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Legislation in an Islamic State

Introduction

There are six different issues that we shall investigate in relation to the subject of legislation in an Islamic State. The very first question which arises in this connection is: who has the authority to legislate laws which are binding for all individuals in a society, and a breach of which calls for punitive measures?

From the viewpoint of Islam and reason, all human beings have been created equal; no individual enjoys any inherent right of sovereignty and guardianship (*wilayah*) over others. Race, nationality, geographical location, class none of these factors confers any right of sovereignty on any individual or group. God, the Almighty, is the Master of the universe, and it is He Who is the Sovereign over all creatures. All are equal before Him, and none enjoys any preferential right of sovereignty over others. This idea finds a recurring echo in several Qur'anic verses such as the following:

قُلْ يَا أَهْلَ الْكِتَابِ تَعَالَوْا إِلَىٰ كَلِمَةٍ سَوَاءٍ بَيْنَنَا وَبَيْنَكُمْ أَلَّا نَعْبُدَ إِلَّا اللَّهَ وَلَا نُشْرِكَ بِهِ شَيْئًا وَلَا يَتَّخِذَ بَعْضُنَا بَعْضًا أَرْبَابًا مِنْ دُونِ اللَّهِ

"Say: People of the Book! Come now to a word common between us and you, that we serve none but God, and that we associate not aught with Him, and that none of us shall take others as lords, apart from God ...." (***3:64***)

اتَّخَذُوا أَحْبَارَهُمْ وَرُهْبَانَهُمْ أَرْبَابًا مِنْ دُونِ اللَّهِ

"They (***the Jews and the Christians***) ***have taken their rabbis and their monks as lords apart from God ...."*** (***9:31***)

The right of authority and sovereignty, solely a Divine prerogative, is referred to as `amr' in the Qur'an. This is the meaning of the word which occurs in such verses as the following:

أَلَا لَهُ الْخَلْقُ وَالْأَمْرُ

***"…Verily, His are the creation and the command* (*amr*) *…."* (*7:54*)**

إِنَّ الْأَمْرَ كُلَّهُ لِلَّهِ

***"… The command* (*amr*) *belongs to God entirely …"* (*3:154*)**

The same meaning of *amr* is meant in the phrase *uli al-amr* (those in authority) in the verse:

يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولِي الْأَمْرِ مِنْكُمْ

***"O believers, obey God, and obey the Messenger and those in authority among you …."* (*4:59*)**

All mankind are of a single origin, and no race, nation or individual has any superiority over others, except on the grounds of piety and righteousness:

يَا أَيُّهَا النَّاسُ إِنَّا خَلَقْنَاكُمْ مِنْ ذَكَرٍ وَأُنْثَىٰ وَجَعَلْنَاكُمْ شُعُوبًا وَقَبَائِلَ لِتَعَارَفُوا إِنَّ أَكْرَمَكُمْ عِنْدَ اللَّهِ أَتْقَاكُمْ

***"O mankind, We have created you from a male and a female, and made you nations and tribes, that you may know one another. Surely, the nobler among you in the sight of God is the more God fearing of you …."* (*49:13*)**

Accordingly, any law regardless of who legislates it, is not binding upon others. Only the Divine Law is valid and binding, on the basis of God's all embracing mastery and sovereignty over all things:

إِنِ الْحُكْمُ إِلَّا لِلَّهِ أَمَرَ أَلَّا تَعْبُدُوا إِلَّا إِيَّاهُ

***"…Sovereignty belongs only to God; He has commanded that you shall not serve any but Him …."* (*12:40*)**

وَلَقَدْ بَعَثْنَا فِي كُلِّ أُمَّةٍ رَسُولًا أَنِ اعْبُدُوا اللَّهَ وَاجْتَنِبُوا الطَّاغُوتَ

***"Indeed, We sent forth among every nation a Messenger,* [*saying*]*: Serve God, and eschew the taghut …."* (*16:36*)**

The above Islamic principle has been incorporated in the Constitution of the Islamic Republic of Iran,

which declares: `The Islamic Republic is a system based on: (1) faith in the One God, and His exclusive prerogative of sovereignty and legislation, and the duty to submit before Him ....”

