily change the basic meaning and character of the freedom of belief: It should matter little, therefore, whether one speaks of the freedom of belief in the context of Islamic or in any other legal system. For, the basic idea of freedom defies impositions of any kind on an individual's personal choice. Freedom of belief, like all other freedoms, basically operates as a safeguard against the possible menace of oppression from superior sources of power. This is essentially true, also, of the Islamic concept of this freedom: As Fatḥī Uthmān observes, "No power of any kind in the Islamic state may be employed to compel the people to embrace Islam. The basic function of the Islamic state, in

this regard, is to monitor and prevent the forces which might seek to deny the people their freedom of belief".[151]

From an historial perspective, it is interesting to note that when the Blessed Prophet of Islam began his mission among the pagans of Mecca, he invited them into the new faith despite their hostile attitude and response. This situation lends support to the conclusion, as al-ʿĪlī points out, that Islam subscribes to freedom of belief, since Islam itself began by inviting and persuading people to embrace it on the merit of its rationality and truth. In other words, Islam can only be expected to validate freedom of belief if it were to remain true to its own beginnings.[152] This is precisely the stance that the ulema have adopted and upheld: "The doctors of theology and *tawḥīd* (monotheism) are in agreement to the effect that confession to the faith (*īmān*) is not valid if it is not voluntary. In the event, therefore, where confession to the faith is obtained through compulsion, it is null and void."[153] On a similar theme, Ibn Qudāmah, the renowned Ḥanbali jurist/theologian has written:

> It is not permissible to compel a disbeliever into professing Islam. If, for example, a *dhimmi* (non-Muslim citizen) or a *musta'man* (person of protected status) is forced to accept Islam, he is not considered a Muslim unless it is established that his confession is a result of his own choosing. If the person concerned dies before his consent is known, he will be considered a disbeliever... The reason for the prohibition of duress here is the words of God Most High that there shall be no compulsion in religion.[154]

The Qur'ānic text that Ibn Qudāmah has referred to in this passage is of central importance to our discussion and I shall return to it later. At this point, however, I proceed with a general characterisation of freedom of religion in the writings of some modern authors. These works, which draw substantially from the evidence in the sources, come to much the same conclusions as are found in earlier writings. The only notable difference between classical and modern works on religious freedom is that some of the earlier writers were persuaded by the argument that many Qur'ānic passages which affirm the freedom of religion have subsequently been abrogated or superceded by other passages of a more restrictive type. However, modern Muslim opinion on the subject tends to dismiss this rather weak argument. A representative contemporary opinion on the subject of freedom of religion can be found in the following excerpt issued by a recent International Conference on Islamic law

which was held between the leading scholars of Saudi Arabia and Europe. "The individual is free in regards to the creed he wishes to embrace, and it is unlawful to compel anyone to embrace a religion". The statement gives as its authority the Qur'ānic text which declares that "there shall be no compulsion in religion," and also the following Qur'ānic passage which was addressed to the Blessed Prophet: "Had thy Lord willed, everyone on the face of the earth would have professed the faith. Are you then forcing people to become believers?" (al-Baqarah, 2:256; Yunus, 10:99).[155]

- لَا اِكْرَاهَ فِى الدِّيْنِ.

- وَلَوْشَآءَ رَبُّكَ لَا مَنَ مَنْ فِى الْاَرْضِ كُلُّهُمْ جَمِيْعًا
اَفَاَنْتَ تُكْرِهُ النَّاسَ حَتّٰى يَكُوْنُوْا مُؤْمِنِيْنَ.

This latter passage is a Makki text which was revealed at an early stage of the advent of Islam. This was later followed and confirmed, after the Prophet's migration to Madinah, by the *āyah* in Sura al-Baqarah (2:256). Thus, freedom of belief has been consistently enunciated as a norm of the Sharī^{c}ah (*aṣl al-tashri^{c}*), regardless of considerations of time and circumstance.[156]

The substance of these Qur'ānic provisions has also been upheld in the 1952 convention of the ulema of Pakistan who drafted a statement entitled "The Basic Principles of an Islamic State". This included the following clauses: "The citizen shall be entitled to all the rights ... he shall be assured within the limits of the law of ... freedom of religion and belief, freedom of worship ...."[157] Similarly, the Universal Islamic Declaration of Human Rights, issued by the Islamic Council of Europe provides: "Every person has the right to freedom of conscience and worship in accordance with his religious beliefs." (Art XIII).[158] Provisions of this kind have now become a regular feature of the constitutions of many contemporary Muslim countries, including Malaysia and Pakistan. The Federal Constitution of Malaysia 1957, which is currently in force, declares the following in Article (11) entitled "Freedom of Religion":

(1) Every person has the right to profess and practise his religion, and subject to clause (4) to propagate it.

(2) No person shall be compelled to pay any tax the proceeds of which are specially allocated in whole

> or in part for the purposes of a religion other than his own.

The text goes on to declare, under clause (3) that every religious group is entitled to manage its own religious affairs, to establish religious and charitable institutions, and to acquire and own property for such purposes. Clause (4) provides that a state law, and in respect of the Federal Territories of Kuala Lumpur and Labuan, federal law, may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.

In the case of the *Minister of Home Affairs* v. *Jamaluddin bin Othman*[159] the Supreme Court of Malaysia has upheld its decision to respect the constitutional clause on freedom of religion in its full sense, by dismissing a plea made by the Minister of Home Affairs that conversion to Christianity by a Muslim was a punishable offence. In this case, the respondent Jamaluddin was detained under the Internal Security Act 1960, s.8(1), by the Minister of Home Affairs, for what really amounted to apostasy, but he was prosecuted for an internal security offence. Originally, the respondent was detained "for acting in a manner prejudicial to the security of Malaysia," and the allegations that led to Jamaluddin's detention were that he had himself converted from Islam to Christianity and that he was propagating Christianity among the Muslims of Malaysia. It was also alleged that he participated in a work camp and seminar for such a purpose and that as a result of these activities he had converted six Malays to Christianity. The defendant pleaded that the Minister did not have the power to order detention without trial. On an application by the respondent for writ of *habeas corpus*, Justice Anuar, the trial judge in the High Court of Kuala Lumpur, took the view that "the Minister had no power to deprive a person of his right to profess and practise his religion which is guaranteed under Art. 11 of the Federal Constitution, and, therefore, if the Minister acts to restrict the freedom of a person from professing and practising his religion, his act will be inconsistent with the provision of Art. 11, and, therefore, an order of detention would not be valid." Consequently, the judge ordered the release of the respondent from detention. The Minister for Home Affairs appealed to the Supreme Court in Kuala Lumpur, but the Criminal Appeal Division dismissed the appeal and stated the grounds of its decision as follows:

> The sum total of the grounds for detention in this case was the supposed involvement of the respondent in a plan or programme for the dissemination of Christianity

> among the Malays... We do not think that mere participation in meetings and seminar can make a person a threat to the security of the country. As regards the alleged conversion of six Malays, even if it were true, it cannot by itself, in our opinion be regarded as a threat to the security of the country.

While dismissing the appeal the court added that the grounds for detention in this case, when read in the proper context, were insufficient. That the guarantee provided by Art. 11 of the constitution, that is that the right to freedom of religion must be given effect, unless the actions of a person go well beyond what can normally be regarded as professing and practising his or her faith.

The 1973 Constitution of the Islamic Republic of Pakistan which is currently in force proclaims in its section on Fundamental Rights and Liberties that:

> subject to law, public order and morality
> (a) every citizen shall have the right to profess, practise and propagate his religion; and
>
> (b) every religious denomination and every section thereof have the right to establish, maintain and manage its religious institutions (Art. 20).

The Constitution of Pakistan also forbids discrimination against religious communities regarding taxation, educational policies, and the allocation of funds and concessions that the state may make to religious communities or institutions (Art.21, 22, 38).

While quoting some of the Qur'ānic *āyāt* on the subject, Mutawalli has characterised the main thrust of the Qur'ānic teaching on religious freedom as follows: religious belief should be founded in conviction and considered choice, not on mere imitation or conformity to the views and beliefs of others. The Sharī^{c}ah forbids compulsion in religion as it is incompatible with the courteous and elegant methods of persuasion that the Qur'ān itself prescribes for the propagation of Islam. While stating the evidence to support his observation, the same author observes, on an historical note, that Muslim rulers and governers have, on the whole, exercised tolerance in the treatment of non-Muslim subjects, particularly regarding their religious beliefs. Mutawalli also agrees with the conclusion, that Thomas Arnold has reached in his investigation, that the rumour that Islam was imposed by the sword is tainted with prejudice and is far from the truth. Any oppression that might have soiled the

otherwise tolerant record of Muslim rulers was mainly attributable to political factors which find little support in the principles of Islamic law. The practice of early Islamic leaders, particularly the Pious Caliphs, was consistently guided by the Qur'ānic norms which seek to protect the integrity of the individual conscience. Abu Zahrah and Mutawalli, among others, are both explicit on this point. According to the former writer, "the early Muslims have shown great care and sensitivity not to compel anyone in the matter of religion." Abu Zahrah also tells of an incident where an elderly Christian woman came as a supplicant to the Caliph ᶜUmar b. Al-Khaṭṭāb, who met her request with favour. Afterwards, he invited her to embrace Islam, but she refused. At this, the Caliph became anxious fearing that his invitation might have amounted to compulsion, and he then expressed his remorse by uttering this invocation: "O my Lord, I have not intended to compel her as I know that there must be no compulsion in religion, ... righteousness has been explained and distinguished from misguidance." Thus, the Caliph ᶜUmar expressed the point that only God Most High can turn the hearts and minds of people toward righteousness.[160]

The precedent and attitude of the Pious Caliphs reflects the correct understanding of the norms of Sharīᶜah which clearly recognise the freedom of religion and which proscribe all oppression and violation of the integrity of this freedom.[161]

Notwithstanding the relative clarity of the Qur'ānic proclamations on the freedom of religion, the subject has become controversial. This is due partly to certain other passages in the Qur'ān which have sometimes been interpreted in a manner which casts doubt on the subject. Indeed, some commentators have drawn the drastic conclusion that the Qur'ānic passages which validate holy war (*jihād*) and fighting against disbelievers actually abrogate the Qur'ān's proclamations on tolerance and respect for other religions. The controversy has been exacerbated further by its reliance on the provision in the Sunnah which authorises the death penalty for apostasy without, however, paying due attention to other evidence in the Sunnah to the effect that death punishment was only meant for apostasy which was accompanied by hostility and treason. However, a full enquiry into these issues would fall beyond the scope of this study. Some of these issues have already been treated and investigated at length in books and articles in the English language.[162] I shall, therefore, confine my discussion to some of the conclusions that have been drawn without paying undue attention to many of the details.

In his monograph, T*he Punishment of Apostasy in Islam*, S.A. Rahman looks into the evidence in the Qur'ān and the Sunnah in detail, and draws attention to the fact that the Qur'ān is silent on the question of death as punishment for apostasy, despite this subject occuring no less than twenty times in the Holy Book. Rahman then traces the chain of transmission of the Ḥadīth which proclaims that; "whoever changes his religion shall be killed."

مَنْ بَدَّلَ دِيْنَهُ فَاقْتُلُوهُ.

As this is a solitary (Āḥād) Ḥadīth, Rahman finds some weakness in its transmission (*isnād*). Rahman's conclusion is also supported by other evidence such as the fact that neither the Blessed Prophet himself, nor any of his Companions ever compelled anyone to embrace Islam, nor did they sentence to death anyone for a mere renunciation of the faith.[163] In light of this, it is not surprising to find a number of prominent ulema, across the centuries, subscribing to the view that apostasy is not a punishable offence. Ibrāhīm al-Nakha^{c}i (d.95 A.H.) and Sufyān al-Thawri (d. 162 A.H.) held that the apostate should be invited to Islam, but should never be condemned to death. The Māliki jurist al-Bāji (d.494 A.H.) also observed that apostasy is a sin which carries no prescribed (*ḥadd*) penalty, and that such a sin may only be punished under the discretionary punishment of *ta^{c}zīr*.[164] The renowned Ḥanbali jurist Ibn Taimiyyah, also, categorically agrees on this latter punishment for apostasy.[165]

On a similar note, Maḥmūd Shaltūt analyses the relevant evidence in the Qur'ān and draws the conclusion that apostasy carries no temporal penalty, and that in reference to this particular sin, the Qur'ān only speaks of punishment in the Hereafter:

> As for the death penalty for apostasy, the jurists have relied on the Ḥadīth reported by ibn 'Abbās in which the Prophet has said *man baddala dinahu faqtuluh*. This Ḥadīth has invoked various responses from the ulema, many of whom are in agreement to the effect that the *ḥudūd* (prescribed) penalties cannot be established by Āḥād (solitary) Ḥadīth, and that unbelief by itself does not call for death punishment. The key factor which determines the application of this punishment is aggression and hostility against the believers and the prevention of a possible *fitnah* against religion and state. This conclusion is sustained by the manifest meaning of many of the passages in the Qur'ān which proscribe compulsion in religion.[166]

Mahmassani has observed that the death penalty was meant to apply, not to simple acts of apostasy from Islam, but when apostasy was linked to an act of political betrayal of the community. The Blessed Prophet never killed anyone merely for apostasy. This being the case, the death punishment was not meant to apply to a simple change of faith, but to punish acts such as treason, joining forces with the enemy, and sedition.[167]

Shabbir Akhtar has reached the conclusion that the sacred scripture of Islam does not prescribe any penalty for apostasy alone. The Qur'ān condemns those who turn their backs on guidance' as sinning against God, and it also states that the works of renegades are in vain and Hell is often said to be their destination (al-Baqarah 2:217). He concludes that apostasy is punishable by death if it is aggravated variously by treachery in a military context.[168]

Selim el-Awa discusses the issue of apostasy at length declaring that "there is an urgent need to reinterpret the principles contained in the Qur'ān and Sunnah." He cites the fact that the Qur'ān is completely silent on death punishment for apostasy, and that the evidence in the Sunnah is open to interpretation.[169] El-Awa elaborates that the death penalty in the Sunnah is not designed for apostasy *per se* but for high treason, or *ḥirābah*, that is when apostasy is accompanied by hostility and rebellion against the community and its legitimate leadership. The Ḥadīth which proclaims "whoever renounces his religion shall be killed" is a general (*'āmm*) command which is in need of specification (*takhṣīṣ*). In its general form, it would apply equally to cases that would manifestly fall outside its intention as it would render this same punishment applicable not only to Muslims, but also to a Christian who converts to Judaism, and vice versa. Al-Shawkāni adds to the foregoing, that the general purport of this Ḥadīth has been specified in the Qur'ān in regards to a person who changes his religion outwardly under duress but remains faithful otherwise.[170] Al-Shawkāni has also criticised the ruling of some Shāfi'i scholars who have followed the apparent and general meaning of the Ḥadīth in question and erroneously held that the death penalty therein applies equally to a non-Muslim who converts from one religion to another. On this subject, he states that "My response to this is that the apparent meaning of the Ḥadīth has been abandoned (*matrūk al-ẓāhir*) in regard to a disbeliever who embraces Islam.[171] Moreover, the Ḥanafis have specified the general import of this Ḥadīth in yet another respect which is that a woman apostate is not punished by death but only by imprisonment. According to the rules of intrepretation, as expounded in *uṣul al-fiqh*,

once a decisive (*qaṭᶜi*) ruling of a text has been specified in some respect, the part which remains unspecified becomes speculative (*ẓanni*) and as such becomes open to further interpretation and specification (*takhṣīṣ*). It is, thus, suggested that the Ḥadīth in question may be further qualified, and that the death penalty therein may be reserved only for apostasy which is accompanied by high treason (*ḥirābah*).[172]

The preceding analysis is also extended to the other Ḥadīth, often quoted in support of the death penalty for apostasy, which is as follows:

> The blood of a Muslim who professes that there is no god but Allah and I am His Messenger–is sacrosanct except in three cases: in the case of a married adulterer, one who has killed a human being, and one who has abandoned his religion, while splitting himself off from the community (*mufāriq li al-jamāᶜah*); [173]

لايحلُّ دَمُ اِمْرِءٍ مُسْلِمٍ يشـهد ان لا اله الاّ الله، وإنّى رسول الله الاّ باحدى ثلاث، الثَّيبُ الزّانِى وَالنَّفْسُ بِالنَّفْسِ، وُالتَّارِكُ لدينه مُفَارقٌ للجَمَاعه.

As will be noted, this Hadith is explicit on the point that the apostate must also be a *mufāriq al-jamāᶜah* (one who boycotts and challenges the community and its legitimate leadership) in order to be subjected to the punishment of death.[174]

The Qur'ān specifies a three-fold punishment lucminating in death for *ḥirābah* (high treason). (al-Mā'idah, 5:33-34). Ibn Taymiyyah, in an attempt to reconcile the terms of the preceding Ḥadīth with the Qur'ān, observes that the crime referred to in the Ḥadīth under discussion is that of high treason and not apostasy as such.[175] This observation is again supported by the fact that the Prophet never put anyone to death for apostasy alone. Indeed, there were cases in which certain individuals apostatised after professing Islam, but the Prophet did not convict them to death, or even penalise them. Affirmative evidence on this point is found in the following incident which appears in the recordings of al-Bukhāri and Muslim:

> A Bedouin Arab came to the Prophet s.a.w. and professed Islam. Then he became ill with fever and the next day he

came again to the Prophet and said, 'Give me back my pledge.' He repeated this three times but the Prophet refused, and said: Madinah is like bellows which rejects its dross and retains its purity.[176]

عَنْ جَابِرٍ رَضِىَ اللهِ عَنْهُ: جَاءَ اَعْرَابِىٌّ اِلَى النَّبِى ﷺ فَبَايَعَهُ عَلَى الاِ سْلَامِ فَجَاءَ مِنَ الْغَدِ مَحْمُوْمًا فَقَالَ: أَقِلْنِى، فَأَبَى - ثَلاثَ مِرارٍ فَقَال اَلْمَدِيْنَةُ كالكِير تَنْفِىْ خَبَثَها ويَنْصَعُ طيِّبُها.

This was a clear case of apostasy in which the Prophet made no reference to any punishment at all, and the Bedouin, despite his persistent renunciation of Islam was left to go unharmed.[177]

Furthermore, the following Qur'ānic passage is in complete harmony with the purport of the foregoing Ḥadīth, and provides, once again, a strong argument against the death penalty for apostasy:

Those who believe then disbelieve, then believe again, then disbelieve and then increase in their disbelief, such are those whom God will never forgive nor guide to the path (al-Nisā', 4:137).

اِنَّ الَّـذِيْنَ اٰمَنُـوْا ثُـمَّ كَفَرُوْا ثُـمَّ اٰمَنُـوْا ثُـمَّ كَفَرُوْا ثُـمَّ ازْدَادُوْا كُفْـرًا لَّـمْ يَكُـنِ اللهُ لِيَغْفِرَلَهُـمْ وَلاَ لِيَهْدِيَهُـمْ سَـبِيْلاً.

The renegade could hardly enjoy the benefit of repeated belief and disbelief if capital punishment was the prescribed penalty for the initial act of apostasy. To be sure, this text could be alternatively interpreted to simply indicate the limits of repentance and divine forgiveness. But such a rendering does not, as Shabbir Akhtar confirms, preclude the more obvious interpretation, "that even repeated apostsy, let alone apostasy, is not punishable by death."[178]

In response to the question of whether Islam permits war as a means of propagation, many scholars have reached the conclusion that war is permissible only to protect the freedom of belief and to prevent oppression. The Qur'ān forbids sedition (*fitnah*) in religion, as well as the persecution of people for their religious beliefs. It is

this *fitnah* as Abu Zahrah observes, which the Qur'ān declares to be a menace greater than murder, and thus it permits waging war in order to prevent tyranny and sedition as the following text shows: "And fight them until persecution is no more and the religion is for Allah alone. But if they stop then there is to be no hostility against anyone except the oppressor" (al-Anfal, 8:39).

وَقَاتِلُوْهُمْ حَتّٰى لَاتَكُوْنَ فِتْنَةٌ وَّيَكُوْنَ الدِّيْنُ كُلُّهٗ لِلّٰهِ فَاِنِ
انْتَهَوْا فَاِنَّ اللّٰهَ بِمَا يَعْمَلُوْنَ بَصِيْرٌ.

From this passage, Abu Zahrah draws the conclusion that "fighting is only permissible in order to defend the freedom of belief and prevent oppression in religion.[179] He also quotes another Qur'ānic passage in support of his statement which declares it equally explicit:

> Fighting has been permitted for those against whom war has been waged because they have been wronged; God is most powerful to help them. They are those who were expelled from their homes for no cause other than saying that: God is our Lord (al-Hajj, 22:39).

أُذِنَ لِلَّذِيْنَ يُقَاتَلُوْنَ بِاَنَّهُمْ ظُلِمُوْا وَاِنَّ اللّٰهَ عَلٰى نَصْرِهِمْ لَقَدِيْرٌ
الَّذِيْنَ اُخْرِجُوْا مِنْ دِيَارِهِمْ بِغَيْرِ حَقٍّ اِلَّا اَنْ يَّقُوْلُوْا رَبُّنَا اللّٰهُ.

Rashīd Riḍā comments on the first of these two passages by saying that "This *āyah* reaffirms the one which occurs in Sura al-Baqarah (2:256) and both proscribe compulsion in religion. Both of these passages proclaim and uphold that people are free to pursue religious beliefs of their own choosing. No one is to be compelled to abandon the religion he professes nor must anyone be exposed to punishment and torture for the sake of religion."[180]

By far the most explicit of Qur'ānic *āyāt* on freedom of religion is the following one in Sura al-Baqarah:

> There is to be no compulsion in religion. Surely the right direction has been made clear and distinct from error. He who rejects false deities and believes in Allah has grasped a firm handlehold which will never break (al-Baqarah, 2:256).

لَا إِكْرَاهَ فِي الدِّيْنِ قَدْ تَبَيَّنَ الرُّشْدُ مِنَ الْغَيِّ فَمَنْ يَّكْفُرْ بِالطَّاغُوْتِ وَيُؤْمِنْ بِاللهِ فَقَدِ اسْتَمْسَكَ بِالْعُرْوَةِ الْوُثْقٰى.

This *āyah* was revealed on the occasion when some Companions among the Helpers (*anṣār*) asked the Prophet for permission to compel their relatives to profess Islam. However, some of these people had practised Christianity or Judaism since their early childhood, and the Banū Naḍīr of Madinah even had children who were related to the Companions, but who were brought up by Jewish parents and were considered Jews. When the Prophet issued orders for Banū Naḍīr to move out of Madinah so as to prevent clashes between them and the Muslims, some Companions sought instead to force their relatives into Islam. It was at this juncture that the preceding *āyah* was revealed, and the Prophet ordered his Companions not to compel anyone, but to give them the choice to decide what religion they wished to follow.[181]

Commentators of the Qur'ān such as Ibn Kathīr and Rashīd Riḍā have considered this text to be a general proclamation in the sense that it prohibits compulsion in religion absolutely. No one must be compelled to embrace Islam as it would serve no useful purpose for a person to embrace Islam under coercion while his mind and heart remain closed to enlightenment and guidance. To this Rashīd Riḍā adds that belief (*īmān*), which is the pillar and essence of religion, implies willful submission of the self and that this is impossible through coercion and duress, as it must be attained through conviction and reasoning. Force has, therefore, no place in the matter of belief. The subsequent portion of the text, Riḍā adds, endorses the general message of the *āyah*: In this religion there is guidance and light; the call to the faith should be through explanation. Once the people are shown the right path then it is their choice whether to take it or to abandon it. Riḍā continues:

> We are ordered to invite the people to the path of God with wisdom and good exhortation. ...This would explain the place of *jihād* in Islam. *Jihād* is not of the essence of religion or any of its goals. It is only a protective shield and it is resorted to as a matter of political necessity. The common hysteria and its misguided instructors who as-

> sume that faith is established by the sword merits no attention whatsoever.[182]

Some commentators have attempted to qualify the general import of the *āyah* under discussion (i.e. 2:256) by showing that it was initially in force but was later abrogated when Islam gained victory. S.A. Rahman, the former Chief Justice of Pakistan, responds to this argument as follows:

> There is no warrant for such a conclusion to be found in any Qur'ānic verse, and indeed the ethical plane of such argumentation is too obvious to require comment .... Furthermore, there is no indication in the text that the words are to be understood in a restricted or qualified sense, nor would the *shan-i-nuzūl* reports justify that course.[183]

Rahman characterises al-Baqarah, 2:256 as one of the most important verses in the Qur'ān, and he is regretful and perturbed that Muslim scholars have attempted to whittle down its broad humanistic meaning by imposing limitations on its scope dictated by historic theological controversies.[184]

Another aspect of Qur'ānic evidence that relates to our discussion is its explicit recognition of other great religions preceding the advent of Islam. There are a number of *āyāt* in the Qur'ān which declare not only the validity and divine provenance of other faiths, but are highly complementary of their teachings. The Qur'ānic evidence is explicit on the unity of the origin and purpose of all the revealed faiths. Thus, we read in Sura al-Mā'idah (5:44): "We revealed the Torah in which there is guidance and light,"

إِنَّآ أَنزَلْنَا التَّوْرَىٰةَ فِيهَا هُدًى وَنُورٌ

The text then continues to expound and confirm some of the laws of the Torah, in particular the law of just retaliation, which thus became an integral part of the Sharīᶜah of Islam. A subsequent passage in the same Sura further confirms both the Torah and the Bible while referring to the laws of the Torah in the preceding text:

> And in their footsteps We sent Jesus the son of Mary confirming the law that was revealed before him; We sent him the Gospel in which there is guidance and light and it confirms the law that had come before him, a guidance and admonition to those who fear God. Let the followers of the Gospel judge by what God has revealed therein,

and whoever refuses to judge by what God has revealed are transgressors, (al-Mā'idah, 5:46-48).

وَقَفَّيْنَا عَلَىٰ اٰثَارِهِمْ بِعِيْسَى ابْنَ مَرْيَمَ مُصَدِّقًالِمَا بَيْنَ يَدَيْهِ مِنَ التَّوْرٰىةِ وَاٰتَيْنٰهُ الْاِنْجِيْلَ فِيْهِ هُدًى وَّنُوْرٌوَّ مُصَدِّقًالِّمَا بَيْنَ يَدَيْهِ مِنَ التَّوْرٰىةِ وَهُدًى وَّمَوْعِظَةً لِّلْمُتَّقِيْنَ وَلْيَحْكُمْ اَهْلُ الْاِنْجِيْلِ بِمَآ اَنْزَلَ اللّٰهُ فِيْهِ وَمَنْ لَّمْ يَحْكُمْ بِمَآ اَنْزَلَ اللّٰهُ فَاُولٰٓئِكَ هُمُ الْفٰسِقُوْنَ.

This is followed by further affirmation which is addressed to the Prophet Muhammad: "We sent to you the scripture with the truth therein and it confirms and safeguards that which has preceded it", (al-Mā'idah, 5:48).

وَاَنْزَلْنَا اِلَيْكَ الْكِتٰبَ بِالْحَقِّ مُصَدِّقًالِّمَا بَيْنَ يَدَيْهِ مِنَ الْكِتٰبِ وَمُهَيْمِنًا عَلَيْهِ.

The Qur'ānic recognition of the truth and essential unity of the revealed faiths is not confined to Christianity and Judaism but extends to all the Prophets preceding Moses and Jesus and their teachings. Thus, it is stated that belief in all of them is an integral part of the Muslim faith:

> Say: We believe in God and in what has been revealed to us and what was revealed to Abraham, Ishmael, Issac, Jacob, and the tribes, and in the scriptures that God sent to Moses, and Jesus, and the Prophets. We make no distinction between them ... (āl-ᶜImrān, 3:84).

قُلْ اٰمَنَّا بِاللّٰهِ وَمَآ اُنْزِلَ عَلَيْنَا وَمَآ اُنْزِلَ عَلَىٰ اِبْرٰهِيْمَ وَاِسْمٰعِيْلَ وَاِسْحٰقَ وَيَعْقُوْبَ وَالْاَسْبَاطِ وَمَآ اُوْتِيَ مُوْسٰى وَعِيْسٰى وَالنَّبِيُّوْنَ مِنْ رَّبِّهِمْ لَا نُفَرِّقُ بَيْنَ اَحَدٍ مِّنْهُمْ.

Affirmative references to revealed religions is one of the major themes of the Qur'ān. These recur in several other places in the text and they consistently confirm that Islam does not deny the followers of other faiths the freedom, both within and outside the territorial domain of Islam, to choose, retain and practise the religion they wish to follow.[185] This is precisely the conclusion that commentators have drawn from the totality of the Qur'ānic evidence. Referring to these *āyāt*, Fatḥi 'Uthmān writes that "Islam rejects compulsion even if it be the only way to Islam itself ... for worshipping God and the enforcement of His law cannot be properly achieved unless man is free from fear ..."[186]

The Qur'ān is most explicit on the dignity and nobility of man, both as individuals and communities, and it repeatedly expresses the theme that a person's dignity is intimately related to his or her freedom–particularly freedom of conscience. In sum, the Qur'ān is consistent in its affirmation of the freedom of belief and it fully supports the conclusion that the objectives of Sharīᶜah cannot be properly fulfilled without granting people the freedom of belief, and the liberty to express it.

Another pertinent Qur'ānic theme is the affirmation that religion is a matter of conviction and belief, a matter which is for the individual to decide, and that persuasion and advice are the only ways through which others may be invited to embrace Islam. The passages that are quoted below also cast light on the role and function of the Blessed Prophet and the methods which he was to follow in his call to the new faith.

> If they embraced Islam, they would have found guidance, but if they turned their backs on it, then your only duty is to convey the message (āl-ᶜImrān, 3:20).

فَإِنْ أَسْلَمُوْا فَقَدِ اهْتَدَوْا وَإِنْ تَوَلَّوْا فَإِنَّمَا عَلَيْكَ الْبَلٰغُ.

> Remind them, for you are a reminder, not a holder of power over them (al-Ghāshiyah, 88:21).

فَذَكِّرْ إِنَّمَا أَنْتَ مُذَكِّرٌ لَسْتَ عَلَيْهِمْ بِمُصَيْطِرٍ.

> And if they turn away, then We have not sent you as a guardian over them. Your duty is no other than conveying the message (al-Shūrā 42:48).

فَإِنْ أَعْرَضُوْا فَمَآ أَرْسَلْنٰكَ عَلَيْهِمْ حَفِيْظًا إِنْ عَلَيْكَ إِلَّا الْبَلٰغُ.

Obey God and obey the Messenger and beware (of evil probably referring to wine-drinking and gambling which occur in the preceding *āyah*). But if you turn back then know that Our Messenger's duty is to proclaim the message (al-Mā'idah, 5:92) (See also 5:102 to the same effect).

وَأَطِيْعُوْا اللهَ وَأَطِيْعُوْا الرَّسُوْلَ وَاحْذَرُوْا فَإِنْ تَوَلَّيْتُمْ فَاعْلَمُوْآ أَنَّمَا عَلٰى رَسُوْلِنَا الْبَلٰغُ الْمُبِيْنُ.

Yet another Qur'ānic theme which occurs in a number of passages is that invitation to the faith must be wisely made with courteous advice, and that it must be based on sound reasoning and elegant persuasion.

The message here precludes, once again, resorting to compulsion, tyranny and force in the promotion and propagation of Islam. Furthermore, any addition, diversion, or elaboration which dilutes and diminishes the clear meaning and message of the Qur'ān on these points, whether in the name of *Jihād* or enlightenment, is therefore, unacceptable and should be strongly discouraged. For *Jihād* is abused when it is pursued in such a way as to impede the Qur'ānic principle of the freedom of belief.

Both Wāfī and 'Awdah have drawn the conclusion that Islam protects freedom of religion in at least three ways. Firstly, by enacting that no one may be compelled to abandon his religion and embrace Islam which is clearly proclaimed in Sura al-Baqarah (2:256). Muslim rulers and conquerers have generally abided by this principle and allowed their subjects to continue practising their own religion provided they paid the *jizyah* (poll-tax) and obeyed the government in power. They were, on the other hand, exempted from military service and the *jizyah* was a substitute for this. Secondly, Islam validates the freedom of the individual to propagate the religion of his following through sound reasoning and argumentation. Thus, Muslims are required in the Qur'ān to resort to courteous reasoning to attract others to Islam, and to permit practitioners of other religions to employ the same methods (al-Naḥl, 16-22; al-'Ankabūt, 29:46; al-Baqarah, 2:111). Thirdly, the Qur'ān validates the norm that correct faith (*al-īmān al-ṣaḥīḥ*) stems from certitude

and conviction, and not from imitation and adherence to forms. As the following passage shows, this is why the Qur'ān denounced pre-Islamic practices and attitudes which promoted blind imitation of ancestoral precedents at the expense of independent thought and personal conviction. "When they were told to follow (the truth) that God has revealed they would say: Nay we shall follow the ways of our fathers even though their fathers did not think and were lacking in guidance" (al-Baqarah, 2:170).[187]

وَإِذَا قِيلَ لَهُمُ اتَّبِعُوا مَا أَنزَلَ اللَّهُ قَالُوا بَلْ نَتَّبِعُ مَا أَلْفَيْنَا عَلَيْهِ آبَاءَنَا أَوَلَوْ كَانَ آبَاؤُهُمْ لَا يَعْقِلُونَ شَيْئًا وَلَا يَهْتَدُونَ.

Commenting on this Qur'ānic *āyah*, Wāfi refers to and supports the conclusion 'Abduh has reached that "thoughtless imitation which lacks in wisdom and correct guidance is the hallmark of the disbelievers. A man can hardly be called a *mu'min* (faithful) unless he thinks about his faith and satisfies himself as to the veracity of his belief."[188] 'Awdah concurs with 'Abduh, but adds that the Sharīᶜah also obligates one who is faithful to protect and safeguard his belief. If a person is exposed to intolerable oppression against his belief and lacks the means to protect his freedom, then he should migrate to a place where he can safeguard his belief and self-respect. 'Awdah concludes by saying that "if the person is able to migrate and he does not do so, then he would have committed injustice unto himself." 'Awdah's conclusion here is clearly based on the Qur'ānic text (al-Nisā', 4:97-98) which denounces the attitude of those who do not exert themselves, if necessary, to migrate, in order to safeguard the integrity and freedom of their consciences.[189]

To sum up the Qur'ān has explicitly declared freedom of religion as a norm and principle of Islam. This declaration, found in sura al-Baqarah, 2:256, is consistently endorsed and substantiated in numerous other contexts in the Holy Book. Unfortunately, there are those who have promoted a misleading and politically motivated discourse which declares that Islam denies the freedom of religion, and that the Qur'ānic passages which advocate this freedom were subsequently abrogated and overruled by its other provisions on the subject of *jihād*.[190] The proponents of this view have used abrogation, itself a highly controversial issue,[191] as their primary tool in an

attempt to whittle away at one of the cardinal principles of the Qur'ān. Throughout history, the warlike outlook espoused by this group may have had symphathisers among the conquerers and military strategists, but this view has never commanded general acceptance or support. Furthermore, this school of thought lacks sound reasoning and has been less than convincing in its attempts to overshadow the essence of the Qur'ānic message on the freedom of conscience. The unequivocal recognition of this freedom in the constitutions of present-day Muslim nations bears testimony to a decisive movement in favour of the basic rights of the individual, including the freedom to follow the religion of his or her choice. As a result, there appears to be a consensus of opinion emerging among the Muslims of the twentieth century in support of the universal validity of the freedom of religion in the Sharī^{c}ah and contemporary constitutional law.

Conclusion

The evidence that I have looked at in the various areas of the Qur'ān and the Sunnah is clearly affirmative of the fundamental right to freedom of speech. Only the Qur'ānic principle of *ḥisbah* is broad enough in scope and dimension to include freedom of speech and expression in most of its material manifestations. There are, as previously noted, numerous passages on *ḥisbah* in the Qur'ān, and although the Qur'ānic directives on *ḥisbah* are mainly addressed to the believers, this does not preclude their application to non-Muslims. For the latter enjoy the same rights in respect of speech and constructive criticism as do their fellow Muslim citizens. *Ḥisbah*, in the sense of duty, does not preclude the non-Muslim either, although there may be instances where necessary exceptions have to be made. For example, to attempt to save the life of a drowning person–whether a Muslim or non-Muslim–is an obligation of everyone who witnesses the incident regardless of their faith. But, preventing another person from drinking wine is not expected from an individual in whose religion the taking of alcoholic beverages is not forbidden.

On a similar note, the Qur'ānic principle of consultation, although primarily addressed to the Muslims, does not preclude the non-Muslim citizen from the scope of its application, nor indeed from the ranks of *majlis al-shūrā*. Thus, the non-Muslim may be elected to the consultative assembly, and may represent his or her own community. The Qur'ānic text which proclaims:

فَسْـَٔلُوْٓا اَهْـلَ الذِّكْـرِ اِنْ كُنْتُـمْ لَا تَعْلَمُـوْنَ.

"And ask those who have knowledge if you yourselves do not know", (Al-Naḥl, 16:43), authorises non-Muslim participation in *shūrā* which pertains to community affairs outside the scope of religion.

The right to criticise government leaders and express an opinion, critical or otherwise, in public affairs, or indeed, to formulate a response to a statement or opinion expressed by another individual is, once again, the right of every citizen, Muslim and non-Muslim alike. There is nothing in the Sharīᶜah which reserves the *haqq al-muᶜāraḍah* for the Muslims alone. However, a general observation which should be made here is that in matters which pertain to the dogma of Islam, or those which are regulated by the direct authority of the Qur'ān or the Sunnah, criticism, either from Muslims or non-Muslims, will not be entertained as personal or public opinion does

not command authority in such matters. Islam is basically a religion of authority, and the values of good and evil, or rights and duties are not determined by reference to public opinion, or popular vote, although these too have a certain role to play in the determination of the *aḥkām* (such as in custom, *ijmāᶜ*, and *maṣlaḥah*). But, this need not diminish in any material sense the substance of the freedom of expression that the individual must enjoy under the Sharīᶜah.

The history of legal development in almost all the major legal systems is reflective of the realities and experiences of their respective nations and societies, and the *fiqh* of Islam is no exception to this. There may be instances, though, in some of the detailed formulations of the established *madhāhib*, which may not serve the ideals of harmony and cohesion in the pluralistic and multi-religious societies of our own time. In such instances, a recourse to the broad principles of justice in the Qur'ān and the Sunnah, and a fresh look at the principal objectives of the Sharīᶜah (*maqāṣid al-sharīᶜah*), could be recommended. This may be done in accordance with the true spirit of unfettered *ijtihād* in order to effect changes that reflect the vision of a more refined approach to the Qur'ānic standards of equality and justice.

NOTES

1. Al-Ghazāli, *Iḥyā'* (Maktabah al-Tijariyyah edn.) II, 310.
2. Ibn Qayyim, *Al-Ṭuruq* (1961 edn. by Al-Mu'assassah al-ᶜArabiyyah), p. 278.
3. The early ulema have raised and discussed in detail the question as to whether ḥisbah is a collective duty (*farḍ kafâ'i*), or an individual obligation (*farḍ ᶜaynī*) which should be performed by every Muslim like the *ṣalāh* and other obligatory duties. For further detail see Ḥammād, *Ḥurriyyah*, p. 221 ff.
4. Azzam, ed., *Universal Declaration*, p. 8.
5. Ḥammād, *Ḥurriyyah*, p. 221.
6. Zaydān, *Majmuᶜah*, p. 128.
7. Al-Sibāᶜi, *Ishtirākiyyah*, p. 52.
8. Al-Ghazāli, *Iḥyā'* (Maktabah Tijariyyah edn.) II, 304.
9. Muslim, *Mukhtaṣar Ṣaḥīḥ Muslim*, p. 16, Ḥadīth No. 34.
10. Cf. Ḥammād, *Ḥurriyyah*, p.221.
11. Al-Maqdisi, *Kitāb al-Ādāb*, I, 94.
12. Breaking the gambling instruments or spilling away the wine are among illustrations that al-Ghazāli gives of the use of force in ḥisbah. See for detail *Iḥyā'* II, 329-33.
13. Al-Maqdisi, *Kitāb al-Ādāb*, I, 94.
14. Al-Ghazāli, *Iḥyā'*, II, 324
15. Al-Qafafī', *Al-Furuq*, IV, 255.
16. Hans Wehr, *Arabic-English Dictionary*, p. 970.
17. Al-Ghazāli, *Kitāb al-Ṣuḥbah*, p. 270.
18. Al-Maqdisi, *Kitab al-Ādāb*, I, 328.

19. Cf. Ḥammād, *Ḥurriyyah*, p. 207.
20. Bukhari, *Ṣaḥīḥ*, Kitāb al-Iman, I, 23; Muslim, *Ṣaḥīḥ Muslim*, Kitab al-Imān, Bab: al-Dīn al-Nasihah. Abn Majah quotes this Ḥadith and repeats the first clause therein three times, while al-Nasa'i quotes the first clause with a slight variation, that is *innama al-din al-nasihah*.
21. Al-Nawawi, *Riyaḍ al-Ṣaliḥin*, p. 113, Hadith No. 186.
22. Cf. Al-Nahwi, *Malāmiḥ*, p. 703.
23. Al-Nawawi, Riyāḍ al-Ṣaliḥīn, p. 113, Ḥadīth No. 187.
24. Al-Maqdisi, *Kitāb al-Ādāb*, I, 327, records this Ḥadith:
"An Amir who is in charge of the affairs of the Muslims and fails to exert himself for their benefit and give them sincere advice shall not enter Paradise with them."

مَا مِنْ امير يَلِى اَمْرَ الْمُسْلِمِيْن ثُمَّ لاَ يَجْتَهِدْلَهُمْ اَلا لَـمْ يَدْ خُلْ الْحَنَّةَ مَعَـهُـمْ

25. Ibid., I, 327.
26. Cf. Abu Habib, *Darāsah*, p. 337.
27. Al-Nawawi, *Riyāḍ al-Ṣaliḥin*, pp. 103-107.
28. Ibid.
29. Zaydān, *Majmuᶜah*, p. 128; Abū Ḥabīb, *Darāsah*, p. 334
30. This is unanimously reported (*muttafiqun ᶜalayh*) and recorded as such by al-Nawawi; *Riyāḍ al-Ṣāliḥin*, p. 113, Ḥadith No. 188; al-Maqdisi, *Kitāb al-Ādāb*, I, 327-28.
31. Abu Habib, *Darāsah*, p. 336.
32. Ibn Ḥanbal, *Musnad*, II, 163, al-Suyuṭi, *Jamiᶜ al-Saghīr*, I, 41
33. Ibn Mājah, *Sunan Ibn Mājah*, K. al-Fitan b. Amr bi al-Maᶜrūf wa Nahyᶜan al-Munkar.
34. Al-Bahi, *Al-Dīn wa al-Dawlah*, p. 389.
35. Al-Tabari, *Tafsir*, IV, 152.
36. Ibn Taymiyyah, *Al-Siyāsah*, p. 169.
37. Riḍa, *Tārikh*, II, 207; Abu Ḥabīb, *Darāsah*, p. 642.
38. Asad, *The Principles*, p. 57; Zaydān, *Al-Farḍ wa al-Dawlah*, p. 37; al-Bahi, *Al-Din wa al-Dawlah*, p. 387; see also Abu Ḥabib, *Darāsah*, p. 642 where he quotes Abu al-Aᶜla Maududi and ᶜAbd. al-Qadir ᶜAwdah to the effect that *shurā* is a Qur'ānic obligation.
39. Al-Tirmidhi, *Sunan*, IV, 213.
40. Ibn Ḥanbal, *Musnad*, IV, 277.
41. For details see al-Khālidi, *Qawāᶜid*, p. 145 ff.
42. Cf. Al-Khālidi, *Qawaᶜid*, pp. 141-42.
43. Al-Bahi, *Al-Dīn wa al-Dawlah*, p. 388.
44. Shaltūt, *Al-Islam*, p. 556; al-Sibāᶜi, *Ishtirākiyyah*, p. 5.
45. Zaydān, *Majmuᶜah*, p. 128.
46. Al-Qurtubi, *Tafsir*, IV, 250-51
47. Cf. Al-Khālidi, *Qawāᶜid*, pp. 155; el-Awa, *The Political System*, p. 90.
48. Ibid., p. 155.
49. Ibid., p. 157.
50. For detail on *ahl al-shura* and the participation of women and non-Muslims therein see al-Khalidi, *Qawaᶜid*, pp. 176, 185 Abu Habib, *Darasah*, p. 661 ff; and al-Nabhani, *Muqaddimah*, pp. 114-117.

51. Ibn Taymiyyah, *Al-Siyāsah*, p. 169.
52. Abu Habib, *Darāsah*, pp. 681-82
53. Al-Āmidi, *Iḥkām*, IV, 162; al-Shawkani, *Irshād*, p. 250.
54. For details on the textual authority of *ijtihād* see my *principles of Islamic jurisprudence*, pp. 470-73.
55. Abu Dawud, *Sunan*, Eng, trans. Aḥmad Ḥasan, III, 1013, Ḥadīth No. 3567.
56. Cf. Zaydān, *Majmuᶜah*, p. 288.
57. Cf. Ghazawi, *Al-Ḥurriyyāt*, p. 60.
58. Al-Bahī, *Al-Dīn wa al-Dawlah*, p. 415.
59. Zaydān, *Majmuᶜah*, p. 288; al-Sibāᶜi, *Ishtirākiyyah* p. 48; Munayminah, *Mushkilah al-Ḥurriyyah*, p. 15.
60. Al-Bahī, *Al-Dīn wa al-Dawlah*, p. 415.
61. Mahmassani, *Arkān*, p. 143.
62. Al-Kāsani, Badā'iᶜ, VII 4; Ibn Qudāmah, *Al-Mughni*, IX, 40-41
63. Madkūr, *Al-Qaḍā'*, p. 63.
64. Al-Āmidi, *Iḥkām*, III, 232; al-Qarafi, *Al-Furuq*, IV, 43; Ibn Qudāmah, *al-Mughni*, IX, 57.
65. See for details Ghazawi, *Al-Ḥurrīyyat*, p. 60.
66. Khallaf, *Al-Siyāsah al-Sharᶜiyyah*, p. 136; Mutawalli, *Mabādi*, p. 281; Ramadan, *Islamic Law*, p. 78.
67. For details on how freedom of expression in this period exceeded its limits when the scope of debate entered into the self and attributes of God, the created or uncreatedness of the Qur'ān etc., see al-Bahī, *Al-Dīn wa Dawlah*, p. 552 ff.
68. Mutawalli, *Mabādi*, p. 282.
69. For further details see the chapter on *ijtihād* in my *Principles of Islamic Jurisprudence*, especially p. 488 ff, and my article "The Approced and Disapproved varieties of Ra'y (personal opinion) in Islam" in the *American Journal of Islam Social Sciences*, vol. 7, No. 1, 1990, 39-64.
70. ᶜAfīfī, *Al-Mujtamaᶜ*, p. 93; see also al-Sibāᶜi, *Ishtirākiyyah*, p. 50.
71. Al-Qāsimi, *Niẓām al-Ḥukm*, p. 101.
72. The clause to which ᶜUmar protested was: If a member of the Quraysh tribe went to Muhammad without the permission of his *walī* (guardian), then he was to be returned to his tribe. But, if a member of Quraysh from the side of Muhammad went back to his kin-folk, it was not obligatory on the latter to return him to Muhammad. The conversation between ᶜUmar and the Blessed Prophet is recorded as follows: "Are you not the Messenger of God?" asked ᶜUmar. "I am," said the Prophet. "Are we not Muslims?" continued ᶜUmar... "we are." "Then why are we being denigrated because of our faith?" questioned ᶜUmar. To this the Prophet said, "I am the servant and Messenger of God, I shall not disobey Him and He shall not let me be the loser." (Ibn Hishām, *Al-Sīrah*, III, 331).
73. Ibn Mājah, *Sunan*, *K. al-Fitan*, b. *al-amr bi'l maᶜruf wa nahyᶜan al-munkar*, Ḥadīth No. 4011.
74. Ibn Hishām, *Al-Sīrāh*, IV, 262; Abu Ḥabīb, *Darāsah*, p. 725; al-Qāsimi, *Niẓām al-Ḥukm*, p. 106.
75. Abu Ḥabīb, *Darāsah*, p. 727.
76. Abu Zahrah, *Al-Jarimah*, p. 160; al-Sibāᶜi, *Ishtirākiyyah*, p. 50; al-Nabhan, *Niẓām al-Ḥukm*, p. 250.
77. Al-Khudari, *Muḥāḍarāt*, II 17-18; al-Nabhan, *Niẓām al-Ḥukm*, p. 240; Abu Ḥabīb, *Darāsah*, p. 743.

78. Abu Yusuf, *Al-Kharāj*, p. 13.
79. Al-Sibāᶜi, *Ishtirākiyyah*, p. 50.
80. Khalīl, *Al-Naqd al-Islami*, p. 35.
81. Abu Ḥabīb, *Darāsah*, p. 743.
82. Ḥusayn, *Naqd*, p. 89.
83. Al-Qāsimi, *Niẓām al-Ḥukm*, p. 100.
84. Ḥadīth reported by Tarmidhi in al-Tabrizi, *Mishkāt*, III, 1418, Ḥadīth No, 5129.
85. Khalīl, *Al-Naqd*, pp. 33-34.
86. Bukhari, *Ṣaḥīh*, K. al-Jumᶜah, B.*al-Jumᶜah fi al-qurra wa al-mudun.*
87. Cf. Hammād, *Ḥurrīyyah*, p. 416.
88. Ibn Ḥanbal, *Musnad*, II, 70.
89. Cf. Ḥammad, *Ḥurrīyyah*, p. 416.
90. Muslim, *Mukhtaṣar Ṣaḥīḥ Muslim*, p. 16, Ḥadīth no. 34.
91. Al-Subki, *Al-Ashbāh wa al-Naẓā'ir*, I, 275; Tuffahah, *Masadir*, p. 46.
92. Al-Maqdisi, *Kitāb al-Ādāb*, I, 340; Tuffaḥah, *Maṣādir*, p. 46.
93. Al-Maqdisi, Ibid., Tuffaḥah, *Maṣādir*, p. 47.
94. For details on *istiṣḥāb* see my *Principles of Islamic Jurisprudence*, p. 377 ff.
95. Abu Sulayman, "*Al-Naẓariyyāt wa al-Qawā'id*," p. 56; Tuffāḥah, *Maṣādir*, p. 89.
96. Tuffāḥah, *Maṣādir*, p. 87.
97. Al-Subki, *Al-Ashbāh wa al-Naẓā'ir*, I 275; Tuffaḥah, *Muṣādir*, pp. 88-92.
98. Tuffāḥah, *Maṣādir*, pp. 93-95.
99. Cf. Ibn Qayyim al-Jawziyyah, *Iᶜlām*, I, 55.
100. Abu Dawud, *Sunan*, III, 1013, Hadith No, 3567.
101. The reader might be interested to know that a chapter is devoted to each of these topics in my *Principles of Islamic Jurisprudence*, Kuala Lumpur: Pelanduk Publications, 1989.
102. Al-Ghazāli, *Al-Munqidh* (Macarthy's translation) pp. 122 and 183.
103. Cf. Shaltūt, *Al-Islam*, p. 555.
104. Abu Zahrah, *Tanẓīm al-Islam*, p. 194.
105. Cf. Al-Bahī, *Al-Dīn wa al-Dawlah*, p. 376.
106. ᶜAishah ᶜAbd. al-Rahman, *Al-Qur'ān wa Qaḍāya Cal-Insan*, p. 116.
107. Cf. Fikri, *Al-Muᶜamalāt*, pp. 84-85.
108. Ibid., p. 87.
109. Thus we read in a Ḥadīth that "righteous speech-*al-kalimah al-tayyibah* is a form of charity". See Al-Nawawi, *Riyāḍ al-Ṣaliḥīn*, 2nd ed., p. 284, Ḥadīth No. 699.

اَلْكَلِمَةُ الطَّيِّبَةُ صَدَقَةٌ.

110. *The Holy Qur'ān, Text, Translation and Commentery* by ᶜAbdullah Yusuf ᶜAli, footnote No. 3775.
111. Cf. Ibn Qayyim, *Iᶜlām*, I, 55.
112. Ibid.
113. This is often quoted to be a Ḥadīth of the Prophet. Both al-Āmidi (*Al-Iḥkām, I, 214*) and al-Shāṭibi, *al-Iᶜtiṣām*, II, 319) refer to it as such. It is, however, more likely to be a saying of the famous Companion, ᶜAbd Allah Ibn Masᶜūd (Cf. Aḥmad Ḥasan, *The Doctrine of Ijmāᶜ*, p. 37.
114. Ibn Qayyim, *Iᶜlām*, I, 55.
115. Ibid., I. 67.
116. Ibid., I. 68.

117. Ibid., I. 69.
118. Ibid., I, 70.
119. Ibid., I. 72.
120. Ibid., II, 120.
121. Ibid., I, 55.
122. Cf. Al-Khalidi, *Al-Shūrā*, p. 91.
123. Cf. *The Holy Qur'ān* (al-Mā'idah, 5:2)
124. Cf. Asad, *Principles*, p. 6; alᶜArabi, *Niẓām*, p. 92.
125. Cf. Al-Ansari, *Al-Shūrā*, p. 432.
126. Wasfi, *Al-Niẓām*, p. 76.
127. Maududi, *Al-Ḥukumah*, p. 217.
128. ᶜAbd. Allah, *Naẓariyyah*, p. 153.
129. Cf. Al-Ansari, *Al-Shūrā*, p. 429.
130. Thus, according to al-Awa, "the people's interest at the present time can only be served by allowing political parties so that the differing opinions on the *ummah's* affairs can be (ascertained) and expressed." (cf. conference report on "Pluralism in Islam", *The American Journal of Islamic Social Science* 8 (1991) at 353.
131. Al-Ansari, *Al-Shūrā* p. 431.
132. Al-Awa, n. 130 at p. 431.
133. Ibn Taymiyyah, *Majmuᶜah Rasā'il*. I, 141
134. Muhammad al-Ghazali, *AJISS* n. 130 at 352.
135. Abu Adwud, *Sunan*, Ḥasan's Trans., III, 1013, Ḥadīth no. 3567.
136. Al-Awa, n. 130 at 353, See also Idem, *Fi Niẓām al-Siyasi*, pp. 83-84.
137. Al-Jawziyyah, *Al-Turuq*, pp. 286-289.
138. Cf. al-Khalidi, *Qawāᶜid*, p. 205.
139. Al-Ghāzali, *al-Mustaṣfa*, I. 17.
140. Al-Nabhani, *Muqaddimah*, p. 101.
141. Muslim, *Mukhtaṣar Ṣaḥiḥ Muslim*, Ḥadīth No. 34.
142. Al-Nabhani, *Muqaddimah*, p. 104; see also al-Khalidi, *Qawāᶜid* p. 290.
143. Note for example Safi al-Rahman al-Mubarakfuri's booklet, *Al-Aḥzāb al-Siyasiyyah fi'l-Islam*, Al-Jamiᶜah al-Salafiyyah, India, 1407/1987, whose discussion throughout is focused on unity in Islam and is almost totally oblivious of the application of party organisation to political and economic development matters.
144. Al-Alusi, *Ruh al-Maᶜani*, V, 144.
145. Khan, *Human Rights*, p. 45.
146. Ibid. p. 46.
147. Yusufi Ali, *The Holy Qur'ān*, note 5347.
148. For further details on *Maṣlaḥah Mursalah* see my Article "Have We Neglected the Shariᶜah Law Doctrine of *Maṣlaḥah*?"
149. cf. Abu Zahrah, *Tanẓim*, p.190; al-'Ili, *Al-Ḥurriyyāt*, p.330.
150. cf. Fathi 'Uthmān, *Ḥuqūq al-Insān*, p.97.
151. Ibid., p. 91.
152. Al-'Ili, *Al-Ḥurriyyāt*, p. 330.
153. Ibid, p.356 (quoting Rashid Riḍā's *Tafsir al-Manar* XI, 484).
154. Ibn Qudāmah, *Al-Mughni*, VIII, 144.
155. *Nadwah al-Riyaḍ*, p. 33.
156. cf 'Abd. al-Rahman, *Al-Qur'ān wa Qaḍāya al-Insān*, p. 96.
157. The full statement of this convention appears in Maududi, *Islamic Law and Constitution*, p. 333 ff.

