

Democracy in Islamic and International Law:

A Case Study of Saudi Arabia.

Thesis submitted for the degree of Doctor of Philosophy

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Abstract

Following the rise of Islamic fundamentalism, Muslim nations have been placed in the spotlight of international debate; the prevailing understanding is that democracy and Islam are fundamentally incompatible. This verdict is particularly damning in light of the trend in International Law which, since the collapse of communism in Eastern Europe, has equated democracy with human rights. Yet, a thorough analysis of the debate, taking into account the historical and theoretical bases of liberal democracy — the cultural, legal, and political development of Islam, and the extent to which the politics of Islamic countries represents the politics of Islam — reveals that democracy and Islam are, in fact, fundamentally compatible. In practice, Islamic Law can be applied alongside developments in democratic representations and human rights, whilst popular perceptions of Islam as inhibiting development in human rights are often unfounded, as can be demonstrated by examining the case of Saudi Arabia.

Abbreviations:

A

ACEEEO	Association of Central and Eastern European Election Officials
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
AAPP	Association of Asian Parliaments for Peace

C

CCPR	Committee of Human Rights in charge of monitoring the Implementation of the rights protected by the ICCPR
CDHRI	Cairo Declaration on Human Rights in Islam
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CEHR	Commission for Equality and Human Rights
COE	Council of Europe

E

ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EHRLR	European Human Rights Law Review
EJIL	European Journal of International Law
EU	European Union

H

Harv. Hum. Rts. J	Harvard Human Rights Journal
Hum. Rts. Q.	Human Rights Quarterly
HRLR	Human Rights Law Review

I

ICCPR	International Covenant on Civil and Political Rights
IJCL	International Journal of Constitutional Law

ICERD	International Convention on the Elimination of all forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ILO	International Labour Organisation
IPSS	Inter-Parliamentarians for Social Services
IPU	Inter-Parliamentary Union

N

NATO	North Atlantic Treaty Organisation
NGOs	Non-Governmental Organisations

O

OAS	Organisation of American States
ODIHR	Office for Democratic Institutions and Human Rights
OIC	Organisation of the Islamic Conference
OSCE	Organisation for Security and Co-operation in Europe

P

PUOICM	Parliamentary Union of OIC Member states
--------	--

Q

QJE	Quarterly Journal of Economics
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T

TEU	Treaty on European Union
-----	--------------------------

U

UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCHR	The former United Nations Commission on Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNSG	United Nations Secretary General

USSR

Union of Soviet Socialist Republics

Y

Yale J.Int'l L

Yale Journal of International Law

Yale L.J

Yale Law Journal

1. Part One: Introduction

The compatibility of Islamic Law and Western Liberal Democracy has received much attention during recent years.¹ This attention has been further highlighted by political developments of the early 21st Century, particularly the U.S.A.'s 'War on Terror', which has keenly focused much attention on the cultural incompatibility and the perceived backwardness of 'Islamic' political institutions.² In 1989, a wave of revolutions swept across central and eastern Europe, overthrowing the remaining Soviet-style communist Governments, and heralding the dawn of a new era of International Law and politics. The fall of communism subsequently consolidated the rise of liberal democracy; previously considered as merely one alternative of government amongst many, the triumphal rhetoric of the West following the collapse of the USSR in turn elevated democracy onto a new level, setting it apart and placing it on a superior level to other forms of government. International organisations, such as the United Nations (UN) and European Union (EU), have promoted democracy on a regional basis, and democracy has gradually become inextricably associated with globalisation and the protection of human rights; as such, this form of government has become the most popular in the world.³

In order to draw conclusions concerning the relationship between democracy and Islamic Law, an understanding of the cultural context in which Islamic Law has developed and now operates is vital; in particular, the extent to which key fundamentals of Western Liberal Democracy are also contained in indigenous Islamic Law. Much of the debate surrounding the compatibility of Islam and democracy has been founded on a lack of understanding and knowledge of the peculiar development of Islamic Law and legal institutions. This study aims to readdress this balance.

Human Rights violations which are widely perceived as sanctioned by Islam have included the repression of women, forced conversions and the harsh punishment of apostasy.⁴ Factors which are often seen as symbolic of the incompatibility of Islam with

¹ J Esposito & J Voll, *Islam and Democracy*, 1996, Oxford University Press, p. 62; S Sheikh, *the New Politics of Islam: Pan-Islamic Foreign Policy in a World of States*, 2003, Routledge Curzon Press, p. 126.

² S Huntington, *The Clash of Civilizations and the Remaking of World Order*, 1996, Simon & Schuster Ltd, p. 135.; G Kepel & F Roberts, *Jihad: the Trail of Political Islam*, 2006, I.B. Tauris & Co Ltd, p. 4.

³ F Fukuyama, *The End of History and the Last Man*, 1993, Free Press, p. 46.

⁴ T Sonn, 'Islam and Modernity: Are they Compatible?' pp. 65-81 in S Hunter & H Malik, *Modernization, Democracy and Islam*, 2005, Center for Strategic and International Studies Press, pp. 75-76.

democratic representation include the limitations on the common representations of women, the rejection of multi-party systems, and a political culture that favours war. Confusion is apparent concerning the relationship between the actions of countries with a high proportion of Muslims and Governments which purport to be Islamic, and which might be considered as 'Islamic Government' if we were to look at what the teachings of Islam actually state.

The compatibility of democracy and the associated elements of human rights and liberal beliefs with Islam have been found to be grossly exaggerated. Islam has promoted freedom of beliefs from its very beginning, and punishment of apostasy is found to be over-exaggerated; furthermore, there is a firm foundation in place for the political, legal and democratic participation of women in all areas of public life. Moreover, Islam lays down guidelines which are highly culturally specific, providing full support for the democratic institutions, such as full representation, religious freedoms, freedom of speech, and the multi-party system.

Islamic Law lays the basis for representative forms of Government in several key institutions. These can be seen in operation in the case of Saudi Arabia, which is a key example of a nation with a Government that purports to be Islamic, in that it takes its form and foundation from main sources of Islamic Law, and where the legal maintenance of human rights can be examined in full. The *Shura*, a form of council, represents a key endogenous Islamic institution which bears many parallels to the role of a Parliament in Western democracies; however, importantly, it is an institution which has developed from within Islam, originating in the term of '*Shura*' (meaning consultation), which is mentioned several times throughout the Qur'an.

Saudi Arabia's new *Shura* Council, also known as the Consultative Assembly of Saudi Arabia, forms the country's legislature. When established in 1993, it gave Saudi Arabians the right to participate in political life, and its legal, political and constitutional activities have subsequently resulted in key developments of the regulation of human rights. The local election process in Saudi Arabia was first initiated in 2007, and revisions of the

system will be in practice as of 2011.⁵ These developments illustrate how the establishment of representative bodies within Islamic governments can develop from within — without the requirement often presupposed of being imposed from the outside.

Two questions form the backbone of this thesis: first, ‘Is Islamic Law compatible with democracy?’ and second, ‘Does the example of Saudi Arabia demonstrate an example of compatibility between Islamic Law and democracy?’ In order to fully examine these issues, this investigation is divided into six parts.

The introduction forms the first part. Part Two analyses the evolution and origin of democracy, and the development of what has subsequently become known as Western Liberal Democracy is examined; in relation to the origin of democracy, consideration is given to the origins of the word itself (democracy), and how democracy has evolved throughout history. An awareness of the key events and debates surrounding democracy, all of which have occurred at different points in history and in different nations, can provide a deeper understanding of various fundamental considerations: of different people, each of whom might use the word ‘democracy’ in a slightly different way; of why the concepts we assume to be integral parts of democracy are important; of the practical problems which can occur when democracy is practiced; and — perhaps most importantly — why democracy is, or is not, desirable.

Part Three examines the principles of modern democracy, and role of democracy in International Law will be examined. The changing role of democracy in relation to International Law is then discussed, with a particular emphasis on the way in which the collapse of the U.S.S.R was seen as the triumph of democracy over all other forms of Government. The third part analyses Article 21 of UDHR and Article 25 of ICCPR, in addition to regional instruments, such as ECHR, the American Convention on Human Rights, and the African Charter on Human and Peoples’ Rights.

Part Four comprises an investigation into the history and development of Islamic Law and institutions, whilst paying close attention to the sources and methodology of Islamic Law. There are several important sources of Islamic Law which require particular

⁵ Resolution of Council of ministers of Saudi Arabia in May 18, 2009. See Riyadh Newspaper No 14939, in May 19, 2009.

analytics. Of particular significance are the Fundamentals of Fiqh — *Asul Al-Fiqh* — as an important work which reflects in great detail the sources of Islamic Law. There follows a discussion surrounding the roles of the fundamentals of *Al-Shura*, justice, equality and freedom, the sanction of Islam for different forms of Government, and the compatibility of Islam and democracy, with particular attention paid to apostasy, war, non-Muslims, women and multiple parties. Furthermore, *Al-Shura* is also studied in greater depth, addressing the extent to which it offers an Islamic cultural answer to many exogenous democratic institutions.

Finally, Part Five discusses the practice of democracy in Saudi Arabia, with keen attention paid to the extent to which Saudi Arabia offers a convincing case study for an investigation of the extent to which democratic principles can co-exist and are thus, complemented by Islamic Law. Potential future directions of the *Shura* Council in Saudi Arabia are then examined, with recommendations provided for improvements of the *Shura* Council as a legislative authority in Saudi Arabia. This thesis is based on a specific case study of Saudi Arabia, and so significant consideration is needed regarding the laws and regulations of Saudi Arabia, with keen attention paid to the official newspaper of Saudi Arabia (*Om Al-Qura*) and many local newspapers. These media sources provide an important cultural insight into the country and must be considered in light of the bias and censorship that may occur with such sources. In addition to written sources, first-hand experience is fundamental, and is accordingly gained by visiting the *Shura* Council and attending several of their sessions. This enabled the author, to meet many members and staff of the *Shura* Council.

Part Two: Evolution of Democracy

- **Athenian Democracy**
- **Origin of Liberal Democracy**
- **The Role of Muslim Scholars in the Development of Democracy**

2. Part Two: Evolution of Democracy

Introduction

The term ‘democracy’ is at the centre of many modern political debates, both between nations and within nations. However, in order to truly understand what is meant by democracy, it is essential to first gain an understanding of the origins of the word, and exactly how democracy has evolved throughout history. An awareness of the key events and debates surrounding democracy, at different points in history and in different nations, can help to provide a deeper understanding of how and in what context different people might use the word ‘democracy’, as well as why the concepts we assume are integral parts of democracy are important, the practical problems which can occur when democracy is practiced, and, fundamentally, why democracy is, or is not, desirable. In the following sections, some of these key moments in the evolution of democracy will be outlined with the aforementioned aims in mind.

2.1. Chapter One: Athenian Democracy

Introduction

Democracy as a model for political life, now considered by most societies to be the moral touchstone for Government, originated in ancient Greece. The word ‘demokratia’ denotes what is classically termed ‘pure’ or ‘direct’ democracy. This is a form of democracy originating in the assembly, in person, of all participating citizens, who are then responsible for passing motion, legislating and deciding the position of officials.

For the Greeks, the term demokratia, coined from ‘demos’ meaning ‘the people’ and ‘kratos’ meaning ‘power’, meant rule or Government to the common people, i.e. those who were uneducated, deemed unsophisticated, and poor. This encompassed the majority of the populace,¹ and allowed the Government to work for the direct benefit of the lower and working classes, rather than preferentially for the amelioration of the lives of the aristocratic and privileged classes. Athens occupied the centre of activity for ancient Greek states.

¹ As it will be discussed later, many were excluded from participation in state affairs, namely women, slaves and ‘metics’, non-citizens.

Democracy in Athens was achieved in several stages, as outlined below. The objective of this chapter is to analysis historical antecedents of Athenian Democracy.

2.1.1. The Status in Greece at the Beginning

The Athenians give credit for the formation of the Athenian state to Theseus, the state's legendary founding King. Prior to political unification under Theseus, the Attican peninsula held a number of separate townships, with Athens being the most populous of them all. As soon as Theseus became a powerful force in Athens, he abolished the local town Governments and set up one council and one prytany with the aim of uniting all of the cities into one single state. At this point, everyone was governed from Athens, which then accordingly acted as the single political centre, which subsequently permitted the people to keep their property.² In his *Life of Theseus*, Plutarch records that Theseus was credited with the proclamation, 'Come hither, all ye people', as a leader who set about enlarging Athens into a nation of men united on equal terms, though still divided into distinct classes and professions.³

Between the 700s and 600s BCE, Athens was constantly ruled by an oligarch who held office for life rather than by a King, but, after this period, the term was then shortened to only ten years. Rather than being ancestral, the 'King' was one of three 'Archons' or 'Rulers' under this system, with each member selected every ten years from members of the aristocratic class, with six more positions later added.⁴

These nine Archons reigned over the Athenians in conjunction with the Council of the Areopagus, which included all past Archons serving on the board for life terms. In the latter portion of the 7th Century, in the 630s, an Athenian, known as Cylon, triumphed in the double-foot race at the Olympic Games and became very popular. He captured the Acropolis, and accordingly tried to assert himself as the Athenian tyrant. This was, however, a completely failed attempt, consequently concluding with an angry mob surrounding Cylon and his party, who were hiding by Athene's statue.⁵ Tempted out of

² W Blanco (trans), Thucydides, *The Peloponnesian War*, 1998, W. Norton & Company, Book 2 para. 15, at p. 66.

³ B Perrin (trans), *Plutarch's Lives*, 1914, Life of Theseus, Harvard University Press, Vol. 1, Accessed online at Theoi Project, www.theoi.com. Accessed August 18, 2009.

⁴ J Warrington (ed & trans), *Aristotle, Politics And The Athenian Constitution*, 1959, J.Dent & Sons Ltd. Part 1 of Athenian constitution, from the earliest times to 594 B.C. at pp. 274-276.

⁵ G Rawlinson (trans), *Herodotus Histories*, 1996, Wordsworth Ltd, at Book Five para. 71, at p. 416.

hiding by promises of their own safety, Cylon and his men encountered their deaths at the hands of the aristocrats, then known as the Alcmaeonidae.

Approximately a decade later, Draco was chosen by the Athenians to create new laws. Aristotle described these laws in a manner which showed how the new Constitution bestowed political rights on those citizens bearing arms; in other words, those Athenians who had the means to buy bronze armour and weapons of a hoplite. In contrast, Draco's laws were notorious for their cruelty: death alone was the penalty for any and all crimes. For all that, Draco's laws did nothing to prevent the ensuing trouble, which pitted the rich against the poor. Those citizens without monetary means needed to sell parts of their property for food during bad harvest seasons, along with seeds for replanting (and, of course, due to losing part of their territory, they faced added susceptibility to any ensuing hardships). Ultimately, great deals of these Athenians were deprived of their property, forcing them to become tenant-farmers and virtual slaves of the rich. Consequently, both the prosperity and the stability of Athens were threatened by the crisis that resulted.

Politician and the poet Solon (638 BC-558 BC) may not have been a pure democrat in sentiment, yet, despite this, he was nevertheless an architect of a package of constitutional reform which laid the fundamental groundwork for the democracy that was later to be developed by Cleisthenes — who is widely referred to by historians as the 'father of democracy'. Solon was chosen by the Athenians to review and revise their laws in the year 594 BCE.⁶ The laws of Solon became the future template for the Athenian Government, and for the next two hundred years, it was common for Athenians to describe subsequent innovations in legalities in terms of their loyalty to the 'Solonian Constitution'. However, it would still be a long time before radical democracy was fully established.

Traditionally, the Council of the Areopagus, consisting of former Archons, chose the Nine Archons every year, which was a clever scheme to ensure that the Archon office was held only by nobles and aristocrats. However, following Solon's reform, all Athenians were required to elect for the Archonship a short list of candidates, and then the Nine Archons were picked from this; this meant that the office was no longer limited to the members of a few families, although it was still limited to a certain class of citizens, to which Solon

⁶ J Warrington, above note 4 at p. 249.

outlined four classes of citizens, according to assessable property ownership. whilst he allowed only those in the top three classes to have the privilege of holding the office of Archon, this nevertheless still constituted as an extension of the number of citizens eligible for the post.⁷

It is not entirely clear how laws were enacted under the Solon Constitution; however, there clearly existed an assembly, the Ekklesia, where every man — except those in the lowest class — was free to participate. This was overseen by a council of four hundred (also known as the Boule), selected from the four traditional tribes of Athens (excluding those from the poorest of the four classes), and the Council of the Areopagus, which was tasked with ‘guardianship of the laws’. In subsequent years, a great deal of political upheaval over the Archons occurred, which subsequently leads one to believe that they, too, continued to hold considerable power in the Government of Athens.⁸

Under the rule of Solon, Athens comprised many different aspects that would later form part of the makeup of democracy: this included democratic juries, an Assembly and a Council, and the selection of officials by lot instead of by vote. However, under Solon, Athens still retained several oligarchic characteristics, such as property qualifications, and the powerful Council of the Areopagus, to name a few.

According to Herodotus, after creating new laws for a newly rewritten Constitution for Athens, Solon then extracted a pledge from the people that they would obey these laws, unchanged, for a period of ten years. However, despite his efforts, Solon’s constitution failed to solve all the problems of Athens, and the city consequently fell back into a sorry state, with different factions lobbying for power, each with their own interests at the forefront of consideration. This continued from around 595 BCE to 546 BCE, whereupon a man named Pisistratus overcame several failed attempts to seat himself as tyrant over the Athenians.⁹

Pisistratus appears to have been a rather benign ruler. Thucydides, a 5th-Century historian, ended his short record of the tyrant’s rule with these words: ‘the city was left in full

⁷ J Fine, *the Ancient Greeks: a Critical History*, 1983, Harvard University Press, at p. 368.

⁸ J Warrington, above note 4 at pp. 249-256.

⁹ *ibid* at p. 256-258; G Rawlinson, above note 5 at Book one, para. 59-64.

enjoyment of its existing laws, except that care was always taken to have the offices in the hands of some one of the family'.¹⁰ Aristotle notes that, 'his administration was temperate... more like constitutional Government than a tyranny'.¹¹ Pisistratus' position was upheld by the acceptance of the public, which he manipulated by treating both the rich and the poor fairly. Following his passing, his male progeny, Hippias and Hipparchus, overtook the reign of tyranny for fifteen additional years. The assassination of Hipparchus occurred in 514 BCE and, four years later, the noble Alcmeonidae family, with the aid of the Spartan armies, expelled Hippias and ended the tyranny in Athens.¹²

2.1.2. The Beginnings of the Classical Athenian Democracy

Cleisthenes was an aristocrat living a century after the time of Solon, and was the son of an Athenian. His maternal grandfather, of the same name, was the tyrannical ruler of Sicyon in the Peloponnese.

After the fall of the tyranny of the Pisistradids, two factions vied for the power to rebuild the Athenian Government; one led by Isagoras and one by Cleisthenes. In the year 508 BCE, Isagoras won a victory, albeit not a very significant one, by being selected Archon. Cleisthenes, on the other hand, emulating the tyrant, utilised the support of the lower classes in order to enforce a series of reforms. Taking advantage of the city-state's recent history, Isagoras appealed to the Spartan King, Cleomenes, to assist him with evicting Cleisthenes from the city.

Whilst that tactic had earlier successfully served Alcmeonidae, this time it was a failure, as the occupation of the city by Isagoras and the Spartans, and their attempts to disband the Government and expel seven hundred families, was then met with impressive resistance from the Athenians, consequently resulting in them being forcefully driven out.¹³ Thus, Cleisthenes was left free to enforce his reforms, which was something he accomplished during the final decade of the 6th Century.

These events designate the beginnings of the classical Athenian democracy, owing to their contribution to the organisation of Attica into a political landscape that would endure for the

¹⁰ W Blanco, above note 2, at Book 6 para.54, pp. 253-254

¹¹ J Warrington, above note 4 at Part 16.