Nevertheless, if God were to delegate His right of sovereignty to a human being, and bestow upon him the right to legislate and the authority to rule, then, as a consequence, within the scope of such delegated authority, he will have the license to command and forbid and to enact laws. In that case, his authority will represent Divine authority, his commands will be considered the commands of God, and disobedience to him will amount to disobedience to God. This type of authority, which the Holy Prophet (S) enjoyed, is mentioned in this verse:

مَنْ يُطِعِ الرَّسُولَ فَقَدْ أَطَاعَ اللَّهَ

“Whosoever obeys the Messenger, thereby obeys God ....” (***4:80***)

All prophets have implemented and enforced Divine laws, and, within the scope of the *wilayah* (i.e. guardianship or authority) delegated to them, obedience to them was obligatory for their followers. The following verse refers to the binding authority of the Prophet's judgements:

وَمَا كَانَ لِمُؤْمِنٍ وَلَا مُؤْمِنَةٍ إِذَا قَضَى اللَّهُ وَرَسُولُهُ أَمْرًا أَنْ يَكُونَ لَهُمُ الْخِيَرَةُ مِنْ أَمْرِهِمْ وَمَنْ يَعْصِ اللَّهَ وَرَسُولَهُ فَقَدْ ضَلَّ ضَلَالًا مُبِينًا

“It is not for any believer, man or woman, when God and His Messenger have decreed a matter, to have a choice in the affair. Whosoever disobeys God and His Messenger has gone astray into manifest error.” (***33:36***)

The Prophet’s Role

The Prophet (S) was a sovereign and a lawgiver in his life, and after him the right of sovereignty and the authority to legislate passed on to his successors appointed to the office of *wilayah* (i.e. *khilafah* and *imamah*) over the Muslim community, the Ummah. The Prophet's successor, while maintaining the authority of the Book and the Sunnah intact, possesses the right to legislate according to particular conditions and circumstances, and, on account of his *wilayah,* deserves obligatory obedience, as stated by the verse 4:59. His *wilayah* (like that of the Prophet) is derived from and dependent on the absolute *wilayah* of God.

However, since, on the one hand, the Qur’an does not specify any particular person for the office of *wilayah* (of the uli *al–amr*), and on the other hand the Prophet (S) and his successors (the *awsiya',* i.e. the Imams [A]) have determined its general transferability to anyone who possesses certain specified qualifications, the right to legislate is evidently also transferable to him. (This type of *wilayah is* called *al*

wilayat al–ammah, whereas the *wilayah* of the Prophet [S] and the Imams [A], since it is conferred upon them specifically, is called *al wilayat al–khassah*).

According to the Shi'ah hadith, the office of *al wilayat al–ammah* has been assigned to any *adil* faqih who fulfills the requirements of *ijtihad.* When there are several individuals who possess the requisite qualifications, an individual from among them or a group of them may be elected to take charge of this sovereign office.

It is on this basis that the Article 5 of the Constitution of the Islamic Republic of Iran specifies that:

"During the time when the 12th Imam (may God hasten his appearance) is in occultation, in the Islamic Republic of Iran, the leadership of the affairs and guidance of the people is the responsibility of a just and pious jurisprudent, aware of the contemporary issues, courageous, of drive and initiative, whom the majority of the people know and accept to be their Leader. In case no such jurisprudent enjoys confidence of such a majority, a Leadership Council consisting of jurisprudent meeting the above requirements will assume the same responsibility."

Whatever we have said until this point contains two points of difference between us and our brethren of the Ahl al–Sunnah. The first is about the *imamah* or *al–wilayat al–khassah* of the twelve Imams (A). The second relates to *al–wilayat al–ammah* of the qualified jurisprudent (*faqih jami al–shara'it*) during the period of occultation (*ghaybah*) of the Twelfth Imam (A). A group of Shi'ah `ulama' have also not accepted the doctrine of *al–wilayat al–ammah* of the faqih (also called, *wilayat al–faqih*).

In the case of absence of a qualified faqih, we are faced with the problem of proper governance and administration of the political affairs of the Muslim community. Does Islam offer any solution for this problem, or does it leave the people unguided, to grapple with the problem themselves? Is it conceivable that a religion which has meticulously specified duties in all minor and major affairs of life, should leave unsolved and neglect such a significant and vitae affair of the Muslim society?

This question is relevant to all these three groups: firstly, the Ahl al–Sunnah in relation to the post–prophetic era; secondly, the Shi`ah who do not believe in the institution of *wilayat al faqih* in relation to the period of *ghaybah* of the Twelfth Imam (A); thirdly, for the Shi'ah who believe in *wilayat al–faqih* in relation to the case when a qualified faqih is absent or unavailable. A brief prelude is necessary before we answer this question.

Society without a State

It is evident that a society without a State and a system of laws cannot hope to survive, and even if it does, presumably, it cannot be a society of a high order that can cater to all the needs and demands of the human nature. The existence of social order is an essential need confirmed by all Divine religions.