158. Azzam. ed., *Universal Islamic Declaration*, p. 11.
159. (1989) 1 *Malayan Law Journal*, 368-70, 418-20
160. Abu Zahrah, *Tanẓīm*, p. 192.
161. Mutawalli, *Marbādi*, p. 287 ff.
162. Note e.g. S.A. Rahman, *The Punishment of Apostacy in Islam*; Abdul Ḥamīd Abu Sulayman, *The Islamic Theory of International Relations: New Directions for Islamic Methodology and Thought*; el-Awa, *Punishment in Islamic Law.*
163. Rahman, *Apostasy*, pp. 63-64; al-'Ili, *Al-Ḥurriyyāt*, p.339.
164. Ibn Taymiyyah, *Al-Ṣārim al-Maslūl*, p. 318; al-Shaᶜrani, *Kitab al-Mīzān*, II, 134, El-Awa, *Punishment*, p.55.
165. Ibn Taymiyyah, *Al-Siyāsah*, p. 124.
166. Shaltūt, *Al-Islam*, pp. 292-93; al-Samara'i, *Aḥkām al-Riddah*, p. 114 ff.
167. Mahmassani, *Arkān*, pp. 123-24.
168. Akhtar, *Be Careful With Muḥammad*, p. 71.
169. El-Awa, *Punishment*, p. 55.
170. Al-Shawkani, *Nayl al-Awṭār*, VII, 218.
171. Ibid., VII, 219.
172. Ibid., VII, 219; El-Awa, *Punishment*, p. 55.
173. Muslim, *Mukhtaṣar Ṣaḥīḥ Muslim*, p. 271, Hadith 1023.
174. El-Awa, *Punishment* p. 52.
175. Ibn Taymiyyah, *al-Ṣārim al-Maslūl*, p. 52,
176. Bukhari, *Jawāhir Ṣaḥīḥ al-Bukhari*, p. 150, Ḥadīth No. 229.
177. cf. El-Awa, *Punishment*, p. 54.
178. Shabbir Akhtar, *Be Careful With Muḥammad*, p. 72.
179. Abu Zahrah, *Tanẓīm*, p. 192.
180. Rashīd Riḍā, *Tafsir al-Manar*, Beirut: Dār al-Ma'rifah, 1324, IX, 665.
181. Ibid, III, 37; Al-'Ili, *Al-Ḥurriyyāt*, p. 333-34.
182. Ibn Kathir, *Tafsir*, I, 310; Riḍà, *Tafsir*, III, 37-39.
183. S.A. Rahman, *The Punishment of Apostacy*, p. 21.
184. Ibid, p. 16.
185. Note al-Baqarah (2:91 & 97). al-Nisā' (4:46); Faṭir (35:31) and Āl-Aḥqāf (46:30).
186. Faṭhi 'Uthmān, *Al-Farḍ*, pp. 27-28; note also Ghazawi, *Al-Ḥurriyyāt*, p. 69, and 'Aishah Abd. Al-Rahman, *Al-Qur'ān wa Ondaya al-Insan;* p. 97 ff.
187. Wafī. *Ḥuqūq al-Insan*, pp. 122-23.
188. Ibid, p. 124.
189. 'Awdah, *al-Tashri al-Jinā'i*, pp. 31-33.
190. For a discussion as to how military and political interests have influenced the writings of medieval Muslim jurists on the subject of *jihād*, see Abu Sulayman, *The Islamic Theory of International Relations.*
191. For a discussion of the theory of abrogation (*naskh*) and its impact on Islamic Law see my *Principles of Islamic Jurisprudence*, ch. 7.

Part Three

MORAL RESTRAINTS

I. General Themes

1. INTRODUCTORY REMARKS

Some of the violations of freedom of speech that the Sharī'ah has specified are expounded in positive legal terms which require enforcement by government authorities. Slanderous accusation (*qadhf*) for example, is a prescribed (*ḥadd*) offence for which the Qur'ān specifies a particular punishment. Similarly, blasphemy, sedition and insult are punishhable offences under the law. Beyond these specific violations which shall later be discussed, the bulk of the guidelines that the Sharī'ah provides on the subject are of a moral import, which are by and large addressed to the conscience of the believer and may or may not be justicible. The moral violations of freedom of speech include a variety of reprehensible utterances such as telling lies, backbiting, ridiculing others and calling them by offensive names. There is a wealth of instruction on all of these in the Qur'ān and the Sunnah, as well as in the teachings of the ulema across the centuries. Notwithstanding the emphatic tone of the Qur'ānic language on many of these violations, they have not been translated into practical rules of Islamic law. But, this is not an unfamiliar feature of the Qur'ān which is largely devoted to establishing the basic values and fundamental norms of conduct and these are best conveyed in the form of broad and comprehensive guidelines. From this basic framework it is then possible for the government, and those who are in charge of community affairs (i.e. the *'ūlu al-amr*), to convert these moral teachings into legal ordinances if they deem this to be in the interests of the community and in order to protect against evil.

2. BACKBITING, DEFAMATION AND DERISION

These are some of the varieties of abusive speech which receive much attention in the Qur'ān and in the Sunnah of the Prophet. The Qur'ān is specific in a number of passages on the varieties of evil speech which violate the dignity of others and which seek to expose their weaknesses. In the following text the believers are instructed on this theme;

> O believers, let not people ridicule other people, perchance the latter may be better than the former, nor let women ridicule other women, perchance the latter may be better

than the former. Neither find fault with your own people, nor call one another by nicknames....(al-Ḥujurāt, 49:11)

يٰٓاَيُّهَا الَّذِيْنَ اٰمَنُوْا لَايَسْخَرْ قَوْمٌ مِّنْ قَوْمٍ عَسٰٓى اَنْ يَّكُوْنُوْا خَيْرًا مِّنْهُمْ وَلَا نِسَآءٌ مِّنْ نِّسَآءٍ عَسٰٓى اَنْ يَّكُنَّ خَيْرًا مِّنْهُنَّ وَلَا تَلْمِزُوْٓا اَنْفُسَكُمْ وَلَا تَنَابَزُوْا بِالْاَلْقَابِ.

This is immediately followed by another passage which singles out backbiting (*ghībah*) and depicts its enormity in particularly striking terms:

And defame not one another behind your backs. Does any one of you like to eat the flesh of his dead brother. Surely you would abhor it (al-Ḥujurāt, 49:12).

وَّلَا تَجَسَّسُوْا وَلَا يَغْتَبْ بَّعْضُكُمْ بَعْضًا اَيُحِبُّ اَحَدُكُمْ اَنْ تَاْكُلَ لَحْمَ اَخِيْهِ مَيْتًا فَكَرِهْتُمُوْهُ.

Elsewhere in the Qur'ān is the sura bearing the title 'al-Humazah' (the slanderer). It begins by a clarion denunciation of "every slandering defamer" (al-Humazah, 104:1), and indeed, the whole of this sura is devoted to a rigorous condemnation of backbiting.

The Blessed Prophet has often warned the believers against *ghībah*. In a particular Ḥadīth, the Prophet is reported to have asked his Companions the following question: "Do you know what *ghībah* is?" To this they replied, "Allah and His Messenger know best". Then the Prophet said, "It is to mention your brother in a way that he would dislike." A Companion then asked: "What if what I say concerning my brother is true?" The Prophet replied saying, "If what you say is true then you have defamed him (*by ghībah*), and if he is innocent of what you say, then you have accused him of falsehood and lies (*buhtān*)".[1]

وَعَنْ اَبِىْ هُرَيْرَه رض قال رسول الله ﷺ: اَتَدْرُونَ ماالغِيْبَه؟ قَالُوْا اللهُ وَرَسُوْلُهٗ اَعْلَمْ. قَالَ ذِكْر اَخَاكَ بِمَايَكْرَهُ. قِيلَ اَفَرَ أَيْتَ اِنْ كَانَ فِيْ اَخِىْ مَا اَقُوْل؟ قَالَ اِنْ كَانَ فِيه مَا تَقُولُ فَقَد اِغْتَبْتَهُ وإِنْ لَمْ يَكنْ فيه مَا تَقُوْل فَقَدْ بَهَتَّهُ.

Al-Ghazāli merely reiterated the purport of this Ḥadīth when he stated that "the hallmark of *ghībah* is to mention your fellow Muslim in a way that would displease him if he heard you saying it, even if you were to be telling the truth." *Ghībah* can even be committed, al-Ghazāli adds, by word of mouth, by signs, by passing secrets (*al-ramz*), or by any other form of expression that conveys the basic concept of defaming others.[2]

In a commentary on the same *Ḥadīth*, al-Nawawi, the author of *Riyāḍ al-Ṣāliḥīn*, points out: It is permitted, however to tell the truth even if it technically amounts to *ghībah*, as a matter of necessity, in order to prevent an evil. Similarly, a witness, a petitioner or a pleader who reveals the oppressive conduct of another, may speak about the character of a person if this would help in the course of justice.[3] Thus, it is evident that *ghībah* is permitted only if it serves the cause of justice and the discovery of truth. However, in its unrelated capacity, that is when no higher objective is being served, the mere truthfulness of the content of *ghībah* does not justify its utterance. *Ghībah* is generally held to be one of the major sins (*al-kabā'ir*), although some ulema have reached the conclusion that it is one of the *saghā'ir*, or minor sins. While quoting the above *āyah* (i.e. 49:12) on *ghībah*, Muḥammad Khiḍr al-Ḥusayn points out that exceptions concerning the utterance of *ghībah*, or criticising others in their absence, are made on grounds of necessity (*ḍarūrah*). The concession granted here is in the nature of tolerating a lesser evil, that is the *ghībah* of a particular individual, in order to secure a higher interest (*maṣlaḥah ᶜāliyah*) which often consists of serving the cause of justice, protecting the essential values, and preventing harm to society.[4]

The following instances of permissible *ghībah* have been recorded in the writings of the ulema.[5]

(a) Impugning the witnesses (*jarḥ al-shuhūd*): The law requires that judicial decisions be based on reliable evidence, which is why the Sharīᶜah makes it a duty of the judge to ascertain the reliability and just character of witnesses. This may, in turn, necessitate enquiry into the character and personality of the witnesses and entail revealing their weaknesses, even at the expense of indulging in *ghībah*.

(b) Another area where the ulema have found it necessary to engage in the character analysis of individuals is in the transmission of the Ḥadīth and the attribution of statements to the Messenger of God. The ulema of Ḥadīth have thus enquired at length into

the personality and character of the transmitters of Ḥadīth so as to expose any weakness that might have a bearing on their trustworthiness.

(c) *Ghībah* is permitted of a person who is actively engaged in criminality, and who openly declares his sinful activity to others without any attempt at concealing his wrongdoing. For an individual who indulges in speech that recommends lawlessness and sin transgresses the teachings of Sharīᶜah and indulges in contempt toward them; his personal dignity is therefore no longer immune from the contempt of others. According to a statement attributed to Imām Aḥmad b. Ḥanbal, which is endorsed by his disciple, Ibn Taymiyyah, and also the Māliki jurist, Ibn ᶜAbd al-Barr, there is no *ghībah* regarding a person who publicises his sinful conduct (*mujāhir bi al-maᶜāṣi*). A number of other ulema have, however, drawn the conclusion, once again from the source materials in the Sunnah, that *ghībah* is forbidden absolutely, with only one exception, which is when a person is actively engaged in harming others in words or in action.[6]

(d) According to the expressed terms of the Qur'ān, "God loves not public utterance of evil speech except by one who has been wronged" (al-Nisā', 4:148).

لَا يُحِبُّ اللهُ الْجَهْرَ بِالسُّوْءِ مِنَ الْقَوْلِ اِلَّا مَنْ ظُلِمَ.

This *āyah* will be discussed later in detail, but suffice it to say that the exception granted in this text entitles the victim of an act of injustice to expose the facts of his case and to denounce, if need be, the oppressor (*ẓālim*) and seek help against him. The Qur'ānic proclamation here makes it clear that a firm stand against oppression can hardly be taken without granting the victim the right to speak out.

(e) *Ghībah* is once again permissible if it constitutes an integral part of sincere council, or *naṣīḥah*. For example, it is allowable when a man consults another as to the character of a woman he intends to marry, or when he proposes a trade partnership with another person and seeks advice about the latter's character. Provided that the counsellor is impartial, if he has advice to give which may entail exposing a weakness of character or a bad record of the person at issue, he may give it. But this may be done only if it is believed that a greater evil is not likely to occur otherwise.

(f) *Ghībah* is also permitted if it is intended to deter its victim from criminality and evil. When we know, for example, someone who commits theft or other crimes but who manages to keep it hidden, and we know that he will not be deterred unless the matter is given publicity, then *ghībah* is not only permitted, but is an integral part of the Qur'ānic principle of *ḥisbah*, that is commanding good and preventing evil. As such, it is the duty of everyone to prevent wickedness by whatever means they may have at their disposal, provided that the attempt at prevention is not likely to lead to a greater evil.

(g) If a person is convinced of an impending harm (*ḍarar*) which may threaten the safety and integrity of religion or the homeland unless a particular person is criticised and denounced in his absence, then the former is permitted to do so but only when he deems this to be a lesser evil than the one which is anticipated.

(h) If a person's own life is endangered then *ghībah* is permissible if that danger cannot be prevented unless someone's weakness of character is exposed and he is openly criticised for it.

(i) And finally, the Sharīᶜah permits criticising the views and opinions of others in pursuit of establishing righteousness and truth, even if this involves exposing a fault in the thought or character of their authors. A mistake or misunderstanding may thus be corrected if this is deemed necessary for the preservation of truth or for the elimination of falsehood.

While discussing the calamities of speech (*āfāt al-lisān*), al-Ghazāli specifies five, namely lying, backbiting, acrimony (*mumārāt*), sycophancy (*madḥ*) and jokes. The author then elaborates: Lying is forbidden in all things except when it is absolutely necessary. It must, therefore, be avoided at all times even in one's imagination and self-suggestion. One ought to make a deliberate effort not to sow the seeds of falsehood in one's thoughts and try to avoid it at all times. To substantiate his statement further, al-Ghazāli quotes the following Ḥadīth of the Prophet:

لَا يَزَالُ الْعَبْدُ يَكْذِبُ وَيَتَحَرَّى الْكِذْبَ حَتَّى يُكْتَبَ عِنْدَ اللهِ كَذَّابًا.

For so long as a person lies or justifies a liar, his (or her) name is recorded as one of the liars before God.[7]

Among the instances when telling a lie may be necessary, is when it helps to save an innocent life. For example, if someone is trying to capture and kill an innocent person and asks another of his whereabouts, the respondent may tell a lie in order to prevent bloodshed. In the sayings of the Prophet, the three other instances where lying is permissible are firstly, when it helps to remove hostility and bring harmony between two parties; secondly, when it is done in order to mislead the enemy in warfare; and lastly, it is allowable when a man gives his wife praise and encouragement in order to please her, even if the speech so uttered is not literally true.[8] The Shī^{c}i doctrine of dissimulation or expedient concealment (*taqiyyah*), furthermore, permits telling a lie if it would repel an imminent danger or an aggression to one's life, honour, and property. While protecting property by means of *taqiyyah* is in principle permitted, many Shī^{c}i ulema have discouraged recouse to *taqiyyah* and the concealment of truth for the sake of a small amount (*al-māl al-yasīr*).[9] This subject will be dealt with later, and at this point I shall continue with al-Ghazāli's account on the abuses of speech.

While enumerating the calamities of speech, al-Ghazāli goes on to say that people usually praise the powerful and the rich in their presence and when they attend special gatherings. However, sycophancy often partakes in lying and hypocrisy (*kidhb wa riyā'*) on the part of the flatterer and of self-gratification (*i^{c}jāb*) by those who are being praised. Therefore, both should avoid this type of behaviour.

Other forms of expression which al-Ghazāli has listed under the calamities of speech are indisciplined anger, excessive jokes, and acrimonious talk (*mumārāt*). The author goes on to elaborate that anger (*ghaḍab*) usually leads to abusive speech and to exposure of the victim's weaknesses. Anger in its disciplined and defensive form, such as when fighting aggression and evil is not forbidden, however, it is disallowed only when it exceeds the limits of propriety. The sources of such discipline are the Sharī^{c}ah, human reason, and concern for the promotion of the moral qualities of gentleness (*ḥilm*), and good character (*ḥusn al-khulq*).[10]

Acrimony (*mumārāt*) consists of objecting to the speech of another person with the aim of exposing its defects and establishing one's own superiority over others. (*Mumārāt* is further discussed in a separate section below).

Excessive indulgence in jokes "extinguishes the light of one's heart and leads to loss of dignity". Jokes are permissible in principle, especially those which please people of sound nature, provided they are light and truthful (*yasīran ṣādiqan*). The Blessed

Prophet used to make jokes, but these did not involve telling lies; for he was known to be kind to children and enjoyed joking with them. Excessive indulgence in jokes is discouraged as it is likely to partake in lying and in *mumārāt*.[11]

To this list we may add excessive questioning (*kathrah al-su'āl*), which is generally discouraged in the Qur'ān and receives much attention in the teachings of the Prophet. It is dissuaded only when there is no need for it, but questioning is permitted in the pursuit of knowledge and in the discovery of truth.[12]

3. EXPOSING THE WEAKNESSES OF OTHERS

Avoiding harm to others and concealing the weaknesses of one's fellow human beings is a prominent theme of the moral teachings of the Qur'ān and Sunnah. The message here is conveyed in a variety of forms, contexts, and ideas all of which are indicative of Islam's emphasis on the honour and dignity of the individual, and of his or her right to privacy away from the encroachment of others. Thus, according to a Ḥadīth, "Anyone who conceals the weakness of another in this world, God will conceal his/her weakness in the hereafter".[13]

لَا يَسْتُرُ عَبْدٌ عَبْدًا فِيْ اَلدُّنْيَا اِلاَّ سَتَرَهُ اللهُ يَوْمَ القِيَامَةِ.

A variant version of the same message is reported in another Ḥadīth which provides: "Whoever saves the honour of his brother, God will save his countenance against the blaze of fire in the Day of Judgement".[14]

مَنْ رَدَّ عَنْ عِرْضِ اَخِيه رَدَّاللهُ عَنْ وَجْهِهِ اَلْـنَّار يَوْمَ اَلْقِيَامة.

In yet another Ḥadīth we read: Do not harm your fellow Muslims, do not impute evil to them, and do not try to uncover their nakedness. For behold, if anyone tries to uncover the nakedness of his Muslim brother, God will uncover his own nakedness.[15]

لَا تُؤذُو المُسلِمِيْنَ ولا تَعيْرُوْا، وَلا تَتَّبِعُواعَـوْرا تَهُـمْ . فَاِنَّ
مَنْ يَتَّبِـعُ عَـوْرَةَ اَخِـيهِ المُسلم يَتَّـبِعُ اللهُ عَـوْرَتَـهُ .

Concealing the faults and the privacy of others is a recurrent theme of yet another Ḥadīth:

> When a Muslim protects the honour of another at a time when the latter is attacked, God will protect him at a time when he desires protection. And when a man dishonours a Muslim where the latter is vulnerable to attack, God will dishonour the former at a time when he wants God's help.[16]

مَا مِنْ اِمْرِءٍ مُسْلِمٍ يَنْصُرُ مُسْلِمًا فِيْ مَوْضِعٍ يَنْتَهِكُ فِيهِ مِنْ عِرْضِهِ وَيَسْتَحِلُّ حُرْمَتَهُ اِلاَّ نَصَرَهُ اللهُ عَزَّ وَجَلَّ فِيْ مَوْطِنٍ يُحِبُّ فِيهِ نَصْرَهُ وَمَا مِن اِمْرِءٍ خَذَلَ مُسْلِمًا فِيْ مَوطِنٍ تنتَهِكَ فِيهِ حُرْمَتُهُ اِلاَّ خَذَلَهُ اللهُ فِيْ مَوْضِعٍ يُحِبُّ فِيْهِ نَصْرَتَهُ.

It is reported that one night when ᶜUmar b. al-Khaṭṭāb was patrolling Madinah, he saw a man and a woman committing adultery. The following day the Caliph informed other Companions and asked them whether he should enforce the prescribed penalty (*ḥadd*) for *zinā'* on the basis of his own observation. To this ᶜAli b. Abu Ṭālib responded that the law of God stated clearly that the proof of *zinā'* was four witnesses and that this provision was to be applied equally to the Caliph. Other Companions are also reported to have concurred with ᶜAli's opinion.

While quoting this report, al-Ghazāli observes that "this is strong evidence to the effect that the Sharīᶜah demands *satr al-fawāḥish*, that is concealing evil stealthily committed by oneself or by others; it also shuns espionage or reporting on the private affairs of others.[17]

It will be noted, however, that *satr* (concealment) is recommended (*mandūb*) only with regard to persons who are not well known for corruption and harming others. As for those who are notorious, it is recommended that their evil is not concealed and that the matter is reported to the authorities. For *satr* in such cases will only encourage further corruption and lawlessness.

All of this is relevant to concealing evil (*maᶜṣiyah*) which has occured in the past. As for *maᶜṣiyah* which takes place before one's eyes, one must attempt, to the extent of his or her ability, to prevent or denounce it without delay. If a person is unable to do so, then the matter must be reported to the authorities. It is also permissible to report the faults of the narrators of Ḥadīth, of witnesses in judicial

disputes, and of trustees of charities and orphans. This is allowable whenever it is deemed necessary, and no *satr* is required when the trustees in question are seen to be doing something which violates the proper terms of their duties.[18]

Exposing the faults of others through suspicion and espionage is particularly reprehensible. Thus, according to a Ḥadīth, people are warned to:

> Beware of suspicion (and speech which smacks of suspicion). For suspicion (and speech based thereon) may be totally untrue and may amount to the worst form of lying; and do not spy upon one another and do not try to bare each others hidden failings.[19]

إِيَّاكُمْ والظَّنَ فَإِنَّ الظَّنَ اَكْذَبُ الحَدِيثِ وَلاَ تَجَسَّسُوا ولاَ تَعِيْرُوا.

Imām Aḥmad b. Ḥanbal was once asked as to the correct meaning of the following Ḥadīth: "When you hear something that your brother might have said give it the best interpretation until you find no other way of doing so".

إِذَا بَلغك شَيءٌ عَنْ اَخِيْكَ فَاحْمِلْهُ عَلٰى اَحْسَنِه حَتّٰى لاَتَجِدَ لَهُ مَحْمَلاً.

To this the Imam replied: "Find an excuse for him by saying may be he said, or may be he meant such and such".[20] It is further reported in a Ḥadīth that "Whenever a Muslim apologises to another Muslim, the latter must accept it except in the case where he/she knows that the apologist is being dishonest".[21]

مَنْ اِعْتَذر اِلَيهِ أَخُوهُ المُسلمُ فَلْيَقْبَل عُذرَهُ مَاْ لَمْ يَعْلَمْ كِذبَهُ.

While commenting on these *aḥādīth*, Tuffāḥah has rightly observed that despite the occurrence of the word *akh* (brother) therein, they are of general import and their scope need not be confined to Muslims. The reason being that, in Islam, justice and beauty (*ᶜadl wa iḥsān*) are not confined to the Muslims alone. The question of the way in which people treat their fellow citizens in society, or their brothers and sisters in humanity, is closely linked with the Qur'ānic concept of *ᶜadl* and *iḥsān*, and these do not recognise any restriction

that would compromise their objectivity.[22] This is indeed the main point of the following Qur'ānic text: "and let not the hatred of a people swerve you from the course of justice. Be just, for it is closest to piety (*taqwā*)" (al-Ma'idah, 5:8).

وَلَا يَجْرِمَنَّكُمْ شَنَآنُ قَوْمٍ عَلَىٰ أَلَّا تَعْدِلُوا اعْدِلُوا
هُوَ أَقْرَبُ لِلتَّقْوَىٰ.

Furthermore, Hasan b. ᶜAli is reported to have said that "if a man abuses me (*shatamani*) in this ear and then apologises to me in the other, I shall accept his apology."[23]

Thus, it is evident that silence takes priority over speech when it comes to exposing the faults and weaknesses of others. "One should not talk about the defects of others even if one is asked about them. One must try to avoid prying and espionage and asking personal questions about the private lives of others."[24] For tolerance and forgiveness are necessary in order to encourage an atmosphere of fraternity in the community.

4. RECOMMENDED SILENCE

Another theme which has acquired prominence in the Sunnah of the Prophet is the relative value of silence, especially when speech would serve no useful purpose. There are numerous *aḥādith* on this subject, including this:

> Whoever believes in God and the Last Day let him say when he has something good to say or remain silent.[25]

مَنْ كَانَ يُؤْمِنُ بِاللهِ وَالْيَوْمِ الْآخِرِ فَلْيَقُلْ خَيْرًا او لِيَصْمُتْ.

To speak only when there is an occasion for speech, or when one has a purpose in doing so, is a sign of piety as the following Ḥadīth declares:

> "It is indicative of piety for a Muslim to remain silent in regards to matters which do not concern him".[26]

مِنْ حُسْنِ إِسْلَامِ الْمَرْءِ أَنْ يَسْكُتْ فِيمَا لَا يَعْنِيهِ.

According to a statement attributed to Ibn ᶜAbbās, people are warned to beware of indulging in speech on matters that are of no concern to them, or when there is no occasion for them to speak. For a person

who speaks out of place has indulged in excess. Ibn ᶜAbbās continues: "Engage yourself not in bitter speech either with the learned or the fool. For the former is likely to defeat you, and the latter is likely to abuse you. Mention your brother favourably in his absence, and mention him not in such a way that he would be displeased if he were to hear it."[27]

The best form of speech is that where little removes the need to say more, and a speech whose meaning is manifest in its words.[28] A person ought to be reserved in speech, and to speak only when there is a benefit to be achieved by it. In the event where the benefit of speech is in doubt, then one ought to remain silent.[29]

The Qur'ān encourages believers to speak out, but only if this serves a worthy purpose. Indeed, to remain silent on such an occasion is reprehensible. This Qur'ānic guidance is found in numerous places in the text, including the following: "O you who believe! Fear God and (always) say a word in pursuit of righteousness" (al-Aḥzāb, 33:70).

يَاَيُّهَا الَّذِيْنَ اٰمَنُوا اتَّقُوااللهَ وَقُوْلُوْا قَوْلاً سَدِيْدًا.

In another passage, God Most High addresses the Prophet to be fair and courteous to others: "Tell my servants that they should say things which are best. For Satan sows dissention among them, and Satan is to man an avowed enemy" (al-Isrā', 17:53).

وَقُلْ لِّعِبَادِيْ يَقُوْلُوا الَّتِيْ هِيَ اَحْسَنُ اِنَّ الشَّيْطٰنَ يَنْزَغُ بَيْنَهُمْ اِنَّ الشَّيْطٰنَ كَانَ لِلْاِنْسَانِ عَدُوًّا مُّبِيْنًا.

Commentators have elaborated that the believers are asked, in these Qur'ānic passages to speak fairly even if they were addressing their foes, or manifest transgressors of God's law; not to entertain suspicion concerning others; and to speak courteously to others according to the best standards of discourse. For a false or discourteous utterance could easily destroy the result of one's effort at strengthening the bonds of fraternity.[30]

Furthermore, the Holy Qur'ān instructed the Blessed Prophet not to reciprocate wicked speech:

> Nor can goodness and evil be equal. Repel evil with what is better. Then will he between whom and thee was hatred become, as it were, thy friend and intimate (Fuṣṣilāt, 41:34).

وَلَا تَسْتَوِى الْحَسَنَةُ وَلَا السَّيِّئَةُ اِدْفَعْ بِالَّتِيْ هِيَ
اَحْسَنُ فَاِذَا الَّذِيْ بَيْنَكَ وَبَيْنَهُ عَدَاوَةٌ كَاَنَّهُ وَلِيٌّ حَمِيْمٌ.

The message in this *āyah* is that wickedness must not be allowed to perpetuate itself; if evil is reciprocated with evil, then this will be the necessary outcome. To avoid this, the Qur'ān enjoins the Prophet to repel evil with what is better, and by doing so to turn potential hatred into friendship.[31] Another point to be noted here is that God Most High has granted no one, not even the Prophet, absolute freedom of speech. For the Prophet is given specific guidance as to the way he must propagate his call and communicate with people through good advice and elegant methods of persuasion.[32]

The believers are also encouraged to be thoughtful and to speak only with discretion and foresight as to the likely effects of the words they utter. For those who do so, the following Ḥadīth promises a great spiritual reward:

> When a servant of God utters a word which he has thought about and concluded that it is beneficial, he/she is distanced from fire the distance between sunrise and sunset.

اِنَّ الْعَبْدَ اَنْ يَتَكَلَّمَ بِالْكَلِمَةِ مَا يَتَبَيَّنُ فِيْهَا (اَىْ يُفَكِّرُ اَنَّهَا
خَيْرٌ اَمْ لا) يَزِلُّ بِهَا مِنَ النَّارِ اَبْعَدُ مِمَّا بَيْنَ الْمَشْرِقِ
وَالْمَغْرِبِ (متفق عليه).

While quoting this Ḥadīth, al-Nawawi makes the following observation: although speech without contemplating a benefit is generally frowned upon, conversation with one's guests, discussion in pursuit of knowledge, and remembering the virtues of the upright men of piety (*ṣalihīn*) is not discouraged.[33]

Speech can occur in the form of a considered opinion (*r'ay*), sincere advice (*naṣīḥah*), or consultation (*shūrā*); it can be righteous (*kalimah ṭayyibah*) or evil (*kalimah khabīthah*), and it can occur by way of jest (*laghw*). The Qur'ān and Sunnah explicitly encourage the first four, discourage evil speech, and advise the believers to ignore the last and remain silent in response. The Holy Qur'ān thus praises:

"Those who avoid giving false testimony and when encountered with futility (*laghw*) they ignore it with dignity (Al-Furqān, 25:72).

وَالَّذِيْنَ لَا يَشْهَدُوْنَ الزُّوْرَ وَإِذَا مَرُّوْا بِاللَّغْوِ مَرُّوْا كِرَامًا.

5. ABUSES OF PERSONAL OPINION (*RA'Y*)

In a previous section on freedom of opinion (*ḥurriyyah al ra'y*) I addressed the approved or praiseworthy varieties of *ra'y*. The present section addresses the disapproved or blameworthy opinion and its sub-varieties such as *bidᶜah* (pernicious innovation), *baghy* (transgression), *hawā* (caprice), and *ikhtilāf* (dissension). The blameworthy opinion (*al-ra'y al-madhmūm*) is a type of *ra'y* which is neither completely false nor totally invalid and yet it is misguided and reprehensible. It may occur in the form of *bidᶜah*, *baghy*, or *hawā*. There is yet a fourth variety of reprehensible *ra'y* which is referred to as *jahl* (ignorance) as it is deemed to be no more than an unfounded extrapolation that originates in ignorance. All of these varieties fall under restrictions on freedom of opinion primarily because the right to free speech and expression does not extend to these areas. The term 'restrictions' here does not necessarily mean prohibition. For as this section shall show, the whole of this field is governed, not by legal prohibitions as such, but by moral sanctions, sincere and persuasive advice. Although the precise legal position is not always clear on some forms of *bidᶜah* and *hawā*, these are, broadly speaking, nonjusticible violations of the freedom of speech.

Bear in mind, however, that the whole of this classification is somewhat overlapping; scholars have sometimes used these terms almost interchangeably, presumably because the concepts of, say, ignorance or transgression are often present in some measure in the case of a capricious opinion (*hawā*), and of a pernicious innovation (*bidᶜah*). The main difference between the last two would appear to be that *hawā* consists of a strong element of selfishness, and the pursuit of one's desire in disregard of clear guidance. *Bidᶜah*, on the other hand, is distinguished by an attempt to distort the principles of Islam, or to misinterpret them out of good intention and the desire to explore the unexplored. The word '*bidᶜah*' is generally used in contradistinction with 'Sunnah', that is the normative and familiar practice. In this sense, *bidᶜah* signifies a deviation from, or super-imposition on, the Sunnah of the Prophet. An opinion which amounts to *bidᶜah* may, or may not, be motivated by self-

seeking interest, and as such, it is not always distinguishable from *hawā*. Note, for example, the distinction between the two forms of divorce in Islamic law, known as *ṭalāq al-sunnah* and *ṭalāq al-bidᶜah* respectively. The former signifies the type of divorce which conforms with the law and established precedent, while the latter is labelled as *ṭalāq al-bidᶜah* primarily because it departs from the legal norm which requires that the maximum of three pronouncements of *talaq* are each uttered within a clean period (*ṭuhr*), that is the period between two menstruations. *Ṭalāq al-bidᶜah* ignores this, and combines the three pronouncements of *ṭalāq* to be uttered all at once. As for the question, however, whether this form of *ṭalāq* also partakes in a measure of self-seeking desire (*hawā*) on the part of the husband, the answer is not always clear but is likely to be in the affirmative. Hence the distinction between the concepts under discussion is expected to be in broad outline and is not necessarily exclusive.

Baghy may be distinguished from both *bid'ah* and *hawā* in that it indulges in self-righteousness and attempts to impose a person's own opinion on others, often denouncing all those who oppose it. Beyond these shades of differences, however, the concepts under discussion have much in common between them and are often used interchangeably. The Qur'ān uses the term *hawā* in a somewhat generic sense which could include both *bidᶜah* and *baghy*. We also find that many scholars have used the term "*bidᶜah*" so widely as to include all varieties of reprehensible opinion. Furthermore, none of these are confined to the realm of opinion, but apply equally to acts which may fit the attendant description and attributes of each.

1. *Bidᶜah* and *Hawā*

Literally, *bidᶜah* means an innovation which cannot be vindicated by authoritative precendent, or a pernicious innovation which is far removed from normal and established practice.[34] *Bidᶜah* is defined as an innovation in religion resembling that which the Sharīᶜah has expressly approved and as such, is intended to fulfil the proclaimed objectives of Sharīᶜah.[35] Note, however, that in this definition, the resemblance between *bidᶜah* and the established norm of Sharīᶜah is merely plausible, for in reality *bidᶜah* violates the established standards of the Sharīᶜah. The definition also indicates that the intention behind *bidᶜah* does not deviate from the norm in the sense that the rules of Sharīᶜah are generally intended to achieve benefits (*maṣāliḥ*), and that this is precisely what the innovator intends to

do. However, the good intentions behind *bidᶜah* are of no account, as al-Shāṭibi explains, because the innovator arrogates to himself the authority of the Lawgiver in such a manner that the objectives of law are frustrated.[36] *Bidᶜah* is divided into two types; namely, genuine *bidᶜah* (*al-bidᶜah al-ḥaqīqiyyah*) for which no justification or support neither wholly nor in part, could be found in the Qur'ān, the Sunnah, or *Ijmāᶜ*, nor in any precedent or learned opinion. In other words, it is an innovation in the true sense of the word.

The second type of *bidᶜah* is known as *al-bidᶜah al-iḍāfiyyah*, or partial innovation, which has two facets. One of these is identical with the genuine *bidᶜah* in that it is unprecedented and indefensible, but, there is another side to this type of *bidᶜah* for which support can be found in the established norms. It is, in other words, an ambivalent innovation which can be accepted as part of the authoritative Sunnah or rejected completely, depending on how it is looked at.[37]

Bidᶜah is once again divided into two types, namely *al-bidᶜah al-tarkiyyah* which consists of abandoning something, such as, for example, when a person abandons, or advises others to forsake, something which is lawful under the rules of Sharīᶜah. The opposite of this is *al-bidᶜah ghayr al-tarkiyyah*, that is innovation which does not consist of abandoning anything. It may, however, involve a change, or advance a different perspective which amounts to innovation but not to abandonment.[38]

The hallmark of *bidᶜah* is the pursuit of capricious and whimsical opinion (*hawā*) in preference to divine guidance. Thus we read in the Qur'ān in an address to Prophet David:

> O David, We have made you a vicegerent in the earth, so rule among people righteously and follow not the dictates of *hawā* which lead you astray from the path of God (Ṣād, 38:26).

يٰدَاوُدُ اِنَّا جَعَلْنٰكَ خَلِيْفَةً فِى الْاَرْضِ فَاحْكُمْ بَيْنَ النَّاسِ بِالْحَقِّ وَلَا تَتَّبِعِ الْهَوٰى فَيُضِلَّكَ عَنْ سَبِيْلِ اللّٰهِ.

and in the following text:

> Who is more misguided than one who follows his own *hawā* in disregard of the guidance that God has revealed? (al-Qaṣaṣ, 28:50).

وَمَنْ اَضَلُّ مِمَّنِ اتَّبَعَ هَوٰئهُ بِغَيْرِ هُدًى مِّنَ اللهِ.

In addition, a person who chooses to follow the vagaries of *hawā* is not to be obeyed by others, as the Qur'ān proclaims:

> Obey not the one whose heart is negligent of Our rememberance (ᶜ*an-dhikrinā*), nor one who follows his *hawā*, nor one who has exceeded all limits (al-Kahf, 18:28).

وَلَا تُطِعْ مَنْ اَغْفَلْنَا قَلْبَهُ عَنْ ذِكْرِنَا وَاتَّبَعَ هَوٰئهُ وَكَانَ اَمْرُهُ فُرُطًا.

While quoting the foregoing passages, al-Shāṭibi points out that in all of the three *āyāt* the matter is confined to two things; namely, following the guidance (*hudā, dhikr*), or following caprice (*hawā*). The innovator (*mubtadiᶜ*) has chosen the latter; hence while he is utterly misguided he himself thinks otherwise. Al-Shāṭibi also quotes another Qur'ānic passage which denounces those who attempt to confuse the meaning of the Qur'ān through misguided and self-styled interpretation:

> He it is who has sent down to thee the Book. In it are *āyāt* which are perspicuous; they are the foundation of the Book: Others are allegorical. But those in whose hearts is perversity follow the part which is allegorical, seeking discord (*fitnah*) and searching for its hidden meaning. (Āl-ᶜImrān, 3:7).

هُوَ الَّذِيْ اَنْزَلَ عَلَيْكَ الْكِتٰبَ مِنْهُ اٰيٰتٌ مُّحكَمٰتٌ هُنَّ اُمُّ الْكِتٰبِ وَاُخَرُ مُتَشٰبِهٰتٌ فَاَمَّا الَّذِيْنَ فِيْ قُلُوبِهِمْ زَيْغٌ فَيَتَّبِعُوْنَ مَاتَشَابَهَ مِنْهُ ابْتِغَآءَ الْفِتْنَةِ وَابْتِغَآءَ تَأْوِيْلِه.

It is reported from ᶜĀishah that the Prophet read this *āyah* and then said: "when you see those who argue and dispute about the Qur'ān, these are the ones that God has meant, and they should be shunned." Al-Shāṭibi adds to this by saying: "The disputation that the Prophet has referred to concerns the pursuit of the *Mutashābih* (intricate, unintelligible) in the Qur'ān." Disputation of this kind leads to

disunity and deviation from the guidance of the Qur'ān, as the following passage shows:

> This is My way, leading straight, so follow it and follow not the paths which will scatter you away from it (al-An^{c}ām, 6:153).

وَاَنَّ هٰذَا صِرَاطِيْ مُسْتَقِيْمًا فَاتَّبِعُوْهُ وَلَا تَتَّبِعُوا السُّبُلَ فَتَفَرَّقَ بِكُمْ عَنْ سَبِيْلِهٖ.

According to Qur'ān commentators, the phrase "follow not the paths" refers to the ways of those who have deviated from the straight path, and these are the innovators and the sceptics (*ahl al-bida^{c} w'al-shubhāt*).[39]

While elaborating on some of these statements, al-Shatibi adds: the innovators distort the Sharī^{c}ah in various ways, such as by upholding the manifest or apparent (*ẓawahir*) in the Qur'ān without looking into the objectives and intentions of the Lawgiver. In a reference to the Kharijites, al-Shāṭibi wrote that they upheld the intricate portions (*Mutashābihāt*) of the Qur'ān in preference to the perspicuous (*Muḥkamāt*); that they declared as infidel most of the Companions of the Prophet; that they held the view that in the event the Imam becomes an infidel, all of his subjects automatically become infidels; and that the adulterer is not liable to the punishment of *rajm* (stoning to death). The Kharijites also upheld that the prescribed punishment of *qadhf* (slanderous accusation) applies to those who accuse women of unchastity, but not to those who charge men of similar conduct; that ignorance of the *furu^{c}* (detailed rules of *fiqh*) is an excuse; that God will send a Prophet from among the *'ajam* (i.e. non-Arabs) who will bring a book and the Sharī^{c}ah of Muhammad will then be abandoned; and that the sura Yusuf (i.e. chapter XII of the standard text) is not a part of the Qur'ān, and so on. All these views which the Kharijites advocated are contrary to the principles and established tenets of Islam.[40]

While commenting on the subject of *Mutashābih* (intricate) Ibn Qayyin al-Jawziyyah wrote: a particular form of *hawā* in connection with the Qur'ān is to uphold the *Mutashābih* in preference to the *Muḥkam* (perspicuous) so as to advance and substantiate a particular point of view. What is an even more hideous practice is this: that when the morbid attempt to find a *Mutashābih* with which to reject the *Muḥkam*

fails, attempts are then made to find some weakness in the latter and thereby downgrade it to the level of *Mutashābih* and, in this way, try to suspend the definitive importance of the *Muḥkam*. References are made, at this point, to the Jahmiyyah and Qadariyyah (sub-divisions of the Muᶜtazilah) and their views on the meaning of certain portions of the Qur'ān. The author concludes his discussion by saying that the correct approach which the Companions and the leading jurists and scholars have adopted is precisely the opposite: The *Mutashābih* must be read in light of the *Muḥkam*, and not vice versa, so as to maintain internal harmony and consistency in interpreting the Qur'ān.[41]

References are also made in this context to the views and beliefs of the Bāṭiniyyah (also known as Ismaᶜilliyyah), and in particular, the meanings they have given to some of the key words of the Qur'ān, such as *ṣalāh, zakāh, ṣawm,* etc., which are very different to what is normally understood by the majority of the ulema. They have, thus, interpreted *ṣalāh* as referring to the Prophet, for example, in the Qur'ānic *āyah* that "surely *ṣalāh* keeps one away from indecency and evil" (al-ᶜAnkabūt, 29:44); in their view it is the Prophet who forbids evil not the *ṣalāh* as such. Similarly, according to the Bāṭiniyyah, *zakāh* (legal alms), means "purification of the soul", *ṣawn* (fasting) means "abstaining from evil"; *jannah* (paradise) is held to mean "the sweet smell of the human body"; *wuḍū'* (ablution) is said to mean "following the awaited Imam". *Tayammum* which translates as "ablution with clean earth where no water could be found" is held by the Bāṭiniyyah to mean "obedience to the deputy of the Imam in the absence of the Imam himself"; whereas they translate *ghusl* (bathe) to mean "renewal of one's pledge of allegiance to the Imam".[42] It is, perhaps, due to these and similar remote and allegorical interpretations they have given to the Qur'ān, that the Bāṭiniyyah (proponents of the esoteric and the hidden) have derived their name.

A more recent form of *bidᶜah*, embraced by some Muslims, is to deny the authority of the Sunnah and the view that the Qur'ān, being self-contained, authentic, and comprehensive, is the only source of Sharīᶜah. This is the view taken by a faction calling itself al-Firqah al-Qur'āniyyah (partisans of the Qur'ān) whose views are known to have spread and found adherents in Arab countries like Egypt, and Libya,[43] and elsewhere such as Pakistan and Malaysia.

Whereas some scholars have accepted the notion of a good *bidᶜah*, Ibn Taymiyyah refutes the division of *bidᶜah* into good and evil as he maintains that all *bidᶜah* is evil. People have held different views on *bidᶜah* and some have divided it into two types, namely *bidᶜah qabīḥah*, and *bidᶜah ḥasanah* saying that not all *bidᶜah* is evil.

Then, when a *bidᶜah* is accepted and generally approved by the community of believers it is no longer *bidᶜah*. Ibn Taymiyyah goes on to refute this by saying that these views came into being only after the third A.H./tenth A.D., and that all *bidᶜah* is evil and the Sunnah is completely clear on this point. The author then quotes three *aḥādith* which are: "All *bidᶜah* is misguided – *kull bidᶜah ḍalālah*"; "every innovation is *bidᶜah* – *kull muḥdathah bidᶜah*"; and "the worst of things are the novel among them – *inna sharr al-umūr muhdathātuhā.*" The examples which Ibn Taymiyyah has given of *bidᶜah* in this context pertain mainly to rituals of the faith, such as fasting on certain days of the year, unauthorised prayer (*ṣalāt al-muḥdathah*), and festive celebrations (*aᶜyād*) other than those which are commonly recognised.[44]

The view that some *bidᶜah* is good originates in the precedent of ᶜUmar b. al-Khaṭṭāb who is on record to have welcomed *ṣalāt al-tarāwīḥ* during Ramadan and referred to it as (*niᶜmal-bidᶜah* – what a good *bidᶜah!*). To this Ibn Taymiyyah responds that *tarāwīḥ* was not an innovation at all; that it originated in the Sunnah of the Prophet and the Companions had practised it, but then the Prophet abandoned it after a while for fear of it becoming obligatory. Hence, what ᶜUmar Ibn al-Khaṭṭāb is quoted to have said does not contradict the Ḥadīth that "all *bidᶜah* is misguided". Ibn Taymiyyah concludes that ᶜUmar must have used the word "*bidᶜah*" in its linguistic sense, that is "welcoming something which was forgotten"; and that he did not use the word in the sense of a *bidᶜah* sharᶜiyyah.[45]

Imam Shāfiᶜi has, on the other hand, acknowledged that innovations are of two kinds; one of which violates the Qur'ān, the Sunnah, the precedent of the Companions, and *ijmāᶜ*, and the other is innovation in which there is some benefit. The first of these is misguided innovation (*al-bidᶜah al-ḍalālah*), but the second is not. The Shāfiᶜi jurist, Izz al-Dīn Abd al-Salām has taken this analysis one step further by stating that the beneficial *bidᶜah* may consist of an obligation, such as establishing courses to teach the Arabic language, or of something which is recommendable (*mandūb*), such as opening a school for general education. The misguided *bidᶜah* can also vary in the degree of enormity from a mere *makruh* (reprehensible), such as excessive adornment and decoration of a mosque, to that which is totally forbidden (*ḥarām*), such as reciting the Qur'ān in such a way that its words and meaning are distorted. And finally, a *bidᶜah* may be neutral (*mubāḥ*), such as the use of colouring in food. Those who advocate the idea of a good *bidᶜah* have interpreted the prophetic Ḥadīth, namely that "all *bidᶜah* is misguided" in such a way that the

word *bidᶜah* therein refers only to innovations which violate the Qur'ān and the Sunnah.[46] Imam Mālik has, on the other hand, totally rejected the notion of a good *bidᶜah*. He maintained that reading such a meaning in the words of the Ḥadīth amounted to an outright distortion which must be avoided.[47]

To those who take a totally negative view of *bidᶜah*, the latter may consist of an innovation in religion which is invalid *ab initio*, such as performing additional prayers in certain times of the year (in the month of Rajab, and ᶜĀshūrā e.g.), or it may consist of an addition to something which is basically valid. An example of this would be chanting or reciting prayer words in dance and rythmical movements. Conversely, *bidᶜah* may consist of detracting from the due measure of something, such as chanting the name of Allah as a singular noun, that is in isolation from His other attributes (like Almighty, the Beneficient, the Merciful etc.). And lastly *bidᶜah* may consist of reversing the correct order of something such as reading the sermon of the Eid prayer prior to the actual prayer - instead of it being read thereafter.

Some of the worst forms of *bidᶜah* that Khiḍr al-Ḥusayn has noted are ones which entail loss of property and life, such as placing food and valuables by the graves of the dead, or worse still, sacrificing and slaughtering animals in order to seek the pleasure of the dead and thereby seek protection from misfortune and evil.

One thing which is precluded from all of this is the findings of a qualified scholar (i.e. *mujtahid*) which may not be labelled as *bidᶜah* even if his conclusions happen to be innovative and conflict with the majority opinion. An opinion or *ijtihād* of this kind may not command authority and is considered to be no more than a weak opinion, yet it would be incorrect to apply the term *bidᶜāh* to a ruling of *ijtihād*.[48]

Al-Shāṭibi has also discussed the notion of a good *bidᶜah* and whether this is a concept which is substantially concurrent with *maṣlaḥah mursalah* (considerations of public interest) and *istiḥsān*. Although al-Shāṭibi advances the argument to the point which almost proves that these are all parallel concepts, he falls short of drawing this conclusion. He tells us, for instance, that many people have in fact considered *maṣlaḥah mursalah* to be essentially a form of beneficial *bidᶜah* (*bidᶜah mustaḥsanah*), and if *maṣlaḥah* was to be accepted as a valid principle then there would be no reason to deny the idea of a good *bidᶜah*, for the two concepts are essentially the same. Both of these are founded in the notion of what is proper under the circumstances (i.e. *al-ᶜtibār al munāsib*) for which no specific evi-

dence can be found in the Sharīᶜah. If *maṣlaḥah mursalah* commands any credibility then that should also be the case with regard to the *bidᶜah mustaḥsanah*.[49] Al-Shāṭibi goes on to point out that Imam Mālik and most Hanafi scholars have validated *maṣlaḥah mursalah* and *istiḥsān*. But, at this point he abandons the discourse, and seems to be returning to the Māliki position, which is that *maṣlaḥah mursalah* and *istiḥsān* have nothing to do with *bidᶜah*, that a *bidᶜah* may not be equated with either of these, and that *bidᶜah* are all misguided and that there is no such thing as a good *bidᶜah*.

The logical conclusion would be to say that *maṣlaḥah mursalah* and *bidᶜah ḥasanah* are parallel concepts and it would seem inconsistent to accept one and reject the other. If there is evidence in Sharīᶜah to validate *maṣlaḥah mursalah*, then that should also be the case with regard to *bidᶜah ḥasanah*. In my opinion, Imam Shāfiᶜi's affirmative stand with regard to accepting the notion of *bidᶜah ḥasanah* is more consistent and logical. It also stands to reason to read this interpretation into the text of the Ḥadīth, to the effect, that the Prophet has only denounced the pernicious *bidᶜah* which violates the established norms and principles of Sharīᶜah.

Al-Ghazāli divides the *mubtadiᶜ* into two types: one who invites others to *bidᶜah*, and the other who remains silent out of fear or personal choice. The first type of *mubtadiᶜ* may be propagating something which does not amount to infidelity (*kufr*) in which case the matter rests between him and God (*fa amruh baynah wa bayn Allah*). But if he invites the people to what may amount to *kufr*, he can be even more harmful than the *kāfir ab initio*. For the evil of the latter is not contageous, in the sense that he is known as a non-believer and, as such, the believers are not likely to pay attention to him. But *mubtadiᶜ* who actively propagates *bidᶜah* has a claim to righteousness and tries to spread corruption under the guise of truth; and this type of evil is contageous. This kind of *mubtadiᶜ* must be denounced and his wickedness exposed. People should openly show their disapproval of him; they should shun him, refuse to respond to his greeting (*sālam*) in public, and should avoid helping him or cooperating with him.

As for the commoner who indulges in *bidᶜah* (*al-mubtadiᶜ al-ᶜāmi*), but is unable to persuade others and is unlikely to command any following, then he should be given good counsel (*naṣiḥah*), and kind advice instead of stern treatment and humiliation. But if *naṣiḥah* proves futile and shunning (*iᶜrāḍ*) is called for, then this should be done. For if *bidᶜah* is not denounced, it is likely to spread and give rise to evil influences in society.[50]

Al-Shāṭibi advises reticence in relation to *bidᶜah* whose truth or falsehood is not known, saying: "We are commanded not to disseminate such views until the truth emerges".[51] In response to the suggestion by some ulema that *mubtadiᶜun* who propagate *bidᶜah* should be severely punished, al-Shāṭibi observes that they should be treated in accordance with the enormity of their conduct. If the *bidᶜah* is a minor one, they should be punished lightly, but if it amounts to a grave violation, the punishment should be proportionately increased. The author then concludes that *bidᶜah* is not a monolithic concept, nor is it a singular offence; that each *bidᶜah* should be viewed and evaluated individually; and that treatment or reprimand accorded to its perpetrator must be strictly determined on this basis.[52]

In concluding this discussion I will now refer to a response that Imam al-Ghazāli gave to the question of whether one should avoid discussing *bidᶜah* in any capacity, even if only to refute it.