¹² G Rawlinson, above note 5, at Book 5 para. 62 at p. 412; J Warrington, above note 4 at pp. 261-262

¹³ G Rawlinson, above note 5, at Book 5 para. 72 at p. 416; J Warrington, above note 4 at p. 263

next two hundred years. Cleisthenes' reforms, taken from a broad perspective, emerge into two forms: first, he refined the primary bodies of Athenian democracy; and second, on a fundamental level, he redefined the perspective of Athenians both in relation to each other and to the state. The replacement of the preceding regional loyalties with pan-Athenian solidarity, the prevention of another tyrant's rise to power, and the smashing of the power of the aristocratic families, were the primary aims of the reforms by Cleisthenes, and led to him being hailed as 'the father of Athenian Democracy' by historians in later years.¹⁴

There were three distinct geographical areas on Attica's peninsula: these were the countryside, the coast, and the urban area around the city of Athens itself. Since ancient times, politics had been conducted locally and in accordance with regional concerns and interests. In order to overcome this phenomenon, and to encourage the focus of Athenian politics on common Athenian interests in the process, Cleisthenes organised the population even further: he divided the country into trittyes, or thirty portions; ten of these were on the coast, ten were further inland, and ten surrounded the metropolis.

Each tribe, or phyle, of Athens, consisted of three trittyes, one coming from the coastal, one from the inland and one from the metropolitan regions. From each of the ten tribes, fifty members were deployed to sit on the newly created council of five hundred, which replaced the council of four hundred. The Government of Athens was dominated by the tribes, although local politics included the registration of citizens and the choice of candidates for particular offices.¹⁵ Thus, the people of Attica were all united within their tribes with the objective of ruling the city. As such, deme-politics tended to be under the power of people from outside the city, whilst national politics was dominated by Athenians who were all-year city residents, and those residing in the surrounding areas.

Cleisthenes named the tribes of Attica for heroes believed to have been chosen by Apollo through the Oracle at Delphi, in order to present the new divisions as both ancestral and pre-ordained. Taken in their entirety, these reforms comprised an astounding rework of Athens' civilisation in a bold and new direction. The ancient associations, whether familial or regional, were cast aside, which enabled immediate neighbours to enjoy the privilege of

¹⁴ R. Po-chia Hsia, *the Making of the West, Peoples and Cultures, a Concise History*, Vol. I: To 1740, 2007, Bedford/St. Martin's, at p. 44.

¹⁵ J Warrington, above note 4, at p. 263.

citizenship and its accompanying rights. At the same time, Athens was governed as a whole by the Athenian Demos, which was organised across territory and clan boundaries.

However, due to the recent unification of the Demos and the undermining of the more established aristocratic system, the hazard of tyranny continued: the rich and powerful Pisistratus family survived in Athens, and the Persian King wanted to add the Greeks to his expanding empire. Cleisthenes tried to ward-off this hazard by employing his own notorious new invention, which was ostracism — a procedure which meant a prominent citizen could be expelled from Athens for a period of ten years. The Assembly of Athenian citizens annually voted by a show of hands as to whether or not an ostracism session should be held: if they voted in favour of ostracism, it would take place at another meeting of the Assembly, generally a few months later. At that point, every citizen inscribed a name on a broken piece of pottery, known as an ostraka, and, when six thousand votes were counted on their ostrakas, the names were tallied and the ‘winner’ was accordingly forced to reside outside of Athens for no less than ten years in order to meet with the terms of their ostracism.

Inconvenient as the ostracism was, it was not seen as confirmation of a crime: the ostracised citizen was able to retain his property and rights. In fact, ostracism was completely separate from the processes of justice, with no accusation mounted and no defence offered. Examples of ostracised citizens include friends of Pisistratus and his sons, Themistocles around 470 BCE,¹⁶ although he held democratic views, and Cimon around 461 BCE, whose view was that the aristocrats should rule.¹⁷ Ostracism essentially meant that a man was too much of a risk to play a role in governing Athens, perhaps because the citizens could become very easily persuaded by him — making him a potential tyrant — or perhaps due to mounting tensions between rival politicians. In democracy’s early history, the list of ostracised Athenians was a veritable "Who’s Who" list.

After 416 BCE, ostracism faded away, perhaps due to the ostracism of Hyperbolus who, according to the historian Thucydides, was shunned — ‘not because his power or influence was feared, but because he was a useless wretch and a disgrace to Athens’.¹⁸

¹⁶W Blanco, above note 2, Book 1 para. 135, at p. 52.

¹⁷ J Warrington, above note 4 at p. 264.

¹⁸ W Blanco, above note 2, Book 8 para. 73 at p. 336.

The reforms made by Cleisthenes to Athens at the end of the 6th Century looked as though they were thoughtful, though radical, at the time. The strong hold of this new social order and political system could have been largely accredited to events that occurred in the first decades of the 5th Century. Intending to pay back the Athenians for assisting the Asian Greeks to resist the rule of the Persians, an expeditionary Persian army landed in Attica in the year 490 BCE. The tyrant Hippias, the son of Pisistratus, was to rule over Athens, and so it was fortunate that the new democracy of Athens, overseen by Miltiades, beat the Persians, although it looked unlikely at the time. This military success, and the uneven defeat of a bigger Persian expedition a decade following, set democratic Athens up as a top power in the Grecian universe.¹⁹

A last major reform remained for the Athenian constitution before the Athenian Government was moulded into what it would be for the next one-hundred—and-fifty years. The year 462 BCE brought a movement led by Ephialtes, whose goal was to restrict the powers exercised by the Council of Areopagus; following below is a lengthier discussion of the Council's role (often known simply as the Areopagus). In order to grasp the importance of Ephialtes' reforms, it is necessary to gain an understanding of its place in the Athenian Government prior to his intervention.

According to Aristotle, in the time of the legendary Draco, the first lawgiver of Athens, 'The Council of Areopagus was caretaker of the laws and watched over the magistrates to ensure that they were governing lawfully. Anyone feeling they were treated unfairly could complain to the Council of the Areopagus, outlining the law they felt had been breached'. The Areopagus was aristocratic, and comprised only men who were born into nobility; moreover, only those men who had held the office of Archon were permitted to form part of the Areopagus. These seats, known as Areopagites, were life appointments. According to Aristotle, in the middle of the 6th Century BCE and prior to the time of Solon the lawgiver, men were picked to be archons by the Areopagus, and the Areopagus' selection of the archons who would be its future members was made according to birth and fortune, thereby ensuring the preservation of the Court of the Areopagus as a body of Athenian aristocrats.²⁰

¹⁹ G Rawlinson, above note 5, at Book 6 para. 102-107 at pp. 486-488.

²⁰ J Warrington, above note 4 at p. 249.

Solon altered the process whereby archons were selected, so that forty candidates were elected and from these candidates, nine archons were selected by lot. As per the Solon laws, the Court of Areopagus maintained its role as overseer regarding the constitution: it had the right to punish Athenians and to fine them, it oversaw impeachment cases, and it spent money without restrictions from any other governing body. Under Solon, the structure of the Athens Government, as in the description of Aristotle, was a blend of elements; the Court of the Areopagus was oligarchic, the archons that were elected were aristocratic, and the Courts were democratic.²¹

Directly following the Persian Wars, the Court of the Areopagus experienced return to the glory it had once known. Aristotle recounts how, during the turbulence of the 480 BCE Persian invasion, the Council of the Areopagus headed the organisation, financing and coordinating the evacuation of all citizens to Salamis and the Peloponnese, which was a move that subsequently favourably raised the status of the institution.²² The Council of the Areopagus dominated Athens up until Conon's rule as archon, and reforms were proposed by Ephialtes in the year 462 BCE.²³ His proposals divided up powers which had been traditionally exercised by the Areopagus, dividing them amongst the Boule (the citizen council which ran the city's daily affairs), the Ekklesia (the popular assembly), and the Courts.

Aristotle recounted how Ephialtes put forward and passed his reforms of the Areopagus with his brave denouncement of the institution before the gathered Council and Assembly, or Ekklesia. This meant that the reform ultimately did not belong to Ephialtes alone but became an act of legislation by two of the more democratic bodies in Athens. Aristotle attributed this shift to a newly discovered feeling amongst the Athens populace after the Persian Wars — when these common citizens served in the navy — which was an act that eventually saved the city of Athens. In his politics, Aristotle clearly makes this connection between naval triumphs and the reform of the Court of the Areopagus.²⁴

²¹ Ibid at pp. 61,251-252.

²² J Warrington, above note 4, at P. 23.1

²³ Ibid at pp. 265, 267.

²⁴ Ibid at pp 62, 267-269.

By the year 462 BCE, when the reforms were enacted by Ephialtes, choosing the Archons was accomplished by lot as opposed to by vote.²⁵ According to Aristotle, Ephialtes' reforms paved the way for a decline in the Council of Areopagus' 'superintendence of affairs'.²⁶ Aristotle, when described the 4th Century Council of the Areopagus (over a century after Ephialtes) stated that the Court had power over trials of murder, wounding, death by poison, and arson; however, similar crimes committed in self-defence or which were otherwise deemed involuntarily should come before other Courts, such as the Court of the Palladium or the Court of the Delphinium. Accordingly, the Areopagus made investigations into political corruption and made known its findings to the Council and Assembly for any further action into the matter. Knowing this, we can gain therefore an understanding of how Ephialtes reduced the role of the Areopagus: this aristocratic institution that once had the jurisdiction to make laws null and dismiss candidates from their posts was diminished into a murder Court and investigative body, though it was nevertheless a highly regarded one.

2.1.3. The New Age of Democracy

The next important development towards the democratic state came with Pericles in 462 BC. Gaining prominence during the city's Golden Age between the Persian and Peloponnesian Wars, Pericles is the most famous leader of the Athenian democratic state. He described Athenian democracy in the following terms:

'Our form of Government does not enter into rivalry with the institutions of others. We do not copy our neighbours, but are an example to them. It is true that we are called a democracy, for the administration is in the hands of the many and not of the few. But whilst the law secures equal justice to all alike in their private disputes, the claim of excellence is also recognised; and when a citizen is in any way distinguished, he is preferred for the public service, not as a matter of privilege, but as the reward of merit. Neither is poverty a bar, but a man may benefit his country whatever be the obscurity of his condition'.²⁷

Pericles' generalship is certainly worth mentioning first and foremost. Aristotle states that it was clear that a 'General' or Strategos should be elected rather than chosen through the luck

²⁵ Ibid at p. 264.

²⁶ Ibid at p. 268.

²⁷ B Jowett (trans) *History of the Peloponnesian War, in Thucydides*, 1900, Clarendon Press, vol.1, pp. 127-128.

of the lot. It also happened to be the one and only office that could be held for successive terms by an Athenian. Furthermore, there were ten Generals, or Strategoi, each year that had several powers, which enabled this office to act as a platform from which a citizen could exercise incredible influence over the city's affairs and policies.

A Strategos had the privilege of bypassing channels and of introducing business, on his own authority, for discussion in an Assembly meeting. From the years 454 to 429 BCE, Pericles enjoyed successive re-elections into the office of Strategos. This position enabled him to directly state his opinions on matters he considered important, and to therefore sway them towards his own personal policies. Thucydides, an Athenian General and historian who assisted in pursuing the war with Sparta, characterises Pericles' leadership in this way:

'Pericles indeed, by his rank, ability, and known integrity, was enabled to exercise an independent control over the Demos; in short, to lead them instead of being led by them. For as he never sought power by improper means, he was never compelled to flatter them, but, quite to the contrary, enjoyed so high an estimation, that he could afford to anger them by contradiction. His object was to instigate panic when they were settled and he was happy to create security when they were upset. In short, what was nominally a democracy became in his hands Government by the first citizen'.²⁸

Through Pericles' leadership, the democratic Government was crystallised. However, the most vital fact to consider is that Pericles was just one of ten elected Generals. The holding of this office enabled him to address the Demos, which subsequently allowed him to impose his 'policies'; coupled with his artistic speaking talents, this meant he was able to persuade the Demos to think of, and embrace, his ideas as their own.

In the year 415 BCE, after a time of relative peace, the Demos of Athens began to invade Sicily during the war between Sparta and Athens: not only were the invaders defeated, but all of their Athenian vessels were destroyed, and the Athenian troops that survived being slaughtered during the mission were subsequently forced into deadly servitude, working in the quarries in Syracuse. Following this disaster, certain citizens took it upon themselves to

²⁸ W Blanco, above note 2, Book 2, para. 65 at p. 83.

make changes to the radical democracy, which was their Government, and which was, in their opinion, inflicting misfortune upon the city.

Their first course of action via constitutional channels was to create a small band of ‘Preliminary Councillors’, who would place boundaries on the subjects available to be addressed by the more democratic Council and Assembly.²⁹ Following this, according to Thucydides’ account, in the year 411 BCE, the citizens ended their democracy and subsequently established an oligarchy by primarily assigning ten ‘Commissioners’, each of whom who was tasked with reworking the Athenian constitution.³⁰ Aristotle differs slightly here, claiming that these commissioners numbered in the twenties, and that these were in addition to the ten existing Preliminary Councillors.³¹ These commissioners then proposed a new council comprising four hundred men with acceptance limited to the richer Athenians. This council of four hundred, also known as the Boule, was imbued with the prerogative of selected five-thousand citizens who would have the sole eligibility of assembly participation.

The account of Thucydides describes how this new Council of four hundred challenged the democratic Council with the protection of an armed gang, and how they afterwards paid them their dues and sent them home.³² The oligarchic Government lasted for four months before being replaced by another ruling where five thousand Athenians held the power — certainly more democratic to be sure, yet still worlds away from the radical democracy imagined by Cleisthenes. This situation was also short-lived, ending when ‘the people quickly seized control of the constitution from them’.³³

At this time, democracy enjoyed only a brief restoration, ending when the Spartans captured the Athenian ships at the Aegospotamoi beach and demolished them. As the Spartans blockaded Athens’ harbours, the metropolis folded to their might, surrendering its riches to those referred to as the Thirty Tyrants. A puppet Government of Athenians, as selected by Spartans, was consequently formed and ruled by the Spartans. The tyranny of the Thirty Tyrants mirrored the Oligarchy of 411 BCE, but lasted only a year before control was again

²⁹ Ibid, at Book 8 para. 1 at p. 311.

³⁰ Ibid, at Book 8 para. 67, at p. 334.

³¹ J Warrington, above note 4, at p. 272.

³² W Blanco, above note 2, Book 8 para.67 at p. 334; J Warrington, above note 4 at pp. 271-275.

³³ J Warrington, above note 4, at p. 276.

seized by the pro-democracy forces. With the tyrants overthrown and the city once again falling under democratic rule, Athens was, once again, able to compile and codify its previous laws in a decree summarising the accumulated laws and traditions of the first one hundred years of the Athenian democratic experiment. Furthermore, the Athenians also regulated a general amnesty law in order to stop the endless cycle of retribution for the wrongs committed by both sides during the recent civil upheaval. This law states that the Council may not act without the approval of the Assembly of the People in all matters pertaining to war and peace, death sentences, large fines, disenfranchisement (or loss of citizenship), the administration of public finances and foreign policy.³⁴

In summary, there were several constitutions during this period, amongst them the supreme monarchy in the time of Theseus, Draco's codification of laws, the establishment of Solon from whence originated Athenian democracy following the period of civil war, the Peisistratid tyranny, Cleisthenes' reforms, Areopagus' absolute rule following the Persian wars, the Government of the four hundred, and by the Thirty.

2.1.4. Athenian Institutions

Three main institutions formed the ultimate backbone of the Athenian democratic Government, along with a few other groups of lesser noteworthiness. The People's Court, the council of five hundred (originally the council of four hundred, and also known as the Boule), and the Assembly of the Demos formed the three pillars of democracy, supplemented by the Council of Areopagus, the Generals, and the Archons. The Assembly and the Council, as well as ad hoc panels of 'lawmakers' were included in the legislation.

³⁴ Ibid at pp. 279-282.

The Assembly of the Male Athenians

The Assembly comprised male Athenians (women, whilst they possessed a particular citizen status, did not have political rights). The Assembly's responsibility was to listen to, discuss and vote on decrees. These decrees often impacted all aspects of public and private Athenian life, covering everything from financial to religious matters. Other topics could include — but were certainly not limited to — public festivals, wars, foreign treaties, and regulations for various issues, such as ferry boats.

The Assembly provided a routine opportunity for every man in Athens to voice an opinion and to cast a vote on how the city should be run. This was the core backbone defining Athenian Democracy and, after the year 462 BCE, Ephialtes worked so that the Assembly of the people could gain control of Athens. This was the beginning of democracy but, before this, the Court of Areopagus was in power.³⁵ In the year 404 BCE, Sparta overtook Athens, and Aristotle argues that the establishment of democracy resulted from a growing impetus amongst the people to take control and to make decisions concerning their own affairs. The Government operated in accordance with the desires of the people, overseeing business through decrees and Courts.³⁶

Some people who were lacking the related credentials on a subject were able to speak at Assembly (Ecclesia) meetings, although they were typically shot down by Athenian citizens if and when they did so. Plato's character Socrates, in the work *Protagoras*, declares:

'... when the Athenian Assembly is meeting on the subject of construction, the citizens ask builders to speak; when the subject is ship construction, it is shipwrights they consult, but if anyone else not regarded as a craftsman, whatever his status or background should offer advise, he is rejected and scorned; until the speaker voluntarily steps down out of shame or is forcibly removed by the Archers on the order of the presiding officials'.³⁷

³⁵ Ibid at pp. 267-269.

³⁶ Ibid at p. 283.

³⁷ B Jowett (trans) *the Dialogues of Plato*, 1953, Clarendon Press, at p. 144.

Thucydides observes that, during the 331 to 404 BCE Peloponnesian War, a meeting usually comprised five thousand people,³⁸ and these people were paid for their attendance; as such, even the poor could participate in their own Government without worrying about a day's missed wages due to missing work in order to attend the meeting. This payment system was introduced by Pericles in his reforms. Aristotle realised that the hallmarks of a democratic constitution were not limited to the freedom of speech and the inclusion of all citizens, but rather that the payment for Assembly attendance was also required. Aristotle claims that, when there is no payment, the Council shall be the most democratic of magistracies. However, in states which are able to pay their citizens for meeting attendance in the Assembly, all citizens exercise their citizenship by taking part in the Assembly, because even those who are poor can afford to participate without suffering undue financial hardship. This argument is further supported by the fact that, when a group of Athenians temporarily overthrew the democracy, establishing an oligarchy in the year 411 BCE, they passed a law as one of their first acts stating that no citizen should receive pay for political activity.³⁹

Meetings of the Ecclesia were originally scheduled on a monthly basis, but later took place three or four times a month. There were forty regularly scheduled Assembly meetings each year during the 4th Century. Some votes utilised a method of secret ballots, but most voting in the Assembly was done simply by a show of hands. Even critical issues, such as impeachment and condemnation of generals, were typically voted upon merely by a show of hands.⁴⁰ Any male aged 18 or older was eligible to attend and participate in nominating and voting for Archons, making rulings on legislation and on war and peace, and reaching decisions on other items put forward by the Boule (the council of five hundred) for the agenda.

The full-time Government of Athens was represented by the council of five hundred. It comprised five hundred citizens, representing the ten tribes, with each serving a term of a single year. The main function of the Council was concerned with the preparation of the Assembly's meetings' agenda.

³⁸ W Blanco, above note 2, Book 8 para. 72 at p. 336.

³⁹ J Warrington, above note 4, at pp 111,174, 272-276.

⁴⁰ Ibid at pp. 276, 286.

Serving on the Council is one of the posts that Aristotle describes as being selected by a vote. Elsewhere he states that, in a city ruled by democracy, the Council held the distinction of being the most important board of magistrates. Council participants were paid through most of the 4th Century and 5th Century BCE, with the option of serving two terms during their lifetimes.⁴¹

The most vital of all the roles of the council of five hundred was in making ready the issues to be discussed at the Assembly meetings, in which Athenians would come together to discuss and vote upon decrees. Whilst any male Athenian had the right to speak in Assembly and to accordingly vote, the subjects for discussion and voting were nevertheless controlled by the sum of checks and balances between the Assembly and the Council.