In an anarchic society devoid of any system of law and order, neither prophethood can fulfil the

objectives of its mission of guiding the people, nor is there any ready ground for the worship of God and implementation of His commands. In a state of social and political chaos, the goals mentioned in the following Divine verse cannot be achieved:

لَقَدْ أَرْسَلْنَا رُسُلَنَا بِالْبَيِّنَاتِ وَأَنْزَلْنَا مَعَهُمُ الْكِتَابَ وَالْمِيزَانَ لِيَقُومَ النَّاسُ بِالْقِسْطِ

"Indeed, We sent Our messengers with the clear signs, and We sent down with them the Book and the Balance, so that mankind may uphold justice .... **"** (***57:25***)

The necessity of the existence of the State is a self evident axiom, readily accepted by reason and also affirmed by the Shari'ah. If there can be any argument about government and the State, it is with regard to their form and characteristics. Here, we arrive at the heart of our problem: In case of the absence of a God–appointed sovereign (*al–wali al–mansus*), who should occupy the office of the sovereign?

That which can be stated on rational (*aqli*) and canonical (*naqli*) grounds is that the office of the *wilayah* of Muslims should be occupied by the following in the descending order of priority: the Prophet (S); the successor appointed by the Prophet to the office of *wilayah* (i.e. a*l–wali al–mansus*); an *adil faqih;* an *adil* believer (*al–mu'min al–adil*); a *fasiq* believer (*al–mumin al–fasiq*).

The last three types may hold the office of *wilayah* of Muslims; after the requisite conditions are met by individuals, the individuals are selected for the office, and after they formally take official charge of their duties. Moreover, obedience to their commands which are not contradictory to the Divine commands is essential.

Accordingly, they have also the authority to legislate laws and regulations for fulfilment of the various objectives of the State such as legislation about economic, financial and commercial matters, defence, creation and maintenance of security, administration of justice, recovery of the rights of the weaker sections of the society from the more powerful, and so on. These are some of the essential reasons for the existence of the State, as Imam Ali (A) points out in one of the sermons of the *Nahj al–balaghah*

وَ إِنَّهُ لَا بُدَّ لِلناس مِنْ أَمِيرٍ بَرٍّ أَوْ فَاجِرٍ يَعْمَلُ في إِمْرَتِهِ ٱلْمُؤْمِنْ، وَ يَسْتَمْتِع فِيْهَا ٱلْكَافِرْ، وَ يُبَلِّغُ اللهُ فِيهَا ٱلأَجَلَ وَ ...
...يَجْمَعُ بِهِ ٱلْفَيءْ، وَ يُقاتِلُ بِهِ ٱلعَدُوُّ، وَ تَأمَنْ بِهِ السُبُلْ، وَ يؤخَذُ بِهِ لِلضَّعِيفِ مِنَ ٱلْقَوِي

Mankind cannot dispense with a ruler, good or bad. [As a consequence of the general conditions of law and order provided] by his rule, the believer performs his acts [of righteousness] and the unbeliever attains his [worldly] enjoyments. In it God eases things to reach their ultimate destinations. Through it tribute is collected, the enemy is fought against, the security of the highways is maintained, and the rights of the weak are wrested from the powerful .... (*Nahj al–balaghah,* sermon 40)

In another tradition, `Ali (A) is reported to have said:

الْواجِبُ في حُكْمِ اللهِ وَ حُكْمِ الْإِسْلامِ عَلى اَلْمُسْلِمينَ... أنْ لا يَعْمَلُوا عَمَلاً وَ لا يُقَدِّمُوا يَداً وَ لا رِجْلاً، قَبْلَ أنْ يَخْتارُوا لِأَنْفُسِهِمْ إماماً، عَفيفاً، عَالِماً، وَرِعاً، عَارِفاً بِالْقَضاءِ وَ السُّنَّةِ، يَجْبِي فَيُّهُمْ، وَ يُقِيمَ حَجَّهُمْ وَ جُمْعَتَهُمْ، وَ يَجْبِي صَدَقَاتِهِمْ...

In a Divine rule and an Islamic State it is an obligation of Muslims not to make any [collective] move before they select for themselves a chaste and knowledgeable leader who is pious, abstinent and well versed in administration of justice, who may collect for them tribute, taxes and charities, and take care of their *hajj* and [prayers in] congregation. (*al–Hayat, vo1.II, p.* 421)

Al–Imam al–Sadiq (A) says:

وَ ذلِكَ أنَّ في وِلايَةِ وَالي الَعَدْلِ وَ وُلاتِهِ، إحْياءُ كُلِّ حَقٍّ، وَ كُلِّ عَدْل، وَ إماتَةِ كُلِّ ظُلْمٍ وَ جَوْرٍ وَ فَسَادٍ. فَلِذلِكَ كانَ ... السَاعِي في تَقْوِيَةِ سُلْطانِهِ، وَ اَلْمُعِينُ لَهُ عَلَى وِلايَتِهِ، ساعِياً في طاعَةِ اللهِ، مُقَوِيَّاً لِدينِهِ ...