In his work *Al-Minqidh min al-Ḍalāl*, al-Ghazāli addresses the question of incidental dissemination of *bidᶜah*. While referring to his own writings in refutation of the beliefs and doctrines of the Bāṭiniyyah, al-Ghazāli points out that "the result was that one of the Sunnites found fault with me for overstating the arguments and viewpoints of the Bāṭiniyyah. The criticism was that had it not been for al-Ghazāli pinpointing and marshalling the Bāṭiniyyah arguments, they would have been unable to defend and articulate their own doctrine." In the meantime, Al-Ghazāli accedes, but he refers to Aḥmad b. Ḥanbal's stand on this matter: Long ago, Aḥmad b. Ḥanbal found fault with al-Hārith al-Muḥāsibi for the latter's writings in refutation of the Muᶜtazilah. Al-Ḥārith replied that "refuting innovation is a duty." To this Aḥmad replied: "Yes, but you have first reported their specious argument and then responded to it. It is possible that a man may read only that part, or that only that part may stick to his mind!" Al-Ghazāli continued by adding that Aḥmad b. Ḥanbal's remark was valid, but that it had concerned a specious argument that had not become widespread and notorious. However, once such an argument becomes widespread, replying to it becomes imperative, and replying is possible only after setting forth the argument.[53]

Although in its literal sense, *hawā* can mean a passing whim, an inclination, or a desire without necessarily leading to either the formulation or expression of an opinion, the ulema have nevertheless used it to imply an opinion which originates in these impulses. This usage, which is basically a metaphor using the cause for the effect, is probably motivated by the frequent recurrence of the word *hawā*, and its derivatives, in the Qur'ān. *Hawā* has been defined as

"the pleasure seeking inclination of the soul (*nafs*) towards that which is not permitted by the Sharī^{c}ah."[54]

As already indicated, the Qur'ān refers to *hawā* in contradistinction with guidance (*hudā, dhikr*), and with deviation from the truth which the Qur'ān itself has expounded. It is in this sense that the Qur'ān warns the believers, on no less than twenty five occasions, against the dangers, incitement and temptations of *hawā*, and the hold that it can have on the hearts and minds of the people.[55] The phrase *ahl al-hawā* typically refers to those who say what they please, and who violate the truth by indulging in corrupt and distorted interpretations which are unacceptable to the mind and heart of the believer. For, whenever opinion is allowed to follow personal prejudice and desire, it leads to divergence from the truth and even to outright falsehood.

Among the instances of *hawā* is the personal desire to be the winner at all costs, regardless of the merit of one's case, or concern for the well-being of others. One of the worst forms of *hawā* is when personal craving for superiority and power masquerades under specious reasoning and plausible argumentation in the name of justice, piety, and truth. The hold that *hawā* can have on the minds and lives of people is depicted in the Qur'ānic text where the believers are asked the question, "Did you see the fate of one who took as his god his own vain desire – *hawā* – and God left him astray?" (al-Jāthiyah, 45:23)."

أَفَرَءَيْتَ مَنِ اتَّخَذَ إِلَٰهَهُ هَوَىٰهُ وَأَضَلَّهُ اللَّهُ.

Hawā occurs in the Qur'ān in contradistinction to the Sharī^{c}ah, as is shown in the following passage:

> Thus We gave you a Sharī^{c}ah (i.e. a path) in religion, so follow it, and follow not the desires (*ahwā'*) of those who know not (al-Jāthiyah, 45:18).

ثُمَّ جَعَلْنَٰكَ عَلَىٰ شَرِيعَةٍ مِّنَ ٱلْأَمْرِ فَٱتَّبِعْهَا وَلَا تَتَّبِعْ أَهْوَآءَ ٱلَّذِينَ لَا يَعْلَمُونَ.

Al-Zamakhshari elaborates the meaning of this *ayah*: Follow the Sharī^{c}ah which is founded in proofs and evidences, and let not yourself be tempted by the views and arguments of the ignorant which are founded in caprice and pernicious innovation (*hawā wa bid^{c}ah*).[56] Furthermore, the Blessed Prophet is on record to have addressed his followers that; "None of you can be a true believer

unless your desire (*hawā*) is made subservient to (the guidance) I have brought forth."

لا يُؤْمِنُ اَحَدُكُمْ حَتَّى يكونَ هَواهُ تَبَعًا لَمَاجِئْتُ بِهِ.

According to another Hadith: "Nothing that is worshipped on this earth is hated by God more intensely than *hawa*."[57]

مَاعُبِدَ تَحْتَ السَّمَاءِ اِلٰهٌ اَبْغَضُ اِلَى اللهِ مِنْ الهوىٰ.

Another instance of *hawā* which is clearly forbidden is when a person believes in the legality or prohibition of something and then ignores it when it applies to himself or his friends. To illustrate this, a person may demand his right of pre-emption (*shufᶜ*) while believing in its validity, but when someone else demands the same right of him, he ignores it, claims that it is unproven, and advances an opinion to that effect.[58] Similarly, a person may denounce another for a certain activity such as listening to music, but when his friends do the same, he claims that the prohibition of such activity is not proven, and that the subject remains open to *ijtihād*.[59]

The jurists have not specified any punitive measures for *hawā*, and no particular punishment for the perpetrator of *bidᶜah* either except for a form of social boycott (*al-hijr*, also referred to as *iᶜrād*) which is signified by refusing to greet the executor, or to speak to him, or to approve of his views. The ulema have spoken of *hijr* as a moral obligation of the community, regardless as to whether the perpetrator of *bidᶜah* is a relative, a neighbour, or a stranger, especially when the *bidᶜah* concerns the community at large, and violates what is referred to as the Right of God (*ḥaqq Allah*). But if the *bidᶜah* relates to private rights, such as consisting of a form of slander or libel, then greeting is permitted and *hijr* is not required. There is no maximum limit on the duration of *hijr* and it continues until the person repents and corrects himself. The community is under a moral obligation to denounce the *bidᶜah*, and those individuals who are able to produce evidence in its refutation, and who are in possession of authority and able to put an end to it, must do so.[60]

The ulema have held that it is a duty of the head of state to prevent *bidᶜah* and *hawā* in the government. This is a part of the general obligation of a nation's leader to facilitate the transmission and dissemination of knowledge whenever necessary, or when it is in the interest (*maṣlaḥah*) of the community. These duties of the head of state, comprise the following: Propagation of the faith by defending it against doubts and *bidᶜah*, and offering an adequate response to the

promoters of *bidᶜah* and *hawā*; inviting the disbelievers and the misguided to righteousness and truth; investigating and bringing together the various views concerning *bidᶜah* and *hawā*, and trying to resolve disputes over them by validating or authorising a view that seems best. Whenever the imam exercises this form of *ijtihād*, or when he selects the *ijtihād* of others for the purpose of general practice, even if that *ijtihād* is of disputed validity, it becomes authoritative nevertheless and action upon it becomes obligatory.[61]

2. *Baghy* (Transgression) and *Ikhtilāf* (Dissension)

Baghy means lawlessness, refusing to acknowledge the truth, and exceeding behavioural limits with corrupt intention, dishonesty, and arrogance.[62] *Baghy* also means disobedience to lawful government. In this sense, *baghy* is defined as a refusal to obey the lawful Imam who is not indulging in sin (*maᶜṣiyah*), whether or not such disobedience is based on an interpretation or a particular point of view, which the perpetrator believes to be the truth.[63]

An instance of *baghy* which is frequently encountered is when a person, or a group of persons, are engaged in a lawful pursuit but are denounced for wrongdoing by their opponents. In the sphere of religious rituals, such as the call to prayer (*ādhān*), standing to prayer (*iqāmah*), and even the contents of the ritual prayer - the followers of different *madhāhib* observe them with slight variations. Basically, all the variations are permissible as they all subscribe to the tenet of *ᶜibādah*; and a mere difference of form does not justify any claim to superiority or preference of one over the other. And yet, owing to *baghy*, the followers of some *madhāhib* have denounced and abused their counterparts in other groups for not following the rituals that they have themselves adopted. This behaviour is not even confined to rituals, but also occurs in other spheres. We know, for example, that the mystic has often criticised the jurist for the latter's zeal over the externalities of religion. The jurist has, in turn, criticised the mystic for his esoteric approach to religion and some of the rules and doctrines of the Sharīᶜah. Thus, each has denounced the other in disregard of their respective merits. The views of both the mystic and jurist partake in transgression as they indulge in self-righteousness and an unwarranted denunciation of the opposing views. The correct approach in such cases would be for both sides to assess the merit and demerit of each view, and then to acknowledge them accordingly without transgression and prejudice. All other considerations which are external to the essence of

the matter, such as the desire to expose the ignorance of one's opponent, or to establish one's own superiority and power, etc., must be excluded from the quest for truth and in the assessment or criticism of other opinions.[64]

Dissension (*ikhtilāf*) over the rituals of ᶜ*ibādāt*, including variations in the forms of the call to prayer (*ādhān*, and *iqāmah*); the Eid prayer; prayer at times of fear for one's safety (*ṣalāt al-khawf*); and other such rituals which vary in form but unite in the essence of worship are, according to Ibn Taymiyyah, a type of *ikhtilāf al-tanawwu*ᶜ, that is a variation which is devoid of substance. As opposed to *ikhtilāf al-taḍād* (disagreement over substance amounting to contradiction), *ikhtilaf al-tanawwu*ᶜ consists basically of a preference of one (of the two, or more) equally valid views over the other, which should be presented and evaluated as such. The essence of preference (*tarjīḥ*), according to Ibn Taymiyyah, is in the recognition of the basic validity of two views one of which may be recommended, while the other is neither denounced nor falsified.[65] The author then quotes the following relevant Ḥadīth, reported by ᶜAbd Allah b. Masᶜud:

> "I heard a man reciting an *āyah* (of the Qur'ān) which differed with what I had heard the Prophet s.a.w. reciting the same. So I took his hand and we went to the Prophet s.a.w. and reported the matter. Then I noticed signs of displeasure on his face and the Prophet said: "Both of you are right –*kilākumā muḥsin* – and neither of you should disagree over this. For many a people who came before you met with destruction because of disagreement over trivialities.[66]

سَمِعْتُ رَجُلًا قَرَأَ آيَةً سَمِعْتُ النَّبِيَّ ﷺ يَقْرَأُ خِلَافَهَا، فَأَخَذْتُ بِيَدِهِ فَانْطَلَقْتُ بِهِ إِلَى النَّبِيِّ ﷺ فَذَكَرْتُ ذٰلِكَ لَهُ، فَعَرَفْتُ فِيْ وَجْهِهِ الكَرَاهِيَّه وَقَالَ: كِلَا كُمَا مُحْسِنٌ، ولا تَخْتَلِفُوا ، فأنَّ من كان قبلكم اختلفوا فهلكوا.

Ibn Taymiyyah continues by saying that the Prophet forbade disagreement which consisted of *juḥd*, that is denial of the truth and veracity of the opinion or conduct of the other party. This was the case in the foregoing Ḥadīth where the Prophet drew the attention of the parties to the fact that disagreement which is devoid of substance is basically

destructive. The parties were both reciting the Qur'ān in different dialects, which was why the Prophet declared them both to be *muḥsin* (doing something good or beautiful), but they erred when they denounced and denied the validity of each other's opinion.[67]

As for *ikhtilāf al-taḍād* which amounts to contradiction, the two views at issue are diametrically opposed to one another in regards to either essentials or subsidiary detail or both. The majority opinion on this type of disagreement is that only one of the opposing views could be right and declared as such, but not both. Examples of this type of *ikhtilāf* among scholars are found over the issue of freewill and determinism, on the attributes of the Companions, and in the views and beliefs of different factions of jurists and *mutaṣawwifah* (mystics). The matter is different in *ikhtilāf al-tanawwuᶜ* where each of the two parties are undoubtedly right, but where blame befalls on one who exceeds the limits and resorts to *baghy* over the other.[68] In Ibn Taymiyyah's assessment, by far the greatest differences of opinion among the *ummah* fall into the latter category. These usually consist of mere variations, and amount to nothing than a different perspective or way of looking at reality and truth, and yet, they still lead to hostility and conflict. This is because neither of the disputing parties acknowledge the merit in the views of their opponents and both persist in self-righteousness and for superiority over the other.[69]

Religious and sectarian fanaticism of the type that lays exclusive claim to righteousness is, as one observer explains, a deviation from the valid precedent of the Companions and a form of *bidᶜah/baghy* which is found among the followers of different *madhhabs*. The exponents of such transgression among the Ḥanafis are often people who lay claim to piety and knowledge, and yet they propagate fanaticism in such ways as to proclaim invalid the *ṣalāh* of one who performs it behind a non-Ḥanafi Imam. They also vehemently denounce the raising of hands during ritual prayer upon descending to *rukuᶜ* (bowing), which is normal practice among the Shafiᶜis. There are, in fact, fanatics of this type in every *madhhab*, including the Shāfi'i, Māliki and Ḥanbali, who see the truth as a prerogative of the school of their own following. Even outside the sphere of *ᶜibādāt*, for example in matrimonial matters, these fanatics engage in transgression and *bidᶜah* when they forbid their daughters from marrying a Muslim who is not a follower of their own *madhhab*.[70] They are, indeed, deviating from the consensus of all the leading Imams who have urged their followers to adhere to the teachings of the Qur'ān and the Sunnah, and to abandon individual or scholastic opinions which do not conform to the authority of these sources.

Al-Shahristāni has held that *istibdād bi al-ra'y*, or imposing one's own opinion over others without clear authority, is transgression and *bidᶜah* which contradicts the precedent of the pious and upright ulema of the past. The same author adds that *istibdad bi al-ra'y* is not a *bidᶜah* when it is founded in knowledge and reason; it is only so when views of doubtful provenance and validity are inflicted on others.[71]

One of the manifestations of *istibdād bi al-ra'y* which often partakes in transgression and ignorance is the assumption that one's own knowledge, opinion, and belief is all that counts; that everyone must follow it; and that anyone who differs with it should be denounced. This type of person who persists in such an attitude has little regard for knowledge and truth and tends to ignore merit and reason in other people's opinion. This behaviour only leads to hostility and abuse, and as a result, no benefit can be expected.[72]

And finally, Ibn Qayyim al-Jawziyyah includes, under the category of reprehensible opinion, over-indulgence in personal preference (*istiḥsān*), and the advancement of analogies and speculative argumentation which verge on *hawā* and seek to circumvent the Sharīᶜah. He reflects that this kind of *ra'y* pays little attention to the origin and proper causes of the *aḥkām* of the Sharīᶜah and often deviates from their objectives. Over-indulgence in this type of *ra'y* leads to "suspension of the Sunnah, to ignorance, and to confusion in the correct meaning of the book of God, and to their ultimate neglect."[73] The author includes in this category, argumentation and opinion which originate in excessive questioning, and highly theoretical issues which have little bearing on reality and practical experience. He also points out that there is evidence in the Qur'ān and the Sunnah which discourages over-indulgence in such questions. Ibn Qayyim then quotes the relevant evidence and draws his conclusions that Islam shuns over-indulgence in opinions and questions that smack of a libertine attitude toward the authority of divine revelation. This is borne out, Ibn Qayyim adds, by the accepted principles of *uṣūl al-fiqh* on which the various schools are in agreement: Even a weak Ḥadīth is to be given priority over both *ra'y* and analogy (*qiyās*). But this only refers, Ibn Qayyim hastens to observe, to "that type of *ra'y* and *qiyās* which the generality of ulema have discouraged because they diverge from the Qur'ān and the Sunnah." As for *ra'y* whose conformity to, or divergence from, the Book of God and the Sunnah are not known, this type of *ra'y* may be adopted as the basis for action only when necessary, but that it carries no binding authority on anyone.[74]

I conclude this section by informing the reader that under the heading "Bidᶜah and False Doctrine Under Malaysian Law" I have surveyed provisions of the state enactments of Selangor, Perak, Terengganu, and Kedah on the teaching and propagation of "false doctrine". This information appears under Appendix II at the end of this volume.

II. Special Subjects

There is evidence in the sources which restricts freedom of speech with reference to particular subjects. Three of these which have been singled out in the Ḥadīth literature are the self or essence of God, freewill and predestination, and acrimony (*mirā'*, or *mumārāt*, also referred to as *jadal*). In this category of subjects, I have also discussed dissimulation (*taqiyyah*) as the Sunni ulema have discouraged *taqiyyah* except on grounds of necessity.

Historical evidence suggests that the first two of these themes became the focus of controversy among theological sects and factions during the period of the Companions, the Umayyads and ever since. The Kharijites were probably the first of the sectarian movements whose ideas and doctrines marked a departure from the mainstream of the theological thought and belief structure of Islam. Then there were a number of other movements such as the Muᶜtazilah, the Jahmiyyah, Qadariyyah, and others who became immersed in controversy and eventually lost their grounding. Among the reasons that are given for their failure was their aggressively polemic indulgence in debating subjects on which the Sunnah of the Prophet had advised restraint.[75]

1. THE SELF OF GOD (*Dhāt Allah*)

God has made Himself known to mankind by His most beautiful names– *al-asmā' al-ḥusnā* –which are all revealed in the Qur'ān, and it is through these that the believer must seek the knowledge of God, His attributes and His creation. Because of the exclusive validity and all-pervasive character of the Most Beautiful Names of God, the believer is forbidden from creating new names and attributes for God. The reason for this prohibition being that the believers have no direct knowledge of God beyond what transpired through the revelation of the Qur'ān. There are ninety-nine exalted names of God, all of which

are attributes that are descriptive of His being, and each of these is also a value that sets an example for mankind to strive for to attain in some measure. To negate or to reject any of these attributes not only destroys the foundation of belief but also amounts to a renunciation of the ideals of Islamic spiritual and cultural values. The exalted names of God are not listed in any particular section of the Qur'ān, but are scattered throughout the Holy Book.[76] With regard to these names, the Qur'ān instructs the believers as follows:

1.

وَلِلّٰهِ الْاَسْمَآءُ الْحُسْنٰى فَادْعُوْهُ بِهَا وَذَرُوا الَّذِيْنَ يُلْحِدُوْنَ فِيْ اَسْمَآئِهٖ.

God has (His own) exalted names, so call on Him by these and shun those who use profanity in His names (al-Aᶜrāf, 7:180).

2.

قُلِ ادْعُوا اللّٰهَ اَوِادْعُوا الرَّحْمٰنَ اَيًّا مَّا تَدْعُوْا فَلَهُ الْاَسْمَآءُ الْحُسْنٰى.

Say: Call upon Allah or call upon Rahman, by whichever name you call; to Him belong the Most Beautiful Names (al-Isrā' 17:110).

Having given the signs and attributes of God, the Qur'ān then discourages any attempt at personifying God or drawing any resemblance concerning Him that would reduce or define Him in any particular form: "Eyes cannot envisage Him but He knows what the eyes see and He is most gracious and aware (*al-laṭīf al-khabīr*) (al-Anᶜām, 6:103)."

لَا تُدْرِكُهُ الْاَبْصَارُ وَهُوَ يُدْرِكُ الْاَبْصَارَ وَهُوَ اللَّطِيْفُ الْخَبِيْرُ.

The last two words in this text are, incidentally, two of the exalted names of God. As this text shows, the actual sighting of God is not granted to anyone, including the Prophet Muhammad. However, an attempt was made by Prophet Moses, as the Qur'ān tells us, when he requested actual encounter with Allah s.w.t. Moses was told that "you cannot see Me, but look at the mountain; if you find the mountain stable in its place, then you may see Me..." (al-Aᶜrāf, 7:143).

لَنْ تَرٰينِيْ وَلٰكِنِ انْظُرْ اِلَى الْجَبَلِ فَاِنِ اسْتَقَرَّ مَكَانَهُ فَسَوْفَ تَرٰينِي...

The story goes on to say that God showed His illustrious being in the form of a flashing light in the direction of the mountain and by looking in that direction, Moses fell unconscious. When he recovered he praised God and repented and testified to his faith in Him (al-Aᶜrāf, 7:143).

Thus, the Qur'ānic evidence suggests that God is beyond the scope of human sense and intellect, and cannot be defined by it. Any attempt to do so is bound to engage in speculation, therefore, the Sharīᶜah discourages expatiation on the essence of God in order to prevent errors in the conception of His illustrious being.[77]

The Most Beautiful Names of God are to be taken for what they are, and they may only be attributed to Him according to their revealed literal meanings. Consequently, the few anthropomorphisms that occur in the Qur'ān (the eyes of God as in Hūd, 11:37; His face as in al-Raḥmān, 55:27, and so forth) have become the object of theological controversy in the schools of *kalām*. The central point in the debates advanced by the Ashᶜarites, the Muᶜtazilah and Māturīdis is the question of the reality of the attributes and their relationship to the essence of God.[78]

One of the controversial sects that invoked strong condemnation from the ulema was the Jahmiyyah, an offshoot of the Muᶜtazilah, which is named after its leading figure, Jahm b. Ṣafwān. Originally from Khurāsān, Jahm resided in Kufa and served as Chief scribe (*kātib*) to the Umayyad governor, al-Ḥārith b. Shurayḥ - both of whom were eventually assassinated in 128 A.H. Jahm acquired fame for his controversial views concerning the essence of God. He denied that God had any attributes (*ṣifāt*) and maintained that those which were found in the Qur'ān were not to be understood for their obvious meanings, as they were all allegorical (*mu'awwal*). As Jahm elaborated, if the obvious were to be upheld, it would amount to anthropomorphism, that is resembling God with His creatures, hence, it is necessary to discover the allegorical meanings of the attributes. As a corollary to this line of thought, Jahm further observed that the Qur'ān was created like the other creatures of God. Since God did not speak, in the ordinary sense of the word, the Qur'ān was not His speech. We merely say so as a figure of speech, that is by way of allegory (*ta'wīl*).[79]

Across the centuries, the ulema have denounced and refuted these views in the strongest terms and have maintained that the Qur'ānic attributes of God must be literally understood, and that any remote or allegorical interpretation of these must be avoided. Thus, according to al-Ghazāli, the right course to follow is to refrain entirely from changing the literal meaning and to be wary of introducing any interpretation which was not sanctioned by the Companions. Al-Ghazāli's advice is simply to shut the door to questioning altogether, and to refrain from engaging in discussion and inquiry into the attributes of God. Al-Ghazāli maintains the same view with regard to all the ambiguous or intricate words and expressions that are found in the Qur'ān (i.e. the *mutashābihāt*). To substantiate this advice, al-Ghazāli goes on to relate the story that someone asked the Caliph, ᶜUmar b. al-Khaṭṭāb, as to the approach that should be taken toward the conflicting *āyāt* that are found in the Qur'ān. Upon hearing this, the Caliph struck the man with a whip. A similar episode, which is widely quoted, has it that someone asked Imam Mālik about the meaning of the Qur'ānic phrase, "the being firmly seated" (*al-istiwā' ᶜala al-ᶜarsh* - i.e. of God on the Throne), and he replied: "The being firmly seated is something well-known, and faith in it is obligatory, its modality is unknown, and inquiry about it is a pernicious innovation."[80]

There is clear instruction in the Sunnah regarding the approach that the believers must take on this issue. Thus, according to a Ḥadīth, the believers are asked to "ponder over the creation of God, not about the self of God. For you will be unable to encompass the essence of God in its entirety."[81]

تَفَكَّرُوا فِي خَلقِ اللهِ وَلا تتفكّروا في الله فَإنَّكُمْ لَنْ تَقْدِرُوْا قَدْرَه.

The restriction is obviously based on the premise that human intellect is not endowed with the capacity to define its Creator, although it may explore and explain His attributes in relationship to those aspects of His creation which are known or can be known by it. In this way, our knowledge of God is directly related, as the Qur'ān indicates, to our knowledge of His creation. The Qur'ān on numerous occasions (al-Baqarah, 2:219; al-Aᶜrāf, 7: 116, etc.) invites attention to the signs in the creation of God which testify to His omniscience and omnipresence. We are, thus, encouraged to investigate the world around us, to acquire knowledge of the mysteries of creation, and through it also to increase our understanding of the attributes and exalted names of God.

Since human knowledge of the universe is incomplete, knowledge of the Creator of the universe must also be an ongoing process, and one which is unlikely to attain perfection. Investigating the essence of God, as ᶜAbduh points out, is an idle and dangerous exercise (ᶜ*abath wa muhlikah*) which seeks to fathom the unfathomable, something which is beyond human capacity. It is dangerous as it leads to error in belief. To specify the essence of God is an attempt at limiting the limitless, which is, in turn, tantamount to an attempt at belittling God Most High.[82]

2. FREEWILL AND PREDESTINATION *(Qaḍā' wa Qadar)*

The question as to whether people are free agents who cause and determine their own acts, and the consequences that they generate, or whether all this is predetermined in accordance with the foreknowledge and will of God, is clearly related to the understanding of God and His divine attributes. God has, as the Qur'ān proclaims, "created all things and measured them in due proportions," (al-Furqān, 25:2); so that every single incident and phenomenon which takes place anywhere in the universe is known to God (al-Anᶜām, 6:59).

– وَخَلَقَ كُلَّ شَيْءٍ فَقَدَّرَهُ تَقْدِيْرًا.

– مَا تَسْقُطُ من وَّرَقَةٍ اِلاَّ يَعْلَمُهَا وَلاَحَبَّةٍ فِيْ ظُلُمٰتِ ٱلاَرْضِ وَلاَرَطْبٍ وَّلاَيَابِسٍ اِلاَّ فِيْ كِتٰبٍ مُّبِيْنٍ.

But this measurement (*taqdīr*) is suggested to mean that God specified the nature of all things, and determined their place and relationship to the other parts of His creation. That this is the order of His creation, and that God has subjugated all things to the laws of casuality and purpose, and nothing in His creation is a complete void or accidental.[83]

Since we are unable to acquire full knowledge of the essence and scope of God's attributes such as His knowledge, wisdom, will, among others we are also unable to comprehend the nature of the relationship between God's will and human will, or between His knowledge and ours with clarity and certitude. Therefore, we do not know the precise nature of the interplay (if this is the right word), between our will, and the will and knowledge of God. The subject has aroused speculation and controversy in the various theological schools; the Muᶜtazilah, maintained a rationalist stance in favour of

freewill, the Ashᶜarites advocated predestination; while the Maturidis attempted a compromise between the two positions.

The Blessed Prophet has discouraged expatiation in the debate over freewill and predestination. Thus, according the a Ḥadīth, "indulging in disputation and polemics over freewill and predestination has been one of the principal causes of destruction (of the faith) of human beings".

اَصْلُ هَلَاكِ بَنِى آدَمَ اِنَّـمَا كَانَ اَلتَّنَازُعُ فِى القَدَرِ.

While quoting the above Ḥadīth, Ibn Taymiyyah observes that arguments over freewill and predestination have been the central theme of many factions, such as the Magians who elevated light and darkness into deities, and the Sabians and many others who argued about the causality of the acts of God. These sects determined the causes of God's acts on the basis of their own imaginations while drawing comparisons between God and His creatures, and this led them to deviation and misguidance.[84]

According to another Ḥadīth, the Blessed Prophet instructed the Muslims to exercise restraint when there is talk about destiny: "Restrain yourselves (from talking) about fate."[85]

اِمْسِـكُوا عَنِ القَدَرِ.

It is suggested that ᶜAli, the fourth caliph, relied on the authority of this Ḥadīth when he waged war against the Zandaqah (heretics) and tried to force them against propagating their misguided beliefs.[86]

The generally accepted belief, however, is that all events and activities pertaining to the life, acts, and conduct of an individual, take place according to God's will and knowledge. People are righteous or misguided, fortunate or wretched, because God has willed them such. But even so, human beings are responsible for their own deeds and individuals are endowed with the capacity and will power to plan and do things at their own initiative. These are merely some of the guidelines, but the exact nature of this issue is beyond the grasp of human knowledge.[87]

3. ACRIMONY AND SQUABBLING *(Mirā', Jadal* and *Khuṣūmah)*

The word *mirā'* (or *mumārāt)*, sometimes used synonymously with *jadal* (disputation), means indulgence in soul-destroying arguments which serve no worthy purpose and mar the climate of fraternity

and peace. *Mirā'* often consists of objecting to the speech of another person in order to show its defects explicitly, or by implication. The motive is usually self-commendation and the attribution of folly and ignorance to others. The hallmark of *mirā'* is that it humiliates its victim, and lead to embitterment and hostility.[88]

Jadal, too, consists of raising objections to the speech of another in an attempt to expose its defects, be it in regards to the words uttered, or their purport, or the intention of the speaker. *Jadal* and *mirā'* are basically interchangeable in this sense, and yet, the latter may differ from the former in that the purpose of *mirā'* is to humiliate another person by exposing his ignorance and establishing one's own superiority over him. Whereas *jadal*, depending on the intention behind it, may have a positive aspect, and could apply to argumentation which seeks to explore differences of opinion for a legitimate purpose.[89] If the underlying intention is good, it would be *jadal* in its positive sense, otherwise it would be the reprehensible form of *jadal*, which resembles *mirā'*.

As for *khuṣūmah*, it may be said to consist of disputation and of raising, rightly or wrongly, objections to the speech of another in pursuit of material gain. *Khuṣūmah* may be in response to someone else's speech, or it may initiate an argument, whereas *mirā'* normally consists of an objection to the speech of another person. The hallmark of *khuṣūmah* is excessive indulgence in speech in order to vanquish the opponent and attain one's own purpose. This may occur in any of the following three varieties:

(a) To engage in *khuṣūmah* without malice or causing harm in order to establish a right which is denied by the opponent. This type of *khuṣūmah* is permissible as the Sharī'ah entitles individuals to defend their rights in peaceful manners.

(b) When recourse to *khuṣūmah* is accompanied by violating the right of another and engaging in discourteous and hostile speech. This form of argumentation is undoubtedly reprehensible and must be avoided. The enormity of such *khuṣūmah* is accentuated in the Ḥadīth which proclaims that "The most disliked of men before God Most High is one who is most stubborn in *khuṣūmah* (in pursuit of falsehood)."[90]

أَبْغَضُ اَلرِّجَالِ الى الله تعالٰى اَلاَلَدُّ الخَصِمْ.

This Ḥadīth primarily applies to those who engage in disputes either in pursuit of falsehood, or over matters of which they have

little knowledge. For example, the disputant may be a lawyer who has not studied a case, or has studied it and knows he is in the wrong but he still chooses to fight it. Included in this category are also people who deliberately defend, or dispute over, false views and beliefs in order to influence the feeble-minded and the weak. An individual who disputes for a right cause, and yet, exceeds the limits of propriety by engaging in abusive language is also blameworthy although to a lesser degree than the one who argues in pursuit of falsehood.[91]

(c) When recourse to *khuṣūmah* is not in violation of the right of another, but merely for the sake of fun, or as a pastime which could, however, be obtained even without engaging in *khuṣūmah.* This is once again reprehensible although to a lesser degree than the second variety, quoted above. According to a Ḥadīth, reported by Jābir b. ᶜAbd Allah, the Blessed Prophet said "May the mercy of God be on one who is easy going when he sells, easy going when he buys, and easy going when he makes a demand."[92]

رَحِمَ اللهُ عَبْدًا سَمْحًا اِذَا بَاْعَ، سَمْحًا اِذَا اِشْتَرَى، سَمْحًا اِذَا اِقْتَضَى.

Mirā' is the most reprehensible of all the three varieties of abusive speech under discussion. It is often referred to as the opposite of *ḥusn al-khulq* (pleasant character). The leading ulema have cautioned against *mirā'* so much so that they have even discouraged asking questions which could mar the atmosphere of fraternity and good relations.[93] This attitude to *mirā'* that the ulema have taken is reflective of the overall message of the Sunnah which accentuates the moral enormity of *mirā'* to the extent that it interferes with the integrity of the faith of the believer. Thus, according to one Ḥadīth:

> Prefection in faith (*al-īmān*) cannot be accomplished unless the believer abandons lying in the jokes he makes, and abandons acrimony (*al-mirā'*) even if he is truthful.[94]

لَايُؤْمِنُ العَبدُ الاِيْمانَ كُلَّه حَتّى يَتْرُكَ اَلْكِذْبَ فى الْمَزَاحِ وَيَتْرُكَ اَلْمِراءَ وَلَوْ كانَ صَادِقًا.

The relevance of *mirā'*, to personal piety is seen in the following Ḥadīth which promises distinction and great reward for those who avoid practising it.

> One who abandons *mirā'* and yet he knows that he is right, a dwelling will be built for him in the highest echelons of paradise, and one who avoids it while knowing that he is wrong, a dwelling will still be built for him in paradise.[95]

مَنْ تَرَكَ الْمِراءَ وَهوَ مُحِقٌّ بُنِـىَ لَه الْبَيْـتُ فِىْ اَعْلَى الجَنَّةِ وَمَنْ تَرَكَ الْمِراءَ وَهُـوَ مُبْطِـلٌ بُنِىَ لَهُ الْبَيت فى ربض الجنة.

In both of these Ḥadīths, the message is clear that telling the truth should not justify engaging in acrimonious arguments, and that *mirā'* should be avoided at all times. The proper manner of engaging in argumentation, as specified in the Qur'ān and the Sunnah, is that it must be conducted in an elegant and tactful manner when dealing with Muslims and non-Muslims alike. *Mirā'* is in direct opposition to this behaviour, and according to al-Ghazāli, it is obligatory (*wājib*) upon every Muslim to avoid *mirā'* if he knows that he is in the wrong.[96] This statement is backed up by a Ḥadīth, which ᶜAli b. Abu Ṭālib has reported from the Prophet: "Whoever argues for what he knows is wrong calls upon himself the anger of God until he withdraws from it..."[97]

مَنْ خَاصَمَ فِىْ بَاطِلٍ وَهُوَ يَعْلَمُ لَمْ يَزَلْ فِى سَخَطِ اللهِ حَتَّى يَنْزِعَ.

This Ḥadīth, as one observer comments, clearly forbids deliberate distortion, and undermining the validity of a correct opinion with one which is known to be erroneous.[98]

Al-Ghazāli also quotes another Ḥadīth in which Abu 'Umāmah al-Bāhilī has reported the following:

> The Messenger of God came out and saw us while we were arguing (*natamārā*); he became angry and told us: abandon *mirā'*, for little good can come out of it; abandon *mirā'* as it is of little benefit and it causes hostility among brothers.[99]

عَنْ اَبی أُمامَه البَاهِلی قال: خَرَجَ عَلَيْنَا رسول الله ﷺ ونحن نَتَمَارَى فغضب فقال: ذَرُوا المِرَاءَ لِقَلَّةِ خيره، ذروالمراءَ فَاِنَّ نَفْعَهُ قَلِيْلٌ وَاِنَّهُ يُهَيِّجُ العَدَاوَة بين الاَخْوَانِ.

Thus, it appears from the preceding Ḥadīths that *mirā'* is a defect of morality and faith, and that it is a subject which cannot be properly addressed and regulated by legislation. Perhaps, this is why the Sharīᶜah has made no punitive provisions for *mirā'* other than giving moral advice and exhortation. But when this proves ineffective, then abandonment and social boycott is recommended. The following Ḥadīth is instructive as to the enormity of *mirā'* and how it compares with such other offensive behaviour as ridiculing others, and breach of promises. Of these three, the Ḥadīth apparently refers to *mirā'* first: "Do not dispute (*lā tumār*) with your brother, nor ridicule him, nor make him a promise which you do not honour."[100]

لَا تُمَارِ اَخَالَ وَلَا تُمَازِحْهُ وَلَا تَعِدْهُ مَوْعِدًا فَيُخْلِفَهُ.

Imam Aḥmad Ibn Ḥanbal is reported to have said that it is a hallmark of the *ahl al-Sunnah* (followers of the Sunnah) to abandon acrimony, and the following conversation took place between him and the interlocuter, ᶜAbbas b. Ghālib al-Warrāq:

> I asked Aḥmad b. Ḥanbal, that supposing I was at a meeting whose participants were ignorant of the Sunnah which was known only to me, if one of them spoke out and engaged in *bidᶜah* (i.e. opposite of the Sunnah) should I repudiate it? The Imam advised me not to engage in such an exchange. "Tell what you know of the Sunnah and avoid hostile exchange (*mukhāṣamah*). If you refute his speech you would be engaging in *mukhāṣamah*. If he does not accept it from you, then you should remain silent". Abbas also relates that Imam Malīk is reported to have advised the same behaviour.[101]

On a similar note, Al-Awzāᶜi made the following statement: "When God Most High intends to inflict calamity upon a people, He opens the door of *jidāl* (disputation) to them and closes the door of ᶜ*amal* (action) upon them. Imam Mālik has said that *mukhāṣamah* is not a part of religion. Imam al-Shāfiᶜi has said likewise that *mirā'* even in pursuit of knowledge blackens the heart and sows the seeds of hatred".[102]

4. DISSIMULATION (*Taqiyyah*)

Literally, *taqiyyah* means guarding or protecting oneself and it refers to measures that may be taken to protect oneself against harm on account of holding a particular belief or opinion which is opposed to the views of the majority. *Taqiyyah*, as such, is validated by Shī^{c}i law and it is generally treated as an integral part of the Shī^{c}i theological doctrines.[103] Thus, Shī^{c}i Islam allows its followers to conceal their true beliefs, opinions, and criticisms if this proves to be expedient and safe. Therefore a person who is permitted to hide his true beliefs in order to protect himself against hostility should, by the same token, be able to make statements which are contrary to his true conviction either to mislead others, or to please them by approving in his words that which he believes to be untrue.

The Sunni ulema have, in principle, proscribed *taqiyyah*, but this basic prohibition may be set aside in the event of dire necessity, that is when recourse to *taqiyyah* would repel an imminent danger to a person's life, to his honour, and to his property, or to ensure prevention of a grave bodily harm. However, in the absence of such fears, recourse to *taqiyyah* is prohibited.[104]

The following three Qur'ānic *āyāt* are quoted in support of this doctrine:

– Let not the believers take for friends or helpers unbelievers rather than believers; whosoever shall do this shall have nothing (no help) from God, except by way of precaution that you may guard yourselves from them guarding carefully. And Allah cautions you against His retribution, and to Allah is the eventual coming (āl-^{c}Imrān, 3:28).

لَا يَتَّخِذِ الْمُؤْمِنُوْنَ الْكٰفِرِيْنَ اَوْلِيَآءَ مِنْ دُوْنِ الْمُؤْمِنِيْنَ وَمَنْ يَّفْعَلْ ذٰلِكَ فَلَيْسَ مِنَ اللّٰهِ فِيْ شَيْءٍ اِلَّآ اَنْ تَتَّقُوْا مِنْهُمْ تُقٰةً وَيُحَذِّرُكُمُ اللّٰهُ نَفْسَهُ وَاِلَى اللّٰهِ الْمَصِيْرُ.

The second *āyah* begins by denouncing those who utter words of disbelief but makes an exception for those who do so under duress:

– Whosoever disbelieves in God after believing in Him, not he who is compelled while his heart remains steadfast in the faith, but he who opens his breast to disbelief – on them is the wrath of Allah, and for them is a grievous chastisement (al-Nahl, 16:106).

مَنْ كَفَرَ بِاللهِ مِنْ بَعْدِ اِيْمَانِهِ اِلاَّ مَنْ اُكْرِهَ وَقَلْبُهُ مُطْمَئِنٌّ بِالْاِيْمَانِ وَلٰكِنْ مَّنْ شَرَحَ بِالْكُفْرِ صَدْرًا فَعَلَيْهِمْ غَضَبٌ مِّنَ اللهِ وَلَهُمْ عَذَابٌ عَظِيْمٌ.

The third *āyah* begins by recounting the story when Pharaoh, Haman and Kora ordered Moses's followers to be killed, a man who was a believer but was concealing his faith questioned the wisdom of the proposed killing:

> And a believing man of Pharaoh's people, who hid his faith, said: Will you slay a man because he says My Lord is Allah, and indeed he has brought you clear evidence from your Lord . . . (al-Mu'minūn, 40:28).

وَقَالَ رَجُلٌ مُّؤْمِنٌ مِّنْ اٰلِ فِرْعَوْنَ يَكْتُمُ اِيْمَانَهُ اَتَقْتُلُوْنَ رَجُلًا اَنْ يَّقُوْلَ رَبِّيَ اللهُ وَقَدْ جَآءَكُمْ بِالْبَيِّنٰتِ مِنْ رَّبِّكُمْ...

Thus, a man who himself pretended lack of faith, or dissimulated, spoke in defence of a believer who was exposed to imminent danger. Furthermore, it is reported that the sixth Imām of Shīᶜah, Jaᶜfar al-Ṣādiq, affirmed *taqiyyah* as a necessary component of the faith, and an integral part of religion by saying: "He who has no *taqiyyah* has no religion. *Taqiyyah* is (a mark of) my religion and that of my forefathers."[105]

The Ḥanafi jurist, al-Sarakhsi, defines *taqiyyah* as dissimulation by a person when he says something which is contrary to his inner belief in order to protect himself against danger.[106] The Sunni ulema refer to the same Qur'ānic passages as are quoted by their Shīᶜi counterparts in support of the basic notion of *taqiyyah*, but the two differ widely in their interpretations of the textual evidence. The fundamental difference between them is that *taqiyyah* has no part as such in the Sunni theological beliefs, that it is a totally subsidiary matter in Sunni Islam, and that it is basicaly forbidden. In addition, *taqiyyah* may be practised only in cases of necessity, but not for purposes of expediency and opportunism. In Shīᶜi Islam, on the other hand, *taqiyyah* is a requirement and as such it occupies a far more prominent place. Moreover, the Shīᶜi beliefs encourage *taqiyyah* generally and do not confine its application to

any particular situation, whereas the Sunni ulema have attempted to minimise recourse to *taqiyyah*. This can be seen from the following four conditions that the latter have laid down in order to validate recourse to *taqiyyah*. Firstly, there must be such fear of danger that would necessitate recourse to *taqiyyah*. The absence of this condition would consequently make *taqiyyah* unlawful. Thus, if a person says an untruth merely to please others, or if he expresses support for the oppressive acts of a tyrant while he could have avoided the danger he feared through silence, he would have committed a transgression. Secondly, a person who resorts to *taqiyyah* and utters, for example, words of disbelief; may do so only with the knowledge that dissimulation would save him from danger. Thirdly, when there is no other escape from danger except by recourse to *taqiyyah*. Fourthly, that the danger so feared involves intolerable harm, whether to the person himself, or to someone else, or to the honour or properties of the parties involved. Thus, small hardships such as a slight hunger, detention or beating would not justify recourse to *taqiyyah*.[107]

The critics of *taqiyyah* have held that *taqiyyah* conflicts with the principle of *hisbah*, (commanding good and preventing evil), the principle of *naṣīḥah* (sincere counsel) and, most of all, the commitment of all believers to the values of truth and justice which are integral to Islam. A Shīᶜi writer, Hamid Enayat, tends to accede to the substance of this critique, and he goes further by observing that *taqiyyah* is also in conflict with the true character of Shīᶜi Islam. Thus, in Enayat's phrase "If Shiᶜism is to retrieve its pristine character as a creed of militancy, then it must go on the offensive in all areas of social and political life and this makes the *amr bi'l-māᶜruf* (commanding good) the strongest sanction of its campaign for the total regeneration of the community."[108]

The Sunnis have elaborated that the Sharīᶜah doctrine of *hisbah* has to some extent accommodated the basic notion of *taqiyyah*. The evidence to prove this comes from the Ḥadīth which specifies three levels of responses that a Muslim may give to an evil which he or she witnesses: To change it by one's act, or by one's words, or through silent denunciation – but this last response is referred to as the weakest form of faith. The Ḥadīth, which I have just paraphrased, leaves no doubt that taking positive steps, actual or verbal, in the fulfilment of *ḥisbah* merits a greater reward than mere silence. In other words it permits a limited form of *taqiyyah* by validating silent disapproval within the scope of *ḥisbah*, but it is obviously not recommended. The Sunni ulema, who have spoken at

length about *taqiyyah* have concluded that if everyone, especially the learned members of the community, adopted silence in the face of transgression and distortion of religion, then heresy and corruption will proliferate and the truth will be defaced in the eyes of the people. On the same theme, Imām Ahmad b. Ḥanbal has been quoted to have said that it is not permissible for one who is learned (*ᶜālim*) to speak for, or to condone, falsehood in his words while he knows that the Sharīᶜah grants him no such concession by way of *taqiyyah*. He continues: When learned persons indulge in dissimulation of this kind, the ignorant will not find guidance in their words as they would be likely to confuse the truth with statements that are made in pursuit of *taqiyyah*.[109]

It is interesting to note, however, the role that *taqiyyah* might have played in endorsing the Shīᶜi creed of militancy toward an unjust government. It has been argued that in the interest of political stability, scholars like al-Ghazāli and others went so far as to demand obedience to an unjust government which was in possession of military force. On the other hand, the Shīᶜi jurists, by recourse to *taqiyyah*, were able to coopreate for specific purposes with the holders of power, while refusing to accept in principle any responsibility for the existence of an unjust government. The result of both the Sunni and the Shiᶜi practices was political quietism, but while the Sunni ulema openly attempted to validate the exercise of power in the interest of stability, the Shīᶜi ulema refused to take part in validating the unjust government, and they were able to adopt that attitude by recourse to *taqiyyah*.[110]

NOTES

1. Muslim, *Mukhtaṣar Ṣaḥīḥ Muslim, K. al-Birr wa al-ṣillah, B. al-Nahy ᶜan al-ghiybah*, Ḥadīth no. 1806; Al-Nawawi, *Riyāḍ al-Ṣāliḥīn p. 487. Ḥadīth No. 1531.* The Ḥadīth is thus self-evident on the difference between *ghībah* and *buhtān*.
2. Al-Ghazāli, *Kitāb al-ᶜĀdāb*, p. 129.
3. Al-Nawawi, *Riyāḍ al-Ṣāliḥīn*, pp. 489-90.
4. Khiḍr al-Ḥusayn, *Al-Ḥurriyyah Fi al-Islam*, p. 55.
5. Al-Maqdisi, *Kitāb al-Adāb al-Sharᶜiyyah*, I, 7 and 276-77; Tuffāḥah, *Maṣādir* pp. 109-113; Khiḍr al-Ḥusayn, *Al-Ḥurriyyah*, p. 55.
6. Al-Maqdisi, Ibid.
7. Ibn Ḥanbal, *Fihris Aḥādith Musnad*, I. 440; Al-Ghazāli, *Kitāb Ādāb al-Ṣuḥbah*, p. 128.
8. Al-Maqdisi, *Kitāb al-Ādāb*, I, 13,14 & 23.
9. For detail see Tuffāḥah, *Maṣādir*, p. 123.
10. Al-Ghazāli, *Kitāb Ādāb*, p. 129
11. Ibid., pp. 128-131.

12. See e.g. *Ṣaḥīḥ Muslim* which has devoted a chapter to the subject entitled "Chapter on the Prohibition of Excessive Questioning Without Need" under *Kitāb al-Aqḍiyah*.
13. Al-Nawawi, *Riyāḍ al-Ṣāliḥīn*, p. 135, Ḥadīth No. 245; Al-Ghazāli, *Kitāb Ādāb al-Ṣuḥbah*, p. 344. Muslim and Abu Dawud also record a similar Ḥadīth albeit with minor differences of words. "Whoever conceals (the fault of a Muslim) God will conceal his fault both in this world and the Hereafter".
14. Al-Nawawi, *Riyāḍ al-Ṣāliḥīn*, p. 488, Ḥadīth no. 1530.
15. Tirmidhi, *Sunan*. III, 255, *Kitab al-Birr*, Ḥadīth no. 84.
16. Al-Ghazāli, *Ihyā' ᶜUlūm al-Dīn*, 2nd edn., Cairo: *Dar al-Fikr*, 1400/1980 6/26; Idem, *Kitāb Ādāb al-Ṣuḥbah*, p. 369.
17. Ibid, VI, 15-16. See also al-Ghazāli, *Kitāb Ādāb al-Suhbāh*, p. 345-46.
18. Al-Maqdisi, *Kitāb al-Ādāb al-Sharᶜiyyah*, I, 266.
19. Ṣaḥih Muslim, K. *al-Birr wa al-ṣillah*, B. *al-Nahy ᶜan al-tajassus*.
20. Al-Maqdisi, *Kitāb al-Ādāb*, I, 340.
21. Al-Tabrizi, *Mishkāt*, Vol. 3, Ḥadīth No. 5052.
22. Tuffāḥah, *Maṣādir*. pp. 89-90.
23. Al-Maqdisi, *Kitāb al-Ādāb*, I, 341.
24. Al-Ghazāli, *Kitāb Ādāb al-Ṣuḥbah*, pp. 242-43.
25. Muslim, *Mukhtaṣar Ṣaḥīh*, Ḥadīth No. 844; al-Maqdisi, *Kitāb al-Ādāb*, I, 41.
26. Al-Tabrizi, *Mishkāt*, Vol. 3, Ḥadīth No. 4839.
27. Al-Maqdisi, *Kitāb al-Ādāb*, I, 43.
28. Ibid.
29. Al-Nawawi, *Riyāḍ al-Ṣāliḥīn*, p. 483.
30. Abdullah Yusuf Ali, *The Holy Qur'ān, Text, Translation and Community*, f.n. 2238.
31. Ibid., f.n. 4504.
32. cf. Ghazawi, *Al-Ḥurriyyat*, pp. 56-57.
33. Al-Nawawi, *Riyāḍ al-Ṣaliḥīn*, p. 553.
34. Cf. Nieuenhuijze, *The Lifestyles of Islam*, p. 155.
35. Al-Shāṭibi, *Al-ᶜtiṣām*, I, 29. The Arabic definition of *bidᶜah* reads as follows: *Al-bidᶜah ṭarīqah fi al-dīn mukhtariᶜah taḍāhi al-sharīᶜah, yuqṣid bi al-sulūk ᶜalayha ma yuqṣid bi al-ṭarīqah al-sharᶜiyyah*.
36. Ibid., I, 50.
37. Ibid., I, 54.
38. Ibid., I. 38.
39. Ibid., II, 54.
40. Ibid., I, 240-80.
41. Ibn Qayyim, *ᶜIlām*, II, 230. The author discusses the sectarian views of the Jahmiyyah, Qadariyyah etc., and their temperings with the Qur'ān in some detail at pp. 220-31.
42. Al-Banᶜali, *Taḥdhīr*, pp. 38-8.
43. Ibid., p. 41.
44. Ibn Taymiyyah, *Iqtiḍā'*, I, 55.
45. Ibn Taymiyyah, *Iqtiḍā'*, I, 56; Idem, *Majmuᶜ al Fatāwā*, X, 371.
46. Khiḍr al-Ḥusayn, *Rasā'il*, II, 169.
47. Ibid.
48. Ibid., II, 171
49. Al-Shāṭibi, *Al-ᶜtiṣām*, II, 111 ff.
50. Al-Ghazāli, *Kitāb Ādāb* pp. 201-4.

51. Al-Shāṭibi, *Al-Muwāfaqāt*, IV, 104.
52. Ibid.
53. Al-Miṣri, *Al-Kulliyyāt*, V, 38.
54. Al-Ghazāli, *Al-Munqidh* (MaCarthy's trans.) p. 82.
55. Abu Ḥabīb, *Darāsah*, p. 454.
56. Al-Zamakhashari, *Al-Kashshāf*, III, 511.
57. Both Ḥadiths are quoted by al-Qurtubi in his *Tafsīr al-Qurṭubi*, XVI, 167.
58. Zaydān, *Majmuᶜah*, p. 298; al-Sibāᶜi, Ishtirākiyyah, p. 54.
59. Al-Maqdisi, *Kitāb al-Ādāb* I, 183.
60. Ibid., pp. 237. 269.
61. Ismāᶜīl, *Manhaj al-Sunnah*, pp. 330-32.
62. Zaydān, *Majmuᶜah*, p. 295.
63. While the Ḥanbali definition of *baghy* includes disobedience to an unjust ruler, the Ḥanafīs define it as disobedience to a just or lawful Imam only. See Ibn ᶜĀbidīn, *Ḥāshiyah*, 2nd edition, Cairo: Maṭbaᶜah al-Babi al-Ḥalabi, 1386/1966, III, 426; Yaḥyā Ismāᶜīl, *Minhaj al-Sunnah*, p. 147.
64. Cf. Zaydān, *Majmuᶜah*, pp. 277, 295.
65. Ibn Taymiyyah, *Iqtiḍā'*, p. 130.
66. Ibid., p. 123; Al-Tabrizi, *Mishkāt*, ed. al-Albani, I, 677, Ḥadīth No. 2212.
67. Ibn Taymiyyah, *Iqtiḍā'*, pp. 124-5.
68. Ibid., pp. 130-1.
69. Ibid., p. 134.
70. Al-Banᶜali, *Taḥdhir*, p. 61.
71. Al-Shahristani, *Al-Milal wa al-Niḥal*, p. 1045; Yaḥyā Ismāīl, *Manhaj al-Sunnah*, p. 106.
72. Ibn Taymiyyah, *Iqtiḍā'*, p. 127; Zaydān, *Majmuᶜah*, p. 299.
73. Ibn Qayyim, *Iᶜlām*, I. 57.
74. Ibid., I, 64.
75. For details on sectarian movements see Ibn Qayyim al-Jawziyyah, *Iᶜlām al-Muwaqqiᶜin*, I.57ff; Aḥmad Amin, *Fajr al-Islam*, pp. 252-307; Fazlur Rahman, *Islam* pp. 167 ff and Goldziher Introduction, pp. 167 ff.
76. Shalṭuṭ, *Al-Islam*, p. 330; Sardar, *The Future of Muslim Civilization*, p. 28.
77. Ibid., p. 380.
78. For further detail see Louis Gardet, "God in Islam", *The Encyclopedia of Religion*, VI, 29 ff.
79. Cf. Aḥmad Amin, *Fajr al-Islam*, p. 287.
80. Al-Ghazāli, *Al-Munqidh*, p. 158.
81. Al-Suyuti, *Jāmiᶜal-Ṣaghīr*, I. 227.
82. ᶜAbduh, *Risālah*, p. 51.
83. Cf. Al-Maᶜhad al-ᶜAlami, *Islamiyyah al- Maᶜrifah*, p. 84.
84. Ibn Taymiyyah, *Iqtiḍā*, pp. 143-44.
85. Ḥadīth narrated by Ibn Masᶜud and classified as Ḥasan, that is a degree below *Ṣaḥīḥ* (authentic); al-Tabarani has recorded it as such. A variant and somewhat clearer rendering of the same Ḥadīth appears in al-Ghazāli's *iḥyā'*, I, 50 as follows:

إِذَا ذُكِرَ الْقَدَرُ فَامْسِكُوا.

"Restrain yourselves when there is talk about *qadar*." Cf. Al-ᶜIli, *Al-Ḥurriyyat*, p. 422.
86. Al-ᶜIli, *Al-Ḥurriyyat*, p. 422.

87. Zaydān, *Majmuᶜah*, p. 234.
88. Al-Ghazāli, *Kitāb Ādāb al-Ṣuḥbah*, p. 129; Ḥammād, *Ḥurriyyah*, p. 124.
89. Fikri, *Al- Muᶜāmalāt*, p. 84.
90. Tirmidhi, *Sunan*, Ḥadīth No. 2976.
91. Ibid. p. 90
92. Al-ᶜAsqalani, *Jawāhir Ṣaḥiḥ al-Bukhari*, Ḥadīth No. 275.
93. Al-Ghazāli, *Kitāb Ādāb al-Ṣuḥbah*, p. 261.
94. Al-Maqdisi, *Kitāb al-Ādab*, I, 21.
95. Tirmidhi, *Sunan*, Ḥadīth No. 1993; Al-Ghazāli, *Kitāb Ādāb al-Ṣuḥbah*, p. 258; idem, *Ihyā'*, V, 179.
96. Al-Ghazāli, *Kitāb Ādāb al-Ṣuḥbah*, p. 258.
97. Ibn Ḥanbal, *Fihris Aḥadīth Musnad*, II, 70.
98. Ḥammād, *Ḥurriyyah*, p. 124.
99. Al-Ghazāli, *Kitāb Ādāb*, p. 259; Ibn Qudāmah, *Al-Mughni*, II, 180.
100. Al-Tabrizi, *Mishkāt*, Vol. III, Ḥadīth no. 4892.
101. Al-Maqdisi, *Kitāb al-Ādāb*, I, 226, 323.
102. Ibid., I, 227.
103. Cf. Enayat, *Political Thought*, p. 175.
104. *Al-Mawsuᶜah al-Fiqhiyyah* (of Kuwait), V, 185.
105. Quoted in Enayat, *Political Thought*, p. 176.
106. Al-Sarakhsi, *Al-Mabsut* XXIV, 48.
107. *Al-Mawsuᶜah al-Fiqhiyyah* (of Kuwait) V, 191 ff.
108. Enayat, *Political Thought*, p. 179.
109. *Al-Mawsuᶜah al-Fiqhiyyah* (of Kuwait) V, 199.
110. Cf. Lambton, *The State*, p. 263.