Legislation during the Athenian Period

The 4th Century Athenians were ruled by laws and decrees (known as psephismata, or psephisma in the singular). A vote of the Council or the Assembly — or both of them — passed the decrees. Laws were made via a more complicated process, and the Rule of Law superseded any decrees. A decree proposed in the Assembly by anyone who was in direct contradiction to a law in existence made that person subject to prosecution with the charge of ‘Illegal Proposal’ or ‘graphe paranomon’. Laws went through a process called ‘nomothesia’ or ‘legislation’. The Assembly gathered together on a yearly basis to discuss the current collection of laws. A change in the laws could be proposed by any citizen; however, the repeal of a law could only be proposed if another law was suggested that would ultimately replace it. A board of ‘legislators’, or otherwise known as ‘Nomothetai’ if the Assembly made a decision to alter the laws, was selected for the review and possible revision of the laws. The process of establishing a law much resembled a trial, where both sides were given the opportunity to debate the merits of the laws in existence. Voting on changes was the task of the Nomothetai, and any changes voted upon were published in inscriptions close to the Eponymous Heroes statues, in addition to them being orally read at the next Assembly meeting. In order to be certain that no existing laws contradicted others and that none were in repetition, a yearly review of all laws in existence was performed by the Nomothetai.

⁴¹ Ibid at p. 301.

Aristotle draws a theoretical line between laws and decrees, observing that the laws govern in certain types of democracy, but in other kinds of democracy, decrees can override laws.⁴² However, the Council did employ a special ‘legislative secretary’ who turned out copies of all laws and was present at all Council meetings; this indicates the discussion of proposals for legislation before they were passed on to the Assembly.⁴³

The Council of the Areopagus

The Areopagus, also known as the Hill of Ares, was in Athens, and it was the meeting site of the council (known as the Council of the Areopagus or simply the Areopagus) that was a vital legal body under the democracy of Athens. Though its powers were in constant change, the Areopagus nevertheless existed for many years before the democracy came into existence. Its history, which dates back to mythological pre-history, closely monitors the political history of Athens, and demonstrated the ongoing conflict between democratic and anti-democratic forces. Originally, it had been the primary governing force of Athens, but with the advent of the 4th Century democracy, it became a Court with authorisation over homicide cases, and certain other grave crimes. The past Archons became permanent, lifetime members of the Areopagus.⁴⁴

During the 4th Century BCE, the gravest criminal cases were tried by the Areopagus, as Aristotle observes: ‘Trials for conscious murder and wounding are under the jurisdiction of the Areopagus, including those such as death by poison and arson’.⁴⁵ Other kinds of murder, amongst them involuntary homicide, conspiracy and the like, were held at the Palladium. The Areopagus system provided the accused with the choice either of agreeing to submit to the verdict, or of voluntarily departing the city in advance of the verdict. If the defendant chose to leave, his estate was then sold off by the vendors following the approval of the Nine Archons.⁴⁶

⁴² Ibid at p. 108.

⁴³ Ibid at p. 294.

⁴⁴ Ibid at p. 300.

⁴⁵ J Jones, *On Aristotle and Greek Tragedy*, 1962, Oxford University Press, at p. 167.

⁴⁶ Ibid at pp 266,288,306.

The People's Court

The People's Court, the Heliaea and other Courts that featured citizen juries to hear cases, would vote on and determine the guilt or innocence of their countrymen, and consequently decide on punishments to fit the crimes for those who were deemed guilty. The fact that Athenians received jury payment was, of course, a democratic innovation, since it allowed the less fortunate citizens to have a hand in the governance of their city. No property requirement existed for any service; this meant that any (male) Athenian, who was at least thirty years old and had no debts with the treasury and who kept his citizenship, could serve as a juror.⁴⁷

Descriptions of the Athenian law Courts by Aristotle and their juries take a good look at the complex systems which seemed to have been in place in order to make sure that no jury bribery occurred. The key to this was in making the selection and appointment of jurors as unpredictable as possible. In this instance, a pool of people would be used — all of whom were willing to serve — and jurors would then be randomly selected from the pool. At the last minute, they would be sectioned into random groups, and each group would then be assigned to an active Courtroom. Each group would be randomly tasked to specific Courtrooms and at the last possible minute. In order to make certain that only jurors with authorisation entered each Courtroom, quite elaborate methods were in place.

It was, indeed, common sense that detailed rules governed jury selection, as these juries decided both civil and criminal cases, and appeals from the Council or Assembly by unsatisfied citizens. Democratic rules were dependent upon the Courts — democracy's ultimate guarantor; the composition of the juries of those Courts therefore had to be as democratic as they could possibly be.⁴⁸

2.1.5. A Critical Analysis of Athenian Democracy

Athens, much like other Greek cities of the same time frame, was a completely independent city-state; it was independent both in terms of physical situation and the amount of people involved in it, which meant that it was possible for all citizens to directly participate in the

⁴⁷ Ibid at p. 303.

⁴⁸ Ibid at pp 302-306.

Government processes. Athens was a direct democracy; each citizen was directly involved instead of being represented by other people.

In order to have citizenship status in Athens, both a person's mother and father were required to be citizens. However, in the case that a person's parents were not citizens, the person could still live a normal life, side by side, with other citizens. This sector of the population was referred to as the Metics. After this, females were precluded from claiming status as full citizens. The Metics had their own territories which they were able to return to at any point. Furthermore, although a female married to an Athenian citizen would usually have no connection to any other state, they were denied any political rights; moreover, the slaves had no political rights. As non-Athenians, such individuals were not able to freely go as they wanted to, unlike the Metics, who were also non-Athenians. Therefore, according to the existing research, we can conclude that the full members of the state — those with power to be included in their direct democracy — actually constituted a relatively small number of the population.

Equality existed between all full citizens, and Aristotle noted two defining characteristics of democracy as being 'the sovereignty of the majority and freedom'.⁴⁹ Full citizens all over Athens equally had access to the Athenian assembly. The Council took care of the preparation for the assembly business; the Council, being quite a bit smaller than the assembly, convened far more often as well.

The Courts of people, as we have observed, played a significant role. The members of these Courts were selected, by lot, from the entire citizen body, which thus, gave equal representation to the ten Greek tribes. It is noteworthy that selection by lot is a critical characteristic of the Greek democracy; as Aristotle mentions, the use of a lot is regarded as democratic, and the use of voting is regarded as oligarchical.⁵⁰ These Courts not only looked at straightforward judicial cases, but also additionally acted in effect as a review group on proceedings within the assembly.

Indeed, as we contemplate Athens' democratic system, we need to also contemplate the workings of its trio of primary entities, the assembly, the council and the Courts, which

⁴⁹ Ibid at p. 156.

⁵⁰ Ibid at p. 115.

worked as follows: Government officials and jurors of the Courts, chosen by lots, were responsible for overseeing judicial review; the Council presented business to the Assembly, which then accordingly voted on important decisions, and all full citizens of Athens could attend and address the Assembly.

As established above, much of the population living within Athenian territory was excluded from taking part in the Government of Athens, amongst them slaves, women and Metics (non-citizens). However, the poor were given the opportunity to participate due to the fact that payment was given at all of the central bodies of the state. As those participating in Government required significant amounts of leisure time available in order to attend assemblies, councils and Courts, the Athenian democratic Government paid citizens an average day's wages to enable them to attend the Assembly and actively participate in policy-making and legislation through direct voting⁵¹. This leisure — necessary for the participation in public affairs — was, of course, more accessible for those Athenian citizens who owned slaves to do much of their daily labour, as Aristotle notes: 'It is agreed that leisure is a must in each well-ordered state. The people should be liberated from the need of producing their own day to day requirements'.⁵² Thus, the distinguishing feature of this kind of Government, which was of great significance to the Athenians, was the capacity for individual participation in public life. Pericles writes, 'an Athenian citizen does not neglect the state because he takes care of his own householder; and even those of us who are engaged in business have a very fair idea of politics. We alone regard a man who takes no interest in public affairs, not as harmless, but as a useless Character; and if few of us are originators, we are all sound judges of a policy'.⁵³

As Pericles' strong words suggest, the concept of Athenian democracy was founded upon the relation between moral and political theory. The Greeks rationalised that 'good' is measured from a human point of view; what is good is good for people, thus, the worth of any kind of state is likewise determined by its worth for those who live in it — a good state shelters both flourishing and happy citizens. Aristotle states that, 'the state is a society of

⁵¹ T Ball & R Dagger, *Political Ideologies and Democratic Ideal*, 1999, Longman Press, p. 21.

⁵² Ibid at p. 51.

⁵³ W Blanco, above note 2, at p. 129; M Finley, *Democracy Ancient and Modern*, 1973, Chatto & Windus Press, pp. 23-24.

families and groups of families in a good life for the sake of a perfect and self-sufficing existence... the end or purpose of the state is the good life'.⁵⁴

Plato's core belief is that there is an objective truth concerning subjects of worth; a thing is either 'good' or 'bad' in and of itself, and not depending upon the opinion of a person. If there is disagreement concerning the value of a thing, naturally, there are those who are right and those who are wrong; thus, those who do possess knowledge of the topic in question are at an advantage over those who do not possess that same knowledge. However, in a democracy, it is the views of the people as a whole which are ultimately put into effect, rather than the views of just those who possess certain knowledge. If both views coincide, it is deemed purely accidental. In order to meet this challenge, it is therefore necessary that the majority naturally possess that requisite knowledge. Plato thus, believed that the perfect state was ruled by either those with the relevant knowledge, or otherwise the current rulers or Kings, if they so desired wisdom.⁵⁵

In the ideal state as outlined by Plato, those people who possess the knowledge would ultimately serve out of general interest, and not to indulge in their own selfish interests. The heart of Aristotle's criticism of this ideal stems from the situation whereby democracy becomes the rule of a particular group of people who are looking out for their own interests; in acting in accord with this, they may then not serve the interests of the people as a whole. In the case of disagreement, on the other hand, one view has to emerge dominant, and democracy dictates that the best and most fair way is to opt with the majority view, as identified by the group of majority. Thus, rule by clear majority is the preferable method; therefore, democracy is rule of the masses, by the majority, to their general benefit.

Aristotle does not have exclusivity on this idea; Plato had stated that 'democracy comes into being when the poor win the victory'.⁵⁶ Aristotle further clarifies the difference between democracy and oligarchy, maintaining that each side has its own idea of justice. The democrats judge justice in terms of equality; however, the correct concept of justice is imparting things equally to those who are equal, not imparting things equally to those who are not equal. It is not for any group, including the majority, to rule strictly in favour of its

⁵⁴ Ibid at p. 82.

⁵⁵ E Hamilton, *The Collected Dialogues Of Plato*, 1973, Princeton University Press, at pp 725, 730.

⁵⁶ Ibid at p. 785.

own interests: ‘The good in the sphere of politics is justice; and justice consists in what tends to promote the common interest’.⁵⁷

Aristotle also recognised that democracy could become a negative force, as a dictatorship governed by the majority, or ruled by a group of people who are only interested in serving their own interests. In other words, he poses the question: how can democracy be a just or fair Government in a mixed society? There will certainly be conflicts of interests or opposing opinions; therefore, it is impossible to rule strictly by unanimous decision. The key issue for Aristotle with regards to democracy is the danger of installing the wrong people in positions of power, mainly because they do not have enough knowledge, and/or because they will ultimately try to achieve their own interests rather than acting in the general best interests of the populace. This issue will be addressed shortly.

Conclusion

It is clear that the positive attributes identified in democracy — particularly those related to the equality it promises — are countered by complications which arise when democracy is put into practise, as has been recognised by Aristotle, as well as contemporary critics. The original term ‘demokratia’ has a number of interpretations. The literal interpretation of ‘people-power’ is, upon further examination, more complex than it first appears. Are we to understand ‘people’ to refer to the masses, or to solely those citizens who are specially qualified or educated? The term in Greek (demos) is not specific on this point, and it has even been proposed that the term demokratia was first used by opponents of the system who disliked power being held by the lower social classes. With the aforementioned in mind, the term may therefore have originated as a negative one, denoting a system in which the mob had undue say.

This system, as considered from its negative aspect of ‘mob rule’, naturally had no shortage of internal critics. Following the failures of the Peloponnesian War (431-404), Athens was greatly weakened. Hence, it was at this time that critics of Athenian politics took action: - in the years of 404 and 411, revolutionary attempts by Athenian oligarchs led to the city’s democracy being replaced with oligarchy. The revolution of 404 was aided by Sparta, a traditional adversary of Athens but, despite this, the new Government was unstable and had

⁵⁷ J Warrington, above note 4, at pp 86,175.

failed, and within a year was consequently replaced with the old democratic system. Democracy was restored and persisted for a subsequent 80 years, until 32 BC, when the Kingdom of Macedon overtook all of Aegean Greece, and ended the system. The model, however, continued elsewhere in the Greek world, until it was eventually lost under the Roman Empire.

The Athenian system falls short when contrasted with modern democracies. The Athenians filled a number of their political offices not by election but by randomly selecting citizens through a lottery. The notion of citizenship was also highly significant to Athenian democracy — and in order to be a citizen, one had to fulfil a certain criteria: be an adult, free, male Athenian. Women, resident foreigners, and slaves (all of whom comprised the majority of the population) were all excluded.⁵⁸ Moreover, there was a strict criterion of double descent, which meant eligible men had to have both an Athenian mother and an Athenian father. In addition to this, Athenian democracy provided little, if any, protection for minority rights. Finally, the Athenian assembly possessed the power to temporarily banish citizens from Athens without legal charges being brought against them, simply because the majority of the Assembly believed that these citizens posed a danger to the state; this kind of societal practice of ostracism in terms of elections, in which the decision could be made to exile politicians for up to ten years. The motion was carried when 6,000 citizens had voted in favour of ostracism, which subsequently enabled the removal of influential figures with remarkable ease, thus, helping to avoid power struggles and civil war in the city. Occasionally, this practice served as a punishment for voicing unpopular views, as in the case of Socrates (469-399 BC) in 399 BC. Citizens accusing Socrates of religious impiety and corrupting the morals of the youth of Athens brought about his trial and conviction, and he was condemned to death by poison. Many commented on the method that, with no little irony, that Athens as the first democracy had created the first martyr to the cause of free thought and free speech.⁵⁹

A further key difference between Athenian and current democratic systems is the level of participation. Modern democracy is representative; the populace elects politicians to rule on

⁵⁸ P Cartledge, *the Democratic Experiment*, 2001, BBC History, Accessed on line at www.bbc.co.uk/history Accessed on December 21, 2008.

⁵⁹ T Ball & R Dagger, above note 51, at p. 22; J Ober & C Hedrick, (eds) *Demokratia*, 1996, Princeton University Press, pp. 22- 25.

their behalf.⁶⁰ Athenian democracy was both direct and entirely interactive. In order to make it as participatory as possible, most officials and all jurymen were selected by lot. This private method was thought to be the democratic way, as public election undoubtedly favoured the rich, famous and powerful over the ordinary citizen. From the mid-5th Century, office holders, jurymen, members of the city's main administrative Council of five hundred, and even Assembly attendees were paid a small sum from public funds in order to compensate them for time spent on political service away from the field or workshop, therefore making participation viable for all.

By the 5th Century BC and 4th Century BC, the idea of democracy as an unstable form of Government had appeared. Plato (427-347 BC), for example, believed democracy to be dangerous because it was ruled not only by the people but also by the ignorant, most of who were neither experienced nor knowledgeable concerning how to use political power, and who were similarly envious people, only concerned with their own good. He further argues that civil war, anarchy, and destruction of the city-state came from democracy. Plato argues that, from democracy, rule by the people, it is but a series of short steps to despotism.⁶¹ Aristotle (384- 322 BC) followed Plato in considering democracy to be bad or undesirable, as the great majority *en masse* tend to be short-sighted and selfish. The possibility of polity was proposed; as a good form of rule by the many, polity differs from democracy as it mixes elements of rule by the few with elements of rule by the many. In this system, each group can keep an eye on the other. Furthermore, the other major difference between polity and pure democracy is the distribution of wealth and property, whereby most people are neither poor (as in the case in democracy) nor rich, but rather 'have a moderate and sufficient property.'⁶² Aristotle considered it to be the best of the six regimes that he categorised for discussion.⁶³ After that time, as the Roman Empire concentrated power in the hands of the emperor, the self-governing city-state died, and rule by the many, whether in the form of democracy or polity, perished with it. Then the liberal democracy as the new form of democracy has appeared as the next chapter will elaborate.

⁶⁰ M Behrouzi, *Democracy as the Political Empowerment of the People*, 2005, the Rowman & Littlefield publishing group, at p. 179.

⁶¹ B Jowett, above note 37, at Plato Book VIII of his Republic.

⁶² B Jowett, (ed & trans), *The Politics of Aristotle*, 1934, Modern Library Press, p. 192.

⁶³ T Ball, R Dagger, above note 51, at p. 24.

2.2. Chapter Two: Origin of Liberal Democracy¹:

Introduction

The first chapter has examined the Athenian democracy and this chapter going to examine the origin of liberal democracy. Following the demise of Athenian democracy, popular Government did survive in the ancient world, but in the form of the republic rather than straight-forward democracy. The Greek historian Polybius (200-118 BC) developed the idea of a mixed Government which had been established by Plato², and then by Aristotle through the polity (the term used by Aristotle to describe political rule through a combination of aristocracy and democracy).

The Roman Republic was a mixed Government, which divided the power amongst the three main foci: the individual, the few, and the many, dividing power between the Senate, various legislative assemblies, and executive magistrates. This republican period lasted from 509 BC, when the historical Roman monarchy was overthrown, until the establishment of the Imperial period, beginning with Julius Caesar (100-44 BC). The Empire was headed by a series of emperors, each of whom drained the power from Rome's republican institutions and concentrated it in their own hands. Almost 1,500 years would pass before the republican ideal could be fully revived in the city-states of northern Italy during the Renaissance, and a further 400 years before the democratic ideal experienced a revival of its own.

The beginning of a return to the democratic ideal took place during the English Civil War of the 1640s. Liberal democracy has its origins in the Age of Enlightenment, or the Age of Reason, in Europe in the 18th Century at a time when monarchy was the prevalent practice. During this period, the majority of European states were monarchies founded on

¹ For more see P Rhodes (ed), *Athenian Democracy*, 2004, Oxford University Press; C Macpherson, *The Life and Times of Liberal Democracy*, 1977, Oxford University Press; E Benes, *Democracy Today and Tomorrow*, 1940, the right book club; C McPherson (ed) *J, Locke; Two Treatises Of Government*, 1980, Hackett publishing com; R Tuck (ed), *Leviathan, Hobbes*, 1996, Cambridge University Press; V Gourevitch (ed) *The Social Contract and Other Later Political Writings*, Rousseau, 1997, Cambridge University Press; D Carrithers (ed) *The Spirit of Laws by Montesquieu*, 1977, University of California Press; H Mansfield & D Winthrop, (Trans) De Tocqueville, *Democracy in America*, 2000, University of Chicago Press; J Gray (ed) *On Liberty and other Essays* by J.S. Mill, 1991, Oxford University Press; C Macpherson, *The Real World of Democracy*, 1972, Oxford University Press; S Fredman, *Discrimination and Human Rights*, 2001, Oxford University Press; B Merrill & B Holden, *Understanding Liiberal Democracy*, 1988, Philip Allan Press.

² P Rhodes (ed), *Athenian Democracy*, 2004, Oxford University Press, at p. 96.

the doctrine of the Divine Right of Kings — the belief in the monarch’s right to rule as the one chosen by God; any dissent against his or her right to the throne would have been tantamount to blasphemy. However, this view was not considered acceptable to a growing number of scholars, mainly due to the fact that it ignored various values, such as liberty and equality, and these rights were typically being suppressed by ruling monarchs. In this respect, monarchy increasingly became seen as a system of Government where the people served the Government and not vice-versa.