... that, because the rule of an equitable sovereign and his officials ensures the revival of righteousness and justice in all their aspects, and promises the death of oppression, injustice and corruption of all kinds. For this reason, anyone who strives for the establishment of the power [of such a ruler] and assists him in enforcing his authority is one who endeavours for the cause of obedience to God and for the strength of His faith .... (*al–Hayat, vol.II, p.* 421)

After admitting the need for a sovereign State in the Islamic society at all times and in all places, and accepting its right to legislate, we may now go on to deal with some other issues related with the subject of Islamic government which we mentioned at the outset. Presently we shall take up the two following problems:

A. Is legislation permissible? That is, may we legislate despite the existence of the *ahkam* (laws, rules) of the Shari'ah and how?

B. What is the role of *ijtihad in* legislation in an Islamic State?

Basically, in view of the fact that the enforceable laws in an Islamic State must be in conformity with the fundamental principles of Islam, and in view of the fact that the Divine *ahkam are firmly* embedded in the Book and the Prophet's Sunnah, we have to conclude that there is no room for legislation (in the secular sense), and expression of any opinion contrary to the explicit teachings of the Qur'an and the Sunnah is tantamount to apostasy:

وَمَنْ لَمْ يَحْكُمْ بِمَا أَنْزَلَ اللَّهُ فَأُولَئِكَ هُمُ الْكَافِرُونَ

"... ***And whoever does not judge according to what God has revealed they are the unbelievers."***

(***5:44***)

There may not be any disagreement whatsoever between a law and the *ahkam* of the Shari'ah. However, what are meant here are not the variable but the fixed laws of Islam, such as those related to all the *ibadat* (*viz.* issues relating to *salat, sawm, zakat, khums, hajj,* etc.); the personal laws (e.g. the *ahhdm* related to birth, heredity, marriage, divorce, inheritance, will (*wasiyyah*), death, etc.); and the penal laws (e.g. *hudud, diyat,* and *qisas*).

The possibility of legislation is absolutely precluded in such matters. But in cases where the Shari`ah does not lay down any rule, or where the legal rules have been hitherto based on social acceptability, social habits and customs (*urf*) and certain demands of social welfare (as in the case of legal rules relating to business dealings [*mu'amalat*]), or in cases where the Shari'ah has given powers to others (such as in the case of *ta`zirat,* or matters relating to the affairs of the State, regulations related to State administration, employment, relations with foreign governments, control over the borders and frontiers, etc.), the legislator has a licence and a free hand.

He can, in conformity with the general and basic Islamic criteria, principles and objectives, and in accordance with the interests of public welfare, legislate laws. In other words, there are certain fixed Islamic principles and criteria which may be considered as constituting the constitutional law of Islam, and all other laws and regulations are valid only when they do not negate any of such principles and criteria as: the duty to establish justice.

Respect for the right of ownership; the obligation to safeguard life, property, honour, faith and sanity; the duty to pursue goodness and benevolence and to refrain from evil and malice in all things; the duty to support the oppressed and to fight for the removal of *fitnah* (sedition, persecution) and *fasad* (corruption); the ban on consumption of illegitimate acquisitions (money, assets); the illegitimacy of the *khabaith* and the permissibility of the *tayyibat;* the obligation to honour all agreements and treaties.

The principle of exemption from *usr* and *haraj* (hardship, difficulty); the principle of *la darar wa la dirar* (invalidity of all dealings and arrangements which involve loss, harm or injury to any of the parties involved); joint social responsibility (*al–takaful al– ijtima`i*); public security, etc. Any legislation is valid only when it does not conflict with any of the above mentioned general principles.

This is exactly what the Article 4 of the Constitution of the Islamic Republic affirms: “All law spenal, financial, economic, administrative, educational, military, political, etc. and legislation controlling natural resources should be based upon Islamic criteria. This article generally and universally controls all other articles of the Constitution, as well as other laws and regulations, by the judgement of the jurisprudents of the Guardianship. Council.”

Besides, the Article 170 states: “The judges of the courts of justice shall be obliged to refrain from implementation of any of the Government's decrees and regulations which should be contrary to the Islamic laws and criteria, or should lie beyond the jurisdiction of the powers of the Executive. All

individuals are entitled to apply to the administrative courts for annulment of such decrees and regulations."

Role of Ijtihad in Legislation

Here, the role of *ijtihad* in legislation also comes to light. Because, as mentioned, Islam has certain fixed laws which are not affected either by the passage of time or due to changes in the conditions of life or on account of differences of culture and region. Except in exceptional cases and within the limits of exigency, it is not permissible to violate them. Examples are, the ban on usury, on drinking of wine, gambling, and similar other cases mentioned earlier.