Part Four

LEGAL RESTRAINTS

I. Introductory Remarks

Freedom of expression is, broadly speaking, subject to the same general restrictions which apply to other rights and liberties. The most important of these is avoiding harm to others, therefore freedom of speech must not be used to be hurtful to others nor to encroach on people's rights or their dignity. Similarly, It falls beyond the scope of the valid exercise of this freedom to be used as a means to cause chaos, violence or social strife.[1] Furthermore, freedom of speech, like other liberties, is subservient to the essential interests (*maṣāliḥ ḍarūriyyah*)[2] and values that are needed to maintain a stable socio-political order in society.[3] Therefore, exercise of this freedom must not jeopardise the five essential values of life, faith, intellect, lineage and property. As a general rule, the underlying intention of a speech, and the purpose that it pursues plays a significant role in determining its legality. Has the right of speech been exercised in order to discover truth? To attract benefit? To fulfil a legitimate need, or to injure others? These are among the questions that frequently arise in judicial disputes over the abuse of this freedom. The question of the intent behind words does not fail to command attention, and yet, there might be instances when this freedom is violated such as when others are insulted but when the words uttered are all that count and they may render the question of intention to be totally insignificant.

Under the Sharī^{c}ah, violations of the freedom of speech occur either in the form of particular offences, such as slanderous accusation (*qadhf*), blasphemy, sedition (*fitnah*), insult and cursing (*sabb, la^{c}n*), attribution of lies, and disbelief to others (i.e. *iftirā'* and *takfīr*). It may also take the form of a contempt to, or a denial of, the accepted norms and principles of Islam which may fall under the general headings of *kufr*, and heresy (*bid^{c}ah*). Some of these are criminal offences and carry specific penalties, whereas others are not so well defined and often tend to invoke a moral condemnation only. This chapter examines each of these violations in light of the evidence found in the valid sources and the juristic formulations of the *fuqahā'*.

II. Public Utterance of Evil Speech

The title of this section is a direct translation of the Qur'ānic phrase, *al-jahr-bi'l-sū' min al-qawl*, perhaps one of the most far-reaching of

the Qur'ānic enactments which offer guidelines on the restrictions that may be imposed on freedom of speech. The passage where this phrase occurs is as follows:

> God loves not the public utterance of evil speech (*al-jahr bi'l-sū' min al-qawl*) except by one who has been wronged. God is ever hearer and all-knowing. If you do good openly or keep it secret or forgive evil, (then rest assured that) God is forgiving (al-Nisā', 4:148-149).

لَا يُحِبُّ اللهُ الْجَهْرَ بِالسُّوْءِ مِنَ الْقَوْلِ اِلَّا مَنْ ظُلِمَ
وَكَانَ اللهُ سَمِيْعًا عَلِيْمًا اِنْ تُبْدُوْا خَيْرًا اَوْ تُخْفُوْهُ اَوْ تَعْفُوْا
عَنْ سُوْءٍ فَاِنَّ اللهَ كَانَ عَفُوًّا قَدِيْرًا.

Al-Jahr literally means broadcasting or publicising, whereas *sū'* denotes something evil, or hurtful. Words uttered in public which hurt another person by violating his honour of causing him physical harm and loss of property, whether directly or indirectly (such as by abusing his close relatives and homeland) are all included in this *āyah*. Hurtful speech, in this text, also comprises that which is addressed to an individual, to the multitudes or to the community at large. Furthermore, the text is broad enough to comprehend all modern methods and facilities which are used for the purposes of publicity and broadcasting.[4]

In their commentaries on this *āyah*, the *mufassirūn* indicate that the text here denounces utterance of offensive speech absolutely, that is regardless of the end it may serve, or the context in which it may occur. The text does not, for instance, draw any distinction as to whether the speech so uttered consists of truth or falsehood, or whether it contemplates any kind of benefit. With only one exception, which is specified in the text itself, all varieties of hurtful speech that are made in public are proscribed. The only exception here is made for a person who has been wronged, and his cry for justice must be granted a hearing even at the expense of it being hurtful. Public utterance of evil speech, may consist of speaking ill of others and finding faults in their character, or of attributing misdeeds to individuals and their families. It may also consist of self-gratification and indulgent speech concerning evil deeds committed by oneself, such as adultery, wine-drinking, gambling, or tricks and designs which lead to these. Also included is the publication of obscene literature and the displaying of it in public places, and other forms of misleading advertising which

are all different manisfestations of *jahr bi'l-sū'* – all of these are forbidden. The only exception that the Qur'ān has granted aims at encouraging the quest for justice, which is given priority over the prevention of evil speech. However, even then *jahr bi'l-su'* must be confined to the extent that is deemed necessary without any excess.[5]

Public utterance of evil speech has, thus, been permitted only in order to fight oppression or *ẓulm*, consequently, *jahr bi'l-sū'* is unlawful in the absence of *ẓulm*. For a society in which unlimited evil speech is accepted and unchecked can only expect the decline and ultimate destruction of its moral and cultural values.[6] As already indicated, the scope of the *āyah* under discussion is also broad enough to include virtually all the specific violations of freedom of speech including slander, insult, cursing, sedition, and so forth. The one exception which is made to the general purport of the text indicates that the Qur'ān attaches a higher value to justice then to the prevention of evil speech. Yet, while granting the oppressed party recourse to unrestricted freedom of speech, the succeeding portion of the same *āyah* urges everyone concerned, especially the victim of the abuse, to forgive, whether privately or in public, and to show lattitude and tolerance in anticipation of mercy and reward from God Most High. Thus, while justice must be served and oppressed persons must be granted the opportunity to express their grievances, there may be instances, as the Qur'ān reminds us, where maintaining peaceful communal relations may merit greater attention. To this end, it is forgiveness and tolerance that often commands priority over a persistent demand for retributive justice. As indicated in the following text, the Qur'ān repeatedly stresses the value of forgiveness: "Those who swallow their anger and forgive others" are elevated, to the rank of the virtuous (*muḥsinīn*). And, in yet another text we read "Those who exert patience and forgiveness, they shall attain the greatest achievement." (āl-ᶜImrān, 3:134; Al-Shūrā, 42:43).

– الَّذِيْنَ يُنْفِقُوْنَ فِى السَّرَّآءِ وَالضَّرَّآءِ وَالْكَاظِمِيْنَ الْغَيْظَ وَالْعَافِيْنَ عَنِ النَّاسِ وَاللّٰهُ يُحِبُّ الْمُحْسِنِيْنَ.

– وَلَمَنْ صَبَرَ وَغَفَرَ اِنَّ ذٰلِكَ لَمِنْ عَزْمِ الْاُمُوْرِ.

As for people who persist in defaming others, who disseminate evil, and expose the weaknesses of others, the Qur'ān warns them of the bitter consequences of their conduct:

Those who love to publicise and broadcast scandal among the believers will have a grievous punishment in this life and the Hereafter; God knows best and you know not (al-Nūr 24:19).

إِنَّ الَّذِيْنَ يُحِبُّوْنَ اَنْ تَشِيْعَ الْفَاحِشَةُ فِى الَّذِيْنَ اٰمَنُوْا لَهُمْ عَذَابٌ اَلِيْمٌ فِى الدُّنْيَا وَالْاٰخِرَةِ وَاللّٰهُ يَعْلَمُ وَاَنْتُمْ لَا تَعْلَمُوْنَ.

The emphasis, here is obviously not on forgiveness but on punishment as the text only refers to *'adhāb* (punishment) followed by the sober expression; "God knows best and you know not." Sternness is obviously recommended when there is no room for leniency and forgiveness.

The correct guidance that the Sunnah provides is not only to avoid the utterance of hurtful speech, but also to contribute positively to fraternity and peace in society. This is the purport of this Ḥadīth: "A Muslim is one from whose tongue and hand other Muslims are safe."[7]

الْمُسْلِمُ مَن سَلِمَ الْمُسْلِمُونَ مِنْ لِسَانِهِ وَيَدِهِ.

Although the text refers to Muslims, the message in it is, however, not confined to the believers alone as one observer notes, the Ḥadith speficies Muslims, "because it is with one's own community that one has largely to deal. But the aim is to lay down the foundation of a world-wide brotherhood in which everyone should feel safe."[8] To maintain peace and order in society and to promote fraternity among Muslims is indeed the ultimate goal of the restriction that the Sharīᶜah imposes on freedom of expression.[9]

The Sharīᶜah, however, does not propose any punishment nor even lay blame, on a person who tells the truth and calls things by their rightful names. Hence, no punishment is envisaged for one who calls the adulterer *yā zānī* (O adulterer) provided that this statement is proved to be a fact. It is also permissible and justified under the principle of *ḥisbah* (promoting good and preventing evil) to point out the misdeeds and shortcomings of government employees, people's representatives in national assemblies, and anyone engaged in public services provided that the charges so made can be established by evidence.

Furthermore, the Sharī^{c}ah does not grant special priviledges to individuals or groups in regards to statements made by them, nor does it recognise any special status for a member of parliament, or even for the head of state, in regards to what they say. Also, the same unitarian approach to justice and truth that is characteristic of Islam and its philosophy of *tawḥīd* is reflected in the court organisation of the Sharī^{c}ah which, under normal rules does not allow the setting up of specialised tribunals for civil servants, or for holders of high offices of state. Everyone is answerable for his or her abuse of rights before the same courts, and the unitary standards of justice and propriety in speech and conduct apply to everyone alike.

III. Slanderous Accusation (*Qadhf*)

Indicative of the serious view that Islam takes when the honour and good name of a law abiding individual is attacked, the Qur'ān prescribes a mandatory punishment for slanderous accusation, besides a handful of other offences – collectively known as the *ḥudūd*. Furthermore, even when the slanderer is duly tried and punished for the offence he is liable to yet another supplementary punishment, which is to bar him permanently from being a witness in a court of law. For slander, once committed, tarnishes the good name of its victim, who may well have suffered irreparable damage to his reputation.[10]

Literally, *qadhf* means "throwing" words of abuse at others. In this general sense, *qadhf* could comprise all forms of abusive words including slander, libel, insult and cursing etc.[11] However, the Qur'ānic offence of *qadhf* is a more specific concept which consists of either accusing another person of committing the act of adultery (*zinā'*), or denying legitimacy of his or her child. In the former case, anyone who accuses an innocent man or woman is liable, upon proof, to a punishment of eighty lashes. However, if the accuser can produce four witnesses to testify as to the truth of his or her accusation, then the charge is proven and the accused becomes liable to the punishment of *zinā'*. If the accuser fails to provide evidence then he becomes liable to the punishment of *qadhf*. All other types of allegations, such as accusing another person of bribery and other offences are liable to the discretionary punishment of *ta^{c}zīr*.[12]

The accuser may be a Muslim or a non-Muslim, but the person accused of *qadhf* must be a *muḥṣan*, that is a married Muslim of upright character who has not committed *zinā'* or apostasy (*riddah*)

prior to his or her accusation. But, it is not necessary for the accused to be clear of all acts of criminality. The prescribed penalty for *qadhf* is applied only if the victim (*maqdhuf*) demands it, and the accuser fails to prove the accusation. The slanderer is liable to the same punishment if the victim is a deceased person, in which case the heirs may demand that the accuser be punished. The offence of *qadhf* must in all cases be proven by the normal means of proof, including the testimony of two just witnesses, and confession.[13]

Qadhf may be divided into two types: One is *qadhf* proper, consisting of the accusation of adultery as discussed above, which carries the prescribed punishment of eighty lashes. The second type of *qadhf* may consist of any other abusive speech such as insult, libel, and the accusation of criminal conduct. The victim need not be a *muḥṣan*, that is a married Muslim of upright character. The subject matter of the accusation may, likewise, be any criminal act such as theft, homicide, or fraud, or it may consist of an insult (*sabb*), which is somewhat different from slanderous accusation. The former requires no proof as to its veracity as the mere utterance of insulting words are enough for the offence to materialise, regardless as to whether they are truthful or not. If, for example, one person calls another an ass, this is naturally not amenable to proof. *Qadhf* proper is, on the other hand, open to affirmation or denial as it is usually possible to prove a slander to be either true of false. An insult, however, is expected to be untrue and the meaning it conveys cannot generally be proven by evidence.[14]

Sabb (insult) also differs from *qadhf* in that the latter does not materialise without attributing a specific charge to another person, whereas *sabb* can be a general attribution which humiliates the person to whom it is addressed. When, for example, a person calls another a thief or a drunkard, these are specific charges which are also recognised offences under the law and are amenable to proof. However, a general attribution, such as calling another person "immoral" is in the nature of an insult, but does not qualify as *qadhf*. Sometimes, though, the distinction between the two may be unclear, in which case the court may have to determine.[15] In its assessment, the court will refer to popular custom as this is the main indicator with regard to words and expressions which are not self-evident. Only in the case of the Qur'ānic offence of *qadhf* which carries a prescribed penalty, is it necessary that the words uttered leave no doubt as to their meaning. If there are doubts, however insignificant, the prescribed punishment would not apply, but the judge may still sentence the offender to a lesser punishment under *taᶜzīr*.[16]

The leading Imāms of jurisprudence are in agreement that repeated slanderous accusation addressed to the same person, whether uttered on one or several occasions prior to sentencing, invokes only one punishment. Also, the prescribed penalty of eighty lashes is equally applicable to cases when the slanderous accusation is addressed to a multitude of people. The only difference of opinion, here, is whether the offender should be punished for one or for several offences of *qadhf*. The Imāms Abu Hanifah, Malīk, Ibn Hanbal and Thawri have held that the offender may be punished only once, whereas, according to Imām Shafī^{c}i, the slanderous accuser is to be punished as many times as the number of individuals in the group. According to a third opinion, if a group of people are accused all in a single instance such as when they are addressed "O adulterers", this would be punishable as a single offence, but if each member of the group is individually addressed, then a separate offence would have been committed in respect of each. This ruling is based on the analysis that violation of a person's rights does not in principle admit amalgamation and overlap (*tadākhul*); hence, every instance of *qadhf* addressed to different individuals is treated as a separate offence. *Qadhf*, in this respect, differs from other *ḥadd* offences as they consist mainly of the violation of the Right of God, and, as such, several instances of the violation carry only one punishment.[17]

There is some disagreement among legal schools as to whether the punishment of *qadhf* can be dropped if the accused forgives the offender. The Ḥanafis are of the view that *qadhf*, like the other *ḥadd* offences, is a violation of the Right of God and that pardon by the victim may not obstruct enforcement of the prescribed punishment. On the other hand, the Shafī^{c}is and Ḥanbalis have held that *qadhf* is a violation against the Right of Man (*haqq al-^{c}abd*), therefore, the victim is entitled to grant a pardon in which case no penalty would apply. The Mālikis concur with this view but, with the proviso that the victim may pardon the offender prior to the commencement of judicial proceedings. The Shafī^{c}is and Ḥanbalis, on the other hand, allow the pardon to be granted either before, or after, the commencement of judicial proceedings, and this is considered to be the preferred view.[18]

It is not necessary for *qadhf* to be uttered in public as it can be committed in both public places or in private dwellings; in the presence of other people or away from public sight. This ruling is founded on the analysis that dignity is an inherent attribute of humanity which does not vary with changing circumstances.[19] Besides, the Qur'ān invites the believers to "abandon all sin openly as well as in secret" (al-An^{c}ām, 6:120).

وَذَرُوْا ظَاهِرَ ٱلْاِثْمِ وَبَاطِنَهُ.

As already discussed, there is another Qur'ānic text which declares that "Allah loves not the public utterance of evil speech except by one who has been wronged" (al-Nisā', 4:148). Although this *āyah* suggests public utterance as the criterion of assessing the offensive character of a particular speech, the passage itself does not lay down this as a condition. The text may be said to be referring to the worst of the two ways in which *qadhf* is committed, but the circumstances in which it is pronounced does not necessarily change the substance of the speech in question. As a general rule, the prescribed punishment (*ḥudūd*) are enforced only when they are proven beyond doubt. Thus, only the explicit instances of *qadhf*, that is the unequivocal attribution of *zinā'* to an upright person, would invoke the penalty of eighty lashes. All other varieties of implicit slander would fail to qualify for this, but they may still be punished by a lesser penalty under *taᶜzīr*. Thus, if someone addresses another in such terms as' "I have not committed adultery, nor have my parents. Can you say the same about yourself?" Then statements of this kind, often referred to as *al-tarᶜīḍ bi al-qadhf* (attempted *qadhf*), are not free of doubt and are likely to fall within the purview of the Ḥadīth which provides "Drop the *ḥudūd* in all instances of doubt."[20]

إدرأ والحُدُود بالشبهات.

Finally, the rules of Sharīᶜah pertaining to *qadhf* apply to men and women alike, despite the contrary impression one may obtain from the wording of the Qur'ānic text. There is also a gender bias in the nature of this offence, as the ulema have often pointed out, in that women tend to be the more likely victims of *qadhf*. For example, the Qur'ānic text in Surah al-Nūr (24:4) begins by *walladhīna yarmūn al-muḥṣanāt* (and those who accuse chaste women...). Here, the pronoun *walladhīna*, being in the masculine form, refers to men. Similarly, the word *al-muḥṣanāt* is in the feminine plural and it therefore refers only to women. But, the ulema across the *madhāhib* have maintained the view that this Qur'ānic text is still applicable to men and women alike. Thus, it makes little difference, in so far as the application of this text is concerned, whether the offence is

committed by a man or a woman, and whether the victim is male or female. Also, both sides may belong to the same gender, or they may differ in any combination, yet none of this effects the general import of the text under discussion. Indeed, it is not unusual that the Qur'ān, as is also the case in other legal texts, uses masculine pronouns to include the feminine gender. The Qur'ān has merely referred to the perpetrator of *qadhf* in the masculine plural as this is known to be the more common variant, but it is not meant to preclude women from the rank of potential perpetrators.[21]

IV. Libel (*Iftirā'*)

Iftirā' means attribution of lies to another person, maliciously accusing another person of criminality, or inventing something about an individual which he or she has not done. In its Qur'ānic usage, *iftirā'* is synonymous with lying (*kidhb*)[22]; and in the juristic manuals of *fiqh*, *iftirā'* (also referred to as *firyah*) is treated as a subcategory of slanderous accusation or *qadhf*, and the rules that apply to *qadhf* are also applicable to *iftirā'*.

The maximum penalty for *iftirā'* is the same as that of *qadhf*, which is eighty lashes. All other varieties of false accusation, whether of adultery or other offences, which do not amount to *qadhf* may amount to criminal libel and invoke a deterrent punishment of *ta'zīr*.[23] As Ibn Taymiyyah explains: Slander normally consists of accusation that cannot be retaliated in kind, hence, the rules of just retaliation (*qiṣāṣ*) cannot be invoked in regards to this offence. Accordingly, if someone accuses a chaste woman of adultery, and fails to prove the charge by the testimony of four witnesses, then the accuser is liable to a punishment of eighty lashes. Similarly, if a man accuses a chaste man of either adultery or sodomy, and fails to prove it, he is liable to the same punishment. However, if the slanderous accusation is other than these, then the accuser would be liable to lashes under *ta'zīr*, and furthermore, if the accused person chooses to forgive the accuser, no punishment will be imposed. For according to the majority of jurists, in all cases of retaliation, as well as in misappropriation of property, the personal rights of the defendant and the owner, respectively, take priority over the Right of God.[24]

The judge may also exercise discretion as to whether or not to grant a hearing to claims which seem unfounded or which partake in the abuse of right (*sū' isti'māl al-ḥaqq*). Admittedly, every indi-

vidual has the right to seek judicial relief, and initiate a law suit in the court of justice, but if a claim, by all indications seems false, and aims at inflicting harm on the good name and reputation of another person, then the judge may deny it a hearing, and may punish the claimant if the falsity of the claim is supported by circumstantial evidence (*al-qarā'in*). For example, according to the jurists of the Mālikī school, if, poor and needy persons bring claims against dignitaries with the intention merely to tarnish their reputation, and to cause them to stand before the court, the court may deny such claims to a hearing and punish the accuser. For this type of action is an abuse of the right of seeking judicial relief.[25]

Iftirā' differs from a simple lie (*kidhb*) in that the former is normally coupled with malice – that is the intention to defame another person – whereas this may not always be the case with regard to lying.[26]

The test in *iftirā'* is not whether the charge it contains amounts to criminality, but whether it qualifies under the Qur'ānic criterion of "evil speech". This may be in any form including written words, signs and pictures.[27] Speech which does not fulfil this test would, therefore, not amount to libel and must be tolerated. If a speech is deemed to be evil and hurtful, then it must violate the personal honour and dignity of the individual.

Libel, lies and false accusation are abuses of the freedom of speech which are not amenable to just retaliation (*qiṣāṣ*). If *qiṣāṣ* can be applied, then it is in principle applicable. But, this is usually not so, in which case the punishment of libel is determined under the principle of *taᶜzīr*,[28] which may consist of disciplinary and punitive measures to be determined by the judge. Alternatively, the punishment may consist of *taᶜzīr bi'l-māl*, or damages for the plaintiff, which must commensurate with the harm caused, the social status of the plaintiff, and the prevailing custom of the community.[29]

In order to execute the punishment, whether in slander or libel, the plaintiff must request it, failing which the penalty cannot be enforced. If the victim in either *qadhf* or *iftirā'* is notorious for corruption and is known to be a person of compromised integrity, the accuser is not liable to any punishment. Furthermore, if the libelous speech is injurious to the community, and threatens its moral and religious values, then the Right of God takes priority. The offender must, consequently, be punished, and no one would be entitled to grant him a pardon.[30] In determining the nature and quantum of the *taᶜzīr* punishment in this case, the judge, or the head of state considers the interest (*maṣlaḥah*) of the community, the

nature of the conduct and the conditions of the offender. For offenses pertaining to speech, *taᶜzīr* should, in principle, not exceed the *ḥadd* for slanderous accusation (*qadhf*). There are, however, differences of opinion on this point. Jurists who maintain that *taᶜzīr* penalty should commensurate with the nature of the offence and the interests of community, do not overrule the possibility of *taᶜzīr* exceeding the *ḥadd* of *qadhf*, and furthermore, they maintain that the judge or the Imam has the discretion to sentence the offender to a heavier punishment, whether this consists of lashes or other punitive and disciplinary measures.[31]

In all cases of criminal libel, the subject of the accusation or the conduct which it refers to is, in principle, open to enquiry and proof. When someone is accused, for instance, of a criminal act such as theft or murder, and so on, and the accused person is, by all appearance, not likely to have committed the offence, the claim may still be investigated, and when the claimant fails to prove his accusation, the accused person may wish to restore his good reputation by suing the accuser for *iftirā'*. However, the latter may be punished for the offence only if he had intented to harm the plaintiff or to damage his personal honour and reputation.[32]

V. Insult (*Sabb*, or *Shatm*)

An insult can refer to any word, expression, or gesture which attacks the dignity of the person to whom it is addressed, and which humiliates the latter in the eyes of his or her compatriots. No legal authority provides an exhaustive list of words and expressions that may be classified as *sabb*. Instead, the law refers to the prevailing social customs which are adopted as the principal indicators in order to assess the abuse. While certain words and expressions are generally known to be insulting, there may be instances where their precise significance needs to be measured in the light of prevailing circumstances, such as the social status of the victim, and the context in which words were expressed. As Ibn Taymiyyah has observed, a word may amount to *sabb* in certain circumstances but not in others, and that without reference to circumstances, neither the language nor the law may be expected to provide definitive guidelines.

Insulting words must be hurtful, but they need not be uttered in public in order to qualify as *sabb*. Similarly, the intention behind the words uttered is not of great significance, especially when the

words in question are common words of insult and their purport can be objectively ascertained.[33]

Insult to all persons must be proven by the normal methods, however, the offence does not carry a fixed penalty but may be given deterrent punishment under *taᶜzīr*. Then, it is up to the court to determine the type and quantum of the punishment, bearing in mind the nature of the offence and the circumstances in which it was committed. Only when the insult is addressed to God and the recognised prophets does it amount to the more serious offence of blasphemy. The ulema have unanimously treated blasphemy as a separate offence which invokes a heavier punishment than the common offence of insult. As I have discussed blasphemy in a separate section, suffice it to say that in almost all cases of insult, regardless as to whether they are addressed to Muslims or non-Muslims, men or women, the offence is punishable under *taᶜzīr*. At this juncture, it is interesting to note that the only Qur'ānic *āyah* (see following) which is specific on the prohibition of *sabb* is concerned with insult to non-Muslims, although this does not mean that insulting a Muslim is not an offence.

> Revile not (*lā tasubbū*) those who invite others to profess faith in deities other than Allah, lest, exceeding the limits, they abuse Allah through ignorance. (al-Anᶜam. 6:108).

وَلَا تَسُبُّوا الَّذِيْنَ يَدْعُوْنَ مِنْ دُوْنِ اللهِ فَيَسُبُّوا اللهَ عَدْوًا بِغَيْرِ عِلْمٍ.

The Qur'ān commentators have concluded that this *āyah* forbids insult, which is likely to invoke hostility and abuse, to everyone–Muslims and non-Muslims alike–which shows that the religious following of the person to whom the insult is addressed is immaterial. The text is explicit only with regard to disbelievers and makes no reference to the believers. Nevertheless, the conclusion is drawn that if insult is forbidden to disbelievers, that is the *Ahl-al-Kitāb* (followers of revealed scriptures), the *dhimmis* (non-Muslim citizens), and virtually all non-Muslims, then by a process of deduction, known as the "analogy of the superior" (*qiyas al-awlā*), insulting a Muslim is forbidden all the more so.[34] Similarly, the Qur'ān provides clear instruction (see al-Naḥl, 16: 125 and al-ᶜAnkabūt, 29:46) to the effect that invitation to the faith must be through persuasion and sound reasoning, and must, at no time, be allowed to lead to insult and abuse.

In a similar vein, insult and slander may not be used as a means of preventing evil (*munkar*). A person who attempts to prevent a *munkar* is only permitted to use, if necessary, harsh words which are devoid of lies, insults and abuse. It is only permitted to use words such as "O ignorant", "O foolish", or "O transgressor" (*jāhil, aḥmaq, fāsiq*), for it is said that every sinner tends to partake in these attributes.[35] The question may arise as to whether it is allowable to curse or insult a person, whether Muslim or non-Muslim, who is notorious for criminality and evil. Is it also permissible to curse and abuse sinners and profligates, in general, for their criminality and corruption? The answer to both of these queries is in the negative, precisely because insulting such persons may lead to reciprocal abuse. Similarly, according to a Ḥadīth reported by both Bukhāri and Muslim, the Blessed Prophet said that "One of the major sins a man can commit is when he insults his parents." This statement invoked a question from the Companions who asked, "O Messenger of God! Does a man ever insult his own parents?" The Prophet replied; "Yes when he insults another man's father or mother and this is reciprocated in return."[36]

مِنَ الكَبَائر شَتْم الرَّجُلِ والِدَيْه، قالوا يا رسُولَ الله وَهَلْ يَشْتُمُ الرَّجلُ والديه، قال يَسُبُّ اباالرجُلَ فيسبُّ اَبَاهُ ويَسُبُّ اُمّه فَيَسُبُّ اُمَّه.

In its typically broad and comprehensive style, the Qur'ān lays down the principle when it calls upon the believers neither to "find fault with your own people nor call one another by bad names." (al-Ḥujurāt, 49:11).

وَلاَ تَلْمِزُوْ اَنْفُسَكُمْ وَلاَ تَنَابَزُوْا بِالْاَ لْقَاب.

"Finding faults" and "calling bad names" are concepts broad enough to embrace almost all varieties of abuse and insult. Commenting on this text, al-Maqdisi points out that although certain expressions may appear to attribute a fault to another person they may not fall within the purview of the text. Thus, if a person is described by such terms as deaf or lame, merely with the intention to identify him without any wish to insult, then this is neither backbiting nor calling bad names.[37] The preceding portion of the same Qur'ānic passage forbids ridiculing

words in question are common words of insult and their purport can be objectively ascertained.[33]

Insult to all persons must be proven by the normal methods, however, the offence does not carry a fixed penalty but may be given deterrent punishment under *taᶜzīr*. Then, it is up to the court to determine the type and quantum of the punishment, bearing in mind the nature of the offence and the circumstances in which it was committed. Only when the insult is addressed to God and the recognised prophets does it amount to the more serious offence of blasphemy. The ulema have unanimously treated blasphemy as a separate offence which invokes a heavier punishment than the common offence of insult. As I have discussed blasphemy in a separate section, suffice it to say that in almost all cases of insult, regardless as to whether they are addressed to Muslims or non-Muslims, men or women, the offence is punishable under *taᶜzīr*. At this juncture, it is interesting to note that the only Qur'ānic *āyah* (see following) which is specific on the prohibition of *sabb* is concerned with insult to non-Muslims, although this does not mean that insulting a Muslim is not an offence.

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وَلَا تَسُبُّوا الَّذِيْنَ يَدْعُوْنَ مِنْ دُوْنِ اللهِ فَيَسُبُّوا اللهَ عَدْوًا بِغَيْرِ عِلْمٍ.

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In a similar vein, insult and slander may not be used as a means of preventing evil (*munkar*). A person who attempts to prevent a *munkar* is only permitted to use, if necessary, harsh words which are devoid of lies, insults and abuse. It is only permitted to use words such as "O ignorant", "O foolish", or "O transgressor" (*jāhil, aḥmaq, fāsiq*), for it is said that every sinner tends to partake in these attributes.[35] The question may arise as to whether it is allowable to curse or insult a person, whether Muslim or non-Muslim, who is notorious for criminality and evil. Is it also permissible to curse and abuse sinners and profligates, in general, for their criminality and corruption? The answer to both of these queries is in the negative, precisely because insulting such persons may lead to reciprocal abuse. Similarly, according to a Ḥadīth reported by both Bukhāri and Muslim, the Blessed Prophet said that "One of the major sins a man can commit is when he insults his parents." This statement invoked a question from the Companions who asked, "O Messenger of God! Does a man ever insult his own parents?" The Prophet replied; "Yes when he insults another man's father or mother and this is reciprocated in return."[36]

مِنَ الكَبَائر شَـتْم الرَّجُلِ والِدَيْه، قالوا يا رسُولَ الله وَهَلْ يَشْـتُمُ الرَّجلُ والديه، قال يَسُبُّ اباالرجُلَ فيسبُّ اَبَاهُ ويَسُبُّ اُمّه فَيَسُـبُّ اُمَّه.

In its typically broad and comprehensive style, the Qur'ān lays down the principle when it calls upon the believers neither to "find fault with your own people nor call one another by bad names." (al-Ḥujurāt, 49:11).

وَلاَ تَلْمِزُوْ اَنْفُسَـكُمْ وَلاَ تَنَابَزُوْا بِالْاَ لْـقَابِ.

"Finding faults" and "calling bad names" are concepts broad enough to embrace almost all varieties of abuse and insult. Commenting on this text, al-Maqdisi points out that although certain expressions may appear to attribute a fault to another person they may not fall within the purview of the text. Thus, if a person is described by such terms as deaf or lame, merely with the intention to identify him without any wish to insult, then this is neither backbiting nor calling bad names.[37] The preceding portion of the same Qur'ānic passage forbids ridiculing

words in question are common words of insult and their purport can be objectively ascertained.[33]

Insult to all persons must be proven by the normal methods, however, the offence does not carry a fixed penalty but may be given deterrent punishment under *taᶜzīr*. Then, it is up to the court to determine the type and quantum of the punishment, bearing in mind the nature of the offence and the circumstances in which it was committed. Only when the insult is addressed to God and the recognised prophets does it amount to the more serious offence of blasphemy. The ulema have unanimously treated blasphemy as a separate offence which invokes a heavier punishment than the common offence of insult. As I have discussed blasphemy in a separate section, suffice it to say that in almost all cases of insult, regardless as to whether they are addressed to Muslims or non-Muslims, men or women, the offence is punishable under *taᶜzīr*. At this juncture, it is interesting to note that the only Qur'ānic *āyah* (see following) which is specific on the prohibition of *sabb* is concerned with insult to non-Muslims, although this does not mean that insulting a Muslim is not an offence.

> Revile not (*lā tasubbū*) those who invite others to profess faith in deities other than Allah, lest, exceeding the limits, they abuse Allah through ignorance. (al-Anᶜam. 6:108).

وَلَا تَسُبُّوا الَّذِيْنَ يَدْعُوْنَ مِنْ دُوْنِ اللهِ فَيَسُبُّوا اللهَ عَدْوًا بِغَيْرِ عِلْمٍ.

The Qur'ān commentators have concluded that this *āyah* forbids insult, which is likely to invoke hostility and abuse, to everyone–Muslims and non-Muslims alike–which shows that the religious following of the person to whom the insult is addressed is immaterial. The text is explicit only with regard to disbelievers and makes no reference to the believers. Nevertheless, the conclusion is drawn that if insult is forbidden to disbelievers, that is the *Ahl-al-Kitāb* (followers of revealed scriptures), the *dhimmis* (non-Muslim citizens), and virtually all non-Muslims, then by a process of deduction, known as the "analogy of the superior" (*qiyas al-awlā*), insulting a Muslim is forbidden all the more so.[34] Similarly, the Qur'ān provides clear instruction (see al-Naḥl, 16: 125 and al-ᶜAnkabūt, 29:46) to the effect that invitation to the faith must be through persuasion and sound reasoning, and must, at no time, be allowed to lead to insult and abuse.

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and backbiting others, but as al-Bahī points out, these are inter-related terms in the sense that ridiculing another person may at times amount to insulting him, and backbiting may amount to false accusation and libel, and that all of these, in turn, stem from discourtesy and arrogance.[38] Therefore, it is for the judge to determine the specific import of the words and conduct of the accused in light of the general guidelines that are provided in the sources.

The Qur'ān forbids all forms of transgression (*taᶜaddī*, or *iᶜtidā'*) against others (al-Baqarah, 2:190) and insult is clearly a form of transgression. And then, we read in a Ḥadīth that "insulting a Muslim is transgression (*fusūq*) and fighting him (*qitaluhu*) is *kufr*".[39]

- وَلاَ تَعْتَدُوا اِنَّ الله لا يُحِبُّ الْمُعْتَدِيـن.
- سِبَابُ الْمُسْلِمِ فُسُوقٌ وقِتالُه كُفرٌ.

Clearly this suggests that insult can lead to fighting, and that fighting is even uglier than insult. The word *'kufr'* in this Ḥadīth is used metaphorically in order to accentuate the enormity of the conduct.

Insulting a deceased person falls under the same prohibitive rules as are applied to the living. The Blessed Prophet has strongly recommended that the dead should only be remembered for their virtues and not for their failings. The seriousness of these types of insults are emphasised by the fact that the dead are unable to defend themselves against attacks on their personal integrity and good name. The Prophet has, thus, instructed the Muslims to "mention only the virtues of your deceased ones and avoid talking about their misdeeds."[40]

اُذْكُرو امَحَاسِنَ موتاكم وكفوا عن مساويهم.

In yet another Ḥadīth he directs the believers to "avoid reviling the dead as by doing so you hurt the feeling of their living relatives".[41]

لَا تَسُبُّوا اَلاَمْوَاتَ فَتُؤْذُوْ ابِهِ الاَحْيَاءَ.

To relate all this to the moral character of the believer, the Blessed Prophet has elsewhere declared that avoiding insult to others is indicative of the strength of one's character and faith.

> "It is not for a believer to indulge in insults, sarcasm or cursing."[42]

لَيْسَ الْمُؤمِنُ بالسَّابِ وَلاَ بِالَطَّعانِ وَلاَ بِاللَّعَّانِ.

With reference to the Companions, it is noted that the Prophet held them in affection and esteem. This is not only sustained by the general tone and tenor of Ḥadīth literature in general, but more specifically as in the following quote, where the believers are instructed to refrain from reviling the Companions.

> Revile not my Companions, revile not my Companions! By the One in whose hand my life reposes, if anyone of you should own a mountain of gold (like the mount of Uḥud) you would not match them not even by half, let alone in whole (in moral and spiritual rank).[43]

لَا تَسُبُّوْا اَصْحَابِیْ لَا تَسُبُّوْا اَصْحَابِیْ. فَوَ الَّذِیْ نَفْسِیْ بِیَدِهٖ
لَوْ اَنَّ اَحَدَکُمْ اَنْفَقَ مِثْلَ اُحُدٍ ذَهَبًا مَا بَلَغَ مُدَّ اَحَدِهِمْ وَلَا نَصِیْفَه.

The emphasis that the Prophet has laid on the dignified status of his Companions has led the ulema to treat insult to the Companions (*sabb al-ṣaḥābi*) as a separate offence which is next in order of gravity to the capital offence of blasphemy. Notwithstanding this, however, according to the majority of ulema, the offence carries an unspecified deterrent (*taᶜzīr*) punishment. The penalty so accorded must reflect the enormity of reviling a Companion which is a far more serious crime than the common offence of *sabb*. Imam Mālik's attitude, in this regard, is reflective of the stance the ulema have taken over this issue. He strongly recommended that a Muslim should move away and abandon a town wherein the Companions of the Prophet are frequently reviled.[44]

When a person insults another in several utterances which are commonly known to be abusive, the question arises whether he should be punished for one or for several offences. The Ḥanafi jurist, Ibn ᶜĀbidīn is on record for the ruling that each insult is punishable separately under *taᶜzīr*. The reason being, that insult is an offence against the Right of Man and that rights of this kind are not amenable to amalgamation (*tadākhul*); unlike the prescribed offences (*ḥudūd*), which consist of the Right of God, and as such, are held to be amenable to amalgamation. But, if a deterrent punishment of *taᶜzīr* is imposed on account of a violation of the Right of Man, for example, when the prescribed punishment of *qadhf* is reduced to *taᶜzīr* because of a deficiency in proof, then if the accused has committed several of these types of offences, they all become liable to amalgamation and may be penalised as one.[45]

When the object of insult is the religion (*dīn*) of a Muslim, the question arises as to whether an insult of this kind amounts to disbelief (*kufr*). The dominant view is that it does not, as it would be open to interpretation, however remote, that the object of insult might have been the personal character of the victim and not necessarily his religion.[46]

VI. Cursing (*La^{c}n*)

Cursing (*la^{c}n* or *la^{c}nah*) normally consists of an expression of disapproval or displeasure and an invocation of malediction upon its victim. Curses are often uttered by calling the curse and wrath of God on someone, or by an invocation in the passive voice where the agent is not always specified, for example: May God's curse be upon him; May he be cursed.[47] An incident of cursing in the history of Islam occured when one of the Prophet's Companions, Khubayb, who was captured and condemned to be slain by the disbelievers in Mecca, called out just before he was executed: "O God, count their number and slay them one by one, and let none of them remain alive."[48]

Instances of cursing are also found in the Qur'ān and the Sunnah, for example: "Let the curse of God be upon the oppressors"; "those who annoy God and His Messenger, God will curse them in this world and in the next"; "those who spread mischief in the land, on them is the curse..." (Hud, 11:18; al-Ahzab, 33:57 and al-Ra^{c}d, 13:25).

- اَلَّذِيْنَ كَذَّبُوْا عَلٰى رَبِّهِمْ اَلَا لَعْنَةُ اللهِ عَلَى الظّٰلِمِيْنَ.

- اِنَّ الَّذِيْنَ يُؤْذُوْنَ اللهَ وَرَسُوْلَهٗ لَعَنَهُمُ اللهُ فِى الدُّنْيَا وَالْاٰخِرَةِ وَاَعَدَّ لَهُمْ عَذَابًا مُّهِيْنًا.

- وَيُفْسِدُوْنَ فِى الْاَرْضِ اُولٰئِكَ لَهُمُ اللَّعْنَةُ وَلَهُمْ سُوْءُ الدَّارِ.

The general rule that the ulema have upheld, which is founded in the authority of the Qur'ān, and the Sunnah, is that no one including parents and relatives, whether alive or dead, may be abused by curs-

ing. The evidence also sustains the conclusion that cursing is permissible on those who have been cursed in the Qur'ān and the Sunnah but that "there is no sin in abandoning such."[49] While stating this, al-Maqdisi hastens to add that according to a Ḥadīth reported by Muslim, someone asked the Blessed Prophet to call the curse of God upon the associators (*mushrikūn*), to which the Prophet replied, "I have not been sent to be a cursor (*laᶜān*). My mission is to be merciful."[50]

إِنِّى لَمْ ابْعَثْ لعّانًا، إنما بُعِثْتُ رحمةً.

Al-Maqdisi then quotes Abu al-Ḥusayn al-Baṣri (author of *al-Muᶜtamad fi Uṣūl al-Fiqh*) to have held that cursing is forbidden whether the victim is a particular person or a group of people. It is further reported that when Imam Aḥmad Ibn Ḥanbal was asked as to the permissibility of cursing transgressors such as adulterers, thieves, murderers and wine-drinkers, he advised silence.[51]

Cursing particular individuals is "a dangerous violation" except when this is specified, for example, in the Qur'ān where God has cursed individuals such as the Pharaoh and Abu Jahl. Apart from cases like this it is unlawful to curse a particular person by name, partly because it is just possible that the person concerned, if a non-Muslim or a sinner, might have become a Muslim, or might have repented. "If cursing a disbeliever is unlawful, then it is all the more so with regard to a transgressor (*fāsiq*) and heretic (*mubtadiᶜ*)."[52] It is, thus, concluded that cursing a particular individual, even a disbeliever, is unlawful and must be avoided. The ulema have, however, differed as to the permissibility of cursing Yazīd b. Muᶜāwiyah, who is the chief culprit of the carnage at Karbala in which the Prophet's grandson Ḥusayn and his supporters were martyred. While some have held this to be permissible, Imam Ibn Ḥanbal, his disciple Ibn Qayyim al-Jawziyyah, and many others have advised silence on the issue of cursing Yazīd.[53]

There was, during the lifetime of the Blessed Prophet, a Muslim, known as Nuᶜaymān (his real name is reported as being ᶜAbd Allah) who used to drink wine and was known for his comic jokes. There are reports that he was punished for the wine-drinking more than once, and having known of this, one of the Companions denounced Nuᶜaymān's conduct and cursed him by saying "May the curse of God be upon him for his frequent deviations." This invoked the following response from the Blessed Prophet, who has obviously ignored Nuᶜaymān's failings on account of his other virtues:

Let yourself not become an ally to the Satan against your brother. Do not say this (i.e do not curse Nuᶜaymān) for he loves Allah and His Messenger.[54]

لَا تَكُنْ عَوْنًا لِلشَّيْطَانِ عَلٰى اَخِيْكَ، لَاتَقُل هٰذَا فَاِنَّهُ يُحِبُّ اللهَ وَرَسُوْلَهُ.

According to another report the last portion of this Ḥadīth reads that "I have not known from him anything but the love of God and His Messenger."

مَا عَلِمْتُ اِلَّا اَنَّهُ يُحِبُّ اللهَ وَرَسُولَهُ.

Thus, in both of its reported versions, the Ḥadīth clearly substantiates the principle that no one, not even an offender, may be cursed or insulted, regardless as to whether or not the person in question is guilty of a misconduct.[55] The ulema have generally upheld the ruling that offensive and sinful acts committed by wrongdoers may be denounced by the attributes of the conduct, but not by naming specific names.[56]

Cursing is discouraged even when it is not addressed to a person, when it is uttered in vain, or when it is addressed to objects and natural phenomena. It is reported from Ibn ᶜAbbās that when a man cursed the wind in the presence of the Prophet he was told to "curse not the wind for it is ordained to take its course. When a person curses something which is not a fit subject for it, the curse returns to where it started."[57]

لَا تَلْعَنِ الرِّيحَ فَاِنَّهَا مَأْمُورَةٌ وإِنَّه مَنْ لَعنَ شَيْئًا لَيْسَ لَهُ بِاَهلٍ رَجَعَتِ اللَّعْنَةُ عَلَيْهِ.

And lastly, if an insult or a curse is reciprocated at the spur of the moment, then it must be within the limits of moderation. This is aptly illustrated by the Ḥadīth, reported by both Bukhāri and Muslim, which came about when a group of Jews came to visit the Blessed Prophet. When they addressed him with the distorted phrase "*as-sām ᶜalaykum*" (literally may death be upon you) instead of the familiar Islamic greeting, *assālam alaykum* (peace be upon you), the

Prophet's wife, ᶜĀishah replied in these words, "may death and curse be upon you (*as-sām ᶜalaykum wa al-laᶜnah*)." Upon hearing this, the Prophet told his wife: "O ᶜĀishah, God Most High loves gentleness," to which she replied, "did you not hear what they said?" And the Prophet said, "Yes, but you could have just said *wa ᶜalaykum* (and upon you)."[58]

Gentleness (*al-rifq*) and moderation are among the most desirable features of Islamic ethos which God and His Messenger have repeatedly recommended. These attributes are the antidotes of cursing and insult, and they adorn everything, and beautify every occasion to which they are applied. There is in Islam no recognition of any barrier in their application, and indeed, the scope of these virtues is not even confined to human beings.

VII. Attribution of Disbelief to a Muslim (*Takfīr al-Muslim*)

The Sharīᶜah forbids the attribution of disbelief, blasphemy and heresy to a Muslim. This is a normative principle which is to apply even to doubtful cases where one suspects another of disbelief (*kufr*). Thus, if a Muslim observes a fellow believer uttering words or indulging in acts which might be suggestive of disbelief, he must give him the benefit of doubt, and avoid charging him of disbelief in all cases which fall short of self-evident proof. Even in the latter event, it is strongly recommended, for reasons that I shall presently elaborate, that people should avoid charging others with infidelity and disbelief. Apart from the emphatic tone of a large number of prohibitive *aḥādīth* on this subject, the issue is so sensitive and complex that only a judge or a jurisconsult (*mufti*) who is well-versed in theological sciences is authorised to determine what exactly amounts to disbelief.

A Muslim may not be declared as a disbeliever or apostate when he says or does something which carries a mere probability of disbelief. According to Imām Abu Ḥanifah, if the utterance in question amounts to disbelief by ninety-nine per cent, but to *īmān* (belief) by a mere one per cent, it would still not amount to *kufr*. While recording this view, Abu Zahrah elaborates that the utterance which is suspected of disbelief may have a context, or it may originate in a point of view and may, thus, be capable of an

interpretation that would preclude disbelief, in which case, it should in all cases be given the benefit of doubt. There were, for example, during the time of the fourth Caliph, ᶜAli b. Abu Ṭālib, instances where the Kharijites indulged in excess and levelled accusations of disbelief even on the leading figures among the Companions. Although the Kharijites were regarded to be transgressors, on no occasion did the Caliph declare any of them as infidel (*kāfir*), instead he said that a person who seeks the truth but makes an error is never the same as a person who seeks falsehood, and then proceeds to commit it.[59]

Ibn Ḥazm has stated the principle clearly as follows: Anyone who has uttered the testimonial of the faith (*kalimah shahādah*), and declared his or her faith in the mission and guidance of the Prophet Muḥammad is a Muslim, and this bond with Islam cannot be severed by allegations of any kind unless his or her disbelief is proven by indisputable evidence.[60]

By the same token, once a person is known to have embraced Islam, he or she is presumed to retain that status indefinitely. The fact that a person is known to be a born Muslim, or is known to have embraced Islam, creates a state which, according to the legal maxim that certainty may not be overruled by doubt, is then presumed to continue indefinitely. From that point onwards no amount of doubt, suspicion, or allegation is allowed to interfere or overrule the continued validity of a person's faith.[61]

The ulema and the leading Imams of jurisprudence are in agreement that it is unlawful to attribute disbelief to anyone merely on grounds of differences of opinion and *ra'y*. Similarly, no one may be declared a *kāfir* specifically by name. "For this is," as al-Bahnasāwi rightly points out, "a matter only for the competent judge. It is therefore impermissible for a layman to declare another as infidel." In support of this, it is reported that during the time of the second Caliph, ᶜUmar b. Al-Khaṭṭāb, a person known as Ibn Mazᶜūn, made a statement that wine-drinking was permissible in Islam. However, the Caliph did not declare him as a *kāfir*, saying that it was a matter of evidence and proof, which must be ascertained, and that the facts must also be established by evidence before any judgement was to be passed in the matter.[62]

With regard to the nature of the evidence that needs to be produced, the general rule is that determining the faith or disbelief of a person is to be based entirely on obvious evidence without any reference to the hidden thoughts and feelings of people, which are known only to God. This is the purport of the Qur'ānic text which

instructs the believers: "Say not to those who greet you with *salām* that you are not a believer" (al-Nisā', 4:94).

وَلاَ تَقُوْلُوْا لِمَنْ اَلْقٰى اِلَيْكُمُ السَّلٰمَ لَسْتَ مُؤْمِنًا.

If a mere utterance of *salām* is evidence enough to establish a presumption in favour of a person being a believer, then it is obvious that the Qur'ān does not permit inquisitions of any kind to establish the Islamic identity of individuals. The Qur'ānic principle, here, is further elaborated in a Ḥadīth which provides: "Whoever prays our prayer while facing the *qiblah* that we face and also eats our slaughter is a Muslim. He shall have the same rights and obligations as we have."[63]

مَنْ صَلّٰى صَلاَتُنَا وَاسْتَقْبَلَ قِبْلَتُنَا وَاَكَلَ ذَبِيْحَتُنَا فَهُوَ الْمُسْلِمُ، لَهُ مَالُنَا وعليه ما عَلَيْنَا.

Since unity in faith is the very foundation of the Islamic fraternity, the Blessed Prophet has warned the believers to avoid accusing one another of disbelief. Thus, according to a Ḥadīth reported by ᶜAbd Allah Ibn ᶜUmar; "When a man calls his brother 'O *Kāfir*,' one of them is afflicted with the charge. If the accusation is not true, it befalls upon the person who uttered it in the first place."[64]

إذا قَالَ الرَّجُل لِاخِيْهِ يَا كَافِرْ فَقَدْ بَاءَبِه اَحَدُهُمَا فَاِنْ كَان كَمَا قَالَ وَاِلاَّ رَجَعَتْ عَلَيْهِ.

According to yet another Ḥadīth reported by Abu Dhar al-Ghaffāri: "Whoever charges another person with disbelief, or say to him 'O enemy of God' while this is not so, the charge returns and befalls upon himself."[65]

مَنْ دَعَا رَجُلا بِالْكُفْرِ او قال: عَدُوّ الله، وَلَيْسَ كَذٰلِكَ اِلاَّ حَازَ عليه (اَىْ رَجَعَ عَلَيه).

The message in the preceding *aḥādīth* is not confined to the prohibition of *takfīr*, but extends also to *fisq* and the unfounded attribu-

tion of criminality and sin to others. A Muslim is, thus, forbidden from charging others with *fisq* (transgression, sin). This is the purport of another Ḥadīth which declares in the broadest of terms: "No man accuses another of transgression (*fisq*) or disbelief (*kufr*) without partaking in it himself – if the accused is not a disbeliever or a transgressor."[66]

لَا يَرْمِيْ رَجُلٌ رَجُلًا بِالْفِسْقِ اَوِ الكُفرِ اِلَّا اِرْتَدَّتْ عَلَيْهِ اِنْ لَمْ يَكُنْ صَاحبه كَذٰلِكَ.

Commenting on these *aḥādīth*, Abū Zahrah draws the conclusion that no one may accuse another of blasphemy, apostasy, *kufr*, and *fisq* without clear and manifest evidence, and anyone who does so partakes in the accusation himself. This obviously means, as Abu Zahrah points out, that "if the accuser is lying, he becomes a disbeliever himself."[67]

Takfīr is a grave sin and an offence under Islam. Hence, anyone who accuses another of *kufr* in explicit words, or charges him with attributions that carries the meaning of *kufr* is liable to a deterrent *taᶜzīr* punishment which is to be determined by a competent judge.[68]

In a statement published in *al-Ihram* (8.12.1981, p.3) the Mufti of Egypt was reported to have held the following opinion concerning the attribution of disbelief to a Muslim.

(a) It is unlawful to attribute disbelief to a Muslim for a sin he might have committed, even if it be a major sin; and

(b) Declaring someone a *kāfir* or *fāsiq* may only be attempted by a learned person who specialises in the religious sciences (*ᶜulūm al-dīn*).[69]

In view of the complexity of the issue and the exceedingly diverse rulings and statements that jurists and theologians have recorded on the subject, Abu Zahrah has proposed the creation of a separate judicial post, within the ranks of the regular judiciary, with specialised jurisdiction to adjudicate issues pertaining to apostasy, blasphemy and *kufr*. The court so created should be entrusted with the task, *inter alia*, of determining exactly what utterance and conduct amounts to disbelief, blasphemy, or apostasy as the case may be. The individual must, therefore, try to avoid passing hasty judgments in matters involving the attribution of disbelief to others.[70]

All that a person may do when he suspects that *kufr*, heresy, and apostasy is being committed by another is to give him good advice in the true spirit of the Qur'ānic principle of commanding good and forbidding evil. A person who witnesses the incidence of heresy and disbelief would have fulfilled his duty if he provides the necessary evidence to establish the truth and then leave the matter in the hands of the authorities. Al-Bahnasāwi sums up the position when he writes that "no one may be subjected to adversity and harm on the basis of a mere suspicion or allegation of *kufr*, blasphemy and apostasy without the necessary proof and adjudication of competent authorities.[71]

VIII. Sedition *(Fitnah)*

1. MEANING AND DEFINITION

Dictionaries record various meanings for *fitnah*, including temptation, trial, misguidance, enticement, fascination, commotion, sedition, confusion, affliction, torture and strife.[72] This plurality of meanings might have contributed to a certain ambiguity that is noted in the juridical meaning of the word. *Fitnah* and its derivatives feature prominently in the Qur'ān where they occur in no less than sixty places. *Saḥīḥ al-Bukhāri* records eighty-six Ḥadīths in its chapter entitled *Kitab al-Fitan*. But *fitnah* occurs, both in the Qur'ān and Ḥadīth, in a variety of contexts and denotes meanings which converge and overlap. Among the juridical meanings of *fitnah*, one example which concerns us most in the context of freedom of expression, is seditious speech which attacks the legitimacy of a lawful government. An equally important meaning of *fitnah*, which tends to be the most dominant in the Qur'ān, is to deny the faithful the right to practise their faith.[73] As the discussion proceeds, I shall address each of these two meanings of *fitnah* in detail, however, at this point, I propose briefly to outline some of the other meanings of *fitnah*.