It was in the 18th Century that thinkers, such as Hobbes and Rousseau, first started to put forward the idea of democracy as based on the rejection of class division. However, by the 19th Century, the idea of class-division had been widely justified by its high level of material productivity; furthermore, by the time of Bentham and James Mill, it was felt that inequality was inevitable.³

Intellectually, these dramatic changes in the perceptions of concepts relating to democracy were informed by Enlightenment thinkers concerned with issues of human nature, the state, and the proper relationship between the state and the individual. These ideas were exemplified in various works, such as John Locke’s *Two Treatises of Government*, which argued that sovereignty is only legitimately derived from the consent of the people it governs.⁴ This period also produced great European voices, championing similar values, notably Rousseau and Montesquieu. Later, writers and thinkers, such as John Stuart Mill, further challenged monarchical and aristocratic systems in favour of liberal democracies.

In the latter half of the 18th Century, these developments in the intellectual life of the era subsequently contributed towards the American Revolution and the French Revolution, which attempted to put the principles of liberal democracy into practice. Whilst liberal democracy today largely and significantly differs from these early models, they nevertheless served as models for later systems.

³ See C Macpherson, *the Life and Times of Liberal Democracy*, 1977, Oxford University Press, at pp. 23-44. for more regarding history of Liberal Democracy see E Benes, *Democracy Today and Tomorrow*, the Right Book Club, 1940; and C Macpherson, *The Political Theory Of Possessive Individualism*, 1962, Oxford University Press.

⁴ C McPherson (ed) *J Locke; Two Treatises Of Government*, 1980, Hackett publishing com, at p. 37; and T Pain, *Age of Reason*, Ushistory.org. (Electronic publishing) 1999, at part II, section 21, available at <http://www.ushistory.org/Paine/reason/index.htm> accessed July 21, 2009.

However, as this chapter shall examine, by the end of the Second World War, Liberalism had become widely recognised as being superior to its monarchic and aristocratic rivals, with these once prevalent systems now reduced to the fringes of politics. The collapse of the communist system following the Cold War seems to have provided additional evidence of the superiority of liberal democracy as a system of governance, subsequently leading many countries to undergo processes of democratisation along these lines during this period. This chapter will analyse the ideas of those who have participated in the development and improvement of liberal democracy:

2.2.1. The Theory of State and Government

Philosopher Thomas Hobbes (1588-1670) set out his theory of state and government in *Leviathan*. Written during the English Civil War (1641-1651), the book is largely an attempt to argue for the necessity of strong central Government in order to avert civil conflict. Without Government, Hobbes argues, man would live in a state of constant warfare against everyone else; the natural condition of man, he says, is: ‘solitary, poor, nasty, brutish, and short’,⁵ and is defined as ‘*bellum omnium contra omnes*’ (‘the war of all against all’). Thus, the governed state is based on a ‘social contract’, whereby individuals sacrifice certain liberties in return for peace and safety: ‘the end of obedience is Protection’.⁶ The contract implicitly entered into by each individual — as though spoken to all other members of the society — is expressed by Hobbes as follows: ‘I authorise and give up my right of governing myself to this man, or to this assembly of men, on this condition; that thou give up, thy right to him, and authorise all his actions in like manner’.⁷

Thus, the construction of state, according to Hobbes, is an agreement between equals in an attempt to establish a civil society. The agreement alone is insufficient, however, and force is also necessary: ‘Covenants without sword are but words and no strength to secure a man at all’.⁸ Thus, the people do not simply agree to have a state; they agree to succumb to a power sufficient to frighten them into obedience. Against this power — the sovereign authority of the state — individuals had no rights; Hobbes does admit that rebellion must be

⁵ Ibid at p. 89.

⁶ R Tuck (ed), *Leviathan, Hobbes*, 1996, Cambridge University Press, at p. 153.

⁷ Ibid at p. 119.

⁸ Ibid at p. 117.

expected in cases of extreme abuses of power but, in general, he stated that any abuses of power by the sovereign authority are to be accepted as the cost of the civil state.

One of the most prominent aspects of Hobbes' doctrine is his rejection of the separation of powers, which others have seen as a valuable aspect of democratic rule and a means of preventing a single body from becoming overly powerful. Hobbes argues for the reverse, however, clearly favouring a state in which the sovereign controls every branch of power: military, judicial, civil and ecclesiastical. He outlines twelve rights held by the sovereign, including the right to be judge in all cases, to punish, to choose magistrates and other officials, to restrict freedom of expression, to make war or peace, and to immunity from accusations of injustice or punishment.

In theory, however, Hobbes states that the power of the sovereign stems from his election by the majority. In practice, he says, there is no (lawful) way for the subjects to change the form of Government or to otherwise protest against the actions of the sovereign once he is in power. Hence, Hobbes' state strongly resembles that of the monarchy based on divine right. In fact, Hobbes explicitly argues that monarchy is the preferable option compared to aristocracy or democracy, and is the best suited to 'produce the peace and security of the people'. Nevertheless, whilst Hobbes may not have intended to contribute to the development of liberal democracy, the concept of the social contract expressed in his work did have an important influence on the works of later thinkers who were more receptive to the democratic model.

2.2.2. Concept of 'Social Contract'

John Locke (1632-1704) further contributed to the concept of the 'social contract' between the individual and the state. Like Hobbes, he located the origins of the civil state in the desire of individuals so as to gain greater protection than could otherwise have been attained in the natural state, but his description of this natural state is of a way life much more stable than 'the war of all against all' which we are advised by Hobbes. In the second of the Two Treatises of Government, Locke describes this state as 'a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they see fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man' and

‘a state also of equality, wherein all the power and jurisdiction is reciprocal’.⁹ Furthermore, he goes on to speak of the ‘law of nature’, of which every man is an ‘executive’, with the right to punish any who transgress against him.¹⁰ However, whilst not being as brutal as Hobbes’ hypothetical state of nature, Locke nevertheless concludes that this natural right to defend oneself and one’s possessions is arduous to enforce, and for this reason, he argues, men formed civil society so that conflicts could be resolved through Government.

Although agreeing with Hobbes as to the origins of civil society to a certain extent, Locke does, however, differ from the former when he comes to describe the type of contract between the individual and the Government: for Locke, the power of the ruler is not absolute, and the individual still has a claim to the natural rights and freedom he was born to; for Locke then, the governed state is a matter of trust whereby people have indeed relinquished the exercise of certain rights to the Government, yet they nevertheless still hold these rights and may ultimately resume the exercise of them if they judge that the Government has broken the bond of trust. Indeed, whilst Hobbes argues against revolution — except in the most extreme of cases — Locke, on the other hand, maintains that revolt is not only a right but, in some cases, is even an obligation of the populace.

Like Hobbes, Locke speaks favourably of decisions made by majority consent: ‘When any numbers of men have, by the consent of every individual, made a community, they have thereby made that community one body, with a power to act as one body, which is only by the will and determination of the majority’.¹¹

Lastly, the two philosophers agree when arguing that a state of nature which can be used to contrast with and provide legitimating for the political state, incorporates, in itself, an idea of equality. Thus, Hobbes states that, ‘all men, equally, are by Nature free’,¹² whilst Locke stated that men are ‘by nature, all free, equal, and independent’.¹³ As such, the natural state, for both men, was a state of liberty in which equal people were free to act without Government interference; it is when it comes to defining how these liberties and equalities might be preserved on entry into a civil state that they differ. For instance, whilst Hobbes

⁹ C B Macpherson (ed), J Locke, *Second Treatise of Government*, 1980, Hackett, Indianapolis, at p. 8.

¹⁰ R Cox (ed) *Second Treatise of Government Locke*, 1982, Harlan Davidson Inc. p. 5.

¹¹ *Ibid* at p. 58.

¹² R Tuck, above note 6, at p. 150

¹³ R Cox, above note 10, at p. 58.

sees natural man as surrendering his former liberty and equality in order to preserve the basic benefits of life and security, Locke, in contrast, sees natural man as seeking to preserve this original liberty and equality on entry into political society, and further argues that the only kind of Government which is able to provide this is a complete democratic state, where these rights are granted equally to all citizens.

Jean-Jacques Rousseau (1712-1778), in common with these other influential thinkers of the time when discussing man's current state, embraced the idea of an original state of nature as a starting point. Again, for Rousseau, this natural state is characterised by freedom and equality and, much like Hobbes, he argues that the social contract by which man enters the civil state necessitates the repression of this freedom and equality. The *Social Contract*, in which Rousseau offers an outline of governmental rules based on a framework of classical republicanism, opens with the words, 'man is born free, and everywhere he is in chains'.¹⁴ Nevertheless, Rousseau argues that the civil state should not repress man's natural freedom, but should seek to preserve freedom and equality: 'If one inquires into precisely what the greatest good of all consists in, which ought to be the end of every system of legislation, one will find that it comes down to these two principle objects, freedom and equality'.¹⁵ Moreover, Rousseau agrees with Hobbes that it is rational for the individual to exchange a non-political state for a political state in order to gain some sort of protection, but he also further points out that it would not be rational for man to exchange a state of freedom for one of slavery: for Rousseau, protection alone is not enough, rather 'each, uniting with all, nevertheless obey himself and remain as free as before'.¹⁶

Freedom in the theories of Hobbes and Locke is essentially negative as it requires man to be left alone, free from conflict or danger. For Rousseau, on the other hand, freedom is a positive force, subsequently allowing the individual to gain those things previously denied. The political control provided by the state, as outlined by Rousseau, is seen as a means of increasing access to freedom, equality and security. He describes the point at which 'natural man' found it necessary to make a social contract as arising from a desire to unite forces in order to improve their quality of life, whilst preserving their individual liberty: 'The problem is to find a form of association which will defend and protect with the whole

¹⁴ Ibid at p. 41.

¹⁵ V Gourevitch (ed) *The Social Contract and Other Later Political Writings*, Rousseau, 1997, Cambridge University Press, at p. 78.

¹⁶ Ibid at pp. 49-50.

common force the person and goods of each associate, and in which each, whilst uniting himself with all, may still obey himself alone, and remain as free as before';¹⁷ this is the fundamental problem of which the Social Contract provides the solution.

The contract provides this solution by making it possible for the individual to apparently resign his freedom whilst simultaneously retaining it due to the fact that every individual is in the same position relative to everyone else — and, therefore, all remain equally free: 'each man, in giving himself to all, gives himself to nobody; and as there is no associate over whom he does not acquire the same right as he yields others over himself, he gains an equivalent for everything he loses, and an increase of force for the preservation of what he has'.¹⁸

Rousseau further explains his version of the social contract when he stated that, 'each of us puts his person and his full power in common under the supreme direction of the general will; and in a body we receive each member as an indivisible part of the whole'.¹⁹ The general will, Rousseau admits, often considerably differs from the individual will; the general will 'look only to the common interest', whilst the individual will is concerned with private interest.²⁰ However, according to Rousseau, society should be governed 'solely in terms of this common interest'.²¹ Furthermore, the general will is reached, he explains, by a process of averaging, cancelling out the pluses and minuses of the particular wills. Moreover, rule by the general will support equality: 'For the particular will tends, by its nature, to partiality, and the general will to equality'.²² Thus, for Rousseau, the social pact that moves man from the natural state to the civil state, placing him under the sovereignty of the general will, does not mean sacrificing freedom and equality, but rather consolidates these rights:

'from whatever side one traces one's way back to the principle, one always reaches the same conclusion: that the social pact establishes amongst the citizens an equality, such that all commit themselves under the same conditions and must all enjoy the same rights thus, by the nature of the pact every act of sovereignty, that is

¹⁷ Rousseau, *The Social Contract*, accessed online at www.constitution.org. Accessed August 19, 2009.

¹⁸ V Gourevitch, above note 15. at p. 49.

¹⁹ Ibid at p. 50.

²⁰ J Miller, *Rousseau: Dreamer of Democracy*, 1984. Yale University Press, at p. 62.

²¹ V Gourevitch, above note 15 at p. 57.

²² Ibid at p. 57.

to say every genuine act of the general will, either obligates or favours all citizens equally'.²³

However, whilst Rousseau believes that 'the general will is always in the right', he admits that 'the judgment which guides it is not always enlightened',²⁴ he identifies the difficulty of identifying the general will, stating that this may not always be possible, except in small societies: 'democratic Government suits small States'.²⁵ In addition, he clearly has doubts concerning the capacity of men — mere mortals — to govern themselves by democracy: 'If there were a people of Gods, they would govern themselves democratically. So perfect a Government is not suited to men'.²⁶ Indeed, he goes so far as to say that 'a true democracy has never existed and never will exist; for it is against the natural order of things that the majority should govern the minority'.²⁷ Ultimately, it is inevitable, he suggests, that a minority will take (more or less benign) control, with democracy being replaced by republics, oligarchies and monarchies.

In the modern world in which Rousseau is writing, with new knowledge and developments in economy and society, and with vast growth in the sizes of states, the Athenian democracy — or simple democracy, as it is referred to by Thomas Paine — is no longer practical, and has consequently been replaced by representative democracy:

'As these democracies increased in population, and the territory extended, the simple democratic form became unwieldy and impracticable, and as the system of representation was not known, the consequence was, they either degenerated convulsively into monarchies, or became absorbed into such as then existed.... By ingrafting representation upon democracy, we arrive at a system of Government capable of embracing and confederating all the various interests and every extent of territory and population'.²⁸

²³ N Singh, *The Social Contract or Principles of Political Right by Rousseau*, 2004, Global Vision Publishing House, p. 80.

²⁴ V Gourevitch, above note 15 at p. 59.

²⁵ Ibid at p. 90.

²⁶ Ibid at p. 92.

²⁷ Rousseau, *The Social Contract*, accessed online at www.constitution.org. Accessed July 23, 2009.

²⁸ M Philp (ed) *Rights of Man*, Thomas Paine, 1995, Oxford University Press. at pp 229,232.

These two forms of democracy were further defined by American politician James Madison (1751-1836), who characterised direct democracy whereby individuals participate for themselves, as pure democracy, and the second type, in which individuals elect others to represent them, as Republic.²⁹

2.2.3. Theory of Checks and Balances

Montesquieu (1689-1755) played a key role in defining some of the principles of democratic Government which are now taken for granted, notably the theories of checks and balances, and the separation of powers. Of the first of these, Montesquieu writes, ‘to prevent the abuse of power, things must be ordered that power checks power’.³⁰ In explaining the need for the separation of powers, he explains that, when the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be then no liberty, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers.³¹

2.2.4. Democracy and the American Revolution

Those involved in developing the new American Government, following the American War of Independence against Great Britain (1775-1783), drew heavily upon these ideas concerning liberty, rights and rule being debated in Europe. During the subsequent drafting of the constitution of the newly formed United States in 1787, the favoured form of Government in the US was republican. As John Adams (1735-1826), the second president of the United States (1797-1801) stated, ‘as a republic is the best of Governments, so that particular arrangement of the powers of society... which is best contrived to secure an impartial and exact execution of the laws is the best of republics.’³² The US Constitution did not explicitly mention democracy, but it did, however, guarantee to each state a republican form of Government,³³ this ultimately constituting a modification of the old idea of mixed or balanced Government (similar to the polity described by Aristotle, which combined

²⁹ I Kramnick (ed) *The Federalist Papers, J Madison, A Hamilton and J Jay*, 1987, Penguin Books Press, at p. 126.

³⁰ D Carrithers (ed) *The Spirit of Laws by Montesquieu*, 1977, University of California Press, at p. 200.

³¹ Ibid at p. 202.

³² C Adams (ed) *The Works of John Adams*, vol. IV, 1851, Little and Brown, p. 194.

³³ United States Constitution, Article Four, Clause Four, Guarantee Clause. available at www.usconstitution.net/const.html, accessed on October 15, 2009

aristocracy and democracy), consisting of executive rule by one, judicial rule by the few, and legislative rule by the many.

James Madison, a Founding Father and one of the most influential figures in drawing up the new constitution, firmly agreed with Montesquieu's precept of the separation of powers. In an article defending the structure of the new American Government against criticisms that it violated this maxim and failed to maintain sufficient checks and balances, He states, 'the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny'.³⁴ Moreover, Madison advocated bicameralism, actively supporting the practice of having two legislative houses — the Senate and the House of Representatives. The members of each body were ultimately selected by the people — though via different routes — in order to make them better checks for each other; the lower house (the House of Representatives) directly draws its authority from the people, whilst the upper house draw its authority from a process of selection based on both considerations of wisdom and ability.³⁵

Madison was well aware of the practical difficulties of constructing a Government based on a foundation of democratic values. In his defence of the new constitution, he argued that men are not angels:

'Ambition must be made to counteract ambition...it may be a reflection on human nature, that such devices should be necessary to control the abuses of Government. But what is Government itself, but the greatest of all reflections upon human nature? If men were angels, no Government would be necessary. If angels were to govern men, neither external nor internal controls on Government would be necessary. In framing a Government which is to be administered by men over men, the great difficulty lies in this: you must first enable the Government to control the governed; and in the next place oblige it to control itself.'³⁶

³⁴ I Kramnick (ed) above note 29 at p. 303.

³⁵ Ibid at pp. 343-370.

³⁶ I Kramnick (ed) above note 29, at p. 351.

Following the proposals outlined by Madison, the first ten amendments to the Constitution — also known as the Bill of Rights — came into effect in 1791.³⁷ The Bill was largely introduced in response to objections from anti-federalists who argued that the original constitution had failed to sufficiently protect both human rights and freedoms. It incorporated earlier declarations and texts relating to human and natural rights, including the English Bill of Rights (1689) and the European works of the Age of Enlightenment. Amongst those rights addressed by the bill included the rights to practise different religions, to own weapons, and to a legal trial if accused of a crime. Furthermore, the bill created a popular Government in which the popular element was checked and controlled by the Senate, the Court, and the President.

Once the Constitution had been ratified, two political parties gradually emerged in order to challenge one another for political power. Alexander Hamilton (1755-1804), who had supported the proposed Constitution, joined with likeminded men in forming the Federalist Party, focusing on strengthening the national Government. Meanwhile, others who had opposed the Constitution on the grounds that it was not democratic enough, such as Patrick Henry (1736-1799), joined with men who had, in fact, been prominent supporters of the constitution, notably Thomas Jefferson (1743-1826) and James Madison. This party was formed and subsequently known as the Republican Party, then as the Democratic-Republican Party, and finally, under the leadership of Andrew Jackson (President from 1829 to 1837), the Democratic Party.

By 1828, the various states' Governments of the US had abolished most property qualifications in reference to voting, extending the number of men who could participate in the democratic process.

Alexis de Tocqueville (1805-1859), a French aristocrat who travelled throughout the United States during the early 1830s, wrote a two-volume analysis of American Democracy, titled *Democracy in America*³⁸, upon his return to France. One of his main aims in doing so was in order to foresee what the coming of democracy implied for not only France but also the rest of Europe. Whilst recognising the successes of the American Republic, he expressed

³⁷ See U.S. Constitution online, available at www.usconstitution.net/const.html, accessed on October 15, 2009.