To legislate laws which are contrary to them is considered equivalent to belligerence against God.

Apart from these, there are the variable *ahkam* which are changeable in accordance with changing conditions. This is the secret behind the perpetuity of Islam, its capacity to sustain until the Judgement Day, and its adaptability to varying conditions and situations. In many cases the Shari'ah gives the legislator a licence to frame laws and regulations with due observance of the welfare of the society, or provides general guide-lines for him. For instance, the following hadith is quite explicit about the cases where Islam has on purpose left the Islamic State free to make an independent decision:

> إنَّ اللهَ أفْتَرَضَ عَلَيْكُمْ فَرائِضَ، فَلا تُضَيِّعُوها؛ وَحَدَّ لَكُمْ حُدُوداً، فَلا تَعْتَدُوها؛ وَ نَهاكُمْ عَنْ أشياءَ فَلا تَنْتَهِكُوها؛ وَ سَكَتَ لَكُمْ عَنْ أَشْيَاءَ وَ لَمْ يَدَعْها نِسْياناً، فَلا تَتَكَلَفُوها.

Indeed God has assigned you certain duties which you must not neglect. Then He has prescribed for you certain limits which you must not transgress, and has made certain things infrangible, which you must not infringe on. There are certain things which He has passed over in silence, but not on account of oversight; therefore, do not impose them upon yourselves. (*Nahj al-balaghah,* aphorism 105)

In such cases, characteristic temporal demands may require, at times, absolute permissivity; at times, absolute restraint; and at other times, specific restrictions. The free hand given to the *hakim* (judge, legislator) in the case of *ta`zirat,* which cover a wide range of punishments in Islam and in which the quality and quantity of punishment depend upon the discretion of the judge, thus allowing for differences of culture, is yet another example of the legislative licence. (There is no difference here whether by *"hakim"* we mean the judge or the State, because if the judge is a State authority and possesses executive power, he may select some particular *ta`zirat* and issue a circular to the regional judges, and his directive shall be considered valid. Some jurisprudents have explicitly confirmed this point.)

The principle of *la `usr wa la haraj,* and that of *la darar wa la dirar* are other important bases for variation of the ahkam. Many of the *ahkam al-khiyarat* (that is, those *ahkam* in which one of the parties is free to dissolve an agreement) have emerged in fiqh as a result of the principle of *ld darar wa la dirar.* The

same is true of exigency (*idtirar*) and the Secondary Laws (*al- ahkam al-thanawiyyah*).

The primary role of *ijtihad* in law-making is to distinguish between the fixed and the variable *ahkam.* This is not an easy job because of the presence of numerous ambiguities (*mutashabihat*). Furthermore, the *mujtahid* has to undertake a close investigation, discriminating between the essentials and nonessentials of Islam in the *fatwa's* of the past *mujtahidun,* and employ his deductive skills-which are evidently not free from the influence of his particular conditions and times'-to deduce the *hukum* of the Shari'ah from the original texts and sources.

In this way, he is able to confirm or deny the conformity of a certain proposed law with the Islamic principles. It is on this basis that the Article 19 of the Constitution of the Islamic Republic of Iran states that: "In order to ensure that the laws passed by the Assembly do not contradict the Islamic laws and the Constitution, a Guardianship Council shall be formed, consisting of : (1) Six qualified jurisprudents who are aware of the needs of the time and contemporary problems. The nomination of such persons is the responsibility of the Leader or the Leadership Council. (2) Six lawyers qualified in various branches of jurisprudence from among Muslim jurists whose names are proposed to the Assembly by the Supreme Judicial Council. Their appointment is approved by the Assembly."

End of Discussion

At the end of this discussion, it seems pertinent to call attention to certain points:

1. Some have considered legislation as exclusively a Divine prerogative, and deny that God has deputed any agent with legislative powers. Such legislative powers of a Divine agent are unacceptable to them even in the case of the Holy Prophet (S). The Prophet's Sunnah, or for that matter of all other prophets, is looked upon by them as fulfilment of the Law given in entirety by God.

However, it is quite simple to accept this view with the explanation that the Sunnah of the prophets and for that matter all the laws laid down by the *uli al-amr* has a relation to the *ahkam* revealed by God corresponding to the relation between ordinary regulations approved by the cabinet of ministers to the constitution. Or perhaps it would be more correct to compare this relationship with that between ordinary laws and the constitution, admitting that in some cases the Prophetic Sunnah may be comparable to the regulations approved by the Executive.