As a dominantly moral concept, *fitnah* occurs in the Holy Qur'ān in the sense of temptation or enticement. Note for example, the following: "Know that your possessions and your offspring are but a trial (*fitnah*) and that it is God with Whom lies your highest reward" (al-Anfāl, 8:28; also al-Taghābun, 64:15).

- وَاعْلَمُوْا اَنَّمَآ اَمْوَالُكُمْ وَاَوْلَادُكُمْ فِتْنَةٌ وَّاَنَّ اللهَ عِنْدَهُ اَجْرٌ عَظِيْمٌ.

- اِنَّمَآ اَمْوَالُكُمْ وَاَوْلَادُكُمْ فِتْنَةٌ وَاللهُ عِنْدَهُ اَجْرٌ عَظِيْمٌ.

Here, it shows that love of property and children may entice one toward indulgence in sinful conduct for their sake.[74]

Fitnah also occurs in the Qur'ān to denote trial and testing (*imtiḥān*) someone for what he or she finds difficult to accept or deny. *Fitnah* in this sense entails an exposure to hardship with a view to forcing someone to do or abandon an act, speech, or a belief. As an example, God Most High tests believers and unbelievers in order to reward or punish them in proportion to the *fitnah* they have undergone: "We put to test - *laqad fatannā* - those who preceded them (the believers) and God knows the truthful from those who lie (al-ᶜAnkabūt, 29:3; see also al-Tawbah, 9:49 and al-Dukhān, 44:17).[75]

Another meaning of *fitnah* in the Qur'ān on which the commentators are in disagreement is *shirk*, that is association of other deities with God, such as in the following passage: "And fight them (the associators) until *fitnah* (disbelief) is no more and faith in God prevails everywhere (al-Anfāl, 8:39)."

وَقَاتِلُوْهُمْ حَتّٰى لَاتَكُوْنَ فِتْنَةٌ وَّيَكُوْنَ الدِّيْنُ كُلُّهُ لِلّٰهِ.

According to a commentary attributed to Ibn ᶜAbbās, which is upheld by Ibn Kathīr and the majority of leading commentators, *fitnah* in this passage means disbelief (*shirk*). In this sense, the text would, thus, be held to mean: "fight the disbelievers until *shirk* is eliminated and no false religion remains other than Islam". Al-Alusi has, however, differed with this reading as he maintains that the correct meaning of *fitnah* in this passage is aggression which aims at eliminating the freedom of belief.[76] Commenting on the same *āyah*, Ibn Qayyim al-Jawziyyah points out that *fitnah* occurs here in contradistinction with *dīn kulluh* (the whole of religion), a phrase which appears in the latter part of the sentence. It is thus implied that *fitnah* destroys religion, which may explain why commentators have interpreted *fitnah* to denote disbelief.[77]

Among the various usages of *fitnah* in the Qur'ān, the most typical is one which denotes oppression, whether verbal or actual, that denies the believers the right to practise their faith. Note, for ex-

ample, this Qur'ānic *āyah*: "And expel them from where they have expelled you. For *fitnah* (oppression) is worse than killing" (al-Baqarah, 2: 191).

وَاقْتُلُوْهُمْ حَيْثُ ثَقِفْتُمُوْهُمْ وَاَخْرِجُوْهُمْ مِنْ حَيْثُ اَخْرَجُوْكُمْ وَالْفِتْنَةُ اَشَدُّ مِنَ الْقَتْلِ.

The subject matter of this *āyah* is described to be *fitnah fi al-dīn*, that is *fitnah* which destroys the freedom of religion. In the early days of Islam the disbelievers obstructed the Muslims from observing their faith through hostile means, including persecution, expulsion, and expropriation of property, methods which are described in the Qur'ān to be more heinous than murder.[78] ᶜAbd Allah b. ᶜUmar has explained *'fitnah'* when he said: "And there were very few Muslims, so a man used to be persecuted on account of his religion. They either murdered him or subjected him to torture until Islam became predominant."[79]

On a slightly different note, Rashīd Riḍā points out that the hypocrites (*munāfiqūn*) sought to promote *fitnah* by asking the people during the battles of Uḥud and Tabūk not to go to *jihād*. In the case of Uhud about one-third of the Muslim forces were persuaded, by Ubay b. Salul, to stay behind. As to the incidence of this type of *fitnah* in modern times, Rashīd Riḍā observes further that it is *fitnah* when disbelievers propagate their beliefs among Muslims, especially among those who are weak of mind and ignorant, and try to tempt them away from Islam and toward disbelief.[80] In the Ḥadīth literature, the word *fitnah* (pl. *fitan*) is typically used in reference to war, to commotion, and to the tumult that precedes the Resurrection. Thus, we expect to find a chapter bearing the title *'al-fitan'* in many major collections of Ḥadīth. *Fitnah* in this sense originates in the oppression of misguided rulers which can lead to chaos and confusion over values. Challenging the authority of lawful government, and calamity that afflicts the community because of rampant indulgence in corruption are among the other themes of *fitnah* that feature prominently in the Ḥadīth. If a total sense of insecurity afflicts the believers, then the best course they are advised to take is not to associate themselves with the sources of tumult, and to isolate themselves until the truth emerges.[81]

Freedom of expression does not permit subjugating the faithful to corrupt views and influences which violate the principles of Islam.

Offensive speech and conduct of this kind may be penalised, but the precedent of the first four Caliphs of Islam suggests that the punishment should not be severe unless the conduct in question amounts to blatant disbelief (*khufr ṣarīh*). While Islam forbids its own followers from the use of coercive methods in propagating their faith, it also takes measures to protect them against aggression which denies them their own freedom. *Fitnah* in this sense is the antithesis to freedom of religion, and can claim no validity under any of the legitimate concepts and varieties of freedom.[82]

Seditious *fitnah*, that is *fitnah* in its political sense, is an abuse of freedom of expression which threatens the legitimacy of lawful government, and which could lead to the collapse of normal order in society. This theoretical characterisation of sedition may appear fairly uncontroversial but problems arise when it is translated into practice. Defining the scope of *fitnah*, and establishing a correct balace among conflicting values, often tends to be problematic. It was noted, for instance, that sedition undermines the authority of lawful government, but the legitimacy of a government is not always a self-evident phenomenon. Many instances can be given of self-styled leaders and regimes who came to power by illegal means, for example the former, Soviet-installed, President Najibullah of Afghanistan[83], whose government imprisoned and persecuted others on charges of sedition and other crimes against the state. Also, words and acts constitute *fitnah* only when they succeed, or likely to succeed, in posing a threat to normal order. An isolated act or opinion which remains ineffective and does not incite opposition to lawful government would therefore fail to qualify as *fitnah*.

Statutory restrictions on freedom of speech and expression are commonplace in the legislation of both Muslim and non-Muslim countries. The main areas of concern tend to differ from country to country although a broad line of distinction could be ascertained between advanced and developing countries. Sedition which threatens the security of state tends to occur more frequently in developing nations than it does in industrialised actions with longer experience in democracy. On the other hand, the latter are faced with problems of obscenity and vice, perhaps on a larger scale than might be the case in the developing countries.

Seditious *fitnah* applies to words and acts which incite dissension and controversy among people with the effect that the righteous and the wrongdoer can no longer be distinguished from one another. It clouds the atmosphere of understanding and confounds the thoughts and minds of people to an extent that they can no

longer distinguish right from wrong and are, therefore, unable to advocate the truth.[84]

The Sunnah is emphatic on solidarity with the community of justice (*ahl al-ᶜadl*), and the citizen's duty of obedience to the lawfully elected Imam. One particularly sensitive occasion which is susceptible to seditious *fitnah* is succession to the rule. When a leader is duly elected and confirmed through the community's pledge of allegiance (*bayᶜah*), any attempt to overthrow him or incite disobedience and strife against him is liable, according to the declared terms of a Ḥadīth, to the capital punishment of death.[85] But, entering into further detail on this might lead us away from the main theme of this discussion, namely the bearing of *fitnah* on freedom of speech, which is why I propose to be brief.

2. HISTORICAL EXAMPLES

A total separation between the religious and political contents of *fitnah* is unfeasible in the context of an Islamic polity. For the state in Islam is closely associated with religion, which exceeds, in order of significance, all other considerations of race, language, geography and culture. Hence, when the religious principles of Muslim society are made the target of subversion and attack, the threat is automatically directed at the foundation of society and state.[86] Abu Zahrah illustrates this by reference to the Kharijites, and states that when the latter spread pernicious views and doctrines against Islam, they were not exercising legitimate freedom of expression in pursuit of either truth or knowledge, " but were bent on destruction and abuse and their activities threatened the disintegration of the community." The Kharijites acted in concert and had power with which they jeopardised the security of the nascent Islamic state.[87] I shall have occasion to discuss the Kharijites in further detail, but here I refer to some relatively minor instances of *fitnah* which preceded that of the Kharijites. In an incident of theft in which the Caliph ᶜUmar b. al-Khaṭṭāb was adjudicating, he asked the thief, "why did you commit the offence?" The thief replied, "it was God's will." The Caliph is reported to have ordered an additional number of lashes to be added to the prescribed penalty of theft on account of the misguided remark, referred to by Abu Zahrah, as *su' al-ta'wīl* (ill-conceived interpretation). According to a similar report, the Caliph ᶜUmar punished by flogging a group of wine-drinkers for *su' al-ta'wīl* in the course of investigation. The accused were confronted with the question as to why they drank, and they replied by reciting a passage

from the Qur'ān which is of general import, and yet is couched in a language that could plausibly be interpreted so as to validate all eating and drinking without any restriction (al-Mā'idah, 5:93). The text in question refers to pious believers who may eat and drink as they wish, so long as they remain steadfast in righteousness. The culprits attempted to apply the general terms of this passage to their case, in preference to the specific prohibition that occurs elsewhere in the Qur'ān on wine-drinking (al-Ma'īdah, 5:90). The Caliph tersely responded "had you been pious, you would have avoided drinking." Reports indicate that the Caliph punished these instances of *fitnah* only lightly as they were incidental and were offered in excuse for offences, and not, so to speak, by way of inciting the public to challenge the accepted meaning of the Qur'ān.[88]

Writers have also discussed, in the context of *fitnah*, the incident in which the prominent Companion, Abu Dharr al-Ghaffāri, preached and urged the people to avoid accumulating gold and silver. Abu Dharr was critical of the conduct of government officials under the Caliph ᶜUthman and charged them with *bidᶜah* (conduct repugnant to accepted norm and precedent) for accumulating wealth and for indulging in an ostentatious show of affluence. According to Abu Dharr, the acquisition of wealth beyond one's needs extinguished the light of faith in one's heart and was clearly indefensible. Abu Dharr was initially exiled by the then Governor of Sham, Muᶜawiyah, from Sham (Syria), to Madinah, and later by the Caliph Uthman, from Madinah to one of its suburbs in order to prevent *fitnah*.[89]

There is no substance, in my opinion, to the claim that this was a *fitnah* or even a potential *fitnah*. It would appear that the fragility of the political climate during the Caliphate of ᶜUthman played a part in labelling Abu Dharr's views as seditious, but the substance of his views are so eminently agreeable to the teachings of Islam that they could hardly be refuted, let alone branded as *fitnah*. For in support of his views, Abu Dharr quoted the Qur'ānic *ayah* to the effect that "Those who hoard gold and silver and spend not in the way of God, are warned of a painful doom" (al-Tawbah, 9:34).

وَالَّذِيْنَ يَكْنِزُوْنَ الذَّهَبَ وَالْفِضَّةَ وَلَا يُنْفِقُوْنَهَا فِيْ سَبِيْلِ اللهِ
فَبَشِّرْهُمْ بِعَذَابٍ اَلِيْمٍ.

Another *fitnah*, which occurred during the caliphate of ᶜAli b. Abū Ṭalib was that of ᶜAbd Allah b. Sabā and his followers who

elevated ᶜAli into a deity claiming that he partook in the essence of God. Al-Sibāᶜi writes that Ibn Saba "was intent on destroying Islam and spreading corruption among its followers. This is borne out by the fact that ᶜAli himself equated Ibn Saba's assertions to apostasy (*riddah*) and to the total renunciation of Islam.[90] On the other hand, the Caliph did not punish anyone for such views as they expressed on predestination and freewill (*al-jabr wa al-ikhtiyār*), and speculations as to whether man was a free agent in regards to his own conduct or a mechanical entity who conformed to a predetermined programme, and, if so, what was the basis of his responsibility. Reports further indicate that the Caliph did not take to task anyone for holding the views, as many of the Kharijites did, that one who committed a major sin automatically renounced Islam and became a *kāfir*[91]. The Caliph considered these to be matters which fell within the purview of the Qur'ānic guidance that argumentation should be conducted with courtesy and tolerance (al-Naḥl, 16:125). The authors and propagators of such opinions were to be given *naṣīḥah* and be persuaded to change their views through correct guidance.[92]

An historically renowned *fitnah*, also referred to as an inquisition (*miḥnah*) occurred under the Abbasid Caliph Ma'mūn (c.833 A.D.) over the nature of divine revelation, and whether the Qur'ān was the created or uncreated speech of God. Ma'mūn adopted the controversial view of Mu'tazilah on this issue that the Qur'ān was the created speech of God, that God did not speak like men, that attribution of speech to Him partook in metamorphosis, and that He created the Qur'ān like His other creatures. Many ulema had, on the other hand, embraced the view that the Qur'ān was the uncreated speech of God which was essentially eternal, but which was communicated to the Prophet Muhammad at a certain point of time. The Abbasid Caliph held an inquisition on the issue and went so far as to imprison and persecute members of the ulema community who opposed the officially adopted doctrine. Ma'mūn also directed, among other things, that only persons who were both trustworthy and believed in the createdness of the Qur'ān be admitted as witnesses.[93] This is, however, seen to be a somewhat isolated yet startling instance in the otherwise tolerant picture of the history of academic freedom in Islam. Comparing the medieval university professor in Christendom to the jurists and *mujtahid* of Islam, George Makdisi has concluded that "the professors did not achieve that complete autonomy enjoyed by their colleagues in Islam."[94]

The turmoil which followed the assassination of the Caliph Uthman and the ensuing emergence of the Kharijites is by far the

most widely debated instance of *fitnah* in the history of Islam. The Kharijites (literally, outsiders) were so called because they separated themselves from the community as a result of the attempted arbitration between ᶜAli and Muᶜāwiyah. Once followers of ᶜAli, they became his (and also Muᶜāwiyah's) opponents. They maintained the view that arbitration should have never been proposed and that arbitration in the face of aggression was against the dictates of the Qur'ān. Some of the Kharijites also held the view that the presence of an Imam was not necessary and it did not constitute a religious obligation. They felt that the community may administer its own affairs through mutual advice and consultation, but that an Imam may be elected if this was deemed necessary by the community itself. The Kharijites also held the view that the perpetrator of a major sin became an infidel, and it was on this basis that they charged many of the leading Companions with disbelief for their approval of the proposed arbitration. And lastly, they maintained that leadership was not a prerogative of the tribe of Quraysh and that any Muslim, Arab or non-Arab, who was competent could be elected as Imam.[95]

The Kharijites challenged the legitimacy of the caliphate of ᶜAli because he acceded to arbitration. The nature of the proceedings in which arbitration was conducted, and their outcome, have been variously reported and interpreted, nevertheless the Kharijites denounced the arbitration, and maintained that fighting should have continued until the matter was determined on the grounds of true principles. In support of this they quoted the Qur'ān, in particular the passage which authorises fighting the rebels and outlaws who deviated from the path of God (al-Ḥujurāt, 49:9). The Kharijites also quoted another Qur'ānic passage that "the prerogative of command belongs to none but God" (al-Anᶜām, 6:57).

إِنِ الْحُكْمُ إِلَّا لِلَّهِ.

However the Caliph considered this last assertion as "a word of truth which was given a false meaning". He concluded that although judgement belongs to God Most High, to interpret these passages so as to mean that there was no need for a leader to administer community affairs was a total fallacy.[96] Reports also indicate that about 8,000 Kharijites came out to protest ᶜAli's decision over the arbitration issue. But, ᶜAli did not resort to the use of force, instead he sent the renowned Companion, Ibn Abbās, to discuss their differences amicably with them. About 4,000 of the Kharijites

were persuaded to return, then the caliph asked the rest to return too, but they refused. He then sent them this message: "You may stay as you wish and we shall not wage war on you so long as you avoid bloodshed, highway robbery, and acts of injustice and corruption. But if you commit any of these, we shall fight you."[97]

While discussing this issue, Abu Zahrah voices the view, like many others, that "ᶜAli, may God be pleased with him, was confronted with rebellion and aggression, but he did not fight the Kharijites until they embarked on violence, by killing Khabbāb b. Al-Art." Accordingly, Abu Zahrah has concluded that it is not lawful for the Imam to fight the rebels (*ahl al-baghy*) for mere differences of opinion unless they break the peace and embark on violence.[98] According to yet another report, while the Caliph ᶜAli was delivering a Friday sermon one of the Kharijites interrupted and criticised him. The caliph responded to his criticism, and then said; "We shall not prohibit you from entering our mosque to mention God's name, and we shall not deny your share in the spoils of war (*fay'*) so long as you join hands with us and fight on our side, nor shall we fight you until you attack us - then he resumed the Friday sermon."[99]

Furthermore, we read in a report from Kathīr b. Tamār al-Ḥaḍrami who said: "I entered the mosque of Kufa... Where I met five men cursing the caliph ᶜAli. One of them, covered with a burnus, said, "I have made a covenant with God that I shall kill him." I then took this man to ᶜAli and reported to him what I had heard. "Bring him nearer," said ᶜAli and added, "Woe to you. Who are you?" "I am Sawwār al-Manqūri," replied the man. "Let him go," said the Caliph, to which al-Ḥaḍrami responded, "should I let him go even though he made a covenant with God to kill you?" "Shall I kill him even though he has not killed me?" replied ᶜAli. "He has cursed you," said al-Ḥaḍrami. "You should then curse him or leave him," said ᶜAli.[100]

The Kharijites declared as infidel many of the leading Companions, including Uthmān, ᶜAli, Ṭalḥah and Zubayr, and validated aggression over the lives and properties of Muslims who refused to join their ranks.[101] The majority of jurists declared the Kharijites a rebel faction (*bughghāt*) and applied to them the rules that they applied to rebels, which means that they were to be fought. This is the view of Abu Ḥanīfah, al-Shāfiᶜi, the Ḥanābilah, most of the *fuqahā'*, and the Ahl al-Ḥadīth. However, Imam Mālik has held that they should be asked to repent, and if they refused to do so, they should be killed, not for disbelief (*kufr*) but for causing corruption in the land (*fasād fi al-arḍ*). A group of the Ahl al-Ḥadīth have held

on the other hand that rebels, like the Kharijites, are to be treated in the same way as apostates (*murtaddūn*).[102]

According to Imam Abū Ḥanifah's disciple, al-Shaybāni, those who depart from truth and justice or from the generally accepted Sunnah, and follow a heterodox creed, would be regarded as rebels and dissenters. If they do not renounce the authority of the Imam, they would not be denied residence in the territory of Islam; but if they renounce the authority of the Imam and take up arms against the community they would be liable to *jihād* and may be killed. In support of this ruling, Al-Shaybani refers to those of the Kharijites who took up arms against the Caliph ᶜAli and were consequently fought and defeated in the battle of Nahrawān.[103]

Abd al-Qādir ᶜAwdah defines the rebels (*al-bughghāt*) as political criminals, with followers as well as power at their disposal[104], who renounce the authority of the Imam, and who confront him while maintaining a viewpoint based on an appropriate interpretation (*ta'wīl sā'igh*). To distinguish them from common criminals, the rebels must, therefore, have a viewpoint which opposes the accepted beliefs of the community at large. Their action is attributed to rebellion only when it is accompanied by force which challenges the authority of the Imam. Thus, it appears that *fitnah* and *baghy* (rebellion) resemble one another and could have a common origin, the only distinction between them being the access to power, and the threat of using it while challenging the authority of the Imam, which would turn *fitnah* into *baghy*. It is on grounds of such circumstances that al-Mawardi in the following quote, has, drawn a parallel between sedition and rebellion.

> When a group of Muslims oppose the views of the community (*ra'y al-jamaᶜah*) and follow a course or a *madhhab* which they have innovated, no war is to be waged on them so long as they do not congregate all in one mass. Provided they act as individuals who can be reached by the government, no war should be waged on them, but they are, nevertheless, subject to the rule of law (*aḥkām al ᶜadl*) which applies to the community at large. Should the rebellious faction congregate in a certain locality where they are out of reach and yet they cannot spread corruption, then provided they do not obstruct justice, nor embark on active mutiny, no war is to be waged on them. However, like the rest of the community, they still remain subject to the rule of law. If the rebels mix with the law-abiding community

(*ahl al-ᶜadl*) and try to spread corruption and commit acts of injustice, then the Imam is within his rights to punish them with a deterrent punishment of *taᶜzīr*. The punishment in this case must, however, neither be death nor exceed any of the prescribed penalties of the *ḥudūd*.[105]

Abd al-Qādir ᶜAwdah concurs substantially with the foregoing, especially where he outlines the rights and duties of persons who may have opposition views to those of the community and the lawful government. The opposition is within its right to propagate its views through peaceful means and enjoys the liberty, within the limits of Sharīᶜah, to say what it wishes, just as the law-abiding community has the right to refute such views and expose the evil and corruption in them. If anyone, from either side, violates the injunctions of Sharīᶜah pertaining, for example, to blasphemy and slander, in speech or in other methods of propagation, the perpetrator is liable to punishment under the normal rules of law and the offence is treated as an ordinary offence. The opposition is also entitled to hold assembly, and when they assemble, provided that they do not renounce obedience to the Imam nor obstruct nor violate the rights of others, no one has the authority to ban it. This is in accord with the precedent of ᶜAli b. Abū Ṭālib and the treatment he accorded to the Kharijites. The Kharijites isolated themselves from the rest of the community in Nahrawān, but they still obeyed the governor whom the caliph had appointed in that region. The caliph fought the Kharijites only when they killed his governor, Khabbab b. al-Art. Following this incident, the caliph asked the Kharijites to surrender the murderer to justice. But they refused to comply and replied that it was a communal act, committed by all of them in concert. Thus, they refused to obey the caliph and openly challenged his authority at which point the caliph declared war against them.[106]

To Imams, Mālik, Shāfiᶜi and Ibn Ḥanbal, it is a prerequisite that rebels start fighting the law-abiding community first, and only then is the latter entitled to wage war on them, in which case their lives are no longer protected under the law. But Imam Abu Ḥanīfah has validated waging war on the rebels even before they embark on violence, that is when they assemble together with their force in such a way that presents a threat to normal order in the community.[107]

3. TYPES OF *FITNAH*

Fitnah is divided into two main types, namely *fitnah* pertaining to doubts (*fitnah al-shubhāt*), and *fitnah* pertaining to sensuality (*fitnah*

al-shahwāt). The former is by far the more extensive in scope and significance, in the works of the early ulema at least, by comparison to the latter. *Fitnah al-shahwāt* is concerned mainly with obscenity and corruption both in words and in conduct, and would appear to be no less significant and perhaps equally if not more intractable in our own times. But the ulema have not paid the same degree of attention to this second type of *fitnah* as they have to the first. This may be partly due to the heavy penalty for illicit sex in Sharī[c]ah which ensures that open indulgence in sexuality has been checked, or else that it remained hidden from public eyes.

The two types of *fitnah* may combine in one person or they may exist separately. In Ibn Qayyim's assessment, the *fitnah* which consists of doubts stems from the weakness of knowledge and vision, and its enormity is intensified when it is attended by ill-intent and the pursuit of passion (*hawā*).[108] The doubt in question confuses the truth with falsehood, and the lawful (*ḥalāl*) with the forbidden (*ḥarām*) in such a way that neither side is supported by proof. The *shubh* or doubt may also arise when there are conflicting indications which remain unresolved and confusion arises as a result. Ibn Qayyim goes on to quote two Ḥadīths in which the Blessed Prophet has instructed the believers to "abandon doubt in favour of that which is not doubtful;" and "whoever abandons the *shubhāt* (pl. of *shubh*) purifies his faith and his honour."[109]

– دَعْ مَا يُرِيبُكَ إلى مَالاَ يُرِيبُك.

– من تَرَكَ الشُّبْهاتَ فقد استبرأ لِدينه وعرضِه.

Ibn Qayyim lays emphasis on ill-intent (*fasād al-qaṣd*) which, in combination with ignorance, leads to the greatest of evils. The result is disbelief and hypocrisy (*kufr wa nifāq*), the kind of *fitnah* that befell the hypocrites (*munāfiqun*) and inventors of heresy (*ahl al-bida*[c]). "All of these indulged in *fitnah* which originated in doubt that clouded the truth in their eyes and confounded it with falsehood and misguidance (*ḍalāl*)." The *fitnah* in question may consist of a misconception (*fahm fāsid*), false narration (*naql kādhib*), or prejudice and pursuit of passion which are accompanied by blindness to the truth and corrupt intention.[110]

Ibn Qayyim illustrates the foregoing by reffering to some of the views held by two renowned Muslim scholars, namely Ibn Sina (Avecenna: d.416A.H./1037), and Naṣīr al-Dīn al-Ṭusi (d. 673 A.H.), both of whom have come under sharp criticism and have been

charged with holding views that were against the accepted principles of Islam. Ibn Qayyim, thus, explains: "Ibn Sīnā himself tells us that he was a supporter of the doctrine of al-Ḥākim," one of the leading figures of the Bāṭiniyyah who ruled Egypt, and whose doctrine is followed to this day by the Druz of Lebanon and the Isma^{c}ilis of India. Ibn Qayyim vehemently denounces the fact that words and signs of insult and abuse to Abu Bakr, Umar, Uthman, ^{c}Āishah and many of the leading Companions were exhibited over the mosque and other public places. The reporter adds that Ibn Sīnā did not believe in the truth of prophethood, and that he did not forbid what was forbidden (*ḥarām*), nor did he conform to that which the Sharī^{c}ah had made lawful.

The narrative continues: Muhammad al-Sharistāni wrote a book, entitled *Al-Muṣāra^{c}ah*, (literally, wrestling), in which he refuted Ibn Sīnā's contention where the latter denied that God had created the universe, and denied that God had either the knowledge or the power to create it. This was followed by Naṣīr al-Dīn al-Ṭūsi who became another instrument of *fitnah* by writing a book in refutation of al-Sharistani, bearing the title, *Al-Muṣāra^{c}ah al-Muṣārah^{c}ah*, In this book al-Ṭūsi contends that God Most High did not create the heavens and the earth in six days; that He had no knowledge nor power at His disposal; and that He did not resurrect the dead. Ibn Qayyim equates these views with infidelity and outright disbelief.[111] In addition, it is noted in this narrative that what was initially regarded as a *fitnah* of doubt was subsequently denounced and referred to as infidelity and disbelief.

This shows, once again, that it is exceedingly difficult to demarcate these often overlapping concepts, namely *fitnah* of the mind, or *fitnah al-shubh*, with outright heresy and disbelief. The subject-matter of *fitnah* can, of course, be something which may not have a direct bearing on faith or adherence to a creed, in which case no difficulty would be expected to arise in distinguishing *fitnah* from *kufr*[112]. I will return to this subject later. However, at this point, it might be useful to give another example of the *fitnah* of *shubh*. Once again, I quote the example from Ibn Qayyim and it relates to distorting the meaning of the Qur'ān by reading into its words the kind of interpretation which is in total contradiction with the rest of the Qur'ānic teachings. The phrase in question appears in more than one place in the Qur'ān side by side with a reference to the lawfully wedded wife with whom sexual intercourse is lawful. Thus while validating conjugal relations between spouses the text then continues "and those whom your right hands possess" - *aw mā malakat aymānukum* (al-Mu'minūn, 23:6; see

also al-Ma^{c}ārij, 70:30). This last phrase is taken by some to mean, as Ibn Qayyim points out, that sodomy is lawful with one's male slave. However, he then hastens to write that "anyone who embraces this view is an infidel by virtue of the unanimous agreement of the entire *ummah* (*kāfir bi ittifāq al-ummah*)."[113]

This is a striking and, perhaps, also a typical example of what *fitnah al-shubhāt* is supposed to mean. There is clearly a corrupt intention behind such an interpretation as it stands in stark contrast with the moral teachings, and indeed the letter and the spirit of the Qur'ān. This element of ill-intent (*fasād al-qaṣd*) which Ibn Qayyim has himself specified is also a useful indicator by which to draw a distinction between the *fitnah* of doubt and some of the instances of heresy of *bid^{c}ah* which I have elsewhere discussed. For *bid^{c}ah* is by definition an honest but misguided attempt at making a contribution, on the part of its author, to the development of a legal or religious theme. This is clearly not the case in the *fitnah al-shubhāt*. It is also noted that *bid^{c}ah* is closely related to personal opinion (*ra'y*), albeit a misguided one, and tends to have an intellectual content, whereas *fitnah*, in its simpler varieties at least, can be an utterance or an act without an intellectual overload. Seditious *fitnah* can nevertheless be distinguished from both *bid^{c}ah* and *kufr* on grounds of their respective political and religious contents. Whereas seditious *fitnah* is a dominantly political concept, *bid^{c}ah* and *kufr* tend to have religious overtones. Opposition to the government, and pursuit of political power often constitutes the key ingredients of sedition, whereas these may, or may not, be relevant to heresy and disbelief. Having said this, however, circumstantial factors would tend to play a crucial role in changing *bid^{c}ah* and *kufr* into *fitnah* and the latter into rebellion against lawful authority, or *baghy*.

The second type of *fitnah* to be discussed here is speech or forms of expression which promote obscenity, sensuality and lust – a description which is obvious in the phrase – *fitnah al-shahwāt*. This type of sedition consists of sinful deeds, (*fisq al-a^{c}māl*) when people indulge in prurience and corruption which depraves their thoughts and conduct, especially if they are weak or ignorant. *Fitnah* of this type often originates in lust, passion or caprice and its corrupts the mind, faith, and character of both its perpetrator and its victim. The result is either belief in falsehood, or indulgence in corrupt activity, or both.[114]

Obscenity is value-laden and broad in its meanings, which is why is does not lend itself to a clear definition. Part of the difficulty concerning this type of *fitnah* lies in the changeable character of

public opinion, in what it may regard to be acceptable and decent, as opposed to what it considers lacivious and obscene. Notwithstanding the difficulty over definition and understanding of *fitnah al-shahwāt*, a reasonable case can be made for imposing a limit on freedom of expression in the interest of public decency, and to protect vulnerable members of society against provocative expressions that appeal to base and ignoble passion.

According to Ibn Qayyim, the root and origin of all *fitnah* is traceable in the attitude which gives priority to personal opinion (*ra'y*) over the *shar*ᶜ, and to caprice (*hawā*) over reason (*'aql*). It thus appears that sedition may originate in any, or all, of the allied concepts of caprice (*hawā*), pernicious innovation (*bid*ᶜ*ah*), distorted interpretation (*su'al-ta'wīl*), and inimical doubt (*shubh*). These are turned into *fitnah* when they are expressed, conveyed, or propagated in ways that challenge the legitimacy of lawful government, or if they disrupt peace and order, or deprave and corrupt the minds of weak and ignorant individuals.[115]

Fitnah pertaining to doubt is prevented, as Ibn Qayyim observes, by certitude (*al-yaqīn*), and *fitnah* pertaining to lust is prevented through patience (*al-ṣabr*).[116] The Qur'ān provides the necessary guidance when it addresses the believers to uphold the truth, which protects them against doubt, and to exercise patience, which is their principal defence against indulgence in corruption (al-ᶜAṣr, 101:3). Ibn Taymiyyah has quoted al-Shāfiᶜi in support of his own view concerning this surah, that "If everybody were to meditate on sura al-ᶜAṣr, they would find it sufficient." He continues by saying that God Most High has informed us that all men are at a loss except for those who stand for truth, exhort each other to that effect, and exercise patience, Ibn Taymiyyah then adds, that patience, here, includes patience in bearing hurt, and in regards to things that are said, patience in adversity and against temptation. But then, it is added, that patience of this calibre is unfeasible unless there is something by which a person can gain reassurance and comfort, and that this can be gained by the certainty of firm conviction. As the Prophet said in a Ḥadīth, narrated by Abu Bakr al-Ṣiddīq: "People! Ask God for certitude and good health, for after certitude no gift of His is better than good health, so ask God for both."[117]

The Sharīᶜah does not specify any punishment for sedition. The precedent of the Pious Caliphs indicates that they penalised doubtful *fitnah* with a light deterrent punishment as they were careful not to overly impose on the dignity and freedom of the individual. Instead, the caliphs applied persuasive methods of giving correct

guidance to those who engaged in minor instances of *fitnah*. However, this climate of constructive tolerance and restraint was short-lived, and radical changes soon took place after the emergence and proliferation of sectarian movements and their indulgence in speculative discourse when confounding and polemic ideas became commonplace. There were also conspiracies against the state by individuals and groups, which prompted the jurists to authorise heavier penalties for subversive conduct and sedition. Imam Mālik, and many of the Ḥanabilah, went so far as to validate the death penalty for propagators of heresy (Zanādiqah) and for the instigators of *fitnah*. Imam Mālik and some other jurists, for example, advocated the death punishment for Qadariyyah who denied predestination and believed in the power (*qadar*) of man's free will.[118] The jurists were apparently persuaded in this for fear of mischief spreading in the land, and not necessarily out of a desire for retribution. Ibn Taymiyyah maintained the same attitude when he wrote: If the evil that a *mufsid* (instigator of corruption) is spreading takes such proportions that it could not be terminated except by putting him to death, then he is to be executed. Ibn Taymiyyah has no difficulty in finding some authority, however speculative, for this ruling in the sources. Furthermore, he adds it is not always necessary to wait until the *fitnah* actually occurs, but that preventive action can be taken. Ibn Taymiyyah also maintains that when the offender possesses force, and the means by which to carry out the threat he poses, like the Kharijites and the Zanādiqah, then punishment is justified and it need not be delayed until corruption actually materialises.[119]

Imam Abū Ḥanifah has, on the other hand, ruled out the death punishment for instigators of heresy and sedition. They are, instead, he maintains, to be given a deterrent punishment of *taᶜzīr* which does not amount to death, and yet, is severe enough to deter evil. Death punishment, he adds, is permitted only when the offenders take up arms, in which case they become treasonous rebels (*bughghāt muḥaribūn*) and must be fought.

While referring to Caliph ᶜAli's attitude toward the Kharijites, the Hanafi jurist al-Sarakhshi observes that the Imam may neither kill nor imprison those who differ with the majority and challenge their leadership. According to him, only when the dissenters muster their forces and embark on violence against the just community (*ahl al-ᶜadl*), does it become lawful to resort to the use of force.[120] From his enquiry into the views of the *madhāhib* on this issue, Abu Zahrah has reached the following conclusion: "We are inclined toward the opinion of Abu Ḥanifah and his disciples. For death is the ultimate

punishment and it must be avoided for as long as there is an alternative course of action to take."[121]

While affirming that procreation and enjoyment are the legitimate uses of sex and marriage, al-Ghazāli hastens to add that sex is also one of the greatest incentives to *fitnah*, and that to resist the powerful urge of this instinct requires strong faith and determination. There are two instances of invocation in the Qur'ān where the believers are advised to seek God's help against "the evil of darkness when it prevails" and against "burden which we do not have the capacity to carry" (al-Falaq, 113:3, and al-Baqarah, 2:286).

- وَمِنْ شَرِّغَاسِقٍ اِذَا وَقَبَ.

- رَبَّنَا وَلاَ تُحَمِّلْنَامَالاَ طَاْقَةَ لَنَابِه.

In both of these, it is said that the reference is to sexual urges which darken the intellect when they prevail and which can be overwhelming beyond capacity.[122] To prevent indulgence in *fitnah*, both the Qur'ān and the Sunnah forbid gazing between members of the opposite sex (cf. surah al-Nūr:24:30). According to one Ḥadīth "the gaze is a poisonous arrow that belongs to the devil....."

اَلنَّظْرَةُ سَهْمٌ مَسْمُومٌ مِن سِهَامِ ابليس.

In another Ḥadīth, it is provided that the first (inadvertent) glance at a woman is forgiven but not if it is deliberately repeated.[123]

لَكَ الاُوْلٰى والاُخْرٰى عَلَيْكَ.

While commenting on this second Ḥadīth, al-Sarakhsi observes that the repeated look here means one which is motivated by lust (*shahwah*).[124] This would obviously preclude looking at a woman for a legitimate purpose or on the grounds of necessity.

The Sunnah also warns against intimate proximity (*al-khalwah*) between strangers of the opposite sex. For the *fitnah* of lust does not fail to arise in such situations. A sense of self-discipline and restraint is to be cultivated in all encounters between men and women. "The *zinā'* (adultery) of the eyes," writes al-Ghazāli, "is the greatest of the minor sins as it leads to *zinā'* itself, and one who is unable to control his eyes is also unlikely to be able to control his body."[125] These rules are generally relaxed when the fear of *fitnah* is absent such as encounters between elderly people or in other situations

where the nature of the circumstances overrules the possible *fitnah*.[126] When a person feels overwhelmed by sexual urge, he is advised to seek marriage, and if he cannot afford that, he should fast in order to break the tide of lust. There are, thus, three things, as al-Ghazāli points out, that an unmarried person can do: fasting, lowering the gaze, and occupying oneself with an occupation that overwhelms the heart. But, if all of these prove ineffective, then marriage remains the only possible cure.[127]

A person who has the means and capacity to obtain sexual gratification and yet avoids it is counted, according to one Ḥadīth among the "seven whom God Most High will safeguard under His shadow on the day of resurrection..." And a person who dies in such a state, that is of "silent abstinence" is ranked in another Ḥadīth as a martyr (*shahīd*).[128] The Blessed Prophet is also reported to have said that "obscenity and indulgence in it (*al-faḥsh wa al-tafaḥḥush*) has nothing to do with Islam. The best among Muslims are those who are best in character." This is reaffirmed in another Ḥadīth which addresses Muslims to "avoid obscenity (*al-faḥsh*) as God Most High loves not indecency and corruption".

- إِنَّ الْفَحْشَ وَالتَّفَحُّشَ لَيْسَا مِنَ الإِسْلاَمِ فِى شَىْءٍ. وَإِنَّ أَحْسَنَ النَّاسِ إِسْلاَمًا أَحَاسِنُهُمْ أَخْلاَقًا.

- إِيَّاكُمْ وَالْفَحْشَ فَإِنَّ اللهُ تَعَالَى لاَ يُحِبُّ الفَحشَ وَالتَّفَحُّشَ.

Al-Ghazāli comments that *faḥsh* in the above Ḥadīths is envisaged as obscene and indecent speech, and conduct mostly relating to sexual perversity by those who are morally depraved (*ahl al-fasād*). The morally corrupt, thus, speak of sex in explicitly repugnant and abusive language, which is either reprehensible (*makruh*) or forbidden (*maḥzūr*), depending to some extent on the linguistic usage of the people and the prevailing local custom.[129]

As for *tashbīb*, that is expounding the beauty of women, their good looks and attributes, this is in principle not forbidden, whether in poetry or prose especially when it is not related to a particular person. However, *tashbīb* may partake in transgression (*maᶜṣiyah*) if it is attributed to a particular person other than one's own spouse.[130] Despite an opinion to the contrary which al-Ghazāli acknowledges, he maintains, nevertheless, that singing, dancing, playing with musical instruments, or the watching of these, whether by men or women, are permissible provided that they are not utilised as the

means to sensuality and *fitnah*.[131] In all of this, it is well to bear in mind that the Sharīᶜah validates blocking the means (*sadd al-dharā'iᶜ* to criminality and evil, which is why it forbids wine-drinking of even a small amount as this could develop into imbibing larger quantities. Similarly, intimate proximity (*khalwah*) is forbidden as it could lead to *zinā*: The rule here is that the means and incentives to *ḥarām* become *ḥarām* themselves.[132] If dancing and singing take place as art forms that bring pleasure and entertainment, then they are permissible, but not if they are utilised as the means and temptation to sensuality and corruption.

As for the punishment of those who become the agents of abscenity and corruption, the jurists do not specify any particular punishment, but suggest that this is a matter to be determined under the discretionary powers of the Imam and the judge, known as *al-siyāsah al-sharīᶜiyyah*, or Sharīᶜah-oriented policy. The principle of *siyāsah* authorises the ruler and the judge to take all necessary measures to combat corruption. Ibn Qayyim has quoted Imām Malik, in support of his own view, to the effect that the government and those in charge of community affairs (*'ūlu al-amr*) should take measures to restrict and prevent free intermingling of men with women in the market-place, in recreation areas, and in other places which are frequented by men. Women, he adds, should be discouraged from sitting for longer than necessary in shops of craftmen and manufacturers. But, these restrictions may be relaxed, it is added, in respect of elderly women.[133] While discussing the application of *siyāsah* and *taᶜzīr* to obscenity and *fitnah*, the Hanafi jurist, Ibn ᶜĀbidin, refers to the precedent of the caliph ᶜUmar b. al-Khaṭṭāb which validates banishment (*taghrīb*), and destruction of the means of obscenity and corruption, where this is likely to be effective. This may include destroying the liquor, the vessels in which it is made, or musical and gambling instruments. But, this may only be done by the authorities, not by the general public. Two cases have, thus, been cited in which the caliph is known to have applied banishment. One of these was the case of Naṣr b. al-Ḥajjāj who had become a source of temptation to the women of Madinah, presumably because of his attitude and the fact that he was unusually handsome. It is reported that the caliph initially ordered his head to be shaven, obviously with a view that this might diminish his seductive looks, but it turned out that this was not effective and the *fitnah* that was feared was not prevented. So the caliph ordered that al-Ḥajjāj should be banished from Madinah.[134] The defendant had not committed any particular offence, yet he was sentenced to exile on grounds of a

Sharī^{c}ah-oriented policy. Ibn ^{c}Ābidin, thus, writes that after his conviction, al-Ḥajjāj asked the caliph "What sin (*dhanb*) have I committed, O Commander of the Faithful?" To this the caliph replied that "You have committed no sin, but maybe I have, in that I failed to clear the abode of *hijrah* (i.e. Madinah) from your influence." Thus, the caliph exiled Ḥajjāj for being an agent of seduction and moral depravity (*iftitān al-nisā*) notwithstanding the fact that no particular charge was proven against him. Similarly, the fact that he was so handsome was something over which he had little control. The punishment was, nevertheless, inflicted on the grounds of public interest (*maṣlaḥah*), and in order to prevent corruption.[135]

The second case which Ibn ^{c}Ābidin has briefly discussed is that of Rabi^{c}ah b. Ummayah who was also sentenced by the caliph ^{c}Umar b. al-Khaṭṭāb to banishment from Madinah because of his indulgence in wine-drinking. He was exiled to Khaybar, but then it was reported that he fled from there and embraced Christianity. When the caliph learned of this, he said "I will never sentence a Muslim to exile again." It is, therefore, suggested that imprisonment is preferable to banishment, for the purpose of punishment in such cases is mainly to prevent corruption, whereas banishment leaves open the possibility of corruption recurring. Furthermore, when the suspect is sentenced to exile, he is no longer exposed to the same social pressure as he might be when he continues to live in his own community. This may explain why Ibn ^{c}Ābidin has observed that "banishment tends to open the door to corruption."[136] In order to combat obscenity, the judge may order a deterrent punishment of *ta^{c}zīr* which is an instrument of *siyāsah shari^{c}yyah* in the area of sentencing, and which provides the authorities with flexibility to tailor the sentence to the particular circumstances of each case.[137]

There is general agreement that a house of corruption, and a dwelling belonging to one who is known for obscenity and sin, is no longer given the immunity that the Sharī^{c}ah has granted to private homes. Therefore, it is permitted to raid such a place or even destroy it, if this would deter evil and protect the community against harm. For instance, it is reported that the Caliph ^{c}Umar b. al-Khaṭṭāb intruded a house belonging to a woman, who was a *nā'iḥah* (hired mourner), and who was suspected of immoral activities, and he ordered her to be flogged until her veil fell down. At this point, the caliph made the remark that "she no longer commands the dignity she would otherwise do after indulging herself in sinful activities."

On another occasion, it is further reported that the Caliph ^{c}Umar ordered to set fire to the house of Ruwayshid al-Thaqafi, a wine-

maker in Madinah. The vessels in which the liquor was made were also destroyed and no provision was made for any liability to indemnify the owner of such vessels.[138] In response to a question as to what should be done to a sinner whose house had become a din for drinking and vice, Imām Mālik has said that he should be expelled, and that the house should be rented out. The house should not be sold, the Imām added, because it is possible that the owner may repent and return to his house. The Imām further added that prior to expelling the owner from his house, he should be warned two or three times.[139]

Literature about vice, pornography, and books which distort the truth, advocate lies, and propagate pernicious views and doctrines may be destroyed. For "the harm that emanates from these is greater than wine vessels or musical instruments, and there is no liability for financial loss." With regard to books which oppose a prevailing view or doctrine, or which challenge and refute certain positions, there is basically no objection to such publications, but they may be judged and evaluated on merit and a decision as to whether they should be destroyed may be taken on that basis.[140] There is some disagreement as to whether this ruling is also applicable to non-Muslims, and according to a minority opinion, no distinction is made on grounds of the religious following of the owner. But, the majority of jurists have held that non-Muslims are entitled to compensation unless the Imām rules otherwise.

Broadly speaking, *fitnah* in all of its varieties falls under the purview of *ḥisbah*, that is commanding good and forbidding evil, which is the Qur'ānic right, and also the duty of every individual. Unlike the prescribed offences (*ḥudūd*), retaliation (*qiṣāṣ*), and most of the *taᶜzīr* offences which require adjudication prior to enforcement, *ḥisbah* is basically not dependant on prior decision of government authorities. Thus, when a person witnesses vice being committed, he or she is entitled to intervene and change it to the extent of his or her ability, as the circumstances may permit. The question of compensation for loss may then arise and may be considered. If *ḥisbah* is attempted within its stipulated limits, no compensation would be payable either by the person who has attempted it or by the state.[141] As for entrusting the task of *ḥisbah* to a special government body, such as the market inspector (*muḥtasib*), or the police, the Imam has authority to do so, as indeed it has been done, by statutory legislation and the ordinance of the *ulu al-amr*, in most of the present-day Muslim countries and those of the past. The Imām may do so only if he deems this of benefit to the community, and if it is in harmony

with the objectives of *siyasah shariᶜiyyah*. But government does not have the authority to overrule altogether the citizen's Qur'ānic right to the promotion of good and to the prevention of evil.

The principle in regards to the application of the discretionary punishment of *taᶜzīr* is that the judge and the Imām may order it upon the perpetration and proof of an offence or a *maᶜṣiyah*. The Muslim judge has, therefore, no open-ended authority to penalise acts which the Sharīᶜah has neither proscribed nor discouraged.[142] In light of the overriding concern for government under the rule of law,[143] I have ascertained elsewhere some of the limitations on the powers of the *qāḍi* in regards to *taᶜzīr*. One of the basic purposes of flexibility in the application of *taᶜzīr* is to facilitate protecting the moral standards of the Muslim community. In response to the question of whether the judge may impose a penalty under *taᶜzīr* without there being an actual violation or *maᶜṣiyah*, Ibn ᶜĀbidin has observed that the basic approach in the application of *taᶜzīr* is to confine it to its proper grounds (*haṣr asbāb al-taᶜzīr*). Nevertheless, the ulema have validated *taᶜzīr* in regard to illicit privacy or *khalwah*, which may or may not lead to *zinā'*, and yet it may be punished so as to prevent the possible occurrence of *zinā'*. The jurists of the Māliki school, and many others across the *madhāhib* have also validated detention, in the form of *taᶜzīr*, of individuals who are suspected of having committed an offence, but prior to adjudication and proof.[144] This is also the case with regards to persons who are suspected of immorality and vice, if they are found in suspicious circumstances. The proponents of this view say that the Caliph ᶜUmar has punished Naṣr b. al-Ḥajjāj on grounds of suspected *fitnah* without any specific offence having been proven against him. And lastly, the judge and the Imam have authority to combine *taᶜzīr* with the prescribed punishment of *ḥadd* when the latter is committed in aggravating circumstances. It is, thus, reported that a poet by the name of Najāshi, was brought before the Caliph ᶜAli in a state of drunkenness during the daytime in the fasting month of Ramadan. The caliph punished him eighty lashes for drinking, and then twenty lashes again on the following day, and told him that "the twenty lashes were on account of the disrespect you have shown to the holy month of Ramadan.[145]

4. CONCLUSION

Ever since the rise of the nation state in Muslim societies, legislation has abounded on how to protect the state against the threat of

sedition, conspiracy and rebellion. But, the nation-states in Muslim societies have not made a proportionate effort to balance their overriding concern for security with measures that would safeguard the basic rights of their citizens. Similarly, the governments of Muslim societies have not exhibited the same degree of diligence in protecting the citizen's freedom of expression as they have in limiting it in their drive for self-preservation. This may offer a partial explanation as to why the nation-state has not struck roots in Muslim societies in the same way as it might have in its birthplace in the West. The question of legitimacy and recognition of the lawful authority of the nation-state lies at the root of what has become one of the most dangerous *fitnah* of the twentieth century, namely the military *coup d'etat*. There can be little support, let alone genuine loyalty, for a government that has acceded to power through coercion in the first place, and who then holds on to it through police methods. For a legitimate government necessitates popular representation, and a clear commitment to the fundamental rights and liberties of its citizens.

Among the many ways in which the government could enhance loyalty and popular support for the state in Muslim societies, one would be to forge a closer identity with their own heritage, the Sharī^{c}ah of Islam. The Sharī^{c}ah provides guidelines on preserving human dignity which are strongly individualist in orientation; they protect the individual and inspire lattitude, and they can be utilised so as to enhance the Islamic content of statutory law pertaining to *fitnah*, and other related themes such as *ḥisbah* (commanding good and forbidding evil), and *shurā'* (consultation). To a large extent all the following forms of *fitnah* can be regulated under the umbrella of *siyāsah shari^{c}iyyah*: sedition and incitement to mutiny; violation of the freedom of religion; distorted interpretation; and indulgence in obscenity and corruption. But, a sound and judicious *siyāsah* can only be expected of a government which is confident of its own integrity and the loyalty of its citizens. The soundness and propriety of a government is directly related to its concern for the moral standards of society; and to the diligence that it shows in protecting the family, its youth, and weak individuals against corrupt influences. The seditious *fitnah* of our time is closely related to the consultative capacity of the government, the degree to which it can involve citizens in decision-making processes, and to what extent it can offer inspiration and moral leadership to its people. The oppresive *fitnah* of our time, and its consequent violation of the religious freedom of the believers, is a major issue in minority Muslim com-

munities who live under the sovereignty of non-Muslim governments. The challenges that they face are, however, mostly beyond the scope of this discussion. *Fitnah*, in the sense of distortion accompanied by compromised integrity or outright intention to corrupt, can be diminished by encouraging good standards of morality and conduct in the family, in the educational system, in government departments, and most of all in the efforts that it takes to bring up an integrated individual who is not eager to comprise his conscience by the single-minded pursuit of materialism, and lack of concern for others. To be sure, no society has ever been free of *fitnah*, but when *fitnah* overtakes the leaders of the community, and worse still, when the concern on the part of the community, itself to combat *fitnah* fades into insignificance, and when the people lose sight of its values that is where despair sets in and no one remains immune from its demoralising influence.

IX. Blasphemy (*Sabb Allah wa Sabb al-Rasul*)

1. INTRODUCTORY REMARKS

The first issue that arises concerning blasphemy is over the definition and scope of this offence. Blasphemy has always remained somewhat of an open and also difficult concept to define. This is to a large extent true not only of Islam but also of Christianity and Judaism. A part of the difficulty over the absence of a specific definition for blasphemy in the works of *fiqh* is due to the fact that blasphemy in these works has generally been subsumed under apostasy and treated as a part thereof. The hallmark of blasphemy is, of course, a contemptuous and hostile attack on the fundamentals of religion, which offends the sensibilities of its believers. It is on this basis that blasphemy can be distinguished from apostasy, for the latter can take place without a contemptuous attack and sacrilege. The ulema have generally subsumed blasphemy under apostasy on the analysis that one who blasphemes the essentials of the faith cannot fail, at the same time, to renounce it. This is of course true, but a separate definition for blasphemy is still wanting, especially with reference to non-Muslims who can only commit the one but not the other. In the initial section of this Chapter, I have expounded the nature of the issue over the definition and scope of blasphemy and its differences or overlap with apostasy (*riddah*), disbelief (*kufr*), and heresy (*zandaqah*). The dis-

cussion then proceeds to expound the works of the ulema of the major schools on what may, or may not, amount to blasphemy; whether blasphemy consists primarily of violation of the Right of God or of the Right of Man, and the consequences, if any, of drawing such distinctions. The chapter continues by expounding the scholastic rulings of the *madhahib* over the admissibility, or otherwise, of repentance in blasphemy, and blasphemy by a non-Muslim. A section has also been devoted to Salman Rushdie's novel, *The Satanic Verses,* where I have reviewed, some of the views and responses contributed by contemporary jurists and commentators.

In Appendix IV which appears at the end of this volume, I have presented a brief account of the law of blasphemy in Malaysia, Indonesia, Pakistan, and Egypt. The reader may, thus, expect the two major themes of this Chapter to be an exposition of the rules and doctrines of the leading schools on the subject of blasphemy, and an attempt at re-evaluation of issues that may warrant an analysis. This is to a large extent a corollary of my attempt at separating blasphemy from its allied concepts of apostasy, heresy and disbelief.

This enquiry does not attempt a comprehensive treatment of blasphemy, as many of the juristic details over the punishment of this offence, and so on, fall properly within the scope of criminal law. Therefore, I propose to be brief on such themes, and confine the scope of my discussion to the subject of our concern.

2. DEFINITION AND SCOPE

The linguistic origin of the word "blasphemy" is traceable to the Greek "*blapto*" (to harm) and "*pheme*" (speech), simply meaning to defame or insult. According to the *Encyclopedia of Religion and Ethics* (II, 672), blasphemy in Islam is a very broad concept which comprises "all utterances expressive of contempt for God, for His names, attributes, laws, commands and prohibitions ... such is the case for instance if a Muslim declares that it is impossible for Allah to see and hear everything, or that Allah cannot endure to all eternity, or that He is not one (*wāḥid*) .... All scoffing at Muḥammad or any other prophets of Allah is also to be regarded in Islam as blasphemy."