³⁸ H Mansfield & D Winthrop (Trans) *De Tocqueville, Democracy in America*, 2000, University of Chicago Press, at the Introduction.

concerns regarding its future development, predicting that the debate surrounding the abolition of slavery would ultimately lead to civil conflict, fearing the subordination of wisdom and learning to the prejudices of the masses, and outlining the dangers he associated with democratic Government degenerating into a kind of soft despotism. He identified this aforementioned danger as originating in the capacity of the new form of Government to control areas of the individual's life previously left alone by Governments. In democratic nations, he stated, rulers would not content themselves with ruling the people collectively: it would seem as if they thought themselves responsible for the actions and private condition of their subjects — almost as if they had undertaken to guide and to instruct each of them in the various incidents of life, and to accordingly secure their happiness quite independently of their own consent.³⁹

Here, de Toqueville identifies the major conflict within the concept of 'liberal democracy': whilst, collectively, men gain equality and protection, as individuals, they nevertheless lose a certain independence and freedom. This, de Toqueville fears, could lead to a state of equal mediocrity — the protected, uncompetitive state in which man lives 'every day renders the exercise of the free agency of man less useful and less frequent; it circumscribes the will within a narrower range, and gradually robs a man of all the uses of himself'.⁴⁰ This also means that the ruler's exercise of power is circumscribed: 'This universal moderation moderates the sovereign himself'.⁴¹ Nonetheless, de Toqueville depicts the development of a new kind of 'tyranny', which would be 'more extensive and more mild' than earlier tyrannies, and less easily identified, stating that 'it would degrade men without tormenting them'.⁴²

Despite de Tocqueville's concerns surrounding the tendencies of democracies to degenerate into disguised despotism and to further suppress the freedom and personal development of the individual, democracy nevertheless went on to become increasingly popular; this also stemmed from a number of social and economic developments which occurred during the Industrial Revolution of the late 18th and 19th centuries, alongside a growing faith in the common people's ability to participate knowledgeably in public affairs.

³⁹ Henry Reeve (Trans) *de Tocqueville, Democracy in America*, accessed online at ebooks.adelaide.edu.au Accessed August 6, 2009

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

2.2.5. Utilitarianism and Democracy

English legal and social reformer Jeremy Bentham (1748-1842), one of the most influential developers of utilitarianism, based his proposals for reform on the principle that the right action or law is the one which causes ‘the greatest good for the greatest number of people’. Also known as the principle of utility, or the greatest happiness principle, Bentham defines his theory as thus: ‘It is the greatest happiness of the greatest number that is the measure of right and wrong’.⁴³

Happiness, in Bentham’s theory, becomes a measure of Government; Government must augment the happiness of the community, and so the solution to the problem of good Government is to produce a structure in which each individual person acts to seek happiness. Bentham justifies this location of the general good in the happiness of the individual as follows: ‘The community is a fictitious body, composed of the individual persons who are considered as constituting as it were its members. The interest of the community then is, what?—the sum of the interests of the several members who compose it’;⁴⁴ therefore, ‘it is vain to talk of the interest of the community, without understanding what is the interest of the individual’.⁴⁵

Scottish historian and theorist James Mill (1773-1836) was also concerned with the theory of utilitarianism. He promoted utilitarianism, and is considered as the most powerful and influential advocate of the new doctrine.⁴⁶ It is a law of nature, Mill declares, that a man, if able, will take from others anything that they have and which he simultaneously desires. Therefore, the end to be obtained through Government is to resolve this conflict.

Both Bentham and Mills agree that representative democracy is the best way for states to be governed, but Bentham adds that every official — from the prime minister downward — could be removed at any time by the direct request of a quarter of the people.⁴⁷

⁴³ W Harrison (ed) *A Fragment on Government with an Introduction to the Principles of Morals and Legislation* by J Bentham, 1967, Basil Blackwell Press, at p. 3.

⁴⁴ J Bentham, *An Introduction to the Principles of Morals and Legislation*, 1823, accessed online at The Online Library of Liberty, oll.libertyfund.org. Accessed August 6, 2009, Here Chapter 1, point IV

⁴⁵ *Ibid*, point V.

⁴⁶ J Lively & J Rees, *Utilitarian Logic and Politics* by James Mills, 1978, Clarendon Press, at p. 33

⁴⁷ *Ibid* at p. 56.

In accordance with Bentham, J. S. Mill (1806-1873), son of James Mill, argues that the duty of Government is to promote the greatest happiness of the greatest number, and the best way to achieve this is through representative democracy. He argues that political participation is valuable because of the opportunity it provides for self-development.⁴⁸ Like Tocqueville, he believes that, through the invigorating effect of freedom upon the character of the individual, democracy has the strength of promoting civil virtue amongst the common people. Mill writes,

‘The moral part of the instruction afforded by the participation of the private citizen, if even rarely, in public functions. He is called upon, whilst so engaged, to weight interests not his own; to be guided, in case of conflicting claims, by another rule than his private partialities; to apply, at every turn, principles and maxims which have for their reason of existence the common good: and he usually finds associated with him in the same work minds more familiarised than his own with these ideas and operations.... He is made to feel himself one of the public and whatever is for their benefit will be for his benefit.’⁴⁹

For J. S. Mill, the need for the move to democracy depends upon the impact on the positive goodness of the citizen by being given freedom and control over himself. J. S. Mill views Government as being an instrument of education, with a representative democracy providing the best kind of education.⁵⁰

However, J. S. Mill also recognises that, even in a democracy, people nevertheless still need to be protected against the power of Government, and he further mentions this as being one of most dominant problems that democracy faces. In respect to voting, he treats the voter as a person in a position of trust who ultimately acts on behalf of the whole community. He states, ‘his vote is not a thing in which he has an option; it has no more to do with his personal wishes than the verdict of a jurymen. It is strictly a matter of duty; he is bound to give it according to his best and most conscientious opinion of the public good’.⁵¹ In conclusion, the efficacy of Utilitarianism comes down to how well people can be trusted to

⁴⁸ M Finley, *Democracy Ancient and Modern*, 1973, Chatto & Windus Press, at pp. 72-73.

⁴⁹ J Mill *Considerations on Representative Government in Mill, Utilitarianism, Liberty, and Representative Government*, 1951, E.P. Dutton, p. 197.

⁵⁰ J Gray (ed) *On Liberty and Other Essays* by J.S. Mill, 1991, Oxford University Press. At p. 238.

⁵¹ *Ibid* at p. 354.

understand and act in their own best interests, Bentham was, on the whole, optimistic concerning this, but J. S. Mill remained, on the whole, pessimistic.

2.2.6. Democracy and Liberal Democracy⁵²

Liberal democracy differs from the so-called ‘people’s democracy’: the latter refers to a democratic system where decisions made by the people are incorporated in a single popular will; this will of the people is expressed by a single party and is accordingly executed by the Government under the close guidance of this popular party. The ultimate aim of the democratic form of governance is to eliminate limits on the Government’s ability to implement the will of the people. C. B. Macpherson unfavourably compares this type of governance with the liberal model, referring to it as a ‘non-liberal democracy: the underdeveloped variant’.⁵³ This divergence between the people’s democracy and liberal democracy undoubtedly reveals the conceptual tensions that can exist between liberalism and democracy on a deeper level: whilst the former focuses on the rights of the individual, the latter emphasises the desires of the collective.⁵⁴

The liberal democracy of the West significantly transformed between the 19th Century and the 20th Century, as the laissez-faire tradition of the 19th Century gave way to high levels of Government intervention in terms of both economic and social matters in contemporary times. The nature of liberal democratic Governments has been defined thus: ‘to advance their vision, liberal democrats support and justify a Government that is (1) popular, (2) respectful of human rights, (3) constitutional, (4) representative, (5) responsible, and (6) dedicated to human welfare’.⁵⁵ These are the characteristic features of any liberal democratic Government, and the people of the state ultimately play the role of judges in this form of Government. The mounting importance of the liberal democracy today, based on these features, thus, makes leading thinkers advocate its prevalence all over the world; as Bhikhu Parekh notes,

⁵² See C Macpherson, *The Real World of Democracy*, 1972, Oxford University Press, third section; B Merrill & B Holden, *Understanding Liberal Democracy*, 1988, Philip Allan Press; G Sartori, *The Theory of Democracy Revisited*, 1987, Chatham House Publishers; P Bhikhu. *The Cultural Particularity of Liberal Democracy Prospects for Democracy: North, South, East, West*, 1993, Stanford University Press; B Barber, *Strong Democracy: Participatory Politics for a New Age*, 1992, University of California.

⁵³ C Macpherson, *The Real World of Democracy*, Oxford University Press, 1972, third section, at p. 25

⁵⁴ For theoretical and philosophical theory see B Merrill & B Holden, *Understanding Liberal Democracy*, 1988, Philip Allan Press, at p. 53, G Sartori, *The Theory of Democracy Revisited*, 1987, Chatham House Publishers, chapter 15 at p. 450.

⁵⁵ R Neal & D Simon, *The New World of Politics: An Introduction to Political Science*, 1997, Rowman & Littlefield, at p. 110.

‘In the aftermath of the collapse of communism in the erstwhile Soviet Union and Eastern Europe, many in the west have begun to argue that Western Liberal Democracy is the best form of Government discovered so far and ideally suited to the modern age. Some even think that as the ‘moral leader’ of the world the west has a duty to encourage its spread and to create a new world order on that basis. The nature and universalisability of Western Liberal Democracy has become a subject of great philosophical and political importance’.⁵⁶

Liberal democracy is a combination of two theories: liberalism, which emphasises individual rights, and democracy, which champions popular sovereignty.⁵⁷ The liberal ideology, which justified the emerging capitalist order, was founded on three key concepts: individualism, autonomy, and equality before the law.⁵⁸ Liberal democracy is viewed as an improvement in terms of classical democracies, mainly due to the fact that it grants greater protection and respect to the rights of individuals. Consequently, liberal democracies strive to provide ‘real democracy’— democracy where popular rule is joined, at least at a formal level, by political equality. Liberal democracy protects individual rights through limiting the power and authority of the Government. This check and clarification process of authority is accomplished by devices such as a written constitution or a Bill of Rights. In this respect, liberal democrats believe that democratic Government should be limited, and that the rights of the people should be protected by law against the majority or the Government. The key element which ultimately distinguishes liberal democracy from other forms of governance is its prioritisation of individual freedom. This freedom can be manifested in two ways, either negatively or positively: whilst the former refers to the freedom from having other actors impinge upon one’s rights, the latter connotes the freedom of individual to do as he or she pleases.

In regard to liberal democracy’s focus on individual liberty, and the desire to separate and preserve the sphere of private freedom as opposed to that of public control, it can be quite difficult to both locate and uphold the boundary between the private and the public

⁵⁶ P Bhikhu, *the Cultural Particularity of Liberal Democracy Prospects for democracy: North, South, East, West*, 1993, Stanford University Press, p. 156.

⁵⁷ J Fonte, *Future of Liberal Democracy*, 1995, National Review Press, at the Introduction.

⁵⁸ S Fredman, *Discrimination and Human Rights*, 2001, Oxford University Press, at p. 14., Locke said ‘Men are by nature all free, equal and independent’, P Laslett (ed) *Locke, Two Treaties of Government*, 1988, the Second Treaties, para. 95.

spheres. This difficulty was first identified by de Toqueville in his analysis of American democracy, and today it is manifest in the debate surrounding the so-called ‘victimless’ or ‘consensual’ crimes. Many liberals argue that there are crimes, such as those involving sex, gambling and drugs, which should not be considered crimes at all, mainly because there is no victim. Peter McWilliams, for instance, opens his controversial book *Ain’t Nobody’s Business if You Do*, with the claim, ‘you should be allowed to do whatever you want with your own person and property, as long as you don’t physically harm the person or property of a non-consenting other’.⁵⁹ However, other liberals would argue that it is extremely rare that the second part of this sentence is true — and that crimes that may at first appear victimless often do have a harmful impact on another in some way or another. Furthermore, behind many of these ‘victimless crimes’, there is nevertheless a crime being committed. For instance, prostitution is often claimed to be a victimless crime, and in the majority of countries the act is not actually illegal, as the general consensus is that it is a private matter involving consensual sex between adults. However, various critics, such as Melissa Farley, argue that prostitution is not a victimless crime at all. Farley writes that, ‘all prostitution causes harm to women’.⁶⁰ The debate continues — and so it will continue to do so as people attempt to define the line between public and private, and the issue of whether society itself can be seen as a victim in cases where the crime — such as acts of sadomasochistic sex — where, despite the fact that those directly involved are consenting, society nevertheless still feels the act to be harmful to the whole.

Conclusion

Western Liberal Democracy has emerged from the unique history of European civilisation, and it has grown in such a way that it has now become one of the most important forms of democratic Government in the contemporary world. The evolution of Western Liberal Democracy must be seen as the result of influential movements in Europe, including the French Revolution and the English Revolution, based on theoretical and philosophical debates surrounding issues such as liberty and equality. The 18th Century’s liberalism, which was based on property,⁶¹ has been transformed to a new liberalism, which is established on formal equality and liberty. Western Liberal

⁵⁹ P McWilliams, *Ain’t Nobody’s Business if You Do: The Absurdity of Consensual Crimes in a Free Society*, 1996, Mary Books, p. 3.

⁶⁰ M Farley, *Prostitution: Factsheet on Human Rights Violations*, 2000, accessed online at www.prostitutionresearch.com, accessed on August 12, 2009.

⁶¹ S Bowles, *Democracy and Capitalism*, 1987, Routledge, at Introduction, p. IX.

Democracy in the contemporary world demonstrates that the civil and political rights of the people can go hand-in-hand with higher standards of living. Samuel Bowles argues that, 'in light of these achievements, liberal democracy is touted as the ideal form of Government for all the peoples of the world. Any other system, including any other notion of democracy, is seen as a lesser construct, an inferior design, a recipe for social and economic backwardness'.⁶² Today, one prevalent question concerning the Western Liberal Democracy is whether it can be severed from its Western historical context and universalised for all nations of the world.

Analysing the chief components in the origin and the development of the Western Liberal Democracy, it is essential to examine some of its essential sources. Any political ideology has a historical life, growth and development, and the ideology of the Western Liberal Democracy does not differ.

The republican and constitutional tradition in the modern world, the American Republic, and liberal democracy in Europe following the French Revolution of 1789, have all played significant roles in terms of the contribution to the evolution of the Western Liberal Democracy of the contemporary age. There were also several political, economic, social, and cultural elements which all contributed to the present state of the liberal democracy:

'Liberalism began as a movement for political, economic, social, and cultural freedom. It was strongly endorsed by the growing middle class and its allies, because such freedom protected and advanced their vital interests. These interests included a stronger role in government; safeguards for religion, speech, press, assembly, and due process: freedom from adverse governmental actions in the economic domain (that is, governmental monopolies, economic regulations and restrictions); and the opportunity for freer choices in politics, economics, and society'.⁶³

The development of liberal democracy has been through various threats, and the position it enjoys today is the result of a long process of evolution. In the West, as well as in the

⁶² *ibid.*

⁶³ R Neal & D Simon, above note 55, at p. 106.

former Soviet bloc of the contemporary world, Liberal Democracy has become the dominant model of Government. More importantly, it is gaining momentous ground in other parts of the world today, and its influence all over the world has been spreading for a long time. 'Liberal democracy has evolved its distinctive institutions — parliamentary representation, executive accountability to parliament, multiple political parties — which embody both liberal and democratic values'.⁶⁴

Liberalism is more concerned with protecting people from their rulers than with establishing rules by people; its purpose is, more accurately, to try to remove those obstacles which stand in the way of the individual's freedom. Furthermore, liberalism also displays several democratic principles, such as equality — whether under terms of natural rights or Utilitarianism.

The liberal tendency has become attached to the democratic direction since around the 1800s, when Bentham and the Utilitarians argued that democracy provided every citizen with the chance to protect his own interests. Liberals favour democracy mainly because it enables citizens to hold their Government accountable, thereby protecting their personal interests. Some, such as John Stuart Mill, have gone further, arguing that democracy is good because it encourages widespread political participation which can then subsequently lead to the development of individuals' intellectual and moral capacities. However, as J. L. Talmon points out, since the development of liberal democracy in Western politics, there has existed a tension between two distinct forms of democracy, which have developed side by side, and which can be termed 'Liberal Democracy' and 'Totalitarian Democracy'. Writing in 1960, he argues, 'Concurrently with the type of liberal democracy there emerged from the same premises in the 18th Century a trend towards what we propose to call the totalitarian type of democracy. These two currents have existed side by side ever since the eighteenth century. The tension between them has constituted an important part in modern history, and has now become the most vital issue of our time'.⁶⁵ These two aforementioned forms of democracy differ in that one — Liberal Democracy — focuses on protecting individual rights and limiting the Government, whilst the other — Totalitarian Democracy — emphasises the popular will

⁶⁴ C April & P Chalk, *Introduction: Threats to Liberal Democracy*. The Australian Journal of Politics and History, 44 (3), 1998, p. 325.

⁶⁵ J Esposito & J Voll, *Islam and Democracy*, Oxford University Press, 1996, p. 36.

and the collective structures of society as a whole. These tendencies often co-exist in the works of the scholars and reformers who have played important roles in the development of Western democracy, and both aspects are often present when people today speak of the need to uphold democratic values.

The next chapter as the last chapter of evolution of democracy is going to explain the role of Muslim scholars in the development of democracy.

2.3. Chapter Three: The Role of Muslim Scholars in the Development of Democracy

Introduction

Today, the debate surrounding democracy has reached a point where it largely focuses on the Islamic world, where the shift of power to the people has been complicated by the historic precedence of Shariah law. An examination of the discussions of the state and Government in Muslim scholarship shows awareness of this tension; however, at the same time, high value is placed on democratic principles, such as individual freedom and happiness, consultation, and the collective good, after we have analysed the evolution of democracy and liberal democracy, this chapter will examine the role of Muslim Scholars in Development of the notion of democracy¹.

2.3.1. Al-Farabi's Rising of Democracy

Mohammad Al-Farabi (872-950) was born in Turkestan and later studied Arabic and Greek, amongst other subjects. It has been claimed that he wrote most of his books in Bagdad whilst he laboured by day in a vineyard; he would read and write in the evening by the light of the lamps of the night watchmen in the adjoining gardens. Whether this is true or not, al-Farabi went on to become one of the greatest philosophers and scientists of the Islamic world. One of his major interests was in developing a new form of Government, which was designed to secure the freedom of the people and their happiness (he called it Saada). After studying the philosophers of Athens, he wrote his book, *The Perfect City* (Al-Madinah al-Fadelah), in which he aims to find the key to a utopian society. In this work, al-Farabi examines the moral basis of human beings and the importance of society, concluding that people need to support and help each other, and that they should therefore continue to live together in society.

However, Al-Farabi worried that democracy, or rather 'the city of the crowd' (al-Madina al-Jamaiyya) where citizens place their own desires first, rather overstated the virtue of absolute freedom. Instead, he more keenly advocated the idea of a contract between the people and the head of society, which was to be formed on the basis of a pledge of allegiance in Islamic Law. Happiness is achieved not only by behaviour of people, he argues, but also by their beliefs. As the Utopian city is based on wisdom and knowledge, the

¹ Regarding the form of government in Islamic law see chapter seven.

head of this city must meet these requirements also.² However, whilst Al-Farabi compared his ideal state to Plato's Republic, he nevertheless rejected Plato's idea of a philosopher-King in favour of a Prophet-imam, based on the Prophet Mohammed when he ruled the city-state of Medina.

If this ideal of rule by a Prophet-imam could not be achieved, Al-Farabi advocated democracy as the next best option based on the republic of the Rashidun Caliphate founded after Mohammed's death in 632.³

2.3.2. Religious, Spiritual and Political Leadership

Imamah, the doctrine of religious, spiritual and political leadership of the nation, has been central to Islamic discussions of Government. Abo al-Hasan al-Maoardy (975-1058) stated that 'the main objective of Imamah is not only to protect the religion but also to organise the life'.⁴ He reacted to the crumbling Abbasid dynasty by proposing that the office of Caliph or Imam should in principle be elected rather than appointed. He recommended that the roles of Imam, ministers, and representative people (Ahl, Alhal and Alaqd) should be viewed in their separate parts — much like the separation of powers which ultimately became a fundamental part of Western democracy. He also highlighted the importance of *Shura*, or consultation, and the dangers of arbitrary personal rule.