2. The legislative powers of the Imams (A) are more restricted than that of the Holy Prophet (S). Therefore, they did not allow themselves the right of *ijtihad* in the presence of *nass* (i.e. explicit Divine or Prophetic text), and recommended the criterion of conflict with the Sunnah as a valid ground for rejecting a hadith as untrue. Nevertheless, some elements of the Prophetic Sunnah may be variable an issue which in itself calls for an elaborate discussion.

3. The distinction between the law and *fatwa's* of the *mujtahidun* is also clear. The *fatwa is* a product of

ijtihad and the faqih's deductive endeavour. It is based on research in the four sources of fiqh, namely the Book, the Sunnah, reason and *ijma* (the last of which is again derived from the Sunnah), and giving of final verdict on the basis of various proofs (*adillah*).

At the end of this process the faqih declares his verdict that the *hukm* of the Shari'ah is such and such in such and such a matter. The issue may pertain to the *ibadat,* the personal matters (*al'ahwal al–shakhsiyyah*), or problems of political, economic, social or military significance. Of course, it is possible that such a *fatwa* may be proclaimed as a law by the State.

But the law, on the other hand, is approved by the State authorities with view to such factors as the needs of the time, demands of the welfare of the Ummah, and, occasionally; the requirements of exigency, with due observance of the general principles of Islam. The law derives its legitimacy from the power of the State. Of course, in an Islamic State the legitimacy of the State's authority is also derived from God. In other words, the distinction between the *fatwa's* of the *mujtahidun* and the law passed by the State with respect to the Divine *ahkam is* similar to one between a recommendation and an order.

4. Another issue is that of the policy of the Islamic State in regard to the problem of the diversity of *fatwa's.* In the Islamic State, like any other form of government, the sovereignty of the State laws should extend over the whole of society. Plurality of law, of whatever kind and in whatever form, is equivalent to anarchy and chaos.

However, the diversity of fatwa's, does not cause any difficulty as long as they are related to personal rituals and duties. But in relation to the affairs of the State where the law should ordinarily prevail, all citizens being obliged to obey it uniformly, if everyone followed a different fatwa, the affairs of the State would not only go out of the control of the authorities, but would also result in a general chaos on the level of the judicial and executive wings of the State itself.

Therefore, the only rational alternative is that all citizens should recognize the duty to obey one of the diverse fatwa's which is selected by the supreme legislative body of the State on the basis of the criteria of superior jurisprudential soundness and completeness of conformity with the demands of public welfare, and proclaimed as law.

Moreover, this duty of general obedience to the State laws is based on the obligatory duty of a Muslim to obey the uli al–amr (the legitimate authority) and the rational need for prevalence of general law and order.

Also, there cannot be any valid objection from the viewpoint of the Shari'ah against this; because there is no proviso for validity of legislation except absence of contradiction with the Islamic principles and criteria, and agreement with one of the reliable non–exceptional fatwa's.

From the viewpoint of the problem of diversity of fatwa's as far as I have knowledge at the moment, the late Sayyid Isma'il al–Sadr has affirmed this position in his footnotes on *al–Tashri` al jina'i fi al–Islam*

(“Penal Legislation in Islam”).

We may emphasize again that the consequence of following diverse fatwa's is something which cannot be accepted by anyone. No State will allow the right to different sections of the public to reject government regulations regarding, for example, compulsory military training, payment of taxes, commercial and trade laws, etc. under the pretext that they do not agree with the fatwa of the *mujtahid whom* they follow (marji’ at–taqlid).

This is especially true if we have on hand an anomalous faqih who considers every modern phenomenon as bid `ah (heresy), who justifies smuggling and contraband transactions on the basis that **النَّاسُ مُسَلَّطُونَ عَلى أَموالِهِمْ** (the people have authority over their assets), who denies the right of ownership to the State, gives the right to legislate to none, and, ultimately, considering the State illegitimate and taghuti (non–Islamic) because it does not conform to his views, wants to see the Islamic Republic toppled in the same way as we overthrew the regime of the ex–Shah!

5. Nationality: Nationality is a kind of political relationship which connects an individual with a certain State or country, in a way that his rights and duties are derived from this relationship.

Nationality is one of the issues of international law and has been incorporated in the constitutions and civil codes of countries. The Iranian civil code, in imitation of the French civil code, assigns its Articles 976 to 991 to the matter of nationality or citizenship. It recognizes certain rights and duties for the country's citizens, which are not recognized for foreigners.

In general, the bases for citizenship are blood and soil, that is, the country of birth and the nationality of the parents. In certain cases, the acquisition of citizenship on the basis of marriage is also allowed for. The Iranian civil code accepts both blood and soil in particular cases. Nationality in this sense is one of the notions accepted by all governments for exercising control over their country's frontiers and relations with other States.