It is noted that blasphemy in this passage is so broadly defined as to be capable of application to a wide variety of concepts. No clear distinction has been made between blasphemy and its allied concepts such as apostasy (*riddah*), heresy (*zandaqah*), and denial of Islam (*kufr*). It is interesting to note, perhaps, that Judaism attempts

to confine the scope of blasphemy so that it does not include a simple renunciation of the faith. Similarly, blasphemy as an offence in contemporary western law does not include a simple renunciation of the faith. In Islamic law, too, prominent scholars like Ibn Taymiyyah and others have attempted to distinguish blasphemy from apostasy, but the majority of jurists, as stated earlier, subsume blasphemy under apostasy. There is, in other words, a tendency to treat blasphemy, apostasy, and infidelity as substantially concurrent and interchangeable. It is, perhaps, true to say that during the lifetime of the Blessed Prophet almost all the instances of apostasy were accompanied by hostility and abuse to the Prophet, and as such it became difficult to separate apostasy from blasphemy. In that era, renouncing Islam, rather than insulting the Prophet, was seen to be the more fitting charge to be laid against the renegades and enemies of Islam.

The principal offence of blasphemy, which I shall address in the following pages, is reviling God and the Prophet Muhammad, and a contemptuous rejection of their injunctions. The ulema of the various schools have expounded, words, acts, and expressions which amount to a renunciation of the faith. These include, insult to God Most High and to the Blessed Prophet, irreverent and contemptuous statements that outrage the religious sensibilities of believers, acts such as throwing the holy Qur'ān on a heap of rubbish, giving lies to the fundamentals of law and religion and so on. These have all been identified as words and acts that at one and the same time amount to apostasy, disbelief, heresy, and blasphemy.[146]

Al-Samarā'i has quoted twelve definitions for apostasy (*riddah*), all of which identify *riddah* as the renunciation or abandonment of Islam by one who professes the Islamic faith. They differ only in regards to certain additional elements: while some of these definitions specify that renunciation can take place in words or by action, others add that it can occur not only by means of deliberate speech but also in jest. Most of these definitions are, however, silent on the point as to whether apostasy also subsumes blasphemy. But the one definition that al-Samarā'i has singled out as being most comprehensive is that given by Shāfiᶜi jurist, Qalyūbi, for it comprises, as al-Samarā'i points out, all the varieties of *riddah*, verbal and actual, and all conduct that denotes a rejection of the dogma. This definition also includes expressions which are contemptuous and hostile, as well as those which consist of a simple renunciation of the faith. Qalyūbi's definition is as follows: "*Riddah* is severing one's tie with Islam with the intention of coverting to *kufr* by words or acts that

are indicative of *kufr*, regardless as to whether they emanate in contempt, hostility, or a simple disbelief."[147]

It is, thus, clear that neither Qalyūbi nor Samarā'i have attempted to draw a distinction between a simple disbelief and one which is accompanied by hostility and contempt. Qalyūbi's definition of *riddah* is considered comprehensive precisely because it applies equally to all varieties of disbelief. However, I submit this to be a point of weakness in this definition. For it combines together fundamentally different concepts. A simple disbelief is not the same as one which is contemptous and hostile to the belief structure of Islam and the sensibilities of its followers. Also the attempt to combine blasphemy with apostasy and disbelief is indicative of weakness on different grounds. Bearing in mind the Qur'ānic proclamation to the effect that "there shall be no compulsion in religion" (al-Baqarah, 2:256),

لَآ اِكْـرَاهَ فِى الدِّيْنِ.

it would be difficult to implement this Qur'ānic principle if we were to treat blasphemy and apostasy as a unified concept. I have, therefore, attempted to separate blasphemy from apostasy and disbelief, and to confine my discussion to the treatment of blasphemy alone. Any references which are made to the allied concepts of apostasy, heresy, and disbelief are only intended to serve as aids to the elaboration of the main theme of this discussion.

Without entering into detail, it will briefly be noted that the Qur'ānic *āyāt* on the subject of disbelief have, on the whole, been conveyed in broad and general terms which enable two possible approaches that could be taken toward them. One would be a generic approach that would seek to apply the broad concept of *kufr* to all acts and utterances that amount to a denial of faith and to its principles. Such an approach would tend to blur the dividing lines between blasphemy and a variety of other concepts. The alternative approach that may be taken to the understanding of the Qur'ān would be to distinguish blasphemy from other forms of disbelief in light of the terms and references that are found in the holy text itself. Thus, we find two distinctive terms in the relevant Qur'ānic passages that relate to blasphemy, namely, (*muḥādadah, mushāqaqah*) annoyance and hostility to God Most High and to His Messenger by reviling their exalted names. Now, if we apply blasphemy only to the hostile and contemptuous varieties of *kufr*, we would have attempted to separate blasphemy from the other varieties of disbelief in which these elements are absent.

The attempt to treat blasphemy as a separate offence is justified, as already noted, firstly, on the ground that it consists of insult and contempt which may not be the case with regard to other varieties of *kufr*, and secondly, that it offends the religious sensibilities of the community of believers. It would appear that blasphemy, for the most part, subsumes apostasy, whereas the latter may not amount to blasphemy, especially when apostasy consists of a simple rejection of the faith but does not incur sacrilege. This must be qualified by saying, however, that blasphemy subsumes apostasy with reference to Muslims only as a non-Muslim could not commit the Islamic offence of apostasy. Blasphemy can, on the other hand, be committed by Muslims and non-Muslims alike. However, words and acts must be explicitly hostile and offensive to the religious sensibilities of Muslims if they are to qualify as blasphemous. A non-Muslim would not be committing blasphemy by merely professing a religious doctrine which conflicts with the belief structure of Islam. The Christian belief, for example, that Jesus is the son of God may be deemed blasphemous to the Muslim faith as it attributes a falsehood to the clear text of the Qur'ān where God Most High denies having any offspring (al-Ikhlāṣ, 112:3). But since the Christians normally profess this belief, not so as to offend Muslim sensibilities but as an article of their own faith, they would not be committing blasphemy. When a Muslim commits blasphemy, he or she automatically renounces Islam, for as Ibn Taymiyyah points out, the blasphemer (*al-sābb*) "insults, ridicules and denigrates God, or His Prophets, and the enormity of this is greater than any type of disbelief."[148] This is the view of the vast majority of ulema and some have even claimed a consensus (*ijmāᶜ*) in its support.[149] But, there is a minority opinion, attributed to some jurists of Iraq that utterances which consist of insult and abuse amount to blasphemy only when the perpetrator considers what he says to be permissible in principle (*in kāna mustaḥillan*), but not if he does not lay such a claim, in which case he would have committed a transgression (*fisq*), but not *kufr*.[150] This opinion would preclude from the purview of blasphemy, expressions that the perpetrator may have uttered in attenuating circumstances which do not reflect his balanced judgement and state of mind.

The juristic manuals I have consulted exhibit a remarkable consistency in the themes that they discuss in their chapters devoted to apostasy. Thus, we find that the juristic expositions of the ulema of the four leading schools on apostasy differ only on certain points when they discuss issues such as whether the apostate/blasphemer should, or should not, be offered an opportunity to repent; whether his

repentance is at all acceptable; whether he automatically relinquishes some of his rights, including the property that he owned prior to recantation; and whether, in the event of repentance, his devotional acts such as prayer and fasting performed prior to apostasy remain intact. Other issues that are typically addressed by the jurists include the question as to whether or not the non-Muslim (*dhimmi*) should be differently treated from the Muslim in the matter of blasphemy; whether the female apostate is liable to the same punishment as the male; and whether insulting the wives of the Blessed Prophet, and his Companions are to be treated on the same footing as insulting the Prophet himself. The jurists also discuss the question as to whether a distinction should be made between insult to God (*sabb Allah*), and insult to the Prophet Muhammad, and also whether insulting other recognised Prophets and the angels amount to blasphemy. These issues, which are addressed in the juristic manuals receive fairly consistent responses. Expositions of these issues have the advantage of identifying the positions that the ulema have taken with regard to them fairly clearly, even in the absence of clear definitions. The relative absence of disagreement over issues pertaining to apostasy also tends to impress upon the reader the high level of sensitivity and caution that the ulema have exhibited in the treatment of this subject. Certain issues have, nevertheless, remained unresolved and controversial, one of these being the actual definition of disbelief, or *kufr*, which has meant a variety of things to different individuals and sects.

3. DISBELIEF (*Kufr*)

The juristic literature on *kufr* is primarily concerned with the question as to what may, or may not, amount to infidelity and disbelief (*kufr*), a broad term which comprises almost every variety of disbelief, association (*shirk*), blasphemy and apostasy. In the Qur'ān and the Sunnah, as well as in the juristic works of the ulema, *kufr* occurs with two different meanings, namely the greater *kufr* (*al-kufr al-akbar*) which is the explicit and unequivocal renunciation of the faith, and the lesser *kufr* (*al-kufr dūn al-kufr*) which is a degree below the former. *Kufr* in the latter sense does not incur disbelief and it is used metaphorically in order to accentuate the gravity of conduct which actually amount to transgression (*fisq*).[151] What is of interest here is that the word *kufr* has been applied in a generic sense to concepts which do not necessarily amount to disbelief. Readers who are familiar with the sectarian literature of Islam will also note the somewhat facile manner in which accusations of *kufr*

were made by the different sects and factions against one another, so much so that it often becomes difficult to distinguish between the greater and the lesser *kufr*. Thus, it is not always easy to differentiate the *kāfir* (infidel) from the *fāsiq*, (transgressor) or from the *munafiq* (hypocrite) respectively.

In a Chapter entitled "Who Becomes an Infidel and who Doesn't?" Ibn Ḥazm opens the discussion in his work, *Al-Fiṣal Fi al-Milal wa'l Ahwā' wa al-Niḥal*, with the following remarks:

> There is disagreement on the question of what amounts to disbelief and what exactly distinguishes belief from disbelief. There are groups and sects, on the one hand, who maintain that anyone who rejects his or her own respective views and doctrines on the articles of the faith becomes a *kāfir* ... others have held that rejection of their own doctrines by their opponents amounts to *kufr* only in regards to the attributes of God, but that it amounts to transgression in all other areas. According to yet another view, a Muslim may not be charged with *kufr* or *fisq* (sin) for an opinion regarding either dogmatic or juridical issues (*iʿtiqād aw fatwā*) and that opinions of this kind may partake in *ijtihād* which merit a reward.[152]

On the same page Ibn Ḥazm has recorded that the ulema disagreed on whether a person who abandons the *ṣalāh* (obligatory prayers), *zakāh* (legal alms), fasting (*ṣiyām*), and the pilgrimage of *ḥajj* also becomes a *kāfir*. He then continues to expound the views and doctrines of the Kharijites, the Qadariyyah, the Bāṭiniyyah, and the Murji'ah, their accusations and counter accusations against one another, and whether they amount, in each case, to a mere transgression or to outright disbelief.

It is not my purpose to enter into the details of such polemics and even less so to ascertain, justify, or refute the charges of disbelief that have often been laid by individuals and sects against one another. I only submit here that many of these accusations tend to be at odds with the letter and spirit of the guidance that is found in the sources. It is also due partly to the absence of consensus on the definition of *kufr* that the different sects and factions have found it possible to level charges of disbelief against one another. Furthermore, the concept and definition of *kufr* would appear to have widened so much in scope that it became possible to apply '*kufr*' to almost any deviation, or even to a mere disagreement. Surely though, the correct approach would lie in the opposite direction, for instead

of allowing the expansionist trend in the concept of *kufr*, it should have been narrowed down, specified, and isolated from its allied concepts. This would have been possible, for instance, through distinguishing and specifying the various types of *kufr*, and some of its components which would merit such isolation. There is evidence to suggest that such an approach would be more harmonious with the Sunnah of the Prophet.

The basic guideline that is conveyed in a number of *aḥādīth* (some of which I have quoted in an earlier Chapter on freedom of religion) has been summarised by Abu Zahrah who stated that "no one may accuse another of disbelief, blasphemy, and apostasy without manifest evidence, and anyone who does so partakes in that accusation himself."[153] This view finds in support al-Ghāzali who is critical of the light manner in which a number of sectarian scholars have accused opposing sects with infidelity and disbelief. Note for example, the following statement in al-Ghazāli's *Al-Munqidh min al-Ḍalāl:*

> The Hanbalites tax the Ashᶜarites with unbelief regarding the affirmation of God Most High "being firmly settled on the throne ..." The Ashᶜarites accuse the Muᶜtazilah with unbelief claiming that the latter tax the apostle with lying regarding the "possiblity of the ocular vision of God Most High."[154]

In a subsequent passage, al-Ghazāli shows his disapproval of these accusations:

> Speculative matters are of two sorts, one which touches on the roots of belief, and one which touches on the branches. Now the roots of belief are three: Belief in God, and in His Apostle, and in the Last Day. All other things are branches. Know too, that there can in no wise be any taxing with unbelief regarding the branches ....[155]

It thus appears that the precise meaning of the Qur'ānic references to the ocular vision of God, and of God's "being firmly settled on the throne" are not known, for these issues are decidedly speculative and to base accusations of unbelief on them is totally unjustified. These phrases are also included in the parts of the Qur'ān which are known as *mutashābihāt* (intricate, and unintelligible to the human mind) whose precise meaning is known only to God Most High. Engaging in speculative discourse and polemics over such issues is clearly discouraged by evidence found in the Sunnah,

and any claim to certainty concerning them is an excess in itself, let alone a base for a charge of disbelief.

In addition to the foregoing is the remark that Ibn ᶜĀbidin made concerning this subject. He admits that there is much unfounded accusations of disbelief in the works of the followers of the *madhāhib*. But, he hastens to add that none of the prominent *mujtahids* has done so, and that those who made such charges were mainly writers of a lesser calibre whose works do not command a high degree of credibility.[156]

4. HERESY (*Zandaqah*)

This is a parallel concept which is frequently encountered in the literature on the subject of *kufr*. Broadly speaking, *zandaqah* refers to persons who ostensibly professes Islam but who, like the hypocrites (*munāfiqun*) during the lifetime of the Prophet, conceal their inner disbelief, and disseminate falsehood among the believers.[157] The precise meaning and definition of *zandaqah* has remained somewhat uncertain, however, due to a variety of considerations, including conspiracy and subversion against the ruling authorities, the ulema have taken an unmistakably vigorous stand on the punishment of *zandaqah*. Many different meanings have been recorded for *zandaqah* and *zindīq* (atheist, heretic), for example; expressing impudence and disdain (*al-tahattuk wa al-istihtār*) of the established religious values of Islam; or adherence to Magian and Manichean beliefs, and agnosticism. Evidence suggests that the word has most frequently been applied to persons who professed the beliefs of Mani and Mazdak in private, but who claimed to be Muslims in public. This was the early usage of the word '*zandaqah*' and the other meanings were gradually added during the latter half of the second century hijrah. "The word was loosely used to describe people who believed in their older religions, but who ostensibly professed Islam for self-aggrandisement and material gain.[158] *Zandaqah* was also used to describe people who doubted the veracity of the established religion and who professed the supremacy of reason in all spheres; it also included persons who propagated disbelief, and indulged in wine-drinking and vice, and those who ridiculed the whole idea of religion. Furthermore, the *zandaqah* believed in the permanence of this world (*dawām al-dahr*). Originally, they were the followers of Disan, Mani and Mazdak who believed that light and darkness were the essence of creation and that the universe originated in them. Mazdak also propagated that women and land were the common property of all.[159]

This uncertainty in defining *zandaqah, kufr,* blasphemy, apostasy, and the absence of clear distinctions between them can be seen, once again, in the following quote from *The Encyclopedia of Religion:*

> From the viewpoint of Islamic law, blasphemy may be defined as any verbal expression that gives grounds for suspicion of apostasy (*riddah*). In theological terms, blasphemy often overlaps with infidelity (*kufr*) which is the deliberate rejection of God and revelation. In this sense, expressing religious opinions at variance with standard Islamic views could easily be looked upon as blasphemous. Blasphemy can also be seen as the equivalent of heresy (*zandaqah*) .... Thus in describing the Islamic concept of blasphemy, it is necessary to include not only insulting language directed to God, the Prophet, and the revelation, but also theological positions and even mystical aphorisms that have come under suspicion.[160]

Some jurists have taken a rigorous stand on *zandaqah,* in particular, the Ḥanafis of Iraq who treated the *zindīq* even more severely than the apostate. While punishment by death was assigned for both, the latter was to be given an opportunity to repent and be acquitted as a result. But, the Ḥanafis, and also Imām Mālik ruled that repentance in the case of a *zindīq* was of no avail and did nothing to relieve him of the mandatory death punishment. On the other hand, the majority, including the Shāfiᶜis, have held that the *zindīq* was to be treated like the apostate and should likewise be given the opportunity to repent.[161]

5. BLASPHEMOUS EXPRESSIONS AND THE QUESTION OF INTENT

The first issue to be discussed here is the state of mind of the blasphemer and the relevance of his intention regarding the words or expressions he might have uttered. To what extent is it true, for instance, to say that blasphemy is a strict liability offence? Does the law require proof that words uttered must be representative of the state of mind of the offender? A second issue would be to ascertain the criteria by which to evaluate the meaning and import of words. In this context, I shall review some words and expressions that the ulema have identified as being typically blasphemous.

In response to the question of whether a person who reviles God becomes a *kāfir* merely on the basis of the words he or she uttered,

Ibn Ḥazm wrote that no one on the face of the earth would disagree that *sabb Allah* amounts to *kufr*, except for the Jahmiyyah and the Ashᶜariyyah who have held that insult to God Most High and declaration of *kufr* was not necessarily *kufr*, but only an indication that the perpetrator has ceased to believe in God. Ibn Ḥazm hastens to add that this view is premised on a corrupt foundation which is remote from the consensus of the followers of Islam. For they (Jahmiyyah and Ashᶜariyyah) maintain that faith (*īmān*) consists only of inner affirmation (*taṣdīq bi al-qalb*) and that words and statements are of little significance by comparison. In their view, a man may utter words of disbelief and yet may still be a believer. Once again Ibn Ḥazm rejects this line of argument and regards it as undiluted disbelief (*kufr mujarrad*) as it is contrary to the consensus (*ijmāᶜ*) of the *ummah* and violates the commands of God Most High and His Messenger. He continues by saying that all those who believe that the Qur'ān is the speech of God which was revealed to us by the Prophet Muhammad will agree that our judgement of the belief and disbelief of others must be based on what they say. In addition, he adds that there is ample evidence in the Qur'ān to prove that this is the case. At this point, Ibn Ḥazm cites two Qur'ānic passages in support of his statement:

(a) Verily those who say that Jesus, the son of Mary, is God are disbelievers (al-Ma'idah, 5:17).

لَقَدْ كَفَرَ الَّذِيْنَ قَالُوْا اِنَّ اللهَ هُوَ الْمَسِيْحُ ابْنُ مَرْيَمَ.

(b) And they uttered the word of *kufr* and so they reverted to *kufr* following their profession of Islam (al-Taubah, 9:74).

وَلَقَدْ قَالُوْا كَلِمَةَ الْكُفْرِ وَكَفَرُوْا بَعْدَ اِسْلَامِهِمْ.

Thus, it is clear from the foregoing, that the belief or disbelief of individuals is determined on the basis of their words, unless it is known that they were uttered under duress. Similarly, as Ibn Ḥazm points out, evidence can be found in the Qur'ān, with reference to conduct; for example, where God Most High declared Satan a disbeliever when the latter was ordered to prostrate to Prophet Adam but he refused. Thus, it is suggested that the declaration was on account of Satan's conduct, despite his professed belief that God was his creator (that God created him from fire and created Adam from clay). Ibn Ḥazm also adds that faith is a hidden phenomenon which

is known only to God Most High, but that our judgement of it has to be based on the words and conduct of people. He also refers to passages in the Qur'ān, where God speaks of people who verbally expressed what they did not believe but who still became infidels: For example, the Jews affirmed the truth of the Prophethood of Muhammad, but, when they uttered words of disbelief, they became infidels even if what they said was contrary to their affirmation. Thus, there remains no doubt, Ibn Ḥazm concludes, that reviling God and the Prophet amounts to *kufr*, regardless of the possibility that its perpetrator may not have meant to renounce Islam.[162]

There is general agreement on the point that declaring a Muslim as infidel (*takfīr al-Muslim*), whether for blasphemy or apostasy, is for the most part, a matter which is determined on the basis of obvious facts, that is speech and conduct which can be supported by evidence. Words of disbelief may be explicit, such as reviling God and the Prophet by expressions which are commonly known to be abusive and which convey mockery, hostility and contempt. In the case of such words, the question of motive and intention is immaterial, provided that the perpetrator is in full possession of his faculties. There is no denial that faith is essentially a state of mind, and the jurists are in agreement that a person who conceals his disbelief is still an infidel in the eyes of God, but that the rules of Sharīᶜah concerning blasphemy and apostasy do not apply to him unless his state of mind is expressed in words and conduct. Words that are uttered under duress while the speaker remains a believer, or when such words are said in a state of permissible intoxication, are of no account. However, with regard to intoxication which is forbidden in the first place, the Mālikis, Shāfiᶜis and Ḥanbalis have held that this is not an excuse and that one who commits blasphemy or apostasy in such a state is accountable. Only the Ḥanafis have held, according to the preferred view of this school, that an intoxicated person may not be declared *kāfir* regardless of the type or the grounds of intoxication.[163]

There is a circumstantial aspect to blasphemy which tends to vary with reference to context, the prevailing custom, and public opinion. The meaning of words is often determined in light of the context in which they are uttered, as well as the nuances they may have acquired through customary usage. But, neither the words nor their customary usage are always clear, and a certain amount of ambiguity arises with regard to words of abuse that are implicit and allusive. Furthermore, words and expressions may convey insult according to their customary usage, even if they are not offensive in the dictionary sense, and it is usually the former which carries the

greater weight in such evaluation. Since custom varies with reference to time and place, it would follow that words of insult may amount to insult in certain circumstances and not necessarily in others. It is for this reason, as Ibn Taymiyyah points out, that insult or *sabb* cannot be defined either on linguistic or juridical grounds alone, and that the basic criterion to which reference must be made is popular custom. The import of abusive words is thus to be ascertained on this ground and anything which the people regard to be insulting will be deemed as such.[164] Ibn Taymiyyah elaborates that verbal insult occurs in two forms, namely invocation (*duᶜā'*), or calling bad names (*sabb*). The former would include such statements as "may God disgrace so and so" or "may God's curse be upon so and so", or "death to so and so." With reference to the Blessed Prophet, maledictions of this kind include expressions such as "may no peace and blessing of God be upon him," or "may he be disgraced," etc. These are said to amount to insult when they are explicit, but not if they are couched in terms that are obvious only to some people and not to others. For instance, according to reports on more than one occasion, the Prophet was addressed by the Jews with the phrase ("*as-sām ᶜalaykum* - death be upon you", instead of the common greeting *as-salām ᶜalaykum).* The question arose as to whether this and similar other expressions amounted to blasphemy at all. There are two views on this: Firstly, that they do amount to blasphemy, and secondly, that they do not as the insulting words are not conveyed in explicit and unequivocal terms. An insult, in other words, which is hidden behind a greeting is not explicit. The reports also suggest that the Prophet did not penalise the offenders for doing so. Furthermore, the Prophet instructed the Muslims that "when the Jews greet you with the phrase "*as-sām ᶜalaykum*", then you should just say "*wa ᶜalaykum*" (and upon you).[165]

قَالَ النَبِيُّ ﷺ: اِنَّ اليهودَ اذا اَسْلَمُوا فاِنَّما يَقُوْلُ اَحَدُهُم السَّام عليكم فَقُولوا وعليكم.

There is a view concerning these incidents, however, which maintains that in principle the insult in question would be sufficient for the death punishment to be applied to the Jews, and the fact that the Prophet pardoned the offenders was due to the weakness of Islam at that time. Having recorded this view, though, Ibn Taymiyyah goes on to observe that it is no more than an arbitrary

and presumptive elaboration. For, had it been an insult that invoked capital punishment, the Prophet would have ordered it, or else he would have ordained a lesser punishment. But, the fact that the Prophet did not do so indicates that punishment was not warranted.[166] In addition, Ibn Ḥazm has made a hypothetical observation on this point by saying that if the Jew in question had been a Muslim, then saying *as-sām ᶜalaykum* to the Prophet would have turned him into an infidel (*kāfir*).[167]

Another type of insult known in Arabic is *taᶜrīḍ bi'l adhā*, or an attempt to annoy, and it consists of an ill-wish or malediction which is ultimately true. When someone says for example that "death is incumbent upon so and so", the question arises as to whether a malediction of this sort really amounts to an insult. According to one opinion, such utterances fall short of an insult on the analysis that they consist of something which is obviously true. But, Ibn Taymiyyah refutes this as being no more than a weak opinion, and adds that any invocation of death up on the Prophet amounts to an insult as it also does with reference to other individuals.[168]

The second form of insult under discussion consists of words of abuse such as "ass", "dog", "a fraud" "bastard", and similar other names and adjectives which are simply insulting in the customary usage of most people. While affirming that all of these are typical words of insult in the custom of the Arabs, Ibn Taymiyyah observes that it matters little whether the insult is conveyed in poetry or prose. He adds that satirical poetry is even more offensive as it tends to arouse emotions more effectively than prose, and furthermore Ibn Taymiyyah adds, an exhaustive list of abusive and insulting expressions cannot be provided as they are virtually endless in any language. Reference must, therefore, be made to the prevailing customs of society, and the circumstances in which they were uttered.[169]

In addition, in contrast to libel and slander, words of insult usually attribute a defect (*ᶜayb*) to someone which compromises his or her personal honour in the eyes of others. The factual content of such an attribution is of no relevance. This is, as I have elsewhere explained, a point of distinction between insult and libel, for the latter normally implies the factual ocurrence of its subject matter or the charge which it contains.[170]

Expression which convey a state of mind or an attitude of one person towards another, without the intent to offend, normally do not amount to insult. Thus, when someone makes a statement such as "I do not believe so and so", or "I do not follow so and so", or "I

do not like so and so," then expressions of this kind neither amount to insult nor to explicit accusation and denial (*takdhib ṣarīḥ*). For, lack of affection and belief may be due to a variety of factors, including ignorance, envy and arrogance. However, with reference to the Blessed Prophet, an explicit denial (*takdhib ṣarīḥ*) such as saying that "he was neither a Messenger nor a Prophet", or that "nothing was revealed to him" and so forth, amounts only to disbelief (*kufr*) but not insult (*sabb*).

Although these are explicit denials which are equivalent to saying that "he was a liar" there is, nevertheless, a difference between a simple denial and calling someone a liar. Often the same meaning can be conveyed in words and phrases – some of which may amount to *sabb* while others may not. Notwithstanding this, Imam Aḥmad b Ḥanbal has held an opinion, and he seems to be alone in this, that one who addresses the muezzin and tells him "you lied" (*kadhdhabta*), is a blasphemer, or *shātim*, for this attributes a falsehood to the affirmation and belief of Muslims in the Oneness of God and the truth of the Prophethood of Muhammad; it is also an insult to the community of believers.[171]

Insult (*sabb*) and attributing a lie (*takdhīb*) to another are, however, two different concepts and this can clearly be seen in the following Hadith Qudsi where the Blessed Prophet relates from God Most High:

شَتَمَنِيْ ابْنُ آدَمَ وَمَا يَنْبَغِيْ لَهُ ذٰلِك، وَكَذَّبَنِيْ ابْنُ آدَمَ وَمَا يَنْبَغِيْ لَهُ ذٰلِكَ. فَأَمَّا شَتْمُهُ إِيَّايَ فَقَوْلُهُ: إِنِّي اتَّخَذْتُ وَلَدًا وَأَمَّا تَكْذِيْبُهُ إِيَّايَ فَقَوْلُهُ لَنْ يُعِيْدَنِيْ كَمَا بَدَأَنِيْ.

> The son of Adam insulted Me (*shatamani ibn Adam*) and it was unbecoming of him to do so; he also attributed a lie to Me (*khadhdhabani*) and it was unbecoming to him to do that. As for his insult to Me, it was his saying that "I had an offspring", and he belied Me by saying that he will not return to Me in the manner I created him in the first place.

While quoting this Ḥadīth, Ibn Taymiyyah acknowledges the difference between an insult and a lie, but he adds that there may be occasions where attributing a lie to another may amount to insult, and that this is a matter to be determined by reference to its context, linguistic nuances and to customary usage.[172]

In a similar vein, attribution of a deliberate lie to the Prophet (*kidhb al-rasūl*, or *takdhīb al-rasūl*) is to be distinguished from insulting the Prophet (*sabb al-rasūl*). This can be seen, for example, in the Ḥadīth which reads: "whoever deliberately attributes a lie to me must prepare himself for a seat in (Hell) fire."[173]

مَنْ كَذَّبَ عَلَيَّ مُتَعَمِّداً فَلْيَتَبَوَّأْ مَقْعَدَهُ مِنَ النَّارِ.

This Ḥadīth is obviously silent on any punishment in this world for the conduct at issue. But, there is no doubt, as many commentators have stated, that deliberately accusing the Prophet of lying is one of "the gravest forms of all distortions of truth, and one that calls for the wrath of God Most High. For saying that the Prophet has lied is essentially like attributing a lie to God Almighty Himself."[174] However, unlike the offence of insulting God and the Prophet, for which the majority of ulema have assigned the capital punishment, there is no specific punishment for attributing a lie to the Prophet. The deliberate fabrication and forgery in Ḥadīth, wherein reports are invented and attributed to the Prophet is a heinous sin, but one which is liable to *taᶜzīr* punishment only. Thus, when a person narrates a Ḥadīth which he knows to be a lie, he commits a major sin, but he does not become an infidel unless there is something in the report which indicates disbelief. If what is said amounts to *kufr* by itself, then it would be treated as such whether the statement is attributed to the Prophet or otherwise. With regards to forgery, the ulema of Ḥadīth have isolated a vast number of fabricated statements which they have classified under the general heading of *al-mawḍuᶜāt*.[175] Invented Ḥadīth are, however, to be distinguished from statements which deny the truth of the Prophethood of Muhammad. As already indicated, a denial of this kind amounts to *kufr* if it is devoid of abuse, humiliation and contempt, but, when denial is accompanied by the latter two, it amounts to *sabb*. Infidelity (*kufr*) is therefore to be distinguished, as Ibn Taymiyyah himself has stated, from blasphemy. A person who declares his disbelief is an apostate (*murtad*), but one who conceals it is a heretic (*zindīq*). Ibn Taymiyyah adds that the distinction between blasphemy and apostasy is not always clear as there may be instances where the matter is open to interpretation and *ijtihād*. This is also borne out by the fact that the jurists have held different views as to whether, and how to distinguish apostasy from *sabb*.[176] Thus, the result that emerges from this analysis is that despite a conceptual distinction that some jurists have acknowledged between blasphemy and apostasy, their attempt

did not reflect the majority position which subsumed the one under the other, and applied the same punishment to both.

There is general agreement that slanderous accusation (*qadhf*) and the attribution of unchaste conduct to the Prophet, or the denial of his legitimacy of descent, or the attribution of any of these insults to the mother of the Prophet amount to blasphemy (*sabb al-nabī*) and to automatic renunciation of the faith. *Sabb al-nabī* whether consisting of slander or other forms of insult can be committed by both Muslims and non-Muslims alike, and there is no difference between them in so far as the question of punishment is concerned.[177] Apostasy can, on the other hand, be only committed by Muslims.

Other expressions which the jurists have discussed under the explicit forms of insult to the Blessed Prophet normally include statements which attack his personal integrity such as saying that "he was greedy, ignorant, an idiot, or *tārik al-ṣalāh* (abandoner of prayer)."[178] Insults which are not explicit, and yet convey mockery and disrespect are liable to the discretionary punishment of *taᶜzīr*, like, when a person tells another; "even if you bring me the Prophet on your shoulders, I will not ...". For this type of expression lacks clarity as both the elements of contempt and its attribution to the Prophet are vague and indirect.[179] An explicit insult, whether to God or the Prophet has been held to carry the capital punishment, whereas expressions in which there is doubt, and those which fall short of a direct insult are liable to *taᶜzīr* punishment, the nature and quantity of which may be determined by the judge.[180]

The jurists are in agreement that insult and the attribution of unchaste behaviour (*qadhf*) to the wife of the Prophet, ᶜĀishah, amounts to blasphemy and disbelief, for her chastity is clearly affirmed by the Qur'ānic text (al-Nūr, 24:17). Charges of this kind not only compromise the honour of the Prophet but also attribute a lie to the Qur'ān. Thus, Ibn Taymiyyah has stated that there is a consensus on this matter, and that all the leading Imāms have concurred that insulting ᶜĀishah is tantamount to an affront on the Prophet himself. Imām Mālik's ruling on this issue, which is widely quoted by others, is that this offence upon ᶜĀishah invokes the same punishment as an insult on the Prophet. While confirming Imām Mālik's ruling on the issue, Ibn Ḥazm stresses that insult to ᶜĀishah is apostasy in the full sense (*riddah tāmmah*) as it attributes falsehood to the words of God Most High. As for insult and abuse to the other wives of the Prophet, the ulema have recorded two different views; firstly, that it is like abusing the rest of the Companions, and as such is an offence which is liable to *taᶜzīr* punishment only. The

second view, which is considered to be preferable, has it that an affront and *qadhf* to any of the Prophet's wives is to be treated on the same footing as an insult to ᶜĀishah. The proponents of this view refer to a statement attributed to the prominent Companion, Ibn ᶜAbbās, who equated affronting the wives of the Prophet to that of insulting and dishonouring the Prophet himself.[181] The jurists have also held that the abuse of other Prophets who are identified as such in the Qur'ān, Sunnah or *ijmāᶜ*, by anyone who knows of it, or by insulting all the Prophets without specifying anyone by name is tantamount to an affront upon the Prophet Muḥammad. For belief (*īmān*) in all of them is an article of the Muslim faith, and an insult to them is therefore "apostasy and *kufr* on the part of any Muslim, and it is *muḥārabah* (open hostility and war) when committed by a *dhimmi*."[182] The latter means that if the person charged with the insult is a *dhimmi*, that is a non-Muslim citizen of the Islamic State, then he loses his protected status and becomes liable to punishment for blasphemy. The jurists are equally in agreement that insulting and reviling the angels in general, or any one of them in particular, falls under the same rules which are applicable to insulting the prophets, provided that there is no disagreement on the identity and status of the angel when such is specified.[183] This conclusion is drawn from the Qur'ānic reference that the angels are all Messengers of God. Insult, mockery, and contempt to them, therefore, fall under the same rules that are applied to insulting the Prophet Muhammad.[184]

6. RIGHT OF GOD AND RIGHT OF MAN

At the outset it should be noted that the ulema have taken a more serious view of insult to the Prophet Muḥammad when compared to reviling God Most High. This is not to say that the offence in either case is anything less than blasphemy, nevertheless, it has been said by way of explanation that the honour of God cannot be, in any real sense, touched by the nonsensical conduct of a misguided individual. In this case, the blasphemer merely brings disgrace upon himself as he can in no way compromise the omniscience of God in the eyes of the believers, but, as a human being the Prophet is susceptible to injury and abuse and his rights must be protected. The vast majority of jurists have held nevertheless that insult and mockery to God is blasphemy and that the perpetrator of the attack automatically becomes *kāfir* on the grounds, as al-Buhūti points out, that "no one would do so unless he is a disbeliever."[185]

The main purpose of drawing a distinction between reviling God (*sabb Allah*) and insulting the Prophet (*sabb al-rasūl*) is to determine the admissibility or otherwise of repentance in each case. This distinction is also related in turn to the binary division of rights into the Right of God and the Right of Man. Thus, according to the majority view, *sabb Allah* consists of a violation of the Right of God (*ḥaq Allah*), which is in principle pardonable when the offender repents and expresses regret over his conduct. Insult to the Prophet, or *sabb al-rasūl*, is, on the other hand, held to be a violation of the Right of Man, or *ḥaq al-ᶜabd* (also referred to as *ḥaq al-adami*), that is the personal right and honour of the Prophet. There is disagreement among the ulema on the question of whether repentance by one who insults the Prophet is admissible at all, and whether repentance in this case absolves the offender from punishment.[186] According to the majority opinion, the punishment of reviling God Most High collapses upon repentance prior to arrest. But, there is reservation on this point when it comes to insulting the Prophet Muḥammad. This offence, it is said, is similar to slanderous accusation (*qadhf*) as both consist mainly of the violation of the Right of Man, and repentance in either case is of little consequence, for only a pardon which is granted by the injured party, not repentance as such, constitutes a valid ground for dropping the punishment in offences pertaining to the Right of Man. Thus, it is argued that blaspheming the Prophet consists of a violation of his personal right and that only the Prophet himself could pardon such conduct. As a result, punishment in this case is enforced regardless of whether the offender repents. This is the ruling of the Ḥanbali and Māliki schools, although in both of these different opinions have been recorded among their respective scholars. The Ḥanbali/Māliki ruling operates on the assumption that the right to pardon, in the case of insult to the Prophet, only existed when the Prophet was alive as he could grant it himself, but that it discountinued thereafter. However, the Ḥanbali/Māliki position which overrules admissibility of repentance in the case of *sabb al-rasul* is somewhat questionable. The correct view, in my opinion, is that after the demise of the Prophet, the offence of *sabb al-rasūl* should be no different to *sabb Allah* as both of these violate the Right of God. This is, to all intents and purposes, the position maintained by the Ḥanafis and Shāfiᶜis. But, they arrived at this decision through a different route, for they consider blasphemy–whether in the form of *sabb Allah* or *sabb al-rasūl* – as a sub-variety of apostasy, which is, in turn, considered as an offence which violates the Right of God. My own view of this issue, which I have elaborated on in an earlier section of this chapter, is that blasphemy need not be

regarded as a sub-variety of apostasy; that the two are different concepts and each requires a different treatment. But, I still submit that blasphemy, in both of its varieties under discussion, consists of a violation of public rights. Therefore, it is not only reasonable, but also in the interest of consistency, that the head of state and competent judicial authorities, in their capacities as defenders and representatives of the Right of God should act in the same role, not only with regard to *sabb Allah*, but also with regard to *sabb al-rasūl*.

Furthermore, the distinction between the Right of God and the Right of Man is often determined by the preponderance of the respective interests of the individual and the community. Assigning a particular interest or right to one or the other of these categories is, to some extent, a matter of juristic opinion. For basically all rights in Islam, as the Māliki Jurist, al-Qarāfi points out, consist primarily of the Right of God,[187] which is, in turn, exercised and represented by the community of believers and their lawful government.

Moreover, it would appear eminently logical, and consistent with the central role of the Prophet Muḥammad in the creed and dogma of Islam, that an insult to him is treated on the same footing as reviling God; and that both of these are first and foremost violations of the religious beliefs of Islam and of the rights of the community of believers. Blasphemy in either of these two forms is, therefore, a blatant violation of the Right of God.

7. THE QUESTION OF REPENTANCE

Differences of opinion have arisen among the schools of law in regards to whether the blasphemer should be asked to repent, and whether his repentance, if obtained, is admissible. In this context, the admissibility of repentance acquires especial significance as it can lead to absolute and unconditional acquittal of the accused. Sometimes, there is even disagreement over issues among the jurists of the same school, and this tends to introduce an element of doubt in ascertaining the representative view of the individual schools.

While the Ḥanafis maintain that it is recommended to ask the blasphemer to repent (*istitābah*) and return to Islam, Imam Mālik has considered this to be unnecessary. The Shāfiᶜis and Ḥanbalis have each recorded two different views, one of which corresponds with that of the Ḥanafis and the other with that of Imam Mālik. The majority opinion stipulates *istitābah* as a requirement prior to the enforcement of punishment; the convict should be asked whether he or she wishes to repent and that this should be done over a period of

three days. The Mālikis, however, have ruled out repentance on the analysis that the Ḥadīth which states that "whoever changes his religion shall be killed" is silent on repentance. The majority view, on the other hand, is based on the report from ᶜĀishah that a woman renounced Islam on the day of the battle of Uḥud and the Prophet ordered that she should be asked whether she wished to repent.[188]

In a Chapter on apostasy, al-Shawkani maintains that asking the apostate to repent is valid if the latter has acted from a position of ignorance, but not if he has a claim to knowledge and self-righteousness.[189]

As for the admissibility of repentance, whether solicited or otherwise, by one who reviles God and the Prophet Muḥammad, the majority have held that it is admissible. The Ḥanbalis and the Mālikis have each recorded two different views. The dominant view in both of these schools is that repentance will not absolve the blasphemer from punishment in this world, although it may, if it is sincere, benefit him in the hereafter.[190] In this regard, the Ḥanbalis and Mālikis do not draw a distinction between reviling God and insulting the Prophet, for these are regarded as two manifestation of the same offence and are, therefore, to be treated on an equal footing. This view is, in turn, based on the precedent of ᶜUmar b. al-Khaṭṭāb, who is known to have drawn a parallel between reviling God and insulting the Prophet, and in neither case is he known to have asked the blasphemer to repent. This, it is said, is the main difference between blasphemy and apostasy, that the latter is open to repentance but the former is not.[191] On the contrary, the second view of the Ḥanbali and Maliki schools is that it is obligatory for the convict to be given an opportunity to repent and return to Islam.[192]

The Ḥanafis and the majority of Shāfiᶜis have on the other hand, considered blasphemy on the same footing as apostasy and have ruled that repentance is admissible in both cases. Thus, the blasphemer, like the apostate, is to be asked for repentance on three consecutive days, which will be counted from the time of conviction, and that during this time, the convict is entitled to food and other necessities. Repentance, in the case of the apostate, consists of his or her return to Islam by reciting the testimonial of the faith (*kalimah shahādah*). In the case of a non-Muslim (i.e. a *dhimmi*), repentance may take one of the following two forms: firstly, he either expresses remorse over his conduct and affirms that he will not repeat it; and secondly, the head of state may accept his repentance and the accused may consequently retain his own religion or embrace Islam.[193] According to another view, which I think is pref-

erable, the terms of repentance should be related to the nature and content of the offence, and the accused should specifically denounce what he has done or said in the first place.

Furthermore, repentance from an apostate and his return to Islam is acceptable, according to the Ḥanafis and Shāfiᶜis for a maximum of four occasions. Thus, when the apostate repents and returns to Islam for the fifth time, the latter will be of no account, and on each of the preceding instances, the convict is to be granted a respite of three days. This ruling is based on the report that the Prophet asked a Nabhān "for repentance four or five times." Qāḍi ᶜAyāḍ, while recording this, adds that Ibn Wahab reported from Imam Mālik that the apostate should be asked for repentance permanently, for each time that he commits the offence, and that this is also the ruling of Imams al-Shāfiᶜi and Ibn Ḥanbal.[194]

ᶜAli b. Abu Ṭalib is reported to have held that the apostate should be asked to repent over a period of two months. However, Ibrāhīm al-Nakhaᶜi, the teacher of Imam Abu Ḥanīfah, and Sufyan al-Thawri have held that the door of repentance always remains open to a defector from the faith for as long as he lives.[195]

8. BLASPHEMY BY A NON-MUSLIM

There are three possible situations where a non-Muslim may be involved in blasphemy against Islam:

(a) When a non-Muslim merely professes an article of his own faith, such as when a Christian states that Jesus is the son of God. This is, from the viewpoint of Islam, a simple variety of disbelief rather than blasphemy.

(b) When a non-Muslim says something which, although it is part of his belief, is said in an offensive manner. An example of this is the incident which occured after the call to prayer, when a Jew addressed the muezzin, saying, "you lied." The position here is similar to the case where a non-Muslim scorns an article of the Muslim faith or any of the injunctions of God that are contained in the Qur'ān. If the non-Muslim is a *dhimmi,* he loses his protected status and becomes liable to punishment.

(c) When the insult in question is not a part of the faith of its perpetrator, and it consists of something which is equally forbidden in the religion of his own following. No distinction is made, in regards to his type of blasphemy between Muslims and

non-Muslims, as anyone who reviles God commits a blasphemous offence regardless of his or her religious denomination.

The jurists have differed, as earlier stated, on the admissibility or otherwise of repentance, but most regarded it as admissible, and repentance may, in the case of a non-Muslim, consist of conversion to Islam. Some ulema of Madīnah have also held that repentance is acceptable from a *dhimmi* in the same way as it is from a Muslim and that the non-Muslim does not lose his protected status either. Imam Shāfiᶜi and Aḥmad b. Ḥanbal, according to one of two reports, maintained that the *dhimmi* may not be asked to repent, but if he converts to Islam at his own initiative, he is not liable to any punishment. According to a variant report, Imam Mālik and Aḥmad b. Ḥanbal have held that the *dhimmi* is liable to the mandatory death punishment. However, some Mālikis maintained that if the insult by a non-Muslim consists of attributing a lie to the Prophet (*takdhīb*), then he is not liable to the capital punishment.[196] In yet another view, Imam Shāfiᶜi held that this protected status of the *dhimmi* terminates when he commits blasphemy and that consequently he becomes a *ḥarbī* (enemy of war), in which case the head of state is within his rights to punish him in the same way as a *ḥarbī*. Imam Shāfiᶜi adds that in this matter the head of state has discretionary powers which are similar to those he has with regard to prisoners of war, that is whether to kill the offender, or ask for ransom, and, whether or not to expropriate his property.[197] On the other hand, Imam Abu Ḥanīfah and his disciples have maintained that the covenant with the *dhimmi* (*ᶜahd al-dhimmah*) is not terminated as a result of blasphemy consisting of *sabb Allah* and *sabb al-rasūl*, nor is the *dhimmi* liable to the death punishment, but he is liable to a deterrent punishment of *taᶜzīr* in the same way as when he commits other evil acts (*munkarāt*) which are forbidden to him. In support of this view, the Ḥanafis refer mainly to *aḥādīth*, earlier quoted, in which some Jews have addressed the Prophet by the phrase, "death be upon you" (*as-sām ᶜalaykum*), and that in none of the recorded instances has the Prophet ordered any punishment.[198]

9. THE SALMAN RUSHDIE AFFAIR

Ever since Salman Rushdie's novel, *The Satanic Verses* was published on September 26, 1988 in the United Kingdom by Viking Penguin, it has not ceased to arouse controversy, and has invoked denunciation and protest among Muslims around the world. Muslim communities in Britain, and elsewhere, demanded a ban on the

sale and publication of this book which was seen as a deliberate and aggressive blasphemy against Islam. Protests against *The Satanic Verses* esclated with remarkable speed and resulted in the death of five people in Pakistan and one in Kashmir in February 1989. The following month, two men, the Imam of Belgium's Islamic community, and his assistant, were shot dead, and in June 1991 the Japanese translator of Rushdie's novel was also killed in Tokyo. The aftermath of Rushdie's inflammatory publication has been widely debated and publicised, which is why I propose to be brief on the factual coverage of events concerning this case.[199]

Some of the responses that I will review here are the opinion (*fatwa*) of the late Ayatollah Khomeini of Iran, those of the ulema of the Azhar University of Egypt, and the Islamic Law Academy of the Muslim World League. I will also discuss the views of three individual writers namely Shabbir Akhtar, Rafᶜat Aḥmad, and ᶜAlaeddin Kharufa who have each published a book on the subject and formulated responses which merit attention.

The Satanic Verses reviles and defames the Prophet of Islam, the wives of the Blessed Prophet and his leading Companions. The book also contains contemptous passages concerning the holy Qur'ān and some of the cardinal values and principles of the Islamic faith.

Initially, I had directly quoted some of the blasphemous contents of Rushdie's novel concerning the Prophet himself, his wives and Companions, but decided, upon revision, to report indirectly on those outrageously obscene expressions. His contemptuous remarks about God and the Qur'ān on pp. 363-64 are not only blasphemous but also flippant. To describe the Qur'ān, for example, as "a hotchpotch of trivial rules about every damn thing" (p. 363), smacks of ignorance about the Qur'ān and the profound contribution it has made to civilisation. Rushdie's inflammatory aspersions to the Prophet on page 366, and the gratuitously indecent language he uses in reference to the wives of the Prophet, the *ummahāt al-mu'minīn*, on page 381-82 are simply too agitating and below the standards of civilised discourse. Prophet Abraham is being called, for example, "The bastard" and Prophet Muḥammad as Mahound. The Companions, Bilāl al-Ḥabashi, Khālid bin Walīd, and Salmān al-Fārisi are described as "the trinity of scums", "that bunch of riff raff", "fucking clowns" (pp. 101, 117, 374). "It therefore mattered little", as the Muslim community in Britain said in a statement of protest to Penguin Books Ltd, "what praises or prizes are lavished on such a work."[200] The mere incidence of phrases such as these leaves little doubt as to the author's lack of sensitivity which has caused offence

and outrage beyond measure to countless millions of Muslims within and outside Britain.

Rushdie has often claimed that his *The Satanic Verses* was a fictional account and that the question of truth or falsity cannot therefore properly arise. This assertion seems to have made little impact on critics like M.H. Faruqi, editor of *Impact International,* who went on record to say that "It doesn't matter if it's a fiction, a serious book, or a dream - the point is that the language should be decent."[201] Shabbir Akhtar's remark, that *The Satanic Verses* "remains too close to actual Islamic history for Rushdie's claim to be convincing", finds support in Rushdie's own statement given in an interview in January 1989 where he said: "Almost everything in those sections - the dream sequences - starts from an historical or quasi-historical basis ...."[202]

Another commentator, Galeyn Remington, has stated that Rushdie "manipulated his material in just the way that hurts; he played on Moslem sensibilities in a very knowing way." John Esposito is also categorical in his assessment that "he knew of no Western scholar of Islam who would not have predicted that [Rushdie's] kind of statements would be explosive."[203] Even before the actual break out of riots and protest rallies that led to loss of life, *Impact International* wrote the following report, soon after the publication of *The Satanic Verses:*

> The Muslim community in Britan - and so would be others as information reaches them in course of time - is shocked and outraged beyond any describable measure by the unprecedented enormity of this sacrilege and by the fact that a so far respectable publisher, Penguin, has been insensitive enough to lend its name to this extreme profanity.[204]

Also, it is interesting to note that the official Vatican newspaper denounced *The Satanic Verses* as blasphemous. Furthermore, the Chief Rabbi of Eangland expressed disapproval of Rushdie's novel, and Israel's prominent Rabbi, Avraham Shapira, attempted to prevent publication of the book in Israel as he judged it to be offensive to the religious sensibilities of Muslims.[205]

On February 14, 1989, Iran's Ayatollah Khomeini issued a *fatwā* in which "the author of the book entitled *The Satanic Verses,* which abuses Islam, the Prophet and the Koran, and all those involved in its publication who were aware of its content, are sentenced to death." To this the Ayatollah further added: "I ask the Muslims of the world at large to swiftly execute the writer, and the publishers, wherever they find them so that no one in the future will dare to

abuse Islam. Whoever is killed on this path will be regarded as a martyr, God willing."[206]

Following the broadcast of Ayatollah Khomeini's appeal over Tehran Radio, the relatively moderate president of Iran, ᶜAli Khamenai said, however, that "the wretched man" might still be pardoned if he repented and said, 'I made a blunder', and apologised to Muslims and the Imam."[207] On February 18, Rushdie issued the followng carefully worded statement in which he expressed regret but no repentance over the course the events had taken:

> As the author of *The Satanic Verses* I recognise that Moslems in many parts of the world are genuinely distressed by the publication of my novel. I profoundly regret the distress that publication has occasioned to the sincere followers of Islam. Living as we do in a world of many faiths this experience has served to remind us that we must all be conscious of the sensibilities of others.[208]

Ayatollah Khomeini issued another statement on February 19 on which declared in no uncertain terms:

> "Even if Salman Rushdie repents and becomes the most pious man of time, it is incumbent on every Muslim to employ everything he has got, his life and his wealth, to send him to hell."[209]

The Ayatollah's *fatwā* invoked mixed responses from the ulema and Muslim leaders who expressed reservations over the wisdom of his verdict addressing the Muslims at large, to kill Rushdie without any reference to due judicial process. This was, perhaps, the only procedural flaw in Ayatollah's verdict which became the focus of media attention. But, those who were exposed to media coverage of the whole episode would know that no serious Muslim commentator has challenged the basic validity of Ayatollah's *fatwā*. Adjudication was generally viewed to be necessary if only to find out whether Rushdie was willing to repent. This was the view of the Chairman of the Fatwa Committee of the Azhar University, Shaykh Dr. ᶜAbd. Allah al-Mashad, who said in a statement concerning the death sentence issued by Ayatollah Khomeini that "Islam requires the claimant to present evidence, and the defendant to defend himself either by counter evidence or by taking a solemn oath. Issuing a judgment in the manner it was denied such an opportunity..."[210]

The Rector of the Azhar University of Egypt, Shaykh Jad al-Haq, also advised quiet deliberation and adjudication, as opposed to

mass demonstrations and sensational responses, which have, as he observed, only stimulated demand for the book and its distribution. The verdict, Jad al-Haq added, shot up the sales of this book beyond even the author's own wild dreams.[211]

The Mufti of Egypt, Dr. Tantawi, the country's senior Muslim authority, also went on record to confirm the need for a full and fair trial: The court must ask the writer to explain his intentions so that its judgement is not influenced by misreading and misunderstanding. The accused, even if proven guilty, can seek clemency and forgiveness.[212]

At its eleventh session held in Makkah, from February 10 to 26, 1989, the Islamic Law Academy of the Muslim World League (Al-Rabitah al-ᶜAlam al-Islami) issued a statement on Salman Rushdie. The session, chaired by one of Saudi Arabia's most prominent ulema, Shaykh ᶜAbd al-ᶜAziz Ibn Baz, issued a six-point statement which declared Rushdie an apostate, and recommended that he and his publishers should be prosecuted under criminal charges in a British court, and that the Organisation of Islamic Conference should take up the case against them. The Academy similarly recommended that Rushdie should be tried in absentia in an Islamic country under the rules of Sharīᶜah, and that the decision, even if not enforceable, should serve the purpose of expressing the anger and denunciation of the Muslims over this affront. Furthermore, the Academy dismissed the expression of regret by Rushdie (made earlier on February 18, 1989) for the hurt he had caused to the Muslims as "idle and meaningless" for it failed to renounce the contents of the offensive publication. And lastly, the Academy called upon Muslim countries and governments to ban the importation and sale of *The Satanic Verses* in their respective territories.[213]

The Organisation of Islamic Conference, in its twelfth session of Foreign Ministers held in Riyad, from March 13 to 16, 1989, issued a statement which denounced Rushdie's book as a flagrant violation of the right to freedom of expression. Referring to the Universal Declaration of Human Rights and its limitations on the freedom of speech, the statement stressed "that this right is not to be exercised at the expense of the rights of others, nor should Islam be made the target of sacrilege in the name of freedom of expression." The member states recorded their "strong denunciation of *The Satanic Verses* whose author is considered an apostate." The statement adds that the book ignores the principles of morality, civilised conduct, and respect for the sensibilities of over one billion Muslims. The statement then calls upon all member states to take immediate steps to

ban the book and cause it to be withdrawn from circulation in their countries.[214]

As for the literary and artistic value of Rushdie's novel, Shabbir Akhtar has reached the conclusion that "there is nothing in *The Satanic Verses* which helps to bring Islam into fruitful confrontation with modernity, and nothing to bring it into thoughtful contact with contemporary secularity and ideological pluralism." Akhtar goes on to characterise the book as "a calculated attempt to vilify and slander Muhammad."[215]

This is substantially confirmed by another commentator who says that there is a difference between the kind of writing that provokes healthy anger in people such that it ultimately opens their eyes to new thoughts, and hurtful prose that serves only to offend and blind them. Rushdie's book falls into the second category; "The ignorance, ridicule, humiliation and resentment that parts of this book have nourished will neither illumine the human condition nor open the minds and hearts of people on different sides of the great divide between tradition and modernity."[216]

Is it right for a man of letters to overturn the basic values of society in the name of arts? This is the question Khalid Sayeed has raised: "If I were to tell you that I had a dream in which Hitler appeared and said he had been maligned, that he didn't kill the Jews, and then I wrote about this in lyrical prose, are you going to say to me that this is a work of art and should be judged by different standards!"[217]

In this book, *Ḥukm al-Islam fi Jarā'im Salman Rushdie* (Islam's verdict on the crimes of Salman Rushdie), Alaeddin Kharufa, one of the ulema at Muhammad Ibn Saud University of Madinah, (currently of International Islamic University, Malaysia), has summarised the views and doctrines of the leading schools of Islamic law and has attempted to ascertain Rushdie's position as follows:

> The offences that Rushdie has committed amount to apostasy (*riddah*) under the rulings of all of the *madhāhib* that we have quoted. Rushdie is undoubtedly an apostate; I endorse this and consider him an offender who has renounced Islam and became an apostate. The jurists have, however, differed in regard to whether or not it is obligatory to ask the apostate to repent, and then they have differed as to the admissibility, or otherwise, of his repentance.[218]

Kharufa explains that the preferred view of the Ḥanafī school is that repentance should be solicited over three consecutive days following conviction by a competent court, and that the death pun-

ishment is not enforceable prior to soliciting repentance. It is further stated that "repentance by an apostate like this (i.e. Rushdie) would be admissible to Imam Abu Ḥanīfah."