Abo yala al-Farra (991-1066)⁵ went on to write a book with the same name as the book of al-Maoardy. However, whilst the first book written by al-Maoardy discusses only the three schools of Islamic Law (Hanafi, Maliki, and Shafai), al-Farra's book adds the idea of the fourth school — which is Hanbali — with the aim of bringing together the four schools, or Madhabs, of Sharia law.

In addition to the previous books of al-Maoardy⁶ and al-Gazali, the work of Al-Goyni (1028-1085)⁷ examines the importance of the state and Imamah, and their conditions.⁸ Like his

² A Wafi (ed), *The Perfect City of Al-Farabi*, 1983, Nahthat Egypt Press, at pp. 23-48.

³ See J Iqbal 'Democracy and Justice: Islam's Political Message Restated' in R Bontekoe & M Stephanians, *Justice and Democracy*, 1997, University of Hawaii Press, pp.241-256.

⁴ A Al-Maoardy, *Al-Ahkam Al-Sultaniah*, 1983, Dar Science Books, first part, at p. 5, available online in Arabic language at <http://www.islamweb.net/newlibrary>, accessed July 31, 2009.

⁵ He is Mohammad al-Farra.

⁶ K Mansur (ed), *Al-Gyathy by Al-Goyni*, 1997, Dar Science Books, at p. 13.

⁷ He is Abdu Al-Malik Al-Goyni (1028- 1085)

⁸ He is Mohammad Abo Hamed Al-Gazali (1058-1111)

predecessors, he confirms the importance of society, and accordingly agrees with al-Farabi's earlier conclusion that the best state is one governed by a head to which the people pledge allegiance in Islamic Law.⁹

Ibn Taymea (1263-1328), one of the most famous names amongst Muslim scholars, lived during the troubled times of the Mongol invasions, and advocated a return of Islam to the two roots of the Qur'an and the Sunnah — the 'trodden path' revealed by the Prophet Muhammed. On the request of King al-Nasser Mohammad, he wrote a book titled *The Legal Policy* (al-seasah al-Shariah). The text is divided into two parts: the first examines the responsibility of people — especially those employed in public work — and how they should act, whilst the second part focuses on the rights of the people under Islamic Law. He concludes by confirming the principle of *Shura* (consultation).¹⁰

The great North African scholar Ibn Kheldon (1332-1406) confirmed the importance of social life under one society. His work examines the authority of state, and how it could be improved in terms of nations and their customs, and the idea of fanaticism and its affect on society. He identifies two kinds of state: the Caliph state, which is based on the legal system; and the Monarchic state, which is based on fanaticism. The defining characteristic between the two is that the first is optionally accepted by people, whilst the second, on the other hand, is imposed by force. Ibn Kheldon examines the relationship between the governor and people: he does not consider the Head of State to be an ideal person, but he does provide many conditions for the state to be ruled in the interests of the people.¹¹

Al-Grafi also writes about the role of the Head of State, arguing that the Head of State is authorised under Islamic Law to pursue actions in order to achieve the interests of the people and to accordingly protect them from any harms; however, the Head of State is not in a position to act solely according to his own desires and/or personal interests.¹²

In the work of these Islamic scholars and reformers, we can clearly see that there are democratic values present: the idea of a state based on securing the freedom and happiness of the people (developed by al-Farabi); of ruling in the interests of the people; of individuals

⁹ E Ramadan (ed), *Iqtesad in Al-Eetegad by al-Gazali*, 2003, Dar Kotaiba Press, at pp. 67-82.

¹⁰ A Al-Maqrebi (ed) *Al-Syasah Al-Shariah* by Ibn Tymeah, 1986, Dar Al-Arqm Press, at pp. 20-45.

¹¹ Ibn Kheldon, *Introduction of Ibn Kheldon*, 1966, Al-Tahrer Press, at pp. 41-65, 161.

¹² Al-Grafi, *Al-Ehkam*, 1967, Islamic Printing Library, at pp. 93-97

possessing both responsibilities and rights in relation to the state and each other; the necessity of guarding against arbitrary, personal rule; the importance of consultation when making decisions (*Shura*); and the separation of powers.

With the aforementioned in consideration, it is worth outlining the distinction between the Sunni and Shia divisions of Islam in relation to the question of state leadership. After the Prophet Mohammed's death, he was succeeded as ruler of Medina by Abu Bakr. Sunni Muslims believe that Mohammed had not explicitly named his successor, although he had indicated his approval of Abu Bakr, who was both his friend and advisor, and that the latter was elected by the people. Shia Muslims, however, believe that the rule should have passed to Mohammed's cousin/son-in-law, Ali, taking a view that decisions concerning leadership should not be made by the people, but should rather be appointed by the Prophet, or by God Himself.¹³

Conclusion

The treatment of democracy in Islamic scholarship has many parallels with the development of democracy in relation to both Western thought and Western practice. Central to both is the conflict within democracy between the interests of the individual, and the interests of the collective, as expressed by J. L. Talmun as a division into 'Liberal Democracy' (which privileges the individual) and 'Totalitarian Democracy' (which privileges the collective).

The major difference in the unfolding of the debate surrounding democracy in the Islamic tradition, as opposed to the Western, is the historic conflation of religious and political leadership in Islam, dating to Prophet Mohammed's rule in Medina. This has meant that Islamic scholars have largely shied away from advocating the complete transfer of power from the monarch-figure to the people, as the idea of authority proceeding from a figure who combines religious and political leadership is embedded in the framework of Islamic tradition. This must be taken into account when considering democracy in relation to Islam: as John L. Esposito and John O. Voll highlight, whilst the desire for democracy is high in Islamic nations, and has, in fact, coincided with a resurgence of Islam, it is nevertheless

¹³ 'What's the difference between Shia and Sunni Muslims?' available online at islam.about.com, accessed August 20, 2009.

necessary to examine each society in light of its own individual characteristics, resources and liabilities, as well as in the context of the complex and dynamic global environment.¹⁴

The evolution of democracy that has been explained in this part will be followed by conceptualising modern democracy in international and comparative law in the next part.

¹⁴ J Esposito & J Voll, *Islam and Democracy*, Oxford University Press, 1996, at p. 11.

Part Three: Conceptualising Modern Democracy in International and Comparative Law:

- **Principles of Modern Democracy**
- **Democracy in International Law**

3. Part Three: Conceptualising Modern Democracy in International and Comparative Law

3.1. Chapter Four: Principles of Modern Democracy

Introduction

Liberal Democracy is the most dominant form of democracy in the contemporary world, and the phrase ‘Liberal Democracy’ is frequently used in order to describe Western democratic political systems, including those of the United States, Britain, New Zealand, Canada, and Australia. There are various constitutional forms of liberal democracies — for instance, republics, as in the case of the US, and France — and, on the other hand, constitutional monarchies, such as the UK and Spain. This chapter deals with Western Liberal Democracy through its principles.

A democratic system is often mistakenly characterised as the rule of the majority.¹ Whilst there is usually a large group of middle class individuals comprising this democratic system, this does not necessarily mean that the majority rule; this only means that the majority usually elects the representative to office; however, the hallmark of any democracy is still the protection of the rights of the minority.² The minority exercise powers which they can exercise so as to preserve their rights against the majority.

As Tocqueville so aptly pointed out, ‘the nations of our time cannot prevent the conditions of men from becoming equal, but it depends upon themselves whether the principle of equality is to lead them to servitude or freedom, to knowledge or barbarism, to prosperity or wretchedness’.³ This leads to another important foundation of any democratic system — the protection of civil rights. The civil rights, such as the Bill of Rights, or the first ten (10) amendments of the United States Constitution, are both prime examples of such civil liberties. These are essential in the preservation of the democracy, mainly because they act

¹ J Davenport (ed), *Democracy in the Middle East*, 2007, Chelsea House Publication, p. 380.

² B Mesquita, & G Downs, *Development and Democracy*, September/October 2005, *Journal of Foreign Affairs*, p. 27; J Single, M Weinstein, and M Halperin, *Why Democracies Excel*. September/October, 2004, *Journal of Foreign Affairs*, p. 44.

³ H Doucouliagos & M Ulubasoglu, *Democracy and Economic Growth: A meta-analysis*, 2006, School of Accounting Economics and Finance, Deakin University, Australia, p. 128.

as further checks and balances against the party in power.⁴ It prevents the democratic Government from being used to oppress the rights of the people.

In the previous chapter, an explanation was provided regarding how difficult it is to establish a fixed definition of democracy. However, there is a series of established principles or concepts which have the purpose of deciding which countries qualify as democracies, and which countries do not, which are outlined in the previous chapter as a useful guide.⁵ These criteria were already included in the UDHR⁶ — a founding document detailing the concept of individual rights as being essential for democracy. The basis of democracy on individual rights encourages individuals to stand up for their rights when they are threatened; furthermore, it gives citizens clear ideas as to the proper limits of state authority and a readiness to do battle, at least by legal means, in support of such limits⁷. Next are the principles or criteria of democracy, most of which have been called Principles of Europe's electoral heritage.⁸

3.1.1. Idea of Majority and Minority in Democratic Society

Due to the difficulties associated with achieving a unanimous consensus, many modern democracies have adopted an approach advocating for a 'Government by the majority of the people',⁹ whereby the majority governs a dissenting minority. This problem has consequently led some to suggestions that the primary meaning of democracy is 'all who are affected by a decision should have chance to participate in making that decision either directly or through chosen representatives'.¹⁰ This definition focuses more on the right of affected people to participate in decision-making as democratically as possible.

⁴ B Mesquita & G Downs, above note 2, p. 29.

⁵ Some of These criteria were mentioned by Robert Dahl, see R Dahl, *Polarity*, 1971, Yale University Press at p. 3

⁶ Adopted and proclaimed by General Assembly resolution 217 A (III) of December 10, 1948, Article 21 is (1 everyone has the right to take part in the Government of his country, directly or through freely chosen representatives. 2 Everyone has the right of equal access to public service in his country. 3 The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.)

⁷ R Pennock, *Democratic Political Theory*, 1979, Princeton University Press, at p. 241.

⁸ See Guidelines on Elections adopted by the Venice Commission at its 51st Plenary Session (Venice, July 5-6 2002) available online at http://www.coe.am/en/docs/venice/opinion_190_2002.pdf accessed July 13, 2008

⁹ A Lijphart, *Patterns of Democracy*, 1999, Yale University Press, p. 31.

¹⁰ L Arthur, *Politics in West Africa*, 1965, George Allen and Unwin, p. 64.

The majority and the minority idea in a democratic society refer to the concept of the tyranny of the majority, and how this can be avoided through the protection of minority groups in society. This is one of the major problems linked with a democratic system, in which the will of the majority is able to dictate what happens in society.¹¹ Therefore, there is the danger that minority groups will be ignored or discriminated against. Examples of such minority interests are religious groups, and racial and cultural minorities, such as persons with disabilities, asylum seekers and refugees. In referring to the ‘minority’ in this context, we do not necessarily mean only groups who are numerically inferior to the majority, although this is often the case. The risk of the tyranny of the majority applies also in the case of groups who, although substantial in number, are relatively lacking in political or economic power, so as to render their ability to influence society comparatively limited. The best example of this is the extent to which women can be perceived as a minority group: although not substantially less numerous than men as a group, women collectively can be said to have less political and economic power than men in the sense that there are less women in Parliament, and women, on average, have less earning power than men.¹²

In order to guard against the risk of the tyranny of the majority, special protection is awarded to minority groups in society in an effort to prevent them simply from being subjugated to the will of the majority. This is done via many ways; for instance, as Wheatley said, ‘the exclusion of a minority is mitigated if majorities and minorities alternate in Government through formal democratic processes. In these cases minorities are given the opportunity to become the governing majority in the next election like in the two party systems of Britain and New Zealand’.¹³ Although this way is not guaranteed but there are many principles of democracy that should protect the rights of minority, as can be seen from the next chapter. One specific example is limiting the powers of Parliament via the Separation of Powers doctrine¹⁴. A variety of democratic institutions have been designed ‘to ensure that minority rights are protected’ through an ‘assortment of mechanisms’.¹⁵

¹¹ L Guinier, *The Tyranny of the Majority*, 1994, Free Press, at p. 131

¹² S Fredman (ed), *Discrimination and Human Rights*, 2001, Oxford University Press, at p. 39; S Wheatley, *Deliberative Democracy and Minorities*, EJIL, 2003, Vol. 14 No 3, 507-527 p. 516

¹³ A Lijphart, above note 9, p. 31

¹⁴ This chapter going to explain the principles of democracy in detail, however, Separation of Powers, Equality and the Rule of Law are some principles of Democracy that have protected the right of minorities; they are going to be explained.

¹⁵ D Haider-Markel, A Querze, and K Lindaman, *Lose, Win, or Draw, A Re-examination of Direct Democracy and Minority Rights*, Political Research Quarterly, June 2007, vol. 60 p. 277.

One of the most important protections of the rights of minority is enshrining people's rights in law; as Wheatley says, 'the deliberative understanding of democracy demands that member states do not simply concern themselves with the question as to whether free and fair elections have taken place, but also with issues of political equality, representation and regard for the views and interests of minorities'.¹⁶ This is done both domestically and at an international level. In the UK, for example, the protection of minority interests is achieved via various legislations, such as the Sex Discrimination Act 1975 (Amendment) Regulations, 2008; the Equality Act, 2006; the Equal Pay Act, 1970 (Amendment) Regulations, 2004, which guarantees equal pay for men and women who are employed in the same work; the Race Relations Act 1976 (Amendment) Regulations 2003, the Disability Discrimination Act 1995 (Amendment) Regulations, 2003; the Employment Equality (Religion or Belief) Regulations, 2003; and the Employment Equality (Sexual Orientation) Regulations, 2003.

The protection of minority rights at an international level is, in many ways, considered more significant than their protection at a domestic level; this is mainly because protection offered by international instruments 'vest[s] members of a minority community with rights that secure a measure of autonomy from the state in which they are located'.¹⁷ The general justification for this has been that there exists certain universal attributes of human identity, which are deemed necessary for International Law to recognise and protect from the tyranny of the sovereign power of the state. However, Patrick Macklem has suggested an alternative explanation for the protection of minority rights in democratic society under International Law: he proposes that, in actual fact, the justification for interference in the sovereignty of states can be justified on the basis of international distributive justice, whereby international minority rights can be viewed as a mechanism for righting the wrongs created by the international legal order itself.¹⁸

Whatever the justification for the international protection of minority rights in a democratic society, it is nevertheless interesting to consider the mechanisms used in International Law when striving to provide such protection. At an international level, minority protection is provided both by specific instruments aimed at protecting their rights, and by instruments

¹⁶ S Wheatley, above note 12, at p. 511

¹⁷ P Macklem, *Minority Rights in International Law*, 2008, International Journal of Constitutional Law, Vol. 6, P. 531.

¹⁸ *Ibid.* at p. 533.

that protect human rights more broadly for everyone, including members of minority groups. Dr Anja Mihr notes that minority groups are increasingly turning to human rights-based instruments in order to seek protection for their specific minority rights;¹⁹ perhaps this is recognition of the fact that minorities seeking protection for their rights often do not wish to assert their differences, but rather see the protection of their rights as them asking for the same treatment as others in society.

Other instruments, such as the United Nations Charter and UDHR, provide protection for minority interests by guaranteeing their human rights. For instance, one of the purposes of the United Nations Charter is to promote and encourage respect for human rights and for fundamental freedoms for all — without distinction as to race, sex, language, or religion.²⁰ Furthermore, Article 1 of UDHR proclaims the principle that ‘all human beings are born free and equal in dignity and rights’, whilst Article 2 proclaims that ‘everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty’.²¹ The two covenants of the ICESCR and ICCPR include a common Article 3 on equality between men and women, whilst Article 27 of the ICCPR confirms the right of minorities ‘in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language’.²²

In Europe, Article 14 of the European Convention of Human Rights states, ‘the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination

¹⁹A Mihr, *Minority Groups in European Politics: Institutions, NGOs, Political Parties and Participation*, April, 2006, Humboldt University Press, at p. 3.

²⁰ Article 1 (3) of UN Charter, in addition to that see Article 13(1) b, and 76 (c)

²¹ Article 7 of Universal Declaration is ‘All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.’

²² Article 27 of the ICCPR

on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.²³

Minority interests are specifically protected via certain international conventions and declarations, such as the Refugee Convention, 1951²⁴, the International Convention on the Elimination of All Forms of Racial Discrimination and CEDAW, 1979.²⁵ The list is numerous, and also includes protection, such as the Declaration on the Elimination of all Forms of Intolerance and Discrimination Based on Religion or Belief, 1981²⁶, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990²⁷, the Declaration on the Rights of Minorities, 1992²⁸, the Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, 1999²⁹, Convention on the Rights of Persons with Disabilities, 2006,³⁰ and the Declaration on the Rights of Indigenous Peoples, 2007³¹.

To this end, minority rights can be seen as a vital democratic value which must be taken into account during the formation of a democratic society. The UN Declaration on Minorities³² and the UNCHR has both concluded that the issue of minorities can only be resolved within

²³ Convention for protection of Human rights and Fundamental Freedoms, adopted by the Council of Europe in Rome in November 4, 1950, enter into force in 1953. Available online at <http://www.hri.org/docs/ECHR50.html#P1.Art3> accessed April 14, 2008.

²⁴ The 1951 Convention relating to the Status of Refugees is the key legal document in defining who is a refugee, their rights and the legal obligations of states. The 1967 Protocol removed geographical and temporal restrictions from the Convention. In July, 2001, UNHCR published a special edition of its *Refugees* Magazine dedicated to the 50th Anniversary of the Convention. See UNHCR the UN Refugee agency available on line at <http://www.unhcr.org/cgi-bin/texis/vtx/protect?id=3c0762ea4> accessed February 12, 2008; International Journal of Refugee Law, 2009, 81

²⁵ Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) G.A.res., 34/180, 34 U.N., GAOR Supp., (No. 46), at 193, U.N.Doc. A/34/46, entered into force September 3, 1981.

²⁶ Declaration on the Elimination of all Forms of Intolerance and Discrimination based on Religion or Belief (adopted 25 November 1981 UNGA Res 36/55 GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/684 (1981).

²⁷ International Convention on the protection of the Rights of All Migrant Workers and Members of Their Families (adopted December 18, 1990 entered into force July 1, 2003 UNGA Res 45/158).

²⁸ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Adopted by General Assembly resolution 47/135 of December 18, 1992, available online at http://www.unhcr.ch/html/menu3/b/d_minori.htm accessed February 12, 2008

²⁹ Adopted 8 March 1999 UNGA Res 53/144, available online at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/a.res.53.144.en?opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/a.res.53.144.en?opendocument) accessed February 12, 2008

³⁰ Convention on the Rights of Persons with Disabilities (CRPWD) (adopted 13 December 2006 and opened for signature on March 30, 2007. entered into force on May 3, 2008) Accessed at <http://www2.ohchr.org/english/law/disabilities-convention.htm> accessed February 12, 2008.

³¹ Declaration on the Rights of Indigenous Peoples 2007 (Adopted 12 September 2007 UNGA Res A 61 L.67).

³² Above note 28.

a democratic framework.³³ Moreover, the UNCHR also underscored the importance of this principle in its ruling concerning Greece when noting that the ultimate objective of the right to free elections and political participation is not democracy but is rather a democratic society, and in a democratic society, the majority has regard for the interests of all groups and people in the state — not merely those of its supporters.³⁴ Likewise, the European Court has determined that, ‘democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities’.³⁵ Moreover, the UNCHR reiterated the necessity for all citizens to have the opportunity and eligibility to actively participate in decision-making which affects them, declaring in this regard that, ‘in a democracy the widest participation in the democratic dialogue by all sectors and actors of society must be promoted in order to come to agreements on appropriate solutions to the social, economic and cultural problems of a society’.³⁶ Thus, in any democracy, it is fundamental that minorities are not excluded, either by unjustifiably denying them citizenship, or otherwise erecting artificial barriers to participation;³⁷ without exception, participation should be facilitated.³⁸

3.1.2. The Right to Political Participation

In the 19th Century, Stuart Mill theoretically underscored the importance of participation in public affairs for all members of society, noting that ‘it is important that every one of the governed have a voice in the Government, because it can hardly be expected that those who have no voice will not be unjustly postponed to those who have’.³⁹ This right to

³³ Ibid, at the preamble ‘ways and means of overcoming obstacles to the establishment of a democratic society and requirements for the maintenance of democracy’ adopted March 7, 1995, E/CN.4/RES/1995/60.