However, citizenship or nationality in this sense is non existent in Islam (although we, in the Islamic Republic, are compelled to accept it for reasons of need and advisability. It is one of the instances in which the legislator in the Islamic State can legislate laws with due observance of the Islamic principles and welfare of the Ummah. To respect such laws is a duty in accordance with the obligation to obey the uli al–amr).

Islam is a universal religion and is not limited to any particular tribe, nation, race or region. The earth belongs to God and mankind are all His creation. Accordingly, the laws of Islam are uniformly enforceable in all places. Islam addresses its message to all human beings, Muslims and non–Muslims, whether they live in Muslim lands or elsewhere; although, practically, its laws are enforceable only in relation to Muslims and that too only in the territories of an Islamic State.

From the viewpoint of Islam, the world is divided into dar al–*Islam* (the House of Islam) and *dar al–kufr*

(the House of *Kufr*). The *dar al–kufr* may be either *dar al–barb* (the House of war) or *dar al–'aman* (the House of Amnesty). The *dar al–'Islam* is the territory under the sovereignty of an Islamic State, wherein the Muslims can freely perform their religious duties.

The *dar al–kufr is* the territory under the control of non–Muslim States, where the Muslims are not free to exercise their religious duties and practice Islam. If the *dar al–kufr* should entertain hostilities with Muslims, it is called *dar al–harb.* But if a treaty between it and the Islamic State exists, then it is called *dar al–dhimmah* or *dar al–'aman.*

The *dar al–Islam* has its own specific laws. In it persons of doubtful religious identity are treated as Muslims, and, for example, a slaughtered beast of doubtful legitimacy is treated as *halal* (permissible). On the other hand, in the *dar al–kufr,* persons of doubtful religious identity are treated as non Muslims, and a slaughtered beast of doubtful legitimacy is treated as *haram* (forbidden).

The Muslim, whatever corner of the world he may inhabit, is treated as a citizen of Islam and its subject; he has the same rights and duties as other Muslims, regardless of wherever he may live–in the U.S.S.R., the U.S.A. or China or somewhere else. However, if in the *dar al–kufr* it is not possible for him to fulfil his Islamic duties, it is obligatory for him to migrate to another place.

Also, from the viewpoint of execution of the *hudud* and *ta`zirat,* there is no difference whether the culprit is a resident of *dar al– Islam* or of *dar al–kufr.* The non–Muslim, regardless of wherever he may live, does not enjoy the privileges of a Muslim, although in respect of the universal sovereignty of Islam he is obliged to perform the duties imposed by Islam on all mankind.

The non–Muslim is considered absolutely a foreigner regardless of whether he lives in a Muslim or a non Muslim country. If he is a *dhimmi* and fulfills what is required of the *dhl al–dhimmah,* he enjoys the privileges of the *ahl al–dhimmah.* Then his life, property, and honour are to be respected, and he enjoys certain freedoms within the limits specified in the Islamic Law. In exchange for his commitments, he is under the protection of the Islamic State. If he does not accept the conditions of a *dhimmi,* or violates them, he is treated as a *muhdrib* (in the state of belligerence).

If he is a *mustamin,* that is, a *muharib* granted amnesty by the Islamic State and in general such amnesty is provisional he is under the protection of Muslims and no one has the right to offend him. If he is in a state of belligerence with Muslims, there being no agreement or pact between him and the Muslims, his life and property have no guarantee of security.

To be certain, the Islamic *hudud* and *ta`zirat* in respect of criminals are the same for non–Muslims as for Muslims, except for the offenses of the *ahl al–dhimmah* which are permitted by their canon.

To summarize, citizenship and nationality in Islam is on the basis of belief. Islam recognizes no other criterion except faith. Every individual acquires citizenship individually on the basis of faith. Even the husband and the wife do not derive their citizenship from each other. Children are subject to the parents'

citizenship until maturity. If the parents are non–Muslims, the children are also considered the same. If one of the parents is a Muslim, the children too are considered Muslims.

1. It is essential to note here that accepting the wilayah of a non–ma'sum is a concession dictated by need; because only a ma'sum may properly hold sovereignty over people in his capacity as the vicegerent or deputy of God par excellence (*khalifat Alldh*)*;* his commands being indisputable commands of God.

However, in the case of the absence of the ma `sum, on the one hand, and the unacceptability of chaos and anarchy, on the other hand, we are forced to concede to the selection of a ruler in the descending order of priority mentioned here. At every level of choice, we are further forced to make concession in case of absence of a candidate with the desirable qualifications. Of course, the procedure and conditions for selection of the State authority call for an elaborate discussion, in its own right–a matter which is beyond the scope of this article.