The Shāfiᶜis have held that repentance is admissible even in cases of repeated apostasy. They would require "someone like Salman Rushdie to recite the two testimonials of the faith (*al-shahādatayn*) and declare his penitence and remorse for vilifying Islam."[219]

The preferred ruling of the Ḥanbali school concerning Salman Rushdie would be, Kharufa adds, to admit his repentance on condition that he declares this clearly, recites the two testimonials, and clearly expresses his aversion of what he has done. In the meantime, it is required to discipline the apostate with a stern deterrent punishment. However, according to the Ḥanbali scholar, Ibn Taymiyyah, the like of Salman Rushdie would be considered an infidel whose repentance is neither necessary nor acceptable, and no respite is given prior to his execution.

Having stated these, Kharufa adds that any of these rulings may be implemented, however, "on condition that it secures benefit for Islam (*li-maṣlaḥah al-Islam*) ... and in the meantime represents a commendable invocation for Islam–*di ᶜāyah ṭayyibah li al-Islam.*" Bearing in mind that Islam is a religion of tolerance, magnanimity and ease, contemporary Muslims need to prove the reality of these especially in the context of relations between Muslims and non-Muslims at the present time.

Consequently, according to the majority opinion of the Ḥanafis, Shāfiᶜis and Ḥanbalis, Rushdie's repentance is acceptable only if it is unequivocal and expressive of regret over his conduct; that he recites the testimonials of the faith; and undertakes that he will not attempt to publish his book again; and finally, that he withdraws the existing copies from the market. When he does all these, it then becomes obligatory to accept his statement on face value as Islam does not permit soul searching of any kind.

But, Kharufa adds, if Rushdie refuses to apologise on these terms, then he will remain in fear for the rest of his life, and that it is obligatory on Muslims "to reach him while he is still alive (*an yulaḥiquh madā ḥayātih*) and never to neglect this duty."[220]

On December 28, 1990, The Times of London published an article by Salman Rushdie entitle "Why I Have Embraced Islam? In this article, Rushdie stated; "Although I come from a Muslim family background, I was never brought up as a believer, and was raised in an atmosphere of what is broadly known as secular." He then added that he had a meeting with six Muslim scholars on Christmas Eve and that

the meeting was a victory for compassion, understanding and tolerance. Rushdie went on to say; "This is not a disavowal of my works, but the simple truth, and to my pleasure it was accepted as such."

Then he added "inspite of everything, *The Satanic Verses* is a novel that many of its readers have found to be of value. I cannot betray them. I believe the book must continue to be available so that it can gradually be seen for what it is."

On January 7, 1991, the American magazine, *Newsweek*, wrote that in February 1989, Salman Rushdie had declared "I am not a Muslim." Then "last week at a Christmas Eve meeting with Islamic leaders in England, Rushdie publicly asserted "There is no god but Allah, and Muhammad is his last Prophet."

As can be seen, Rushdie's statements falls short of a categorical renunciation of the blasphemous content of his novel. The persistent ambivalence in Rushdie's statements and the contrast between his words and his conduct is bound to be reflected in any attempt at evaluation. Professing the testimonial of the faith is an interesting development but it could only lead to the anticipated consequence when Rushdie explicitly repents and stops defending and justifying his blasphemous publication and indicates his intentions to that effect. What weight would a verbal performance exactly carry in absolving Rushdie of the charge of blasphemy against the backdrop of his persistent desire, whether for financial gain or a moral claim to righteousness, needs to be determined if only on grounds of procedural propriety, by a competent judicial tribunal. The court that adjudicates this case must exercise full judicial authority and be able to issue a binding decision. It is one thing for Rushdie to make statements while knowing that he does not have to comply with a binding order, and quite another when he knows that he would have to face the consequences of his conduct.

NOTES

1. Cf. Abu Ḥabīb, *Darāsah*, p. 745.
2. Essential benefits are those on which the life of the community depends and their neglect causes collapse of normal life. The five essential interests (*maṣâliḥ*) identified in the Sharī^{c}ah are faith, life, property, intellect and lineage.
3. Cf. Zaydan, *Majmu^{c}ah*, p. 129.
4. Shalṭūṭ, *Tawjīhât*, p. 330.
5. Ibid., p. 331.
6. Munayminah, *Mushkilah al-Ḥurriyyah*, p. 8.
7. Muslim, *Mukhtaṣar Ṣaḥīḥ Muslim*, k. *al-Īmān, b. al-Muslim man salima*, p. 23, Ḥadith No. 69.
8. Ali, *A Manual of Ḥadīth*, p. 27.

9. Cf. ᶜAwdah, *Al-Tashrīᶜ al-Jinā'i*, II, 459.
10. Cf. The Holy Qur'ān, al-Nūr, 24: 1-5.
11. Note e.g. the Eqyptian penal code (Qānūn al-ᶜUqūbāt al-Miṣri), sec. 302 ff, which defines *qādhif* as anyone who attributes to another person a matter, which if were true would render the person to whom the attribution is made liable to a penalty "under this law and would invoke humiliation from his compartiots."
12. Ibn Rushd, *Bidāyah*, II, 440 ff.
13. Bahnasi, *Al-Jara'im*, pp. 149 ff.
14. ᶜAwdah, *Al-Tashrīᶜ al-Jinā'i*, II, 455.
15. Ḥammād, *Ḥurriyyah*, p. 279.
16. Ibn Rushd, *Bidāyah*, II, 441.
17. Ibid., II, 442; al-Jazīri, *Kitāb al-Fiqh*, V, 222-23 and 236.
18. Ibid., II, 443; al-Jazīri, *Kitāb al-Fiqh*, V, 230.
19. Cf. ᶜAwdah, *Tashrīᶜ al-Jinā'i*, II, 478.
20. Al-Tabrizi, *Mishkāt*, II, 1061, Ḥadīth No. 3570; al-Jazīri, *Kitāb al-Fiqh*, V. 215.
21. Ibid., V, 238.
22. Note e.g. sura Yūnus, 10:38 & 69; also al-Mumtaḥinah, 68:12 where *iftirā'* and its derivatives are synonymously used with lie (*kidhb*).
23. *Al-Mawsuᶜah al-Fiqhiyyah*, V, 276.
24. Ibn Taymiyyah, *Al-Siyasah*, p. 164.
25. Abu Sinnah, "*Nazariyyah*", p. 209.
26. *Al-Mawsuᶜah al-Fiqhiyyah*, V, 276.
27. Cf. al-ᶜĪlī, *Al-Ḥurriyyāt*, p. 423.
28. Ibn Taymiyyah, *Al-Siyāsah*, p. 164.
29. Shalṭūṭ, *Al-Islam*, p. 427. This is primarily a ruling of Shāfiᶜi law which allows *taᶜzīr bi'l-māl* or financial compensation, payable to the plaintiff. The Hanafis and others have expressed reservation on the validity of *taᶜzīr bi'l-māl*.
30. Shalṭūṭ, *Tawjīhāt*, p. 333.
31. For details see Ibn Qayyim al-Jawziyyah, *Al-Ṭuruq al-Ḥukmiyyah*, p. 118.
32. Ibid., p. 111.
33. Ibn Taymiyyah, *Al-Sārim al-Maslūl*, p. 541.
34. Al-Sharabāṣi, *Min Ādāb al-Nabawiyyah*, p. 237
35. ᶜAwdah, *Al-Tashrīᶜ al-Jinā'i*, p. 506.
36. Al-Tabrizi, *Mishkāt*, vol. 3, Ḥadīth No. 4916.
37. Al-Maqdisi, *Kitab al-Ādāb al-Sharᶜiyyah*, I, 10.
38. Al-Bahī, *Al-Dīn wa al-Dawlah*, p. 244-45.
39. Al-Tabrizi, *Mishkāt*, vol. 3, Ḥadīth No. 4814.
40. Ibid., vol. I, Ḥadīth No. 1678. In another Ḥadīth, it is provided "when a person dies, remember him for his virtues."
41. Al-Tabrizi, *Mishkāt*, vol. I, Ḥadīth No. 1664.
42. Al-Tabrizi, *Mishkāt*, vol. I, Ḥadīth No. 4847.
43. Muslim, *Ṣaḥīḥ Muslim*, Book on virtues of Ṣaḥābah, chapter: prohibition of insulting the Ṣaḥābah, IV, 197.
44. Ismāᶜīl, *Manhaj al-Sunnah*, p. 135.
45. Ibn ᶜĀbidīn, *Hāshiyah*, IV, 74.
46. Ibid., IV, 230.
47. Cf. Lester K. Little, "Cursing" *The Encyclopedia of Religion*, III, 184.
48. Ibid., p. 182.
49. Al-Maqdisi, *Kitāb al-Ādāb al-Sharᶜiyyah*, I, 314.

50. Muslim, *Mukhtasar Ṣaḥīḥ Muslim, K. al-birr wa al-ṣillah, b. Kirahiyyah al-Laᶜnah*, p. 481, Ḥadīth No. 1822; Al-Maqdisi, *Kitab al-Ādāb al-Sharᶜiyyah*, I, 304.
51. Ibid., I, 306.
52. Al-Sharabāṣi, *Min Ādāb al-Nubuwwah*, p. 237.
53. Al-Maqdisi, *Kitāb al-Ādāb al-Sharᶜiyyah*, I, 303.
54. Ibid., I, 312;
al-Sharabāṣi, *Min Ādāb*, p. 238; al-Bahnasāwi, *Al-Ḥukm*. p. 65.
55. Al-Sharabāṣi, *Min Ādāb*, p. 238.
56. Al-Bahnasāwi, *Al-Ḥukm*, p. 151.
57. Tirmidhi, *Sunan*, Ḥadīth No. 1978; Al-Maqdisi, *Kitāb al-Ādāb*, I, 11; This Ḥadīth is said to be *gharīb* (isolated) but its chain of transmitters is considered to be reliable.
58. Al-Maqdisi, *Kitāb Al-Ādāb*, I, 311-12. The Arabic version of this Ḥadīth appear below.
59. Abu Zahrah, *Al-Jarīmah*, p. 182.
60. Ibn Ḥazm, *Al-Fiṣal*. III, 138.
61. Ibn ᶜĀbidīn, *Ḥāshiyah*, III, 289.
62. Al-Bahnasāwi, *Al-Ḥukm*, p. 128.
63. Al-Tabrizi, *Mishkāt*, vol. 1, Ḥadīth No. 13.
64. Muslim, *Ṣaḥīḥ Muslim, Kit. al-Īmān* I, 79.
65. Al-Tabrizi, *Mishkāt*, vol. 3, Ḥadith No. 4817. For detail on utterances which amount to clear instances of *kufr*, see the section of this book on blasphemy.
66. Al-Tabrizi, *Mishkāt*, vol 3, Ḥadīth No. 4816; Abu Zahrah, *Al-Jarīmah*, p. 182; al-Bahnasāwi, *Al-Ḥukm*, p. 50.
67. Abu Zahrah, *Al-Jarīmah*, p. 182.
68. Ibn ᶜĀbidīn, *Ḥāshiyah*, I, 582; al-Buhūti, *Kashshāf al-Qannāᶜ*, II, 117; *Al-Mawsuᶜah al-Fiqhiyyah* (Ministry of Awqaf, Kuwait) XIII, 234-35.
69. Al-Bahnasāwi, *Al-Ḥukm*, p. 376.
70. Abu Zahrah, *Al-Jarīmah*, p. 176.
71. Al-Bahnasāwi *Al-Ḥukm*, p. 148.
72. Majmaᶜ al-Lughah, *Al-Muᶜjam al-Wasīṭ*, II, 698; al-Zāwi, *Qamus al-Muḥiṭ*, III, 446; Wajdi, *Dā'irah al-Maᶜārif*, VII, 124; Cowan; ed., *The Hans wehr Dictionary of Arabic*, P. 696, Hughes, *A Dictionary of Islam*, p. 129, Muhsin Khan, *the Translation of al-Bukhari, IX* 13.
73. Hughes, *Dictionary*, p. 129.
74. Cf. Ib Qayyim, *Iqhāthah*, II, 125.
75. Cf. Riḍā, *Tafsīr al-Manār*, IX, 644.
76. Ibid., IX, 666.
77. Ibn Qayyim, *Iqhāthah*, p. 123.
78. Riḍā, *Tafsīr al-Manār*, II, 209. The associators used to persecute Muslims for having embraced Islam. They did so to ᶜAmmār b. Yāsir and his family, to Bilal and Ṣuhayb. For details see *Tafsīr al-Manār* II, 316.
79. Muhsin Khan, *Translation of al-Bukhari*, IX, 267, Ḥadīth No. 215.
80. Riḍā, *Tafsīr*, X. 112.
81. Cf. Hughes, *Dictionary*, p. 129; *al-Bukhari, K. al-Fitan* (Khan's trans.) IX, 143ff.
82. Cf. Ghazawi, *Al-Hurriyyāt*, p. 43.
83. This could also be said of Najibullah's predecessors, Karmal and Amin who led, in early 1980's, an unpresentative communist regime in Kabul thanks to the Soviet military occupation. Cf. Kamali, *Law in Afghanistan*, p. 58ff.

84. Cf. Ismāᶜīl, *Manhaj*, p. 141.
85. Note, for example, the Ḥadīth quoted by Ibn Qayyim, *Iqhāthah*, II, 123 and al-Tabrizi, *Mishkāt*, vol. 2, Ḥadīth n. 3678 "If you are all united under one leader and then someone attempts to split you asunder and destroy your unity, then kill him."
86. Abu Zahrah, *Al-Jarīmah*, p. 162.
87. Ibid., pp. 162-63.
88. Ibid., p.p. 155-56, Ghaznawi, *al-Ḥurriyyat*, p. 58.
89. Ibid., p. 156, El-Awa, *The Political System*, p. 43.
90. Al-Sibāᶜi, *Ishtirākiyyah*, p. 49.
91. Major sins (*kabā'ir*) are, according to one definition, those which are severely punished. Another view specifies that the punishment approximates that of the prescribed offences (*ḥudūd*).
92. Abu Zahrah *Al-Jarīmah* p. 155, Ghazawi, *al-Ḥurriyyāt*, p. 58.
93. Cf. Hughes, *Dictionary*, p. 484. *Governors of Egypt*, 445-46. Reports has it that when Imam Abu Ḥanifah was confronted with the question whether the Qur'ān was created or uncreated, he refused to expatiate and advised silence. cf. Abu Zahrah, *Abu Ḥanifah*, p. 181.
94. Makdisi, "Magesterium And Academic Freedom," in N. Heer, ed. *Islamic Law*, p. 131.
95. Shahristani, *Al-Milal*, I, 168; al-Jundi, *Maᶜālim*, p. 203; Chejne, *Succession*, p. 38.
96. Al-Shaybāni, *Al-Siyar* (Khadduri's trans.), p. 231.
97. Al-Shawkāni, *Nayl al-Awṭār*, VII, 187, see also al-ᶜĪlī, *Al-Ḥurriyyāt*, p. 384, Mutawalli, *Mabādi*, p. 284, Ḥammād, *Ḥurriyyāh*, p. 124.
98. Abu Zahrah, *Al-Jarīmah*, p. 172.
99. Al-Shaybāni, *al-Siyar* (Khadduri's trans.) p. 231.
100. Ibid., p. 230, al-Sarakhsi, *Al-Mabsūṭ*, X 124.
101. Al-Shawkāni, *Nayl al-Awṭār*, VII, 190, el-Awa, *The Political System*, p. 56, Ismāᶜīl, *Manhaj*, p. 319.
102. Ismāᶜīl, *Manhaj*, p. 319, Abu Zahrah, *Al-Jarimāh*, p. 165, Ghazawi, *Al-Ḥurriyyāt*, p. 59.
103. Al-Shaybāni, *al-Siyar* (Khadduri's trans.), p. 230.
104. See ᶜAwdah, *Al-Tashrīᶜ*, I, 101.
105. Al-Mawardi, *Al-Aḥkām al-Sulṭāniyyah*, p. 67.
106. ᶜAwdah, *Al-Tashrīᶜ al-Jinā'ī*, I, 104-105.
107. Ibid., p. 105.
108. Ibn Qayyim, *Iqhāthah*, II. 129.
109. Ibid., II, 144.
110. Ibid., II, 129.
111. Ibid., II, 211.
112. Ibid., II, 114.
113. Kamali "Varieties of Raᶜy." AJISS 7, 39-64.
114. Ibn Qayyim, *Iqhathah*, I, 130.
115. Ibid.
116. Ibid.
117. Ibn Taymiyyah, *Al-Ḥisbah fi al-Islam*, p.88.
118. There is some uncertainty as to whether Qadariyyah is just another name for

Muᶜtazilah. Evidence suggests that Qadariyyah were the ancient Muᶜtazilah before Wāsil b. ᶜAta' separated himself from the teachings of Hasan al-Basri. Subsequently, it is stated that the Muᶜtazilah refused to be known as Qadariyyah. When, for example, Imām Ahmad b. Hanbal wrote a book in refutation of Qadariyyah and Jahmiyyah and referred to them both as al-Muᶜtazilah, Bishr b. al-Muᶜtamar, a leading Muᶜtazilah, protested and denied their association with both (cf. Aḥmad Amin, *Fajr al-Islam*, pp. 287-88; Hughes, *Dictionary*, n. 22 above at 478). Note also Goldzoher, *Introduction*, p. 82ff, where Muᶜtazilah and Qadariyyah are treated as two separate movements. What seems nevertheless clear is that on the subject of man's accountability for his conduct the two have maintained similar positions.

119. Ibn Taymiyyah, *al-Siyāsah*, p. 123; see also Abu Zahrah *Al-Jarīmah*, p. 157, who quotes Ibn Taymiyyah at length on the subject.
120. Al-Sarakhsi, *Al-Mabsūṭ*, I, 125.
121. Abu Zahrah, *al-Jarīmah*, p. 159.
122. Al-Ghazāli, *Iḥyā'*, VIII, 18.
123. Both Ḥadiths quoted in Ibid, VIII, 185, and al-Sarakhsi, *al-Mabsūṭ*, X, 152-53.
124. Al-Sarakhsi, *Al-Mabsūṭ*, X, 153.
125. Al-Ghazāli, *Iḥyā'*, VIII, 185 and further detail at VI, 159.
126. Cf. Al-Sarakhsi, Al-Mabsūṭ, X, 154.
127. Al-Ghazāli, *Iḥyā'* VIII, 188.
128. Both Ḥadiths are quoted by Al-Ghazāli, *Iḥyā'*, VIII, 190.
129. Ibid, IX, 12-14.
130. Ibid, VI, 160.
131. Ibid, VI, 150-60 where al-Ghazāli discuses the issues in detail.
132. Cf. Ibid, VI, 143.
133. Ibn Qayyim, *Al-Ṭuruq*, pp. 258-59 (Beirut edn. by Dar al-Maᶜrifah).
134. Ibn ᶜĀbidin, *Ḥāshiyah*, IV, 14.
135. Ibid., IV, 15.
136. Ibid., IV, 65.
137. For details on *siyāsah sharᶜiyyah* see my article "Siyāsah Sharᶜiyyah".
138. Ibn Qayyim, *Al-Ṭuruq*, p. 28.
139. Ibid., p. 258 (Beirut edn. by Dar al-Maᶜrifah).
140. Ibid., p. 256
141. Cf. Ibn ᶜĀbidin, *Ḥāshiyah*, IV, 65.
142. Cf. ᶜAwdah, *Al-Tashrīᶜ al-Jinā'i*, p. 138 ff.
143. Kamali, "The Limits of Power," *Islamic Studies* 28 (1989), 323-353.
144. Al-Shāṭibi, *Al-Iᶜtiṣām*, II, 293.
145. Ibn ᶜĀbidin, *Ḥāshiyah*, IV, 66-67.
146. Cf. Al-Samarā'i, *Aḥkām al-Murtad*, p. 116 ff.
147. Ibid., pp. 43-46.
148. Ibn Taymiyyah, *Al-Ṣārim*, p. 561.
149. Al-Samarā'i, *Aḥkām al-Murtad*, p. 99.
150. Ibn Taymiyyah, *Al-Ṣārim*, p. 514. While recording this view, Ibn Taymiyyah adds, on the same page, that al-Qāḍi Abu Yaᶜlā al-Farrā, and Ibn Ḥazm al-Andalusi have also recorded the same opinion. That some of the jurists of Iraq advised the Caliph Hārun al-Rashid with regard to someone who had insulted the Prophet that the offender should be flogged, as insult in his case was not accompanied by any claim to validity. Having stated this Ibn Taymiyyah goes on to say that when Imam Mālik was informed of this *fatwā*, he rejected it. Ibn

Taymiyyah himself agrees with Imām Mālik and says that the view attributed to the *fuqahā'* of Iraq is somewhat obscure and that Abu Yaᶜlā has probably taken it from the works of some Mutakallimūn (i.e. Muᶜtazilah).

151. Cf. Al-Bahnasāwi, *Al-Hukm*, p. 62.
152. Ibn Ḥazm, *Al-Fiṣal*, II, 137-38.
153. Abu Zahrah, *Al-Jarīmah*, p. 82; see also al-Bahnasāwi, *Al-Ḥukm*, p. 50.
154. Al-Ghazāli, *Al-Munqidh* (McCarthy's trans.) p. 150.
155. Ibid., p. 162.
156. Ibn ᶜĀbidīn, *Ḥāshiyah*, IV, 237.
157. Cf. Abu Zahrah, *Al-Jarimah*, p. 196; al-Zuhayli, *Al-Fiqh*, VI, 184; al-Jazīri, *Kitāb al-Fiqh*, V, 428.
158. Aḥmad Amin, *Ḍuḥā al-Islam*, pp. 154-57.
159. Al-Bahnasāwi, *Al-Ḥukm*, p. 373.
160. Carl Ernst, "Blasphemy: The Calender Concept," *The Encyclopedia of Religion* II, 242-43.
161. Aḥmad Amin, *Ḍuḥā*, p. 158; al-Bahnasāwi, *Al-Ḥukm*, p. 373; al-Jazīri, *Kitāb al-Fiqh*, V, 428; al-Samarā'i *Aḥkām al-Murtad*, p. 206.
162. Ibn Ḥazm, *Al-Muḥallā*, XI, 411-12.
163. *Al-Mawsuᶜah al-Fiqhiyyah* (of Kuwait), XIII, 230-31; Al-Jazīri, *Kitāb al-Fiqh*, V, 436.
164. Ibn Taymiyyah, *Al-Ṣārim*, p. 539.
165. Ibid., Ibn Ḥazm, *Al-Muḥallā*, XI, 416.
166. Ibn Taymiyyah, *Al-Ṣārim*, p. 539.
167. Ibn Ḥazm, *Al-Muḥallā*, XI, 416.
168. Ibn Taymiyyah, *Al-Ṣārim*, XI, 416.
169. Ibid., pp. 541, 543.
170. Bahnasi, *Al-Jarā'im*, p. 147.
171. Ibn Taymiyyah, *Al-Ṣārim*, p. 541.
172. Ibid., p. 543.
173. Abu Dawud, *Sunan* (Hasan's trans.), III, 1036. Ḥadīth No. 3643.
174. Al-Sharabāṣi, *Min Ādāb al-Nubuwwah*, p. 197.
175. Ibid., p. 202; Ibn Taymiyyah, *Al-Ṣārim*, pp. 172, 174.
176. Ibn Taymiyyah, *Al-Ṣārim*, p. 531.
177. Ibn Qudāmah, *Al-Mughni*, VIII, 232; *al-Dusūqi, Ḥāshiyah*, IV, 309; al-Jazīri, *Kitāb al-Fiqh*, V, 4290.
178. Al-Dusūqi, *Ḥāshiyah* IV, 309; al-Sharbīnī, *Mughni al-Muḥtāj*, IV, 135.
179. Ibid., IV, 311.
180. Ibid., IV, 312.
181. Ibn Taymiyyah, *Al-Ṣārim*, pp. 566-67; Ibn Ḥazm, *Al-Muḥallā* XI, 415; *Al-Mawsuᶜah al-Fiqhiyah* (of Kuwait), XIII, 231.
182. Ibn Taymiyyah, *Al-Ṣārim*, p. 565; see also al-Buhūti, *Kashshāf*, VI, 177; *Al-Mawsuᶜah al-Fiqhiyyah* (of Kuwait) XIII, 231; al-Jazīri, *Kitab al-Fiqh*, V, 423.
183. Thus, it is somewhat uncertain whether al-Khiḍr and Luqmān were Prophets, and whether Harut and Marut were angels. cf. *Al-Mawsuᶜah al-Fiqhiyyah* (of Kuwait), XIII, 231; *al-Dusūqi, Ḥāshiyah*, IV, 312.
184. Ibn Ḥazm, *Al-Muḥallā*, XI, 412; Ibn ᶜĀbidīn, *Ḥāshiyah*, IV, 235.
185. Al-Buhūti, *Kashshāf*, VI. 168; Qāḍi ᶜAyāḍ, *Al-Shifā'*, II, 270.
186. Cf. Ibn Taymiyyah, *Al-Ṣārim*, p. 547-48; Qāḍi ᶜAyāḍ, *Al-Shifā'*, II, 271; al-Samarā'i, *Aḥkām*, p. 94.
187. Al-Qarafi, *Al-Furuq*, p. 141.

188. Cf. Qāḍi ᶜAyāḍ, *Al-Shifā'*, II, 254; Ibn Quḍāmah, *Al-Mughni*, X, 74 ff; Al-Shawkāni, *Nayl al-Awṭār*, VII, 221; Rahman, *Apostasy*, p. 116.
189. Al-Shawkāni, *Nayl al-Awṭār*, VII, 221.
190. *Al-Mawsuᶜah al-Fiqhiyyah* (of Kuwait), XIII, 231; al-Buhūti, *Kashshāf* VI, 168; Ibn Ḥazm, *Al-Muḥallā*, XI, 411.
191. Ibn Taymiyyah, *Al-Ṣārim*, p. 300.
192. Al-Jazīri, *Kitāb al-Fiqh*, V, 425; al-Samarā'i, *Aḥkām*, p. 104.
193. Ibn Taymiyyah, *Al-Ṣārim*, p. 302.
194. Ibid., V, 437-38; Qāḍi 'Ayāḍ, *Al-Shifā'*, II, 260.
195. ᶜAyāḍ, *Al-Shifā'*, II, 260; Ibn Qudāmah, *Al-Mughni*, VIII, 125; Al-Shawkāni, Nayl *al-Awṭār VII*, 221.
196. Ibn Taymiyyah, *Al-Ṣārim*, pp. 559-61; Ibn Ḥazm, *Al-Muḥallā*, XI, 415; Al-Mawsuᶜah al-Fiqhiyyah (of Kuwait), XIII, 231.
197. Ibn Taymiyyah, *Al-Ṣārim*, p. 8.
198. Ibid., pp. 10-24, and 254-55; Ibn Ḥazm, *Al-Muḥallā*, XI, 416.
199. Further detail of events, press reviews, scholarly opinion and conference resolutions concerning Rushdie can be found in Lisa Appignanesi and Sara Maitland, *The Rushdie File*, New York: Syracuse University Press 1990; Rafᶜat S. Aḥmad's *'Āyāt Shayṭāniyyah*, p. 82 ff; Kharufa's *Ḥukm al-Islam fi Jarā'im Salman Rushdi*, p. 13ff, and Shabbir Akhtar, *Be Careful with Muhammad, The Salman Rushdie Affair*. The last three were all published in 1989. For full facts of publication see my bibliography below.
200. Quoted in Appignanesi, *The Rushdie File*, p. 65.
201. Quoted in Appignanesi, *The Rushdie File*, p. 27.
202. Akhtar, *Be Careful*, p. 129; Appignanesi, *The Rusdie File*, p. 22.
203. Both quoted in Appignanesi, *The Rushdie File*, p. 250.
204. M.H. Fārūqi "Sacrilege, Literary but Filthy: the Satanic Verses", *Impact International*, 28 October - 10 November 1988.
205. Appignanesi, *The Rushdie File*, pp. 235-6.
206. Front page Article "Battle of the Book", *Newsweek*, February 27, 1989; Ahmad, *Āyāt Shayṭāniyyah*, p. 84.
207. Ibid.
208. Quoted in Appignanesi, *The Rushdie File*, pp. 97-8.
209. Ibid., p. 99.
210. Quoted in Aḥmad, *Āyāt Shayṭāniyyah*, p. 91.
211. Ibid., pp. 112, and 119.
212. Quoted in Appignanesi, *The Rushdie File*, p. 139.
213. The text of the statement appears in Kharufa, *Ḥukm al-Islam*, pp. 111-13. For a shorter version see Ahmad, *Āyāt Shayṭāniyyah*, p. 112.
214. Quoted in Kharufa, *Ḥukm al-Islam*, pp. 114-15.
215. Akhtar, *Be Careful with Muhammad*, p. 6.
216. Christopher S. Taylor, *Christian Science Monitor*, 3 March, 1989.
217. *Globe and Mail*, Toronto, 18 February 1989.
218. Kharufa, *Ḥukm al-Islam*, p. 105.
219. Ibid, p. 107.
220. Ibid., pp 106-109.

Conclusion

The weight of the Sharī^{c}ah evidence I have reviewed and presented on the various aspects of freedom of expression is supportive of the dignity of the individual and his freedom of conscience. At the root of this evidence lies the basic moral issue of freedom versus responsibility, which could hardly be resolved on an ethically sound foundation unless the individual is granted the freedom to say and act in harmony with his conviction, and what he or she believes to be of benefit to society. When an upright individual of sound judgement encounters abusive conduct which upsets his sense of commitment to justice and truth, he ought to be able to take a stand to denounce it, and express an opinion to that effect. Similarly, the individual should be able to support a cause or conduct which he or she considers to be upright and beneficial. This is the basic message of a great deal of the moral and legal teachings of Islam that I have reviewed. While providing the necessary authority for freedom of expression, the Sharī^{c}ah also maintains a tolerant outlook toward other religions and legal traditions, and grants non-Muslim residents in Muslim communities the right to speak for justice, decency and truth, and to denounce the opposite of these.

Ethical values are upheld in Islam through affirmative moral teachings which inculcate uprightness of speech and conduct in the individual. Compassion, self-restraint, respect for the rights of others, and avoidance of harm to them, be it in the form of backbiting, acrimonious speech, or of exposing the weaknesses of others are among the major themes of the moral edifice of Islam and the foundations of its moral integrity and *taqwā*. The basic rights and dignity of the citizen are in turn protected through a series of legal prohibitions concerning slanderous accusation, defamation, and insult. The Sharī^{c}ah adopts a similar stance regarding sedition and blasphemy so as to prevent sacrilege and serious threats to peace and order in society. In all of this we find that the evidence in the source materials of Sharī^{c}ah aims at ascertaining a high standard of refinement in the application of the law so that charges of slander, insult, and sedition are only laid when deviation from correct norms exceed the limits of propriety and justified tolerance. Punitive measures are seen as the last resort which must, of course, be taken whenever warranted. But, we note in the Qur'ān and the Sunnah, a remarkable degree of emphasis on moral persuasion, good advice, appeal to the good conscience of individuals, repentance, and forgiveness. These

are some of the most important aspects of social fraternity which Islam strongly advocates. The emphasis on persuasive methods is clearly overwhelming, and moral advice must naturally come before punitive measures, and all efforts must be made to reform the individual who might have breached acceptible norms of conduct. Reformation through moral advice (*naṣīḥah*), expiation (*kaffārah*) and repentance (*tawbah*) is the essence and objective of the legal directives, and moral teachings of the Qur'ān and the Sunnah, which should be given proper institutional expression in any judicial system which aspires to Islamic norms.

Many constitutions of contemporary Muslim countries have adopted provisions which declare freedom of speech and freedom of religion among the basic rights of the citizens. Notwithstanding the fact that most of these constitutional declarations were inspired by western models, they tend nevertheless to be in harmony with the normative guidance of the Qur'ān and the Sunnah, which proscribe compulsion in religion on one hand, and, on the other, demand the individual to be an active participant in the quest for moral integrity and the vindication of truth. The recipients of these Qur'ānic teachings enjoy full freedom of expression and yet, in the meantime, they are required to observe all the restraints that make freedom of expression worth its name. Modern constitutional proclamations on basic rights are conceptually sound, but what seems to be wanting, is implementation in practice. Constitutional proclamations on civil liberties in many Muslim countries have yet to be transformed into reality and become part of the applied law of the land. There is, also, a need for taking new measures that would enhance the scope and substance of freedom of expression. This can be done, perhaps, through articulating in detail the state laws on aspects of this freedom which have not received proper attention. Statutory legislation in Muslim countries has, on the whole, imitated the Western exposition and approach toward freedom of expression, and has little or nothing to say on such of the Qur'ānic concepts as *ḥisbah, naṣīḥah, shūrā*, and association in good work (*taᶜāwun*). How these are to be articulated in the form of pragmatic formulas incorporating the rights and duties of the citizen and state is a question which has not received attention in the constitution-making exercise of Muslim states in the present century. The Sharīᶜah, provisions on these and other themes pertaining to the rights of the individual are decidedly in favour of enhancing the status of the individual *vis-a-vis* the state. From the viewpoint of the Sharīᶜah the state is under duty to implement these provisions. An Islamic approach to freedom of expression

can only be expected to evolve through the embodiment of the spirit and vision of the Qur'ān and Sunnah which should clearly command priority, even if this might mean a certain departure from the *ijtihādi* position of a particular school.

Some exceptions apart, the commitment of contemporary Muslim countries to the Western model of a national state has become entrenched in their constitutions often to such an extent that their constitutions are seen as instruments of Western secularity. The West, itself, has been able, on the whole, to implement its own approach to constitutional rights in line with its own culture and traditions. Muslim countries have, however, found Western ideas and institutions at odds with their own heritage. This is probably why constitutional liberties have not become a reality in Muslim societies, despite the decades of experimentation and effort in this pursuit. However, I am not saying that all the ideas contained in these constitutions are unacceptable to Islam, because this is clearly not the case. The pro-liberty and consultative substance of modern constitutional law may be said to merit attention and even find support in the Sharī^{c}ah. But, the Sharī^{c}ah has its own concepts and postulates which need to be given substance if an integrated Islamic approach were to be adopted by the state itself and in regard to the basic rights and liberties of its citizens.

Freedom of expression is the principal theme in the democratic substance of any constitution, and advancement in this area is in many ways seen as a yardstick by which to assess the representative capacity of a government. The Islamic resurgence of recent decades has clearly brought home the message that Muslim masses almost everywhere were less than satisfied with the workings of their national governments and constitutions. It is now time for Muslims to take initiative and to chart out their own plans for a system of government and constitution that originate in their own heritage and values. To articulate a new Islamic approach with regard to dignity and to people's rights and immunities, as well as their duties and responsibilities will undoubtedly require sustained effort and dedication. But, the rewards will be that the Muslim personality and culture would have expressed itself within its own context and in harmony with its own culture. Within that context, the Islamic ideals of promoting human dignity would have begun to be a reality. If this were to be a process of trial and error, which is perhaps inevitable to some extent, then let that be in a new context rather than continuing the decades-old experimentation in western constitutional doctrines. For this was tried and has not succeeded.

Indeed, it has failed to bring originality, self-sufficiency and integration to the Muslim individual and the Muslim society of the twentieth century.

Appendix I
An Analysis of Rights (Appendix to Part One [Section III])

ḤAQQ, ḤUKM SHAR^{C}Ī AND ^{C}*ADL*

1. Meaning and Definition of Ḥaqq

Although the primary meaning of *ḥaqq* in Arabic is "established fact" or "reality" (*al-mawjūd al-thābit*), in the law it means "truth" or what corresponds to facts, which is the word's dominant meaning[1]. "Right", "power", and "claim" signify some of the other equally prominent meanings of *ḥaqq*, and some writers have even added "beneficience" and "public good" (*al-khayr wa'l-maṣlaḥah*) to the list.[2]

Ḥaqq occurs frequently in the Qur'ān and it is often used to imply certainty and proof of values, rewards, promises and punishments. Al-Ṣābūni has listed at least six different meanings of *ḥaqq* in the Qur'ān, but he concludes that certainty and proof *(al-thubut wa'l wujūb)* generally underlines the Qur'ānic usage of this word.[3]

Ḥaqq in the language of the Qur'ān is interchangeable with duty (*wājib*). Although instances can be found where *ḥaqq* means a right, as opposed to an obligation - such as the passage which entitles "the beggar and the indigent" to certain rights (*ḥaqq*) the wealth of the affluent (al-Zāriyāt, 51:19) - there is no attempt in the Qur'ān to distinguish either of these as the dominant meaning of *ḥaqq*. Occasionally *ḥaqq* is used to denote ultimate victory and salvation of the believers as a certain outcome of some action. (cf. Yūnus, 10:103, al-Rūm, 30:47). Killing is forbidden save in the cause of justice (*bi'l-ḥaqq*); and "do not conceal the truth (*al-ḥaqq*) while you know it," (al-Baqarah, 2:42), are two examples, along with similar usages of *haqq* which leads al-Bahī to the conclusion that *ḥaqq* in the Qur'ān is inextricably linked with justice and benevolence (^{C}*adl, wa ihsan*). And that these are the ultimate values which are sought wherever there is a mention of *ḥaqq* in the Qur'ān.[4] Finally, *ḥaqq* is sometimes used without conveying an emphatic obligation, but as a way of encouraging a certain conduct. In a Ḥadīth, for example, which is recorded by Muslim, Abu Hurayrah has narrated that "A Muslim has a right (*ḥaqq*) over other Muslims in six matters ...," namely, to return his *sālām* (greeting), to accept his invitation, to give sincere advice, (*naṣīḥah*) and so forth. These are obviously moral rights but

to emphasise observance, they are all referred to as *ḥaqq*. This would incidentally serve as an example of the concept of moral, as opposed to legal, rights in Islam.

Classical Muslim jurists have not articulated a juridical definition for *ḥaqq*, and have instead relied on the linguistic meaning of the word.[5] As ᶜAlī al-Khafīf has observed, the jurists may not have felt the need to do so as the word is clear and versatile and its juridical usage often comes close to its literal meaning.[6]

A somewhat vague definition of *ḥaqq* appears in *Baḥr al-Rā'iq*, of Ibn Nujaym where *ḥaqq* is defined as "the entitlement of a person to a thing" (*al-ḥaqq mā yastaḥiqquhu al-rajul*). This definition is circumlocutory as it defines *ḥaqq* by its own derivative. The same author has, however, given an accurate definition of the right of ownership which he terms "an exclusive assignment" (*ikhtiṣāṣ ḥajiz*).[7] An exclusive claim or assignment in favour of the right-bearer is a basic ingredient of the general concept of *ḥaqq*, and it is in this respect that *ḥaqq* is distinguished from "permissibility" or *ibāḥah*. The right of ownership is a typical example of *ḥaqq* as an exclusive assignment. On the other hand, freedom of movement and freedom of speech are examples of *ḥaqq* in the sense of *ibāḥah*. For these are advantages to which people are generally entitled, and thereby, no exclusive claim is established in favour of anyone in particular.[8]

Modern scholars have advanced several definitions for *ḥaqq* and they vary in respect of the emphasis that they place on the various elements thereof. Some of these definitions view *ḥaqq* from the perspective of *ḥukm shar*ᶜ*i*, while others tend to emphasise the concept of interest or *maṣlaḥah*. To avoid engaging in technicalities, I shall only quote one definition where *ḥaqq* is described as "an exclusive appropriation or power over something, or a demand addressed to another party which the Sharīᶜah has validated in order to realise a certain benefit."[9]

In this definition, exclusive appropriation (*ikhtiṣāṣ*) precludes things which are merely permissible, that is the *mubāḥāt*, from the scope of *ḥaqq*. Right must also be validated by the Sharīᶜah, and this requirement prevents factual appropriation which is not valid, such as stolen items in possession of the thief. A right may likewise be exclusive to God, to a human being, to real persons, or to corporate persons. And lastly in this definition, right is the means to a benefit, but it is not identical with that benefit. For example, the right-bearer who is entitled to conclude a contract of sale may not use it in order to procure usury (*ribā'*), nor may this right be used in order to harm another person or the community by means, for example, of hoard-

ing (*iḥtikār*). For these actions are all forbidden by the expressed will of the Lawgiver. Thus, the benefit that is pursued by *ḥaqq* is distinguishable from the *ḥaqq* itself and can be separately identified. *Ḥaqq* is a *maṣlaḥah* only when it consists of an exclusive assignment, but in its objective sense, a *maṣlaḥah* which is unrelated to anyone in particular is not *ḥaqq*. Nevertheless, it appears that *ḥaqq* in Islamic law is intertwined with *maṣlaḥah*. Although the two are not identical, *ḥaqq* is essentially goal-oriented (*ghā'iyyah*) and its valid exercise is determined on that basis. When a right is used in a manner that violates the *maṣlaḥah* on which it is predicated, the exercise amounts to abuse of that right. According to al-Shāṭibi, "the acts that the Sharī'ah validates are not goals in themselves but the means to certain other objectives, and these are the benefits (*al-maṣāliḥ*) in whose pursuit the acts have been validated in the first place."[10] Thus, we understand that in Islam notwithstanding the *ḥaqq* being essentially an individualist concept, the rights and interests of individuals are subservient to higher values, such as justice and *maṣlaḥah*.

The power (*sulṭah*) that is established by *ḥaqq* may be over a person, such as the right of custody (*ḥaḍānah*) over a child, or it may be over a thing, such as the right of a legal heir to a share in the estate of his deceased relative. However, due to the overriding influence of *maṣlaḥah* on *ḥaqq* the right-bearer has no unlimited power in exercising his right. For example, the right to life is sacrosant not only against aggression by others, but also against aggression by oneself. Similarly, the owner of property is not entitled to destroy it without any useful purpose. To do so would violate the basic objective of the Lawgiver and the *maṣlaḥah* on which it is founded.

2. *Ḥaqq and Ḥukm*

The ulema of *uṣūl al-fiqh* discuss *ḥaqq* and its varieties under the general subject of *ḥukm shar'i* (law or value of Sharī'ah).[11] *Ḥukm* is a broad subject which comprises a variety of concepts, including commands, prohibitions, permissibility, and others. All *ḥukm* in the Sharī'ah originate in the Qur'ān and the Sunnah, which constitute the sum total of Allah's communication to mankind. The Qur'ān has, in turn, authorised those who are in charge of affairs, the *'ūlu al-amr*, to issue *ḥukm*.

Ḥukm is the cause (*sabab*) of *ḥaqq*, but *ḥaqq* and *ḥukm* are not identical. In other words, *ḥaqq* is the result or effect of *ḥukm*. In *uṣūl al-fiqh*, *ḥukm* is defined as "communication from the Lawgiver

pertaining to the conduct of a legally competent person" (*mukallaf*) which may consist of a demand, an option, or an enactment (*al-waḍ*ᶜ).[12] This definition is broad enough to encompass and subsume *ḥaqq* in almost all of its varieties. A demand is usually communicated either in the form of a command or a prohibition. Whenever a demand is conveyed in decisive terms, it constitutes a *wājib*, or a *ḥarām*. But, if the demand is not utterly emphatic, it constitutes either a *mandūb* (what is recommendable), or *makruh* (what is reprehensible). An option (*takhyīr*), on the other hand, leaves the individual at liberty to do or not to do something, and the *hukm* that is so created is known as *mubah*. An enactment (*al-waḍ*ᶜ) is neither a demand nor an option but an objective exposition of the requirements of a *ḥukm* which ordains something as a cause, a condition, or a hindrance to something else. This aspect ensures that the *ḥukm* of Sharīᶜah is properly applied, only when its cause (ᶜ*illah*) is present, all the necessary conditions (*shurūṭ*) fulfilled, and also, when there is nothing to hinder its proper enforcement.[13] The fact, that right for the most part, is subsumed under the general subject of *ḥukm sharᶜi* is significant insofar as it suggests that right in Islamic law originates, directly or indirectly, in the clear injunction of Sharīᶜah.[14]

As noted earlier, *ḥukm* has a wider definition than *ḥaqq* as it is not confined to regulating relations among individuals in society, which is the main theme of *ḥaqq*, but also because it regulates relations between man and his Creator. This last meaning is often subsumed by the juristic concept of *ḥaqq Allah*, but in reality *ḥaqq Allah* is a *ḥukm* more than it is a right. Thus, it appears that every right in Islamic law is a *ḥukm*, but that every *ḥukm* does not necessarily consist of a right. This can be seen more clearly, perhaps, in the case of *ḥukm waḍᶜi* which may expound a certain aspect of a *ḥukm taklīfī*, but may not create a right or an obligation at all.[15] All *ḥukm sharᶜi*, as al-Shāṭibi points out, have a devotional (*taᶜabuddi*) aspect which means that in Sharīᶜah no *ḥukm* is totally devoid of the Right of God. Al-Qarāfi expresses basically the same idea by saying that in Islam there is no Right of Man in total isolation from the Right of God.[16]

Some ulema of *uṣūl*, such as Ṣadr al-Sharīᶜah, have spoken of public rights and permissibilities such as "freedom, honour, and ownership" (*al-ḥurriyyah wa'l-ᶜiṣmah wa'l-mālikiyyh*) as the basic rights of every human being,[17] while others have spoken of the right of ownership as a basic right and an "exclusive appropriation" (*ikhtiṣāṣ ḥājiz*) of the owner. It is also noted that many rights in Islamic law fall under the category of so-called duty-oriented rights.

Although Muslim jurists do not apply such a classification, the tendency in Islamic law to unify right and duty under the single concept of *ḥukm*, and then to seek a balanced orientation of both under the general concept of *ᶜadl* indicates an emphasis toward integration. Many rights in Islam are in fact duty-oriented rights, for example, the father's right to discipline his child is in reality a duty combined with a certain measure of authority. So is the right of a guardian in respect of equality in marriage (*kafā'ah*) which ensures that the prospective spouse is a suitable match for his ward.[18]

3. Ḥaqq and ᶜAdl (Justice)

I have noted the tendency in the Sharīᶜah toward integrating rights and obligations into the broad concepts of *ḥaqq* and *ḥukm*, and also the view that a balanced implementation of rights and duties is governed by the Qur'ānic standards of justice. The usage of *ḥaqq* in the Qur'ān is inextricably linked with justice which is, in fact, one of the Qur'ānic meanings of *ḥaqq*. We know, of course, that justice in any legal system is concerned with the correct implementation of rights and duties, but the question here is over an organic integration of these into the rubric of justice. This is something which is unique to the Qur'ān and distinguishes the Islamic approach as typically unitarian in comparison to other legal systems. As stated earlier, the Sharīᶜah does not seek to eliminate the distinction between rights and obligations, nor does it, on the other hand, emphasise duality and division between them in the familiar pattern of a modern constitution. In fact, right and duty in the Qur'ān merge into the concept of *ᶜadl* so much so that they become, in principle, an extension of one another. While I noted that *ḥukm* subsumes both rights and obligations, the relationship between *ḥukm* and *ᶜadl* is also one of a means to an end. *Ḥukm* is the means toward *ᶜadl*, and so is *ḥaqq* whose fulfilment and realisation in both of its dual capacities of right and obligation is predicated upon *ᶜadl*. Thus, Islam seeks to establish justice through the enforcement of *ḥukm shar ᶜi*, which is at the same time expected to mean the proper fulfilment of rights and duties. The Qur'ān's ubiquitous emphasis on *ᶜadl* makes this clearly one of the cardinal objectives of Islam and an overriding theme of the Holy Book itself. To underscore this, I refer to a passage where justice is declared to be not only the ultimate goal of religion, but of Prophethood, and of divine revelation, and is, in other words, the core and essence of Islam itself: "We sent Our Messengers with clear signs, and sent down with them the Book

and the measure in order to establish justice among the people" (al-Ḥadīd, 57:25).

لَقَدْ اَرْسَلْنَا رُسُلَنَا بِالْبَيِّنٰتِ وَاَنْزَلْنَا مَعَهُمُ الْكِتٰبَ وَالْمِيْزَانَ لِيَقُوْمَ النَّاسُ بِالْقِسْطِ.

The phrase "Our Messengers" suggests that justice has been the goal of all revealed religious guidance throughout human history. The thrust of this emphasis is on objectivity and universality in its standards:

> O believers! Stand out firmly for justice as witnesses to God, even if it be against yourselves, your parents and relatives, and whether it be against the rich or poor (4:135).

يَاَيُّهَا الَّذِيْنَ اٰمَنُوْا كُوْنُوْا قَوَّامِيْنَ بِالْقِسْطِ شُهَدَاءَ لِلّٰهِ وَلَوْ عَلٰى اَنْفُسِكُمْ اَوِالْوَالِدَيْنِ وَالْاَقْرَبِيْنَ. اِنْ يَّكُنْ غَنِيًّا اَوْ فَقِيْرًا.

> And let not the hatred of a people swerve you from the path of justice (5:8).

وَلَا يَجْرِ مَنَّكُمْ شَنَاٰنُ قَوْمٍ عَلٰٓى اَلَّا تَعْدِلُوْا.

> and when you judge among people, you judge with justice (4:58).

وَاِذَا حَكَمْتُمْ بَيْنَ النَّاسِ اَنْ تَحْكُمُوْا بِالْعَدْلِ.

The Qur'ān also enjoins Muslims to be just toward non-Muslims especially those who are not oppressive and have not committed acts of aggression toward the believers (60:8).

لَا يَنْهٰكُمُ اللّٰهُ عَنِ الَّذِيْنَ لَمْ يُقَاتِلُوْكُمْ فِى الدِّيْنِ وَلَمْ يُخْرِجُوْكُمْ مِّنْ دِيَارِكُمْ اَنْ تَبَرُّوْهُمْ وَتُقْسِطُوْٓا اِلَيْهِمْ.

In a recent address given at the International Islamic University, Malaysia, the Chief Justice of Pakistan, Muhammad Afzal Zullah, attempted to ascertain a certain order of priority in the values and belief structure of Islam. If there were three such values which commanded absolute priority these were *tawḥīd*, *risālah* and *ᶜadl*, that is belief in the oneness of God, in the truth of Muhammad's prophethood, and in justice. He said that the order of priority in this scale had become the subject of deliberation between himself and one of the other judges of the Supreme Court of Pakistan, and they agreed that owing to the high profile that *ᶜadl* is given in the Qur'ān that it should precede the *risālah*, and as such it was to come next to *tawḥīd*.[19] This would warrant the conclusion that *ᶜadl* is a fundamental right of everyone without any discrimination whatsoever. When we recognise the basic unity of purpose in *ᶜadl*, *ḥukm*, *ḥaqq*, and *wājib*, there remains no objection to a functional distinction between the various rights and their division into categories which depend on the nature of each particular right, and the weight and character of affirmative evidence that is found to support it.

As standards of justice in the Qur'ān transcend all levels of discrimination, this high level of objectivity could hardly be sustained in a situation of bipolarity between right and obligation. For placing any undue emphasis on one, at the expense of the other, is likely to compromise the objectivity of justice. In other words. a comprehensive approach to *ᶜadl* necessitates that rights and obligations are integrated into its essence. At present, there is in many modern constitutions a general acceptance of the binary division between right and obligation, and then a commitment in varying degrees to the pursuit of one or the other. On the other hand, the Qur'ānic approach to justice is typically unitarian. In Islam, rights and obligations are naturally integral to *ᶜadl*, and yet they are subsidiary to the essence of justice itself. But justice is not identical with right, for if it were then it could simply be waived by anyone who had a claim to it. As a concept, justice is more objective than that, and it is free of the bias which "right" might entail in favour of its bearer.[20]

In so far as it relates to the binary division of rights into Right of God and Right of Man, Islam's approach to establishing a balance between these is objective in the sense that it seeks to protect the interests of both the individual and the community under the umbrella concept of *ᶜadl*. Contrary to the philosophical orientations of individualism, liberalism, and socialism the Sharīᶜah does not seek to emphasise the one at the expense of the other. *ᶜAdl* itself is the

philosophy of Islam and this necessitates an integrated and unitarian approach toward rights and obligations.[21]

Within the general framework of *ᶜadl* the precise adjustment of rights and obligations in favour of one or the other may be open to other interests such as considerations of public policy, and *maṣlaḥah*, insofar as they remain in harmony with the Qur'ānic scheme of values. Therefore, placing emphasis on a particular right or obligation would be acceptable if this proved to be beneficial, and reflected an integrated approach to justice, greater refinement in *ijtihād*, and better accommodation of the legitimate aspirations of society.