³⁴ S Wheatley, *Democracy in International Law*, April, 2002, ICLQ Vol. 51, pp 225-247 at p. 245.

³⁵ *Chassagnou and others v France*, ECHR, Reports 1999-III, para.112, (1999) 242 (Applications nos. 25088/94, 28331/95 and 28443/95)

³⁶ [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.RES.1995.60.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.RES.1995.60.En?Opendocument) accessed February 26, 2008.

³⁷ S Wheatley, *Deliberative Democracy and Minorities*, 2003, EJIL, Vol. 14 No 3, 507-527 p. 517

³⁸ In The Human Rights committee’s general comment on Article 25 of ICCPR ‘positive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty, or impediments to freedom of movement which prevent persons entitled to vote from exercising their rights effectively. Information and materials about voting should be available in minority language’. General comment 25 (27) Adopted by the Human Rights committee at its 1510th meeting, UN DOC.CCPR/C.21/Rev.1/add.7 (1996), Para. 12. the ‘Lund Recommendations’ on the effective participation of national minorities in public life (1999) adopted by a group of international experts, the purpose of Lund recommendations is to encourage and facilitate the adoption by States of specific measures to alleviate tensions related to national minorities, see Lund recommendation, available online at http://www.osce.org/documents/hcnm/1999/09/2698_en.pdf accessed February 26, 2008.

³⁹ J Mill, *Thoughts on Parliamentary Reform*, 1874, vol. 4 Cosimo Inc

participation was formalised under Article 25 of ICCPR,⁴⁰ stating that, ‘every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2⁴¹ and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country’.⁴²

The general comment adopted by the Human Rights Committee CCPR at its 1510th meeting (fifty-seventh session) on July 12, 1996, contends that, ‘the conduct of public affairs, referred to in paragraph (a), is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by Article 25 should be established by the constitution and other laws’.⁴³ This official position ensures — at least on the formal level — that individuals are actively protected from abuses of public power, including those supported by the majority at the expense of the minority.

However, this participation can be carried out either directly or indirectly. In respect of direct participation, this is outlined in paragraph (b) of Article 25, whereby it is stated that a central requirement for democracy is the population’s direct participation in public affairs. Empirically, as previously examined, this value can be difficult to put into practice. Nonetheless, the Human Rights Committee has specified a number of actions and instances where this does occur, such as when individuals exercise power as members of legislative bodies or by otherwise holding executive office. Furthermore, citizens can also directly participate in public affairs through either selecting or amending their constitution, or when

⁴⁰ ICCPR, Adopted by the General Assembly resolution 2200A (XXI) on 16 December 1966, entered into force March 23, 1976. 999 UNTS 171

⁴¹ Article 2 is ‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.

⁴² Available online at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm accessed February 12, 2008.

⁴³ See the general comment on Article 25 of ICCPR Adopted by the CCPR Committee at its 1510th meeting, U.N. Doc CCPR/C/21

deciding public issues via a referendum or other such electoral process as conducted in accordance with paragraph (b). Additionally, individuals have the opportunity to directly participate in policy making as part of a popular assembly granted decision-making power over local issues or as pertaining to the specific concerns of a particular group. Similarly, citizens are also able to directly participate as members of intermediary bodies intended to represent citizens in consultation with the Government. Where a mode of popular direct participation is established, no distinction should be made of citizens; for instance, barring them from participation based on the civil rights grounds laid out in Article 2, paragraph 1. Furthermore, there should also be no unreasonable restrictions aimed at hampering such participation.⁴⁴

Along with its existence as a cherished and protected democratic right, direct participation also further significantly contributes to the practical strengthening of democratic institutions and governance. The dialogue between citizens and local elected representatives is deemed essential for local democracy as, for instance, it reinforces the legitimacy of local democratic institutions and the overall effectiveness of their action.⁴⁵ As noted by the former commission on human rights, the right to full participation and other fundamental human rights are inherent to the functioning of any democratic society⁴⁶. Sub-national legislative bodies and local councils should always be directly elected.⁴⁷ The right to freedom of political expression is protected by the right to freedom of expression contained in Article 19 of ICCPR,⁴⁸ and it is considered part of direct participation of people to criticise or openly and publicly evaluate their Governments without fear of interference or punishment.⁴⁹ CCPR, in the case of *Marshall vs. Canada*, recognised that, regardless of the particular system of Government, a democratic system must provide for the participation of minority groups;⁵⁰ in the present case, the CCPR confirmed that Article

⁴⁴ See para. 5 and 6 of general comment on Article 25 of ICCPR, above note 38

⁴⁵ Recommendation (2001)19 of the Committee of Ministers to member states on the participation of citizens in local public life.

⁴⁶ E/CN.4/1999/L.55/Rev2, preamble, para. 6

⁴⁷ See Article 3 of European Charter of Local Self-Government, Strasbourg, October 15, 1985.

⁴⁸ See *Dergachev v Belarus*, 921/2000. UN Doc. CCPR/C/74/D/921/2000 Rev. 1, 2 April, 2002, para. 8. Article 19 of ICCPR is '1 everyone shall have the right to hold opinions without interference 2 Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'

⁴⁹ *Aduayom et al, v. Togo*, (Application no. 422-424/90), UN Doc. CCPR/ C/57/D/422/1990, August 19, 1996, para.7.4

⁵⁰ *Marshall v. Canada*, (Application Number 205/1986) U.N. Doc. CCPR/C/43/D/205/1986 at 40 (1991)

25 does not guarantee the right to direct participation,⁵¹ as they can indirectly participate. Secondly, we should also consider indirect participation: an integral part of modern democratic societies is the role played by indirect participation for popular decision-making, and the most prominent form of indirect participation is through the free election of Government representatives. The international community, through organisations such as the UN and OAS, has increasingly monitored elections so as to ensure states' compliance with these criteria. In addition to Article 25 of ICCPR, Article 21 of UDHR refers to election practices, and it is this practice which was reinforced by the creation of UN endorsed guidelines for regulating such election observation in 1992.⁵²

Article 25 of ICCPR states that every citizen must be granted both the right and opportunity to vote; this means that every nation must do everything in their power to ensure that this right is implemented for all its citizens, with special consideration given to minorities who may be more in danger of having this right infringed upon than those individuals within the majority.⁵³ With the aforementioned in consideration, even the right to vote subject to nationality or residence, and the right for foreign residents to vote and stand for election in local authority elections, are considerations recognised in Article 6 of the Council of Europe Convention on Participation of Foreigners in Public Life at Local Level.⁵⁴

Thus, states must guarantee that all persons entitled to vote are able to exercise this right: where registration of voters is required, this should be facilitated, and obstacles to such registration should not be imposed. If there are any conditions applied to this registration, such as those concerning residence, they must be reasonable and should not be imposed in such a way as to exclude the homeless from the right to vote. The state must also be proactive in this regard. The Human Rights Committee stated that positive measures should be taken so as to overcome specific difficulties, such as illiteracy, language barriers, poverty, or impediments to freedom of movement; any and all hindrances which may potentially prevent persons entitled to vote from effectively exercising their rights. For instance, citizens who speak minority languages or are considered illiterate should be aided in their ability to vote through the use of photographs and other symbols; moreover, measures

⁵¹ General comment 23, above note 38.

⁵² GA Res 47/138, 18 Dec, 1992.

⁵³ See UN doc.CCPR/c/79/Add.21. (1994)

⁵⁴ (done at Strasbourg on 5 Feb 1992 entered into force May 1, 1997, ETS No. 144) Accessed at <http://assembly.coe.int/Documents/WorkingDocs/Doc00/EDOC8916.HTM>

should be adopted to ensure that illiterate voters have adequate information on which to base their choice. In addition, states' parties must also indicate in their reports to international organisations the manner in which these difficulties have been dealt with.⁵⁵ The declaration regarding fair and free election states that every adult citizen has the right to vote in elections, and must be able to do that on a non-discriminatory basis. Part of this right includes the assurance that there is an effective, impartial and non-discriminatory procedure for the registration of every adult citizen as a voter. No eligible citizen shall be denied the right to vote or otherwise disqualified from registering as a voter. Furthermore, if such restrictions are enacted, they should be enacted in accordance with objectively verified criteria as prescribed by the law, and must further be consistent with the State's own obligations as proscribed by International Law.⁵⁶

In conformity with paragraph (b), elections must be conducted both fairly and freely on a periodic basis and within a framework of laws guaranteeing the effective exercise of voting rights. Persons entitled to vote must be free to do so for any candidate and for or against any proposal submitted to referendum or plebiscite for public decision. Furthermore, they also must be free to support or to oppose an existing Government without undue influence or coercion of any kind aimed at inhibiting this right or otherwise unfairly distorting the free expression of the elector's will. Voters should be able to form opinions independently, free from violence or the threat of violence, compulsion, inducement or manipulative interference of any kind. Reasonable limitations on campaign expenditure may, however, be justified where considered necessary so as to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party in comparison to others.⁵⁷ Every individual who is denied the right to vote or to be registered as a voter shall be entitled to appeal to a legal body deemed competent to review such decisions, and to correct such errors in what is considered to be a prompt and effective manner. Every voter also has the right to equal and effective access to a polling station in order to exercise his or her right to vote.⁵⁸

⁵⁵ General comment 25 (27) Adopted by the human right committee, UN DOC.CCPR/C21/Rev.1/add.7 (1996), Para. 12 see S Wheatley, *Deliberative Democracy and Minorities*, 2003, EJIL, Vol. 14 No 3, 507-527 p. 517.

⁵⁶ Article 2 of Declaration on Fair and Free Election, unanimously adopted by Governing Council (formerly called the Inter-Parliamentary Council) of IPU at its 154th session (Paris, March 26, 1994), Accessed at <http://www.ipu.org/cnl-e/154-free.htm> on March 16, 2007

⁵⁷ CCPR, General comment, para.19, above note 38

⁵⁸ Article 2 of Declaration on Fair and Free Election, above note 56.

However, all restrictions on the right to vote should be reasonable and are required to be established by law; even for those convicted of crimes, the period of their suspension should be proportionate to the offence committed and the sentence provided.⁵⁹ To this end, the CCPR declared that laws depriving convicted persons of their voting rights for periods of up to ten years may be a disproportionate restriction under Article 25.⁶⁰ In the *Hirst vs. United Kingdom* case, the ECtHR held that a prisoner did not forfeit his or her Convention rights beyond the right to liberty merely because of his or her status as a person detained following conviction. Furthermore, the right to vote was not considered to be a privilege, and the presumption in a democratic state had to be in favour of inclusion. As such, universal suffrage had become the basic principle governing democratic societies.⁶¹

Thus, restrictions on the right to stand for election must — as is the case concerning voting restrictions — be reasonable and accordingly enshrined within the law in order to prevent the occurrence of discrimination. The right of individuals to stand for election should not be unreasonably limited by, for example, requiring candidates to be members of a political party or of any specific party. Without prejudice to paragraph (1) of Article 5 of the ICCPR, political opinion may not be used as grounds to depriving any person of the right to stand for election.⁶² In the case of *Debreczeny vs. Netherlands*:⁶³ Mr Debreczeny was a national police sergeant elected to the municipal council in Dantumadeel where he was also stationed; however, in a decision made on April 10, 1990, the state council ruled that Mr Debreczeny was not eligible for this office due to his position as a national police sergeant, citing issues of a conflict of interest. This judgement was based on Article 25, paragraph (f), of the Gemeentewet (Municipalities Act), which stated that membership in the municipal council was incompatible with, *inter alia*, employment as a civil servant in subordination to local authorities. The author submitted that the refusal to accept his membership in the local council violated his rights under Article 25 (a) and (b) of the ICCPR. He contended that every citizen, when duly elected, should have the right to be a member of the local municipal council where they reside. For this reason, he argued that the relevant regulations, as applied to him, constituted an unreasonable restriction on this right as outlined in Article

⁵⁹ Para.10 and 14 of CCPR, above note 38

⁶⁰ UN doc CCPR/C/79 ADD.57 para.19 (1995)

⁶¹ *Hirst v. UK* (No. 2) Application no. 74025/01, (2006) 42 E.H.R.R. 41

⁶² para.15-17 of the General Comment, above note 38.

⁶³ *Debreczeny v. Netherlands*, (500/1992) CCPR/C/53/D/500/1992

25 of the Covenant. The CCPR noted that the restrictions on the right to be elected to a municipal council are clearly regulated by law, and that they are based on objective criteria, namely the selectee's professional appointment by or in subordination to the municipal authority. The Committee accepted the State party's reasoning for these restrictions put in place so as to guarantee the sanctity of its democratic decision-making process through limiting issues of conflict of interest. The Committee remarked that the author's position as a national police officer stationed in Dantumadeel made him subordinate to the mayor of this town who himself was accountable to the council, thus, representing a potential conflict of interest for both parties. Due to this potential conflict of interest, the Committee ruled that restrictions on the author did not violate his rights under Article 25 of the Covenant.⁶⁴

At its 45th session, the General Assembly of UN adopted a resolution entitled enhancing the effectiveness of the principle of periodic and genuine elections.⁶⁵ In any State, the authority of the Government can only be derived from the will of the people as expressed in genuine, free and fair elections, held at regular intervals on the basis of universal, equal and secret suffrage.⁶⁶ In conformity with paragraph (b) of Article 25 of ICCPR, elections must be conducted both fairly and freely, and on a periodic basis within a framework of laws guaranteeing the effective exercise of voting rights. Persons entitled to vote must be free to vote for any candidate they choose, as well as for or against any proposal submitted to referendum or plebiscite. In addition, they must also be free to support or to oppose Government, and to do as such without undue influence or coercion of any kind which may be viewed as able to distort or inhibit the free expression of the elector's will. Voters should be able to independently form opinions, free from violence or the threat of violence, compulsion, inducement or manipulative interference of any kind. Furthermore, reasonable limitations on campaign expenditures may be justified where this is necessary so as to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party. The results of these genuine elections should be both respected and actively implemented.⁶⁷

⁶⁴ *Debreczeny v. The Netherlands* above note 63, for the same case see *Ignatane v. Latvia* (88/1999) U.N. Doc. CCPR/C/72/D/884/1999.

⁶⁵ GA Res. 45/150 Feb 21, 1991.

⁶⁶ Article 1 of Declaration on Fair and Free Election, above note 56

⁶⁷ para.19 of CCPR general comment, above note 38

Practically, this is assured through election monitoring by international organisations, such as the UN and the OAS.⁶⁸ The General Assembly of the UN declared that the ‘periodic and genuine elections (are a) necessary and indispensable element and crucial factor in the effective enjoyment of a wide range of other human rights’, when it authorised the monitoring of national elections.⁶⁹ However, whilst elections are an important component of any democratic Government, they are, by no means, exhaustive when defining such a society; the UN Secretary General stated in this regard that democratisation must begin but cannot end with competitive elections.⁷⁰

CCPR notes that any system operating in a State party must ultimately guarantee and give full effect to the free expression of the will of the electors.⁷¹ Based on this decision, CCPR placed the following restrictions on party activities: firstly, party membership should not be a condition of the eligibility to vote, nor of grounds for the disqualification of this right;⁷² secondly, the rights of persons to stand for election should not be unreasonably limited by requiring candidates to be party members or otherwise aligned to any specific party;⁷³ and finally, the right to freedom of association, including the right to form and join organisations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by Article 25. The CCPR concluded that political parties and the opportunity to be a member of a political party play a significant role in the conduct of public affairs and the election process overall.⁷⁴

The previous electoral matters can only be guaranteed if the basic conditions of a democratic state are fulfilled; therefore, there should be conditions for implementing such principles. For example: respect for fundamental human rights;⁷⁵ regulatory levels and

⁶⁸ See E Brahm, *Election Monitoring*, 2004, Beyond Intractability Org, available online at http://www.beyondintractability.org/essay/election_monitoring, accessed on September 26, 2007.

⁶⁹ GA Res. 46/137 of Dec 17,1991

⁷⁰ Report of the Secretary General, support by the UN system of the efforts of Governments to promote and consolidate new or restored democracies, UN Doc A/52/513, 1997, para.30

⁷¹ para.21 of CCPR general comment, above note 38

⁷² Ibid para.10

⁷³ Ibid para.17

⁷⁴ Ibid para.26.,for more see G Fox, *the Right to Political Participation in International Law*, in G Fox & B Roth,(eds) *Democratic Governance and International Law*, 2000, Cambridge University Press. at p. 59

⁷⁵ This conditions have been stated in more detail in draft explanatory report, p. 25 ‘Democratic elections are not possible without respect for human rights, in particular freedom of expression and of the press, freedom of circulation inside the country, freedom of assembly and freedom of association for political purposes, including the creation of political parties.’ Code of good practice in Electoral Matters guidelines and Explanatory Report adopted by the Venice Commission at its 52nd Plenary Session (Venice, October 18-19, 2002)

stability of electoral law; the fundamental elements of electoral law (in particular the electoral system); membership of electoral commissions and the drawing of constituency boundaries, which should not be open to amendment less than one year before an election, or should be written in the constitution or at a level higher than ordinary law; moreover, there should be procedural guarantees, including the organisation of elections by an impartial body, national and international observation of elections, and an effective system of appeal. However, there is no preference for a certain electoral system — both proportional and majority election systems are possible.⁷⁶

Article 25 of ICCPR has provided standards for conduct of elections. It mandates that, within a democracy, everyone has the right to partake in the management of public affairs. For this reason, it therefore demands the existence of representative institutions at all levels and, in particular, a Parliament which represents all necessary components of society. Furthermore, these institutions must have the necessary power and means to express the will of the people by legislating and overseeing Government action.⁷⁷

Paragraph (c) of Article 25 of ICCPR guarantees every citizen both the right and the opportunity to enjoy public services without regard for distinctions based on race, colour, sex, language, religion, or political view. In addition, these services cannot be denied on the basis of national or social origin, property, birth or other status, and must be in accordance to general standards of equality. However, this right does not entitle every citizen to obtain guaranteed employment within the public services.⁷⁸ As stated in paragraph 4 of the general comments of CCPR, it is considered reasonable to require some restrictions, such as a higher age or educational requirements, for the provision of public services.⁷⁹ Moreover, as public services are comprehensive, they include the executive, judiciary, legislature, and other areas of state administration within their larger jurisdiction.

Article 25 (c) deals with the rights and opportunities of citizens to have access to general terms of equality in relation to public service positions. Citizens should enjoy public services equally; this implies that the State should be proactive in ensuring that all citizens,

⁷⁶ For more about the electoral system see B Grofman & A Lijphart, *Electoral Laws and Their Political Consequences*, 1986, Agathon Press.