2. Al–Shahid al–Awwal (Muhammad ibn Makki) in his work, al–Qawa'id, says:

> الشَّقَّةُ مُوجِبَةٌ لِلْيُسْرِ لِقَوْلِهِ تَعالى: وَ ما جَعَل عَلَيْكُمْ فِي الدِّينِ مِنْ حَرَجٍ...، يُريدُ اللهَ بِكُمُ الْيُسْرَ وَ لا يُرِيْدُ بِكُمُ الْعُسْرَ...، وَ قَوْلِ النَّبيِّ (ص): بُعِثْتُ بِالْحَنيفِيَّةِ السَّمِحَةِ السَّهْلَةِ، وَ قَوْلِهِ (ص): لا ضَرَرَ وَ لا ضِرار..، وَ هَذِهِ القاعِدَةُ تَعُودُ إِلَيْها جَمِيعُ رُخَصِ الشَّرْعِ.

The permission to choose an easier and more practicable alternative (*yusr*) when practice of a *hukm* involves difficulty and hardship is based on the Divine verses:

> هُوَ اجْتَبَاكُمْ وَمَا جَعَلَ عَلَيْكُمْ فِي الدِّينِ مِنْ حَرَجٍ

" … He (***God***) ***has laid on you no impediment*** (***haraj***) ***in your religion ….”*** (***22:78***)***;***

> يُرِيدُ اللَّهُ بِكُمُ الْيُسْرَ وَلَا يُرِيدُ بِكُمُ الْعُسْرَ

"… God desires ease (***yusr***) ***for you, and desires not hardship*** (***`usr***) ***…. "*** (***2:185***)

And also on such traditions of the Prophet (S) as; “I have been sent with an easy and lenient Islam ….” and *“Id darar wa* la *dirar fi al– Islam”. All* kinds of licences authorized by the Shari'ah are derived from this principle.

It is obvious that such cases of licence do not contradict, in the least, the hadith:

> حَلاَلُ مُحَمَدٍ حَلالٌ إلى يَوْمِ ٱلقِيامَه وَ حَرامُهُ حَرامٌ أَبَداً إلى يَوْمِ ٱلقِيامَه.

The *halal* and *haram* of Muhammad (S) are valid to the Judgement Day.

Or the statement of Imam 'Ali (A):

ما أَبْدَعَ أَحَدٌ بِدْعةٌ إلّا نَزَلَ بِها سُنَّةٌ

No one ever started a *bid'ah* without thereby discarding a *sunnah* (of the Holy Prophet). (*al–Wafi, vol. I, pp.* 59–60)

The above traditions relate to condemnation of bid `ah (innovation or heresy) in the faith; not to unchangeability of all the *ahkdm of* Islam.

3. One cannot deny the influence of such factors as social and geographical environments; personal temperament; major contemporary events and general conditions, such as war and peace; general and personal economic conditions such as plenty or famine, or prosperity or poverty; family background and education; degree of success or failure in life; the type of contemporary rule and rulers whether oppressive or not, and scores of such other factors on the process of deduction of the *ahkam* of the Shari'ah by a *mujtahid.*

A faqih who has grown up in the dry and waterless deserts of Hijaz will not approach the issues of *taharah* and *najasah* (ritual purity and impurity) in the same way as a faqih who comes from a place like Mazandaran (with plenty of rainfall, rivers and streams a region covered with green, dense forests). *A* faqih used to poverty and destitution will differ in his interpretation and application of the *ahkam* of the Shari'ah from one who grows up in the midst of prosperity and general welfare.

Their views will not agree about the meaning of *istita`ah* for the Hajj pilgrimage and they will hardly agree about what constitutes *israf* (wastefulness). A *mujtahid* of the days of Qajar rule may be expected to share few points of agreement with the faqih who has lived through the days of Islamic Revolution, about the issues of *jihad* and the duty of *al– amr bi alma'ruf wa al–nahy `an al–munkar.*

Unfortunately this point is not given sufficient attention. If due attention had been paid to this matter, it would have been much easier and simpler to revise many *fatwa's* and to recognize one's right to be skeptical about the juristic conclusions and opinions of the past. In any case, it is one of the essential requirements for a living practice of *ijtihad* in every era to recognize the variability and relativity introduced into the *mujtahid's* judgements on account of changing conditions and circumstances.

It is as essential to understand the possibility that a later faqih may understand the same original sources differently and find in them things which were not visible to the earlier fuqaha'. If we understand this issue, it will give a greater dynamism to the Islamic fiqh and allow it to be more answerable to the needs of times. It is also evident that the influence of conditions of environment by no means deprives the faqih of the validity of his *fatwa's.*

Otherwise, no *fatwa* of anyone would ever be valid. However, realization of this point can awaken us to the need for a living study of various problems in every age and the need for courage to reevaluate the opinions of others.

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