Conclusion

It would appear that many aspects of *ḥaqq* in Islamic law were developed in the absence of a clearly articulated definition, however, we find on the other hand that Muslim jurists had, from an early stage, articulated a definition for *ḥukm shar*ᶜ*i* and each of its various components.[22] The availability of a clear definition for *ḥukm* may have retarded progress on the definition of *ḥaqq* and encouraged the tendency for one to be subsumed under the other. Also, *ḥukm* exhibits a closer affinity with obligation (*wājib*) rather than *ḥaqq*. Right and duty are, of course, mutually related even if they are not mirror-reversed reflections of each other. Although rights and duties are not always correlative, in that one can exist without the other, non-correlative rights and duties are nevertheless specific exceptions of a marginal rather than a central significance.[23]

The analysis I have presented here and in Part One supports the primacy of *ḥukm* and *wājib* over *ḥaqq* in Islamic law, but neither of these has ever meant relegating *ḥaqq* into insignificance. Nor has it detracted the ulema from paying exclusive attention to developing the various aspects of *ḥaqq*, such as its causes *asbāb*, varieties and classifications; its uses (*istiᶜmāl al-ḥaqq*) and abuses *taᶜassuf fi istiᶜmāl al-ḥaqq*; the fulfilment of a right *istīfā' al-ḥaqq*; and the termination of a right (*inqiḍā al-ḥaqq*).[24] I have also developed a certain perspective over the relationship of *ḥaqq* with *ᶜadl* under the unitarian influence of *tawḥīd*, and I have, in the same light, discussed the recognition as a separate category of fundamental rights in Islamic law.

Western jurists are divided on the relative significance of right versus duty. Wesley Hohfeld was not the first, for example, to recognise "right" as a very ambiguous term. In his work, *Fundamen-*

tal Legal Conceptions (New Haven, 1964), he elaborated this theme to a great extent more than his predecessors. Right is an advantange, in his view, and as such is a general concept when compared to duty which is specific. A person under duty must be told specifically, not in general terms, what he may or may not do. But a right to life and property, statable as it is, is very general and may be correlated with not one, but a long catalogue of duties. To correlate a right to a specific duty is, therefore, not always self-evident as this relationship, certain as it is, can be either clear and immediate, or it can be diluted and remote. With this in the background, Western thinkers have advanced two different theories, one of which advocates the relative primacy of rights as the origin of duties. The opposite theory is often referred to as that of redundancy of rights: "Whether we speak of rights or duties is at the end of the day merely a matter of perspective or style since nothing extra is conveyed by using instead of duty the language of right."[25] "Being a right against" can be alternatively stated by "having a duty towards" without, in any material sense, detracting or denying the substance or the two-party relationship of either. It is, perhaps, due to the correlativity of right and duty that recognition of one must of necessity mean a corresponding recognition of the other.

NOTES

1. Cf. "Ḥaqq, "*Al-Mawsuᶜah al-Fiqhiyyah*, n. 10 at 7; "Ḥaqq" *The Encyclopedia of Islam*, New Edition.
2. Ḥammād, *Ḥurriyyah al-Raᶜy*, p. 433.
3. Al-Ṣābūni, *Muḥāḍarāt fi-l Sharīᶜah*, pp. 341-42.
4. Al-Bahi, *Al-Islam fi Ḥall Mashākil*, p. 68.
5. Cf. Al-Zaraqā, *Al-Madkhal al-Fiqhi al-ᶜĀm*, III, 10. The tendency to rely on the literal meaning has also prevailed in the *Al-Mawsuᶜah al-Fiqhiyyah* (Fiqh Encyclopedia) of Kuwait where the article on "*Haqq*" (vol. 18) does not give a definition of *ḥaqq*.
6. Al-Khafīf, *Al-Ḥaqq wa'l-Dhimmah*, p. 36.
7. Ibn Nujaym, *Al-Baḥr al-Rā'iq*, 148 ff. This definition is also quoted by *al-Mawsuᶜah al-Fiqhiyyah* of Kuwait: Wizārah al-Awqāf wa-l-Shu'ūn al-Islamiyyah 1409/1989, vol. 18. p. 10.
8. Cf. Al-Darīni, *Al-Ḥaqq*, p. 182.
9. Al-Darīni, n. 8 at 193:
10. Al-Shāṭibi, *Al-Muwāfaqāt* II, 385.
11. Cf. al-Darini, n. 8 at 211.
12. Cf. *Al-Mawsuᶜah*, n. 7 at 8. The ulema of *fiqh* on the other hand define *ḥukm* as the ruling that a *mujtahid* arrives at, based on the evidence in the sources and general principles of the Sharīᶜah, concerning the conduct of the *mukallat*. Cf. Ahmad Zaki Hammad, "Ghazāli's Juristic Treatment of the Sharīᶜah Rules

in al-Mustasfa," *The American jorunal of Islamic Social Sciences* 4 (1987), 158.

13. For a detailed discussion of this definition see M.H. Kamali, *Jurisprudence* p. 321 ff.
14. *Al-Mawsuᶜah*, n. 7 at 11.
15. Al-Khafīf, n. 6 at 41. al-Darini, n. 8 at 210.
16. Al-Shāṭibi, n. 10 at II, 317; Al-Qarāfi, *Kitāb al-Furūq*, I, 140-41.
17. ᶜUbayd Allah b. Masᶜūd al-Bukhāri known as Ṣadr al-Sharīᶜah, *Al-Tawḍīḥ*, 1327, II, 161.
18. Cf. Al-Darīni, n. 8 at 176.
19. "The Application of Islamic Law in Pakistan," an address by Mohammad Afzal Zullah, Chief Justice of Pakistan, on 6th September 1991. Although the learned speaker did not mention this, his position here has a precedent in the theological doctrines of the Muᶜtazilah. In their formulation of the five principles of the faith (*uṣūl al-khamsah*) ᶜ*adl* comes only second to *tawhīd*. The five principles are: (1) *tawḥīd*; (2) ᶜ*adl* (3) belief in the promise of reward and punishment (*al-waᶜd wa al-waᶜīd*); (4) Belief in the intermediate phase (*al-manzilah bayn al-manzilatayn*), that is between Islam and disbelief (and accordingly between Paradise and Hell); (5) commanding good and forbidding evil. Cf. Abu Zahrah, *Tārīkh al-Madhāhib* p. 119.
20. Cf. ᶜImārah, *Al-Islam wa Ḥuqūq al-Insān*, p. 57.
21. Cf. al-Darini, n. 8 a 148-49.
22. These are the *ḥākim* (Lawgiver), *maḥkūm fīh* (subject matter of *ḥukm*, *maḥkūm ᶜalayh* (the party of incidence) and of course the *ḥukm* itself.
23. The correlativity of rights and duties is a much debated subject of jurisprudence. But it seems that a duty can exist independently of right. In Islamic law, this is true of many of the obligatory duties in the area of ᶜ*ibādāt*, which are not necessarily predicated on a particular right. Similarly, duties in criminal law, whether Islamic or Western, are imposed on members of society none of whom have concomitant rights. (Cf. Dias, *Jurisprudence*, 4th edn. p. 37). A right on the other hand seems to be more dependent on duty, and it is the duty in this duo which appears to be the stronger or more independent part.
24. See for details al-Sanhuri, *Maṣādir al-Ḥaqq* I, 35 ff; Abu Sinnah, "Naẓariyyah" Yusuf Musa, *Al-Fiqh al-Islami* at 211 ff; and al-Zarqā, n. 5 at III, 15 ff.
25. See for details Stoljar, *An Analysis of Rights*, p. 47 ff.

Appendix II
(Appendix to Part Three [Section V] on Bid'ah)

Matters pertaining to the religion of Islam in Malaysia are regulated under State Enactments rather than federal law. Usually bearing the title "Administration of Muslim Law Enactment", these legal decrees normally contain a chapter on offences against the religion of Islam, including such matters as propagation of false doctrines and teachings. Notwithstanding some variation in the law from one state to another, the Enactments which are discussed here do not differ a great deal, and may, therefore, be regarded as representative of the general approach of Malaysian law on the issues of our concern. These provisions also serve as an example of how a basically moral tenet of the Sharī^{c}ah has been made the subject of legislation. Broadly speaking, teaching a false doctrine may perhaps fall under the category of a reprehensible act (*makruh*), but the head of state has powers under the Sharī^{c}ah to legislate on such matters, and to impose a total ban on *makruh* should this prove to be beneficial and in the interests of good government. For example, the Selangor Administration of Muslim Law Act, 1952 (as amended by the Administration of Muslim Law (Amendment) Enactment No. 9 of 1983), which is also applicable in the Federal Territory of Kuala Lumpur, provides the following under the heading of "false doctrine".

> Whoever shall teach or publicly expound any doctrine or perform any ceremony or act relating to the Muslim religion in any manner contrary to the Muslim Law shall be guilty of an offence punishable with imprisonment for a term not exceeding six months, or with a fine not exceeding one thousand dollars (S. 18).

This provision also appears *in toto* in the 1965 Administration of Muslim Law of Perak (S. 169.1). But, the Perak Enactment goes on to add in Subsection 2 of the same Section that a person who is convicted for a false *fatwā* or teaching and has printed or published any material to which the conviction relates, the materials shall be forfeited and destroyed.

The 1986 Administration of Muslim Law Enactment of Terengganu, in its section (204) reproduces *in toto* the foregoing

provisions of the Perak Enactment, with the only difference that the penalty for the offence in question "... shall be a fine not exceeding five thousand ringgit or imprisonment not exceeding three years or both." The next provision in the same section is concurrent with that of the Perak provision on the forfeiture or destruction of the material to which the conviction relates.

These provisions are broad enough to comprise propagation of false doctrines and teachings that partake in *bidᶜah* or transgression of the principles of Islam. There may be cases of *bidᶜah* which may not be obviously "contrary to the Muslim law," as some instances of *bidᶜah* may also claim to be a true interpretation of Muslim Law on matters which may not have any precedent in the established Shariᶜah. However, it seems correct in principle that the law should operate on the basis of certainty, and that penal sentences can only be justified in cases of proven violation of the principles and doctrines of Islam. This is also the test in the Administration of Muslim Law Enactment of Perak which provides a maximum imprisonment of six months and a fine of five hundred dollars to any person who may be involved in the publication, printing and distribution of books and documents which are found to contain "any matter contrary or repugnant to the true tenets of Islam or to any lawfully issued *fatwā*" (S. 168). The phrase "true tenets of Islam" in this Section would appear to go beyond the obvious levels of repugnancy and would seem to authorise a probing into the veracity, or otherwise, of a dubious claim to truth. Be that as it may, the law here does not seem to concern itself with genuine scholarship and with speculative but otherwise sincere exposition of doctrines. I also note here that instances of violation are not always expected to be complex or difficult to identity.

The provision of Section 169(1) of the Perak Enactment was recently invoked in a case which was given publicity in the Malaysian press. According to one report, Haji Mohamed, a religious group leader, who graduated from Al-Azhar University and was teaching at an Anglo-Chinese School in Perak was jailed for deviant teachings. He was found guilty of having "taught his followers that there was no Friday in the Qur'ān and the lunar calendar .... That it was against Islamic teachings to designate that particular day for congregational prayers." He was also charged with giving sermons and for holding the normal Friday congregational prayers on Saturday evenings between dusk (*maghrib*) and late evening (*ᶜishā'*).[1] There was not sufficient evidence to prove this latter charge, but the defendant was still sentenced to three months imprisonment for denying an

established principle of Islam which has been consistently practised by the Muslim masses through unanimous consensus. There is a Chapter in the Qur'ān bearing the title "al-Jumᶜah" (the Congregation) and it contains a passage addressing the believers that "when you are called to the prayers on Friday (*min yawm al-Jumᶜah*) then rush to the remembrance of God and abandon trading ... (62:10)". In the face of a clear text such as this, which has also been continuously practised by Muslim masses, there would seem to be little room for any divergent interpretation of the kind Haji Mohamed had attempted to propagate.

At around the same time, in August 1991, the Malaysian National Council for Islamic Affairs, which is attached to the Prime Minister's Department, issued a circular to all Government Departments which communicated the decision to ban the publication and propagation of a book authored by the Darul Arqam leader, Ustaz Ashaari Muhammad. Bearing the title *Aurad Muhammadiah Pegangan Darul Arqam*. This publication, although basically a prayer book also contained controversial teachings on certain aspects of the faith. The reasons given for the ban on its circulation included the following:

(a) The book claims that Shaykh Suhaymi, the founder of Aurad Muhammadiah (who only died within the last few decades) has met with the Prophet Muḥammad and received the Aurad from him in the holy Kaᶜbah.

(b) It also claims that Shaykh Suhaymi is not dead but has disappeared, only to reappear as Imam al-Mahdi (i.e. the Messiah).

(c) The book modifies the "confession of faith" (*shahadah*) in such a way as to reflect Shaykh Suhaymi as Khalīfah (successor) to Prophet Muḥammad, thereby placing him at par with Khulafā al-Rashidūn.

Furthermore, the circular pointed out that the followers of Al-Arqam firmly adhere to the teachings of their leaders and it claimed that the success of the Darul Arqam Movement has been due to the blessings of *Aurad Muhammadiah*. Consequently, the Government of Malaysia imposed a ban not only on the book, but on all Darul Arqam propaganda activities within the Government Departments.[2]

Once again we note that claims of direct contact with the Prophet Muḥammad, or claims over the occultation of Shaykh Suhaymi are not entirely new. Some of these, especially the one concerning the occultation (*ghaybah*) and reappearance of Shaykh Suhaymi, obviously resembles the Shīᶜi theological doctrines, namely those of the

Shī'ah Imāmiyyah over the disappearance of their twelfth Imam, al-Mahdi, who is believed to be still alive and will reappear again. Belief in the occultation and the Mahdi is one of the points over which the Sunnī and the Shī'i followers of Islam are divided, and the Government of Malaysia has not hesitated to uphold the Sunni/ Shāfi'i doctrines on this matter. This may be a slightly more complex case compared to that of Haji Mohamed of Perak, yet there is little doubt that these claims are contrary and repugnant to established Muslim law. As far as the Sunnis of Malaysia are concerned, they are against the true tenets of Islam, and would, as such, represent an unacceptable innovation (*bid'ah*).

NOTES

1. *The Star*, Kuala Lumpur, Tuesday Oct. 1, 1991, p. 13.
2. Circular dated 7th August 1991 by the Islamic Affairs Division, Prime Minister's Department, Kuala Lumpur.

Appendix III
(Appendix to Part Four [Section VIII] on *Fitnah*)

A GLANCE AT MODERN LAW

A. Sedition

Statutory enactments on the subject of sedition in present day Muslim countries are, on the whole, wide-ranging and open to interpretation, often so much so as to impinge on freedom of speech. The Federal Constitution of Malaysia 1957, for example, grants freedom of speech and expression to all Malaysian citizens, and it authorises the parliament to pass laws that may impose restrictions on this freedom. This is, in principle, a correct approach in that only parliament has been granted such powers, but the list of restrictions that parliament can impose is quite impressive. Parliament may, thus, by law, impose on the freedom of speech whatever restrictions as it deems necessary or expedient in the interest of the security of the Federation, friendly relations with other countries, public order or morality, and restrictions to protect the privileges of parliament, or to provide against contempt of court, defamation, or incitement to any offence (Art. 10). Further restrictions are envisaged, under clause (4) of the same Article which provides that parliament may pass laws prohibiting the questioning of sensitive matters such as racial issues or the prerogatives of Malay rulers.

In a Kuala Lumpur Conference on freedom of expression held in December 1989, several presenters discussed and explored aspects of Malaysian law pertaining to the restrictions that are imposed on this freedom. The speakers tended to approve of the guidelines contained in the constitution, but they were critical of some of the provisions of the Sedition Act 1948. One of the presenters, Shad Fārūqī, in his paper entitled "Laws Relating to Press Freedom in Malaysia" reviewed the Sedition Act and observed that the concept of sedition in Malaysia was much broader than in the United Kingdom, Ireland, India and Australia. A Malaysian lawyer was, consequently, unable to give a clear definition of what constitutes free speech and what constitutes sedition with the consequent effect that "this legal uncertainty is very much in favour of the prosecutor".[1] Under the Sedition Act of Malaysia, sedition could be committed in any one of the

following ways: inciting disaffection against any Malay Ruler or government; inciting unlawful changes to any lawful matter; inciting contempt for the administration of justice; raising discontent among the people; promoting ill-will between races or classes, or questioning "sensitive issues" such as citizenship matters, the national language, special privileges of Malays and natives of Sabah and Sarawak, and the status of the Malay Rulers. Section (3) of this law also penalises any act, speech, words, or publication that have a "seditious tendency", a phrase which to a large extent renders the question of intention irrelevant. But, the test here is once again whether the speech in question "seeks to bring the government into hatred or contempt, excite disaffection against it, or promote ill-will and hostility among races or classes of population in the country."[2] "Disaffection" in the context of the Sedition Act means more than political criticism; it means the absence of affection, disloyalty, enmity and hostility. To "excite disaffection" in relationship to government refers to implanting, arousing, or stimulating in the minds of people a feeling of antagonism, enmity, and disloyalty which tend to make the government insecure.[3] The law does not proscribe honest and reasonable criticism of government, which is generally regarded to be beneficial: "It is of course true that the greatest latitude must be given to freedom of expression. It would also seem to be true, as a general statement, that free and frank political discussion and criticism of government policies cannot be developed in an atmosphere of surveillance and constraint."[4] The fact remains, however, that restrictive legislation on freedom of speech is quite elaborate. Some of the provisions of the Sedition Act are also reiterated in the Malaysian Penal Code (S. 298A) which penalises unlawful utterances and publications that cause disharmony, disunity, enmity and hatred. In another paper presented to the Kuala Lumpur conference on freedom of expression, the author Lee Min Choon commented that some of the restrictions imposed under the Sedition Act "may be unreasonable". The writer further pointed out that judicial construction and elaboration by the judges has not helped matters. One particular judicial remark on the meaning of "disaffection" (quoted above) was thus analysed, and the assessment it invoked from the writer was that "this restriction tends to stifle the legitimate activities and aims of political opposition."[5]

In its Chapter entitled "Offences Relating to Religion", the Penal Code of Malaysia provides that acts of oppression and violence against religion are punishable with imprisonment and fine: Anyone who "destroys, damages or defiles any place of worship, or any

object held sacred by any class of persons, with the intention of thereby insulting the religion of any class of persons" is thus liable to maximum imprisonment of two years or with fine, or both (S. 295). A subsequent section of the Penal Code provides the following:

> "Whoever by words, either spoken or written, or by signs, or by visible representations ... causes or attempts to cause disharmony ... or feeling of enmity, hatred or ill-will ... on grounds of religion between persons or group of persons professing the same or different religions shall be punished with imprisonment for a term which may extend to three years, or with fine or with both (S. 298 A).

Under the Printing Presses Publications Act, 1984, malicious publication of false news in an offence which renders "the printer, publisher, editor and the writer thereof," upon conviction to a maximum imprisonment of three years or a fine "not exceeding twenty thousand ringgit or both" (S. 8A). The next clause in the same section clarifies the position in regards to malice which is to "be presumed in default of evidence showing that, prior to publication, the accused took reasonable measures to verify the truth of the news."

The Constitution of the Islamic Republic of Pakistan 1973 grants freedom of speech and expression "to every citizen" and it protects freedom of the press. But then it goes on to provide that these freedoms are subject to "any reasonable restriction imposed by law in the interests of the glory of Islam or the integrity, security or defence of Pakistan ... public order, decency or morality ... defamation or incitement to an offence" (Art. 19).

In a commentary on this, Muhammad Munir pointed out that by virtue of this constitutional provision, all laws relating to the defence and security of the country, for instance, laws relating to suppression of mutiny and internal rebellion, and laws relating to sedition and treason will be held valid even if they impose restrictions on freedom of speech, provided the court is satisfied that the restrictions so imposed have a reasonable relationship with the preservation of security. Reasonable relation in this context means "not a remote or fanciful relation, but an intimate and proximate relation between the law and the security of the State."[6] While commenting on the reference, in the same Article, to public order, Munir adds that words which promote enmity between classes may thus properly be punished. The Pakistan Penal Code thus penalises such utterances (S. 153-A) and so does the Public Safety Act, and the Security of Pakistan Act 1952. Similarly, an order under Section

144 or Section 107, Criminal Procedure Code, prohibiting speeches likely to disturb the public order is protected. These restrictions also apply, the same author adds, to speeches prejudicially affecting the supply of essential commodities and services.[7] And lastly, constitutional references to morality and decency normally contemplate restrictions on obscene and prurient publications.

Another modern law offence which relates to the Sharī'ah concept of *fitnah* is contempt of court and contempt of parliament, both of which are recognised as statutory offences in the legislation of many Muslim and non-Muslim countries. Under Common Law, any speech or conduct, whether within the courtroom or outside, that tends to bring the authority and administration of the law into disrespect or interferes with court proceedings is a contempt of court. If for example the lawyer or the witness addresses the court in such a way that brings into disrespect the dignity of the court, the presiding judge may punish the offender for contempt of court.

In England the overriding aim of the law of criminal contempt is to ensure that the jury is not exposed to prejudicial information prior to issuing its verdict. Hence, when the mass media publishes material in the course of a jury trial which could prejudice the jury, the publication may be held to be in contempt of court. Contempt of court under most jurisdictions remains an offence which is almost entirely governed by the discretionary powers of the judges, and they tend to exercise unrestricted power to decide when newspapers and others are guilty of contempt.[8]

The Federal Constitution of Malaysia provides that the Supreme Court or a High Court shall have power to punish any contempt of itself (Art. 126). The procedure for contempt proceedings in the Supreme Court is governed by the Rules of the High Court 1980 and similar rules regulating proceedings of the Supreme Court. In addition, the court can adopt summary contempt procedure on its own motion in cases where it is urgent to act immediately against contumelious conduct committed during its proceedings. When the contempt is committed outside the court, it is equally important that the dignity of the court be protected against attacks even outside the court, in which case the Attorney-General or any private party may initiate the contempt proceedings.

The discretion of the court in punishing contempt of court (and contempt of law) has, however, been regulated in Malaysia in so far as it relates to the Sharī'ah courts. Thus, we find in the 1988 Sharī'ah Criminal Code Enactment of Kedah 1988 (and its equivalent 1985 Enactment of Kelantan) provisions which specify a maximum term

of imprisonment or equivalent fine for contempt of court. Section 31 in each of the two Enactments thus respectively provide:

> Any person who fails to comply with, contravenes, objects to, derides or refuses to obey any order of court shall be liable, on conviction, to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding one year or both.

The Kedah and Kelantan Enactments also make liable to imprisonment of up to six months anyone who "derides or despises any law" which is in force in their respective states (S. 18 and S. 28 respectively).

Furthermore, legislative enactments on the administration of Muslim law in the various states of Malaysia contain provisions on contempt of religious authorities. Consequently, anyone who is found guilty of contempt of the lawful authority of the Sultan as the Head of Religion of the state or other officials of the council of Islamic Religion are liable to imprisonment up to one year and a maximum fine of three thousand ringgit (the exact quantities vary in different states. Cf. SS. 171, 207 and 32 of Administration of Muslim Law Enactments of Selangor 1983, Terengganu 1986, and Kedah 1988 respectively).

While summarising the Malaysian law, Professor Ahmad Ibrahim writes that in Malaysia both the executive and the judiciary have ample powers to deal with criticism which exceeds the permissible limits. The courts can punish for contempt any criticism which it considers to be lacking in reasonable courtesy and good faith. The executive can act under the Sedition Act and can also have resort to the powers to detain under the Internal Security Act. The right to free speech is therefore limited. It ceases at the point when it comes within the mischief of the Sedition Act or the Internal Security Act, or when it is considered to be in contempt of court.[9]

B. Obscenity

The test of obscenity in an old but basic English decision was held to be whether the tendency of the matter charged as obscenity or obscene publication is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands the publication is likely to fall.[10] In later cases the probable effect, and not the mere tendency of the publication has been emphasised. The effect of a publication is to deprave and corrupt if it suggests to the minds of the young of either sex, or even persons of more advanced

years, thoughts of a most impure and libidinous character.[11] But, do books on sex in marriage corrupt or deprave? Do we know when and how and to what extent the reading of a particular book will arouse sexual passions, and how are these to be balanced against the literary, scientific or educational value of a publication? Harry Street sums up the position of English law by saying that "so far the charge against the law of obscenity is that it failed to face up frankly to the difficulties of defining obscenity."[12]

Malaysia has on the whole followed the British Common Law on the basic concepts and definition of obscenity and obscene publication. Malaysian legislation on this subject is, however, scattered and provisions relating on it are found in several statutes including the Penal Code, Printing Presses and Publications Act, and Cinematography Act. The Penal Code makes it a punishable offence for anyone to publicly exhibit, sell, distribute, or in any manner put into circulation, import or export "any obscene book, pamphlet, paper, drawing, painting, representation, or figure, or any obscene object whatsoever" and the offence is liable to imprisonment of up to three years, or fines, or both (S. 292). The next section provides that anyone who makes available, sells or exhibits an obscene object to a person under the age of twenty one is liable to a term of imprisonment which may extend to five years, or a fine, or both (S. 293). However, obscene acts which are committed in public places "to the annoyance of others", obscene songs, ballads, and words "in or near any public place" are punishable with a maximum imprisonment of three months, or with a fine, or (S. 294) both.

The Printing Presses Publications Act 1984 grants the Interior Minister of Malaysia unlimited discretionary powers to "control undesirable publications" by an order which is to be published in the *Gazette*. The Minister may thus "prohibit absolutely or subject to such conditions as may be prescribed, the printing, importation, sale, distribution or possession of obscene materials in any form including notes, photographs, music and sound recordings." (S. 7). The next section renders into an offence the possession of any prohibited publication and it is liable "on conviction to a fine not exceeding five hundred ringgit" (S. 8).

Obscenity under the State legislation of Kelantan and Kedah in peninsular Malaysia is a punishable offence which carries up to six months imprisonment. The Sharī^{c}ah criminal code of Kelantan 1985 (and of Kedah, 1988), under Section (6 and 6 respectively) bearing the title "Utterance of Indecent Words" provides the following:

> Any person who in any place wilfully utters or disseminates any word which is contrary to *ḥukum syarak* (a variant rendering of *ḥukm shar'i*) and likely to cause a breach of peace shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.

The Kedah and Kelantan Enactments also penalise indecent acts by anyone who "commits in a public place any act or behaves in an indecent manner which is contrary to *hukum syarak*." The acts so committed carry upon conviction up to six months of imprisonment, a maximum of one thousand ringgit or both (S. 5.1).

The Pakistan Penal Code prohibits possession, production, sale, and distribution of "any obscene book, pamphlet, paper ... or ... any obscene act in any public place ...." The offence so committed is punishable with imprisonment "which may extend to three months or with fine or with both."[13] The question of providing a precise legal definition for "obscene" has remained unresolved. In *re D. Pandurangan and Another* v. *State Prosecutor* (1953) *Criminal Law Journal* 763-64, the High Court of Madras considered the prosecutors' argument that certain pornographic books were obscene and fell within the mischief of 5.292, Indian (also Pakistan) Penal Code. The court identified the main problem to be that

> The word "Obscene" is not defined in the code. The natural and ordinary meaning of the term as given by the dictionaries is this:
> Webster's New International Dictionary: Obscene: Offensive to chastity or modesty; expressing or presenting to the mind or view something that delicacy, purity and decency forbid to be expressed; impure as obscene language, obscene picture ... lustful ideas, indecent, lewd ....

Having expounded the dictionary meaning of "obscene", the court went on to add that in the absence of a legal definition, it remains to be "a question of fact in each case whether a particular book falls within the meaning of this word. In this case a perusal of the book will convince anyone that it falls within the meaning given above."

Muhammad Munir's description of obscenity is based on, and substantially concurrent with, the foregoing. The only point on which Munir seems to depart from the said conclusion is where he says that the words "decency" and "morality" have a much wider signification under the penal law of Pakistan than "obscenity".[14] In the

absence of a clear definition for "obscenity", or its allied words such as "indecency" and "immorality", for that matter, the difference between these concepts is not as self-evident as Munir has tended to suggest. Unless the concepts in question are given a definition, it would seem difficult to consider the scope of one "much wider" than the other.

NOTES

1. Shad Fārūqī, "Laws relating to Press Freedom in Malaysia," p. 3.
2. Lee Hun Hoe, Chief Justice of Borneo, in *Public Prosecutor* v. *Ooi Kee Saik*, (1971) 2 MLJ 108.
3. Ibid., statement by Raja Azlan Shah, J (as he then was).
4. Ibid.
5. Lee Min Choon, "Should There Be Any Restriction," p. 5.
6. Munir, *Constitution of Pakistan*, p. 159.
7. Ibid., p. 161.
8. For details see Street, *Freedom*, p. 152. ff.
9. Ahmad Ibrahim, "Freedom of Speech" *Law Info*, p. 19.
10. Street, *Freedom*, p. 122.
11. Cf. Munir, *The Constitution*, p. 162.
12. Ibid., p. 127.
13. Section 292 & 294 Pakistan Penal Code.
14. Munir, *The Constitution*, p. 162.

Appendix IV
(Appendix to Part Four [Section IX] on blasphemy)

A GLANCE AT MODERN LAW WITH SPECIAL REFERENCE TO MALAYSIA

Although Malaysia does not claim to be an Islamic state, Islam has a visible presence both in the constitution and social reality of Malaysia. Islam, side by side with Malay custom (*adat*), could be said to be among the strongest forces in society. It is partly due to the presence of sizeable minorities of Chinese (about 30%), Indians (about 10%) and others (about 10%) that Malaysian leaders describe their country as a multi-religious and multi-cultural society. This has, in turn, provided the government with a case for its secular orientation. Muslims constitute about fifty per cent of the population and the Malay rulers or sultans must necessarily be Malays professing the religion of Islam. There is, however, nothing in the constitution which provides that the Prime Minister or any Minister or Federal high officials must be a Muslim.[1] The Federal Constitution declares Islam as "the religion of the Federation" and in the meantime provides that "other religions may be practised in peace and harmony in any part of the Federation (Art. 3(1)." Article 11 of the Federal constitution provides that every person has the right to profess and practise his or her religion and subject to clause (4) to propagate it. Clause (4) provides that "state law and in respect of the Federal Territories of Kuala Lumpur and Labuan, Federal Law may control or restrict the propagation of religious doctrine or belief among persons professing the religion of Islam." The state legislature may consequently take the necessary measures to protect Islam against distortion and propagation of false doctrine.

Commenting on Islam in the Malaysian Constitution, Professor Ahmad Ibrahim has observed that "the special position of Islam in the constitution",[2] is also seen in the form of oath to be taken upon assuming office by the Yang di-Pertuan Agong. The oath is in the solemn Islamic form and reads in part that "We shall at all times protect the religion of Islam and uphold the rules of law and order in this country." In response to the suggestion that Islamic law is not recognised in Malaysia as it is not included in

the definition of law in Article 160 of the constitution, the same author is of the view that given a more positive attitude to matters of interpretation it can be argued that the definition of the law uses the term "includes" and so can be extended to embrace the Islamic law.[3] In Professor Ahmad Ibrahim's assessment, there is room for argument, within the terms of the constitution, by the Muslims of Malaysia "that they are entitled under Article 3 (1) to lead their way of life according to the teachings of Islam. If they wish to follow the Islamic Law and not the English Common Law, they should be allowed to do so."[4]

As noted above, under the Federal Constitution, matters pertaining to the religion of Islam are to be regulated by state enactments (except for the Federal Territory). This is also the case with regard to the affairs of the Sharī'ah courts which are governed by the state enactments rather than Federal Law.

With reference to blasphemy, the Administration of Muslim Law Enactment of Selangor 1952 (amended in 1983) which is also applicable in the Federal Territory of Kuala Lumpur only contained a provision on "contempt of religion". The provision appears in part IX of the Enactment which exclusively deals with offences concerning the religion of Islam, and it reads as follows:

> Whoever by words spoken or written or by visible representations insults or brings into contempt or attempts to insult or bring into contempt the Muslim religion or the tenets of any sect thereof or the teaching of any lawfully authorised religious teacher or any *fatwā* (religious edict) lawfully issued by the President (of the State Religious Council) or under the provisions of this Enactment shall be punishable with imprisonment for a term not exceeding six months or with fine not exceeding one thousand dollars (S. 172).

The terms of this provision are broad enough to comprise all words and acts of contempt against Islam and as such they are not confined to blasphemy in particular. But blasphemy would still remain the principal concern of this provision. The broad terms of the law here also extend to "attempts to insult or bring into contempt" the laws and principles of Islam.

The Terengganu Administration of Muslim Law Enactment 1986 contains a similar provision on contempt of religion. But the offence so created here carries a heavier penalty. Section (209) thus reads:

> Whoever, whether orally or in writing or by any act or in any manner whatsoever, treats with contempt the Religion of Islam or the ways of any of the four Mazhabs, or any religious officer or religious teacher or authorised Imam or any *fatwā* lawfully issued under this Enactment commits an offence and shall be punishable with a fine not exceeding three thousand ringgit or with imprisonment not exceeding one year or with both.

Like that of the Selangor Enactment, the scope of this provision is also wide in that it is not confined to blasphemy but comprises a range of contemptuous acts, including contempt to the religious edict (*fatwā*) of an authorised religious officer. Since blasphemy is the most objectionable of all forms of contempt to religion, it would be expected to carry the maximum punishment that is stipulated in this Enactment.

The Sharī^{c}ah Criminal Code of Kedah Enactment (No. 8 of 1988) has a general provision on the "utterance of indecent words" which reads as follows:

> Any person who, in any place, wilfully utters or disseminates any word which is contrary to Hukum Syarak and likely to cause a breach of peace shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or both (S. 6).

Once again the wording of this Section is broad enough to comprise not only blasphemy but *bid^{c}ah* or any distortion of the principles of the established Sharī^{c}ah. Be that as it may, minor variations apart, these provisions are fairly representative of the laws of other Malaysian states. Section (6) of the Sharī^{c}ah Criminal Code of Kelantan, 1985, for example, is identical with the foregoing provision under Kedah law. One year of imprisonment under the law of Terengganu and six months in most other states, an equivalent fine in each case or both would thus seem to be the standard punishment for contempt of religion including blasphemy. The 1986 Administration or Islamic Religious Affairs Enactment of Terengganu contains a provision which carries the more specific title of "contempt of Qur'ānic verses" and the offence in this case carries a heavier penalty. Section (206) thus reads:

> Whoever, whether orally or in writing or by any act or in any manner whatsoever, treats with contempt, or causes

> to be treated with contempt, any verse from the Qur'ān or any Ḥadīth or any word or sentence regarded as holy by Muslims commits an offence shall be punished with a fine not exceeding three thousand ringgit or with imprisonment not exceeding one year or with both.

The equivalent provision to this in the 1952 Selangor Enactment is entitled "misuse of the Koran" and although slightly less emphatic in tone it contemplates the same offence, which is punishable in the Federal Territory and Selangor with "imprisonment for a term not exceeding six months or with a fine not exceeding one thousand dollars" (S. 170 and S. 21 of the amending Enactment No. 9, 1983 of Selangor). Notwithstanding the specific reference to "contempt of Qur'ānic verses" in the Kedah Enactment, the provision is, nevertheless, capable of general application to contemptuous expression of "any word or sentence regarded as holy by Muslims".

As for the question whether the perpetrator of the said offence would still be regarded as a Muslim or an apostate, the Terengganu Enactment provides that "No person, except the Majlis (i.e. the Islamic Religious Council of Terengganu) or the Mufti shall ... make or issue any *fatwā*, relating to the Religion of Islam or *hukum syarak*, or accuse any person professing the religion of Islam being *murtad* (apostate) *syirik* (associator) or an infidel" (S. 205). The next clause in the same Section also provides that "No person, except Hakim Shar^{c}i shall decide" whether a person professing the religion of Islam has become an apostate or infidel. The term "Hakim Shar^{c}i" here means a competent *qāḍi* who is knowledgeable of the Shari^{c}ah.

Given the conditions of Malaysian society where large minorities of non-Muslims, Chinese, Christians and Hindus live side by side with their Muslim compatriots, and where everyone is exposed to each other's divergent religious and cultural influences, it is no surprise to find that the law takes a serious stand on the question of unfounded charges of blasphemy and infidelity. The Terengganu Enactment thus provides further that anyone who contravenes the provisions of Section (205) and declares another an infidel, apostate, or blasphemer commits an offence punishable with "a fine not exceeding five thousand ringgit or with imprisonment not exceeding three years or with both" (S. 205.3).

A similar provision exists in the 1952 Selangor Enactment which renders punishable the issuance of religious edicts (*fatwā*) by unauthorised persons including religious scholars and leaders, into a punishable offence. This enactment is explicit on the point that

issuing *fatwā* in matters pertaining to offences against the religion of Islam is the sole prerogative of the state religious authorities. Persons who may issue such a *fatwā* are the state Mufti or anyone who acts under powers conferred by the religious authorities of the state, namely the Sultan and the Religious Council. An unauthorised person who issues a *fatwā* is consequently liable to a punishment of up to six months of imprisonment or a fine not exceeding "one thousand dollars or with both" (S.168 - amended in 1983). These provisions may fall under the broad doctrine of *siyāsah shar^{c}iyyah*, or Shari^{c}ah-oriented policy, which authorises the ruling authorities to introduce rules and regulations as they deem necessary and beneficial. Given the sensitive nature of the issues involved and the pluralist character of Malaysian society, the Malay sultans and rulers in almost all of Malaysian states have apparently been persuaded to adopt the policy of disallowing unauthorised *fatwā* on matters pertaining to offences against the religion of Islam.

The Pakistan Penal Code and the Code of Criminal Procedure were amended under the late president, General Zia ul-Haq, and they now contain provisions which make any utterance that implies disrespect to the Prophet of Islam, any member of his family (i.e. the *ahl al-bayt*), his Companions, as well as words of contempt to the *sha^{c}ā'ir-i Islam* (that is the principles and rituals of Islam) into a punishable offence. The amended version of the Penal Code thus renders the offence in question liable to death or to life imprisonment:

> Whoever by words, either spoken or written, or by visible representation, or by any imputation, Innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.[5]

The offence here is obvioulsy treated as a *ta^{c}zīr* offence which may be punished, in its most aggravated instances, by death. In other instances the offence carries life imprisonment and fine. The Penal Code also provides that anyone who "wilfully defiles, damages, or desecrates... the Holy Qur'ān ... or an extract therefrom... shall be punishable with imprisonment for life" (S. 295-B). Furthermore, the Penal Code makes liable to a term of imprisonment "which may extend to three years, or with fine, or with both" anyone who "directly or indirectly defiles the sacred name of any wife (*ummul mumineen*), or members of the family (*ahle bait*) of the Holy Prophet" (S. 298-A). And finally, anyone who wilfully "insults or attempts to

insult" the religious feelings of any class of the citizens of Pakistan" are liable to imprisonment "which may extend to two years or with fine, or both" (S. 295-A).

Blasphemy prosecutions are somewhat rare. I have known of only two cases which were reported in 1991–one in Indonesia and the other in Egypt and both were widely publicised in the media. In the first case, the editor of a weekly periodical, *Monitor*, which used to be the best selling tabloid in Indonesia, was sentenced to five years imprisonment for blasphemy against Islam.

Arswendo Atmowiloto, a Roman Catholic aged 42, was charged in the district court of Jakarta after publishing an opinion poll in October 1990 which rated "pop singers, politicians, and even himself as more popular than the Prophet Muhammad .... The poll ranked Prophet Muhammad eleventh in popularity behind the likes of President Suharto, and Iraqi President Saddam Hussein."

Under Indonesia's Criminal Code, blasphemy carries a maximum of five years imprisonment. The defendant was found guilty of "intentionally and publicly disgracing one of the religions of Indonesia". While announcing this, the presiding judge Sarwono sentenced the defendant to the maximum term of five years. The judge added that because Arswendo had apologised he was ordered to pay only 2,500 rupiah in costs compared with ten million rupiah of fine that the prosecutor had demanded. The newspaper was also closed in October 1990 "after the Muslims demonstrated violently across the country following the poll." The presiding judge added that the defendant's conduct had upset Muslims "and could disrupt, directly or indirectly, the nation's unity, stability and resilience."[6]

In December 1991 a blasphemy prosecution also took place in Egypt, where the judicial authorities convicted a novelist, ᶜAlaa' Hamid together with his publisher-distributor to eight years of imprisonment each for blasphemy which consisted of a fictionalised satire about the Prophet of Islam. The case was tried in a special security court in Cairo, and the sentences were passed under anti-subversion law which included the publisher and printer as accomplices. The reports do not give much detail but it seems that this case was in many ways similar to that of the British author, Salman Rushdie, who blaspshemed Islam in his novel *The Satanic Verses*. ᶜAlaa' Hamid's publication, entitled *Masāfah fi ᶜAql Rajul* (distance in man's mind) also consisted of stories based on dream sequences of disparaging type to the Prophet Muhammad resembling the theme and context of Salman Rushdie's novel.

The newspaper comments highlighted the point that it was unusual for this case to be tried by the security courts. For in the past, security courts in Egypt have almost exclusively dealt with political offences deemed threatening to the state. Sentences passed by the security courts are appealable only to the Prime Minister of Egypt. Anti-religious publications in Egypt are normally treated under the provisions of the Penal Law no. 29 of 1982 which penalise such offences to a term of "imprisonment ranging from six months to five years and fine of 500 to 1000 Egyptian pounds" (Art. 928).

In a BBC World service broadcast of December 27, 1991, it was announced that no appeal was expected to be allowed in this case.[7] Notwithstanding this, a newspaper report carried two weeks later, stated that the Egyptian Organisation for Human Rights, which is a private lobbying group had appealed to the Prime Minister of Egypt on Mr Hamid's behalf.[8] Naquib Mahfouz, the 1988 Nobel literature wrote in a news column, just before the Hamid verdict was announced, saying that he and a number of other Egyptian writers were surprised at the severity of the sentence and the manner in which he was tried and prosecuted. Mahfouz wrote concerning this episode: "would it not have been better to rationally analyse and criticise the book and then shelve it, if you will, among all those other books that have, since the Middle Ages, attacked Islam?" Let that be as it may, it is quite obvious that blasphemy can and does disrupt public order and incite hysteria and violence on a massive scale. It would appear that the Egyptian authorities were particularly apprehensive not to let this episode incite the kind of provocation that the world had just experienced following the publication of *The Satanic Verses*. Despite the fact that among the Third World nations Egypt has taken pride over its lively press and respect for freedom of speech, it seems certain that ᶜAlaa Hamid and his associates had underestimated the sensitivity of their fellow citizens in Egypt over blasphemous attributions to the Prophet of Islam.

I conclude this section with reference to a case of apostasy in the Sudan under Numeiri in which the accused was tried and executed. It seems that the whole issue became enmeshed in the politics of crisis which made it exceedingly difficult for the courts to remain objective and impartial. This was the case of Mahmud Muhammad Taha, the 76-year old leader of the Muslim Republican Brothers who was executed in 1985 for his heretical views on aspects of Islam which he was preaching for close to two decades. In 1976, Al-Azhar offically declared him to be an apostate from Islam and many other Muslim organisations recorded their disapproval of Taha's

views. The case became so controversial that it became the catalyst for Numeiri's downfall, whose regime was overthrown within weeks of Taha's execution. As of the early 1980s, Numeiri had begun an Islamisation programme which was less than convincing and was in want of public support. In an attempt to save his fledgling regime from imminent collapse, Numeiri turned to Islam and started on a course of activities which were seen to be politically motivated and contrived. Because of their criticisms of Numeiri's policy, many Republicans were thrown in jail. Taha was well-spoken, articulate, and persistent in his controversial views on Islam. Included among these was the view concerning the obligatory prayers (*ṣalāh*), which according to Taha, could become a mere mechanical act: A Muslim can reach a stage in devotion and piety whereby the ritual prayer becomes no more than an unnecessary act of formalistic conformity. Another equally controversial view that Taha advocated was to deny the article of the Muslim faith over the finality of the prophethood of Muḥammad. Taha maintained that Muḥammad was a true Prophet but that he was not the last of the prophets. With regard to the pilgrimage of Ḥajj, Taha also held the view that a believer need not go to Mecca to pay homage to his Creator. He can perform a similar act of devotion anywhere at any time. Numeiri arrested him and many of his followers who were tried in January 1985 apparently for offences other than apostasy. Taha boycotted as illegal his trial for offences against the Sudan Penal Code of 1983 and the State Security Act of 1973. On review, the trial court's judgement, which did not deal with apostasy, was replaced by the higher court ruling which convicted Taha of apostasy, and sentenced him to death. In ruling Taha an apostate, the appellate court also relied on an *ex parte* civil proceeding that was brought in 1968 by private plaintiffs offended by Taha's opinions on Islam. That case had resulted in a ruling that he was an apostate. The appeal court also relied on declarations by al-Azhar and the Muslim World League. Numeiri approved the sentence and Taha was publicly hanged on January 18, 1985. One of the unresolved issues of this case was a reference to Articles 47 and 48 of the Constitution on freedom of expression and belief. The court did not address this issue and simply ignored the Constitution.[10]

NOTES

1. Ahmad Ibrahim, "The position of Islam in the Constitution of Malaysia": in Ahmad Ibrahim et al, comp. *Readings on Islam*, p. 215.

2. Idem, "The Principles of an Islamic Constitution and the Constitution of Malaysia," (1989) *1 IIU Law Journal* 1 (No. 2) p. 7.
3. Ibid., p. 8
4. Ibid., p. 7
5. The Pakistan Penal Code 1860 (amended up to 15th November 1991), S. 195-B.
6. *New Straits Times*, Kuala Lumpur, Apr. 9, 1991, p. 21.
7. BBC Radio Broadcast heard by the present writer.
8. *New Straits Times*, January 6, 1992, p. 8. see also report and interviews on this case in *Al-Bilad* (Beirut) No. 78, April 25, 1992, p. 50.
9. For details see Safiya Safwat, "Islamic Laws in the Sudan," in Al-Azmeh, ed., *Islamic Law*, pp. 231-49, see also Mayer, "Law and Religion in the Muslim Middle East," p. 135 ff.
10. I am grateful to my Sudanese Colleague at the International Islamic University, Malaysia, Professor Muhammad 'Ata al-Sid, for his information and comments on Mahmud Taha's case during a conversation with me on February 6, 1992. For further information on Numeiri's Islamisation episode, see S. Safwat, "Islamic Laws in the Sudan,": in Al-Azmeh, ed., *Islamic Law*, p. 242 ff. Also for details on Taha's case see Mayer, *Islam and Human Rights*, p. 182 ff.

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Glossary

Aḥadīth: Plural of *ḥadīth*, q.v.

Āyah: A verse of the Qur'ān.

Bid'ah: Pernicious innovation as opposed to valid precedent. *Bidᶜah* is often used in contradistinction with Sunnah, q.v.

Ḍarūriyyāt: Essential values often referring to the five values of life, faith, property, intellect and lineage. The term is also used in contradistinction with *hajiyyāt* and *taḥsīniyyāt*, q.v.

Fiqh: Islamic law as developed by Muslim jurists. The term is often used synonymously with Sharīᶜah; the main difference being that Sharīᶜah bears a closer link with divine revelation, whereas *fiqh* mainly consists of the works of ulema and jurists.

Faqīh: Jurist, plural, *Fuqahā'*.

Farḍ ᶜAyn: Emphatic personal obligation, often referring to religious duties, which are established by the decisive injunctions of the Qur'ān and Sunnah.

Farḍ Kafā'i: Collective obligation of the community as a whole which is discharged even if some, if not all, members of the community perform it.

Fāsiq: Transgressor, one who violates the moral and religious values of Islam. The term is often used in contradistinction with *ᶜādil* (upright).

Fatwā: Considered opinion given by a qualified scholar, a *mufti* (jurisconsult), or a *mujtahid* (one who is competent to conduct *ijtihād*) concerning a legal/religious issue.

Fisq: Transgression, often used in contradistinction with *kufr* (disbelief)

Fitnah: Sedition, affliction and tumult. In the Qur'ān it is often used to imply oppression and persecution which denies its victim the freedom of religion.

Ḥadīth: Lit. speech, referring to the sayings and teachings of the Prophet Muḥammad. It is used interchangeably with Sunnah, q.v.

Ḥajj: Pilgrimage to Makkah, being an obligatory duty of all capable Muslims to perform it at least once in his or her lifetime.

Ḥājiyyāt: Complementary benefits which come next in order of priority to *ḍarūriyyāt*.

Hawā: Caprice or whimsical desire that lends one away from correct guidance and approved principles of Islam.

Ḥisbah: Commanding good and forbidding evil (*amr bil-maᶜrūf wa nahy ᶜan al-munkar*). It is a collective obligation (*farḍ kafā'i*) of the Muslim community to take an affirmative stand towards *ḥisbah* and put in into effect whenever the occasion arises.

Ḥudūd: plural of *ḥadd*, prescribed punishments, which the Qur'ān or Sunnah have determined for a handful of offences including adultery and theft.

Ḥukm: Law, injunction, and value of Sharīᶜah which seek to regulate the conduct of competent individuals who are capable of bearing legal obligations.

ᶜ*Ibādāt*: plural of ᶜ*ibādah*, devotional matters and rituals of worship, often referring to obligatory duties such as daily prayers, giving charity and fasting. The term is often used in contradistinction with *muᶜāmalāt*, q.v.

Ibāḥah: Permissibility, being the verbal noun of *mubaḥ* (permissible), which represents a value point in the Islamic scale of five values, next for example, to *wājib* and *mandūb*.

Ijmāᶜ: General consensus of jurists and ulema in a juridical or *shrᶜi* matter. It is often used in contradistinction with *ikhtilāf*, q.v.

Ijtihād: Lit. self exertion, independent reasoning by a qualified person (i.e. *mujtahid*) in order to deduce the juridical ruling of an issue from the source materials of Sharīᶜah.

Ikhtilāf: Disagreement and difference of opinion, often used in contradistinction with *ijmāᶜ*.

Imam: Lit. a leader, often referring to the eponym and leading authority of a legal school (*madhhab*), or any leading scholar, for that matter, the prayer leader who leads congregational prayers in the mosque, and also the head of state.

Īmān: Faith consisting of professing Islam in one's words which are also indicative of an affirmative state of mind towards Islam.

Istiḥsān: Juristic preference, that is when one of the two possible solutions to an issue is given preference to the other on grounds of it being more conducive to the general objectives of Sharīᶜah.

Jihād: Lit. struggle in both the moral sense of struggling against evil, or striving for excellence - and also in the physical sense of armed struggle for a holy cause.

Kalām: Lit. speech, often referring to the scholastic theology of Islam developed by such schools as the Ashᶜariyyah and Muᶜtazilah.

Khalwah: Illicit privacy between members of the opposite sexes.

Kufr: Lit. concealing, denial of Islam by one's words and conduct. The term is often used in contradistinction with *īmān*.

Makruh: Reprehensible, abonimable, something which is blameworthy yet legally not punishable; it is one of the value points on the well-known scale of five values.

Mandūb: Recommended, praiseworthy, a course of conduct which earns moral reward and yet if abandoned, the abandoner is not liable to punishment. It is also synonymous with *mustaḥab*.

Maᶜrūf: Good, in accordance with the Sharīᶜah, and the approved custom of society. The term is often used in contradistinction with *munkar*, q.v.

Maṣlaḥah: Plural *maṣāliḥ*, public good, benefit or interest, often used in contradistinction with *mafsadah* (mischief, evil). The rules of Sharīᶜah are all deemed to be for the realisation of the *maṣāliḥ* of the people.

Muᶜāmalāt: plural of *muᶜāmalah*, civil or commercial transaction, often used in contradistinction with *ᶜibādāt* (devotional matters).

Mufassirūn: Commentators, normally referring to authors of *tafsīr*, or commentary on the Qur'ān.

Munkar: Evil, dissaproved and contrary to the established values of Islam.

Murtadd: Apostate, that is a person who has renounced Islam, after embracing it, by his or her explicit words and conduct.

Mutashābihāt: Plural of *mutashābih*, intricate, unintelligible to the human mind. Typical examples are the abbreviated letters which occur at the beginning of some surahs of the Qur'ān.

Naṣīḥah: Sincere advice offered often at the initiative of its donor.

Nuṣūṣ: Plural of *naṣṣ*, clear textual injunctions of the Qur'ān or Sunnah which convey meanings that are self-contained and independent of interpretation.

Qadhf: Slanderous accusation, being one of the prescribed (*ḥadd*) offences, which carries a punishment of eighty lashes of the whip.

Qāḍi: Judge.

Ra'y: Considered opinion often used in contradistinction with *naṣṣ*.

Qiyās: Analogical reasoning aimed at extending a given ruling of the Qur'ān and Sunnah to a new case on grounds of an effective cause which is in common between the new case and the original case.

Ṣalāh: Obligatory prayers that a Muslim has to perform five times daily.

Sharīᶜah: Islamic law as contained in the divine guidance of the Qur'ān and Sunnah. 'Islamic law' is the nearest English translation of Sharīᶜah, yet the latter is not confined specifically to legal subject matter and extends to the much wider areas of moral and religious guidance.

Siyāsah Shar^{c}iyyah: Sharī^{c}ah-oriented policy, often referring to descretionary decisions taken by the Head of State or *qāḍi* in pursuit of public good, in response to emergency situations, or in cases where a strict application of the established law leads to undesirable results.

Sunnah: Teaching and exemplary conduct of the Prophet Muḥammad which constitutes the most authoritative source of Islam next to the Qur'ān. The Sunnah of the Prophet is known through authentic reports of his sayings, or *aḥadith*.

Taḥsiniyyāt: Embellishments, or things which are merely desirable, as opposed to *ḍarūriyyāt*, which are deemed to be essential.

Taqiyyah: Dissimulation, a principle of Shi^{c}i theology which permits the believer to conceal the truth when this is the only way of his or her defence against an imminent danger.

Taqlīd: Lit. imitation, often implying indiscriminate following of the rulings and opinions of the ulema of the past. It is often used in contradistinction with *ijtihād*.

Ta^{c}zīr: Lit. deterrence or a deterrent punishment which the *qāḍi* may impose at his discretion by reference to attending circumstances. It is often used in contradistinction with *hadd*.

^{c}Ūlu al-amr: Government and community leaders, as well as the ulema, who exercise authority and influence in community affairs. The Qur'ān requires that they must be respected and obeyed.

Ummah: The Muslim community at large, irrespective of colour, race, place of residence, language and nationality. The only bond of unity with the *ummah* is unity in faith.

Uṣūl al-fiqh: Sources or roots of Islamic law. It refers mainly to the Qur'ān and Sunnah as the principal sources of Sharī^{c}ah, but also to a number of other sources and methods which are used in order to facilitate the proper exercise of *ijtihād*.

Wājib: Obligatory, an obligation arising from the decisive injunctions of the Qur'ān and Sunnah.

Zakāh: Lit. purity, legal alms that a Muslim must give to help the poor and the needy. It is roughly two and a half percent of one's assets which is payable annually.

Ẓann: Speculation based on probability, as opposed to *shakk* (doubt), in which the chances of it being right or wrong are equal on either side. *Ẓann* is often admitted as a valid basis of adjudication.

Zinā': Adultery and fornication, sexual intercourse outside marriage.

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