⁷⁷ Article 11 of Universal Declaration on Democracy, adopted without a vote by the Inter-Parliamentary Council at its 161st session (Cairo, September 16, 1997)

⁷⁸ See CCPR/C/60/D/552/1993, para. 13/1,

⁷⁹ See UN doc.1997, CCPR/C/79/Add.73 para. 17

even the disabled, are able to enjoy this right. The criteria and processes for deciding appointments, promotions, suspensions and dismissals must therefore be objective and reasonable. Affirmative measures may be taken in appropriate cases so as to ensure that there is equal access to public service for all citizens. Basing access to public services on equal opportunity and general principles of merit, as well as providing secured tenures, helps to ensure that individuals holding public service positions are free from political interference or undue external pressures. Furthermore, it is particularly important that persons do not suffer discrimination in the exercise of their rights under Article 25, subparagraph (c), or on any of the grounds set out in Article 2, paragraph 1.⁸⁰

In the case of *George Kazantzis vs. Cyprus*,⁸¹ the author claimed that his non-appointment to the post of District Judge in favour of someone less qualified than himself violated his right to ‘access, on general terms of equality, to public service’. In making such a claim, Mr Kazantzis invoked Article 25 of the Covenant, along with Article 17 and Article 26. The author alleged that he was properly qualified for the post of District Judge but was only given a two-minute interview before being rejected for this position. Furthermore, it was asserted that the appointment of another applicant was based on factors other than the actual interview.⁸² The CCPR observed, however, that the author had provided no details as to the reasons the successful judge was appointed beyond general allegation of nepotism, nor did he adequately prove why his candidacy was superior in relevant respects to that of his competitor, or to any of the further matters which the CCPR would be required to consider before it could resolve such a claim. Consequently, the author failed to substantiate his allegations in accordance with the admissible law.⁸³

⁸⁰ Article 2 paragraph 1 is ‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. Para 23 of CCPR general comment above note 38, see S Wheatley. *Democracy, Minorities and International Law*, 2005, Cambridge University Press, At p. 130.

⁸¹ *George Kazantzis v. Cyprus*, U.N. Doc. CCPR/C/78/D/972/2001

⁸² As to the author's claims of a violation of articles 17, 25 and 26 of the Covenant, the CCPR notes that the author claims that his application had been treated unequally, with a person less qualified than the author being appointed by the Supreme Council of Judicature to the post of District judge. The CCPR notes that Article 25(c) of the Covenant confers a right of access, on general terms of equality, to public service, and thus, in principle, the claim falls within the scope of this provision in this respect.

⁸³ For more cases under Article 25 (c) see *George Damianos v. Cyprus*, U.N. Doc. CCPR/C/84/D/1210/2003

As there are no generally accepted standards with regard to the election monitoring the resolution of the parliamentary Assembly of the Council of Europe⁸⁴ states that, ‘at the moment, despite the work which international organisations such as the OSCE’s⁸⁵ Office for Democratic Institutions and Human Rights (ODIHR)⁸⁶ and the Council of Europe have been doing for some years, there is no single text setting out the basic rules for the conduct of elections’.⁸⁷ The Assembly, therefore, called on the Venice Commission⁸⁸ with the purpose to ‘set up a working group, with the aim of discussing electoral issues on a regular basis; to devise a code of good practice in electoral matters on the guidelines set out in the appendix to the explanatory memorandum of the report on which this resolution is based, on the understanding that this code should include rules on the run-up to the election, the elections themselves and on the period immediately following the vote; to compile a list of the underlying principles of European electoral systems by co-ordinating, standardising and developing current and planned surveys and activities’.⁸⁹ The working group subsequently drafted a Code of good practice in Electoral Matters, which was adopted by the Venice Commission in 2002; the draft explanatory report of the code of good practice clarifies that the European electoral Heritage ‘comprises two aspects, the first, the hard core, being the constitutional principles of electoral law such as universal, equal, free, secret and direct

⁸⁴ Council of Europe Founded in 1949, the Council of Europe seeks to develop throughout Europe common and democratic principles based on the European Convention on Human Rights and other reference texts on the protection of individuals. The Parliamentary Assembly, driving force for European co-operation, grouping 636 members (318 representatives and 318 substitutes) from the 47 national parliaments. Available online at http://www.coe.int/T/e/Com/about_coe/ accessed April 14, 2008

⁸⁵ Organisation for Security and Co-operation in Europe, The OSCE develops from its beginnings in 1975 as a Conference that helped to bring together the Cold War rivals, into the world's largest regional security organisation, whose activities promote peace and stability. With 56 participating States from Europe, Central Asia and North America, the Organisation for Security and Co-operation in Europe (OSCE) forms the largest regional security organisation in the world. The OSCE is a primary instrument for early warning, conflict prevention, crisis management and post-conflict rehabilitation in its area. It has 19 missions or field operations in South-Eastern Europe, Eastern Europe, the Caucasus and Central Asia. The Organisation deals with three dimensions of security - the politico-military, the economic and environmental, and the human dimension.

⁸⁶ The OSCE Office for Democratic Institutions and Human Rights is based in Warsaw, Poland. It is active throughout the OSCE area in the fields of election observation, democratic development, human rights, tolerance and non-discrimination, and Rule of Law.

⁸⁷ Resolution, 1264 (2001) of the parliamentary Assembly of the Council of Europe, Text adopted by the Standing Committee, acting on behalf of the Assembly, on November 8, 2001 see Doc. 9267, report of the Political Affairs Committee, para. 3

⁸⁸ The European Commission for Democracy through Law, better known as the Venice Commission, is the Council of Europe's advisory body on constitutional matters. Established in 1990, the commission has played a leading role in the adoption of constitutions that conform to the standards of Europe's constitutional heritage. Initially conceived as a tool for emergency constitutional engineering, the commission has become an internationally recognised independent legal think-tank. It contributes to the dissemination of the European constitutional heritage, based on the continent's fundamental legal values whilst continuing to provide ‘constitutional first-aid’ to individual states. The Venice Commission also plays a unique and unrivalled role in crisis management and conflict prevention through constitution building and advice. See http://www.venice.coe.int/site/main/Presentation_E.asp accessed April 14, 2008.

⁸⁹ Above note 87, para.6

suffrage, and the second the principle that truly democratic elections can only be held if certain basic conditions of a democratic state based on the Rule of Law, such as fundamental rights, stability of electoral law and effective procedural guarantees, are met'.⁹⁰

Article 3 of Protocol 1 of the ECHR emphasises what it considers to be the right of people to participate in political life, and to accordingly stand for election if so desired.⁹¹ the ECtHR in the case of *Tanase and Chirtoaca vs. Moldova*,⁹² unanimously held that there had been a violation of Article 3 of Protocol 1 to the Convention: the applicants alleged that the ban preventing Moldovan nationals holding other nationalities from being elected to Parliament interfered with their right to stand as candidates in free elections, and to accordingly take their seats in Parliament if elected, thus, ensuring the free expression of the opinion of the people in the choice of legislature. They relied on Article 3 of Protocol 1. The authorities had subjected them to discrimination in comparison with other Moldovan nationals.

The Parliamentary Assembly of the Council of Europe declared that the Code of Good Practice in Electoral Matters is of great importance as it sets out the underlying principles of European electoral systems and further stipulates the conditions for their application.⁹³ Subsequently, it accordingly made recommendations to the Committee of Ministers to transform the Code of Good Practice in Electoral Matters⁹⁴ into a European convention, taking into consideration, where appropriate, the draft convention of the ACEEEO⁹⁵ and the work of the Office for Democratic Institutions and Human Rights (ODIHR)⁹⁶ of the Organisation for Security and Co-operation in Europe (OSCE).⁹⁷ In its reply to the

⁹⁰ Code of good practice in Electoral Matters above note 75

⁹¹ Convention for protection of Human rights and Fundamental Freedoms, adopted by the Council of Europe in Rome in November 4, 1950, entered into force in 1953. Article 3 of protocol 1 is 'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.' Available online at <http://www.hri.org/docs/ECHR50.html#P1.Art3> accessed April 14, 2008.

⁹² Application No.7/08 ECtHR 657, September 16, 2009

⁹³ Rec 1595, on January 30, 2003.

⁹⁴ Above note 75

⁹⁵ The Association of Central and Eastern European Election Officials (ACEEEO) was created in November, 1991 in Budapest, it is promoting the institutionalisation and professionalization of democratic procedures in the regions, as a non-profit, regional organisation, which is independent from political parties and Governments with a legal standing based on International Law, available on line at <http://www.aceeoo.org/> accessed April 14, 2008. However, Draft convention 'on election sanders, electoral rights and freedom' approved by the ACEEEO in Moscow on September 26-28, 2002.

⁹⁶ Above note 86

⁹⁷ Above note 85

recommendation of the Parliamentary Assembly, the committee of Ministers had recognised the importance of the Code and was pleased to note that it is already serving as a useful reference document for related Council of Europe activities. The Committee of Ministers considered that, at this stage, it would be considered premature to initiate work on its transformation into a legally binding instrument. The Committee of Ministers takes note of the signing of the Convention on Standards of Democratic Elections, Electoral Rights and Freedoms in the Member States of the Commonwealth of Independent States in October, 2002, and will follow with interest its implementation.⁹⁸ The last convention was approved by the Inter-Parliamentary Assembly of the Commonwealth of Independent States (CIS),⁹⁹ and both intergovernmental and international non-governmental organisations have accordingly endorsed the Declaration of Principles for International Election Observation;¹⁰⁰ furthermore, the European Commission and the European Parliament have also endorsed the Declaration.

In Europe, Elections must be held on the basis of the European Electoral Heritage, which comprises two aspects: first, the constitutional principles of electoral law, as mentioned by Article 25 of ICCPR, such as universal, equal, free, secret and direct suffrage; and second, the principle that truly democratic election can only be held if certain basic conditions of democratic state — based on the Rule of Law, such as fundamental rights, stability of electoral law, and effective procedural guarantees — are met.¹⁰¹

Article 13 of African Charter on Human and People's Rights¹⁰² emphasises the right of people to participate in political life. In 2007, the Assembly of Heads of State and Government of the African Union adopted the African Charter on Democracy, Elections, and Governance. One of the main objectives of this Charter was to promote the establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press, and accountability in the management of public

⁹⁸ CM/AS(2003)Rec1595, October 13, 2003,

⁹⁹ Convention was adopted on October 7, 2002 and was ratified, on September 28, 2006; the Secretary General of the Council of Europe asked for an opinion on the Venice Commission on the Convention, The final opinion was adopted by the Venice Commission at its 70th plenary session (Venice, March 16-17, 2007).

¹⁰⁰This Declaration commemorated at the United Nations in October, 2005.

¹⁰¹ Explanatory report adopted by the Venice Commission at its 52nd Plenary Session (Venice, October 18-19, 2002) above note 77.

¹⁰² adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986., Article 13 is 'Every citizen shall have the right to participate freely in the Government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law'

affairs.¹⁰³ Even despite the fact that neither the UN nor any other international organisations have an intrinsic competence to monitor election;¹⁰⁴ efforts have nevertheless been made to draw-up international instruments with guidelines for democratic elections.¹⁰⁵

3.1.3. Freedom of Expression

A further condition essential for democratic elections is the freedom of expression, thus, allowing for no limitation as to the ability for individuals within democracies to express their ideas and opinions. Freedom of expression is a fundamental human right, permitting people to receive and exchange information, regardless of frontiers or political boundaries. In its very first session in 1946 — before any human rights declarations or treaties had been adopted — the UN General Assembly adopted resolution 59(I) stating that, ‘freedom of information is a fundamental human right ... the touchstone of all the freedoms to which the United Nations is consecrated’.¹⁰⁶ Freedom of expression is essential in enabling democracy to work and in allowing public participation in decision-making. Citizens cannot effectively exercise their right to vote or actively take part in public decision-making if they do not have free access to information and ideas, and/or if they are unable to freely express their views. Freedom of expression is thus, not only important for individual dignity but also for participation, accountability and democracy. Violations of freedom of expression often go hand-in-hand with other violations, in particular the right to freedom of association, as will be analysed next.

Many domestic constitutions or acts of democratic countries have included the right of freedom of expression.¹⁰⁷ Moreover, treaties and international instruments provide the most significant international protections of the rights to freedom of expression; for instance,

¹⁰³ Article 2 of African Charter on Democracy, Elections, and Governance, adopted by the eighth ordinary session of the assembly, held in Addis Ababa, Ethiopia, January 30, 2007 .

¹⁰⁴ The UN has to receive a formal request of a member state, see Boutros-Ghali, an agenda for democratisation, supplement to the reports A/50/332 and A/51/512 on democratisation, December 17, 1996. States is tempted to accept international observers to legitimise the election results, but it remains an option and not an obligation. See T Franck, *Legitimacy and Democratic Entitlement*, in G Fox and B Roth, above note 73, at p. 43-44.

¹⁰⁵ For more detail of guidelines for democratic election see *Compendium of International Standards for Election*, 2007. Elanders Graphic Systems AB, available online at <http://www.needs-network.org>. Accessed on July 18, 2008. This Compendium aims to assist EU Election Observation Missions and other interested stakeholders in clearly identifying the international standards to use in assessing the conduct of elections.

¹⁰⁶ The UN General Assembly adopted resolution 59(I), on 14 Dec 1946,

¹⁰⁷ For example see Article 5 of basic law of federal republic of Germany; Article 20 of Constitution of the Kingdom of Spain; Article 40, 6 of constitution of Ireland; Article 21 of Constitution of Italian Republic, Article 13 of Federal Constitutional Laws of republic of Austria, Article 1 of Constitution of the Kingdom of Sweden, and Article 1 of Human Rights act of the UK.

Article 19 of the UDHR¹⁰⁸ proclaims the right to freedom of expression, which includes freedom to seek, receive, and impart information and ideas through any media, and regardless of frontiers. These rights are limited, however, by Article 29, which permits restrictions ‘solely for the purpose of securing... respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society’.

Article 19 of ICCPR¹⁰⁹ sets forth the right to freedom of opinion and, in a general comment concerning this Article, the human rights committee emphasised the requirements imposed by these Articles, stating that ‘restrictions must be provided by law, and they must be justified as necessary.’¹¹⁰ However, even military secrets do not fall outside the scope of Article 10, as is emphasised by the ECtHR.¹¹¹ The United Nations General Assembly declared during its first session, ‘freedom of information is a fundamental human right’.¹¹² The UNCHR stresses the importance of a diversity of sources of information, including mass media at all levels, and the importance of the free flow of information as a way of promoting full enjoyment of the freedom of opinion and expression¹¹³

Article 10 of the ECHR¹¹⁴ and Article 9 of African Charter on Human and People’s Rights¹¹⁵ emphasises this Right, it is subject only to the general restrictions set forth in

¹⁰⁸ UDHR above note 6. Article 19 is ‘Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.’

¹⁰⁹ ICCPR, above note 40, Article 19 is ‘1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:(a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public) of public health or morals.’

¹¹⁰ Report of the HRC to the General Assembly, 38th sess., supp. no 40, 1983(A/38/40) General Comment 10

¹¹¹ *Handyside v UK* (1979-80) 1 E.H.R.R. 737 para.49 and the *Sunday Times v United Kingdom*, (1979-80) 2 E.H.R.R. 245, April 26, 1979, para.65,

¹¹² The UN G.A. Resolution 59(1), 14 Dec. 1946.

¹¹³ Former UNCHR, Resolution 2001/47

¹¹⁴ Above note 91, Article 10 is ‘1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.’

Article 27-29, Article 13 of American Declaration of the Rights and Duties of Man¹¹⁶ asserted on that right. The ECtHR has emphasised that ‘freedom of expression constitutes one of the essential foundations of such democratic society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10(2), it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society’.¹¹⁷ However, the previous treaties and international instruments do not make the right to freedom of expression absolute: in fact, interferences with this right may be permitted if they are prescribed by law. For example, the ECtHR concluded that Article 10 has been infringed in cases where there was no legal basis on restrictions imposed on a compliant who desired access to reading matters, radio and television, or for interference with exercise of his right to receive information during his psychiatric treatment and confinement.¹¹⁸ Accordingly, in order to have a legitimate aim, a restriction must be in furtherance of, and genuinely aimed at, protecting one of the permissible grounds as listed in Article 10, 2.¹¹⁹ To be deemed a ‘necessary’ restriction, it must be more than reasonable or desirable. A ‘pressing social need` must be demonstrated, the restriction must be proportionate to the legitimate aim pursued, and the reasons given to justify the restriction must be considered to be both relevant and sufficient.¹²⁰ Such reasons for the legitimate repression of speech include, for example, national security, territorial integrity, public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, the prevention of the disclosure of information received in confidence and measures taken for maintaining the authority and impartiality of the judiciary. The contracting states have a certain margin of appreciation in terms of determining the necessity of a restriction, a margin which ‘goes hand in hand with

¹¹⁵ ACHR, above note 102, Article 9 is ‘Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law.’

¹¹⁶ American Declaration of The Rights and Duties of Man, Adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948.

¹¹⁷ *Handyside v United Kingdom*, (5493/72) ECHR 5 (December 7, 1976) para.49

¹¹⁸ *Herczegfalvy v. Austria*, 48/1991/300/371. 24 Sep 1992, para. 91 and 94, for the same cases see *Hashman and Harrup v. UK*, Application no. 25594/94 (Judgment of November 25, 1999) Reports 1999-VIII; *Gawed v. Poland*, judgment no 26229/95, reports 2002-II.

¹¹⁹ *The Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245, April 26, 1979

¹²⁰ *Handyside v United Kingdom*, above note 113, at para. 48-50. and *The Sunday Times v United Kingdom*, above note 111, at para.62

a European supervision¹²¹ Moreover, freedom of expression may be limited by the right to a fair judicial hearing¹²² and the right to privacy¹²³.

Freedom of Speech, as part of the Freedom of Expression right, has historically been used as a tool of the people to prevent the suppression of their rights by voicing their opinions. The fundamental laws of European States have traditionally held one's freedom to information in the highest regard.¹²⁴ Moreover, the Freedom of Speech is a constitutionally guaranteed right:¹²⁵ it protects the right of every person to speak his mind with regard to any issue at all, even if it is critical of a certain class or even the Government.

3.1.4. Freedom of Association¹²⁶

Individuals must also have the freedom to form and join organisations. In this respect, everyone has the right to join any group of people with a common purpose or interest. It has been long since recognised that the right to form associations cannot be frustrated or limited by any group. Furthermore, in the interests of preserving this right, over the course of the history of the European Union, several groups have lobbied for change in order to ensure that this right is not abridged: the citizens of a nation were no longer to be regarded as servants but rather as dominant political forces in determining policies of a nation.¹²⁷ In addition, there are many interrelated causes for the French Revolution.; perhaps the single most obvious cause was the rising ambition of bourgeoisie class, who were allied with the lower class folk in their attempt to overthrow what was then perceived as an oppressive monarchy in France during that period.¹²⁸

The French experience clearly outlines the importance of the Freedom of Association. As a democracy, everyone is ideally offered the right to be heard. However, a pragmatic assessment of this right shows that, sometimes, there is the need to have other voices pitch-

¹²¹ *The Sunday Times v United Kingdom*, above note 111 at para. 59.

¹²² See Article 14 of the ICCPR, Article 8 of the ACHR, Article 7 of the ACHPR and Article 6 of the ECHR.

¹²³ See Article 17 of the ICCPR, Article 11 of the ACHR, and Article 8 of the ECHR

¹²⁴ S Holmes, *Passions and Constraint: on the Theory of Liberal Democracy*, 1995, University of Chicago, p. 198

¹²⁵ A Sen, *Democracy as a Universal Value*, 1999, *Journal of Democracy*, 10.3, pp. 3-17.

¹²⁶ The ECtHR defined freedom of association in the *Association X v Sweden*-case as 'a general capacity for the citizens to join, without interference by the State, in associations in order to attain various ends.' see International expert Steven Anderson November, 2003, Case 130, Estonia 31, for more about freedom of association see J Wright, *Tort Law and Human Rights*, 2001, Hart publishing, at p70.

¹²⁷ M Doyle, *Democratic Liberalization*, 2007, Columbia University Press, p. 27.

¹²⁸ P Mcphee, *the French Revolution 1789-1799*, 2002, Oxford University Press, p. 79.

in so that one can be heard; this is where the Freedom of Association becomes relevant as it pools together people with similar interests and subsequently forms them into a block, which is ultimately considered more effective in lobbying for, and protecting, their interests. Whilst an individual is protected by the law, an association has more political clout: there is more influence that a group is able to exert on the policy making functions of a Government. As such, abridging one's right to associate is ultimately detrimental to the success of a democracy — and also detrimental to the rights of a group.

Article 20 of the UDHR¹²⁹ protects the Right to Freedom of Assembly and Association.¹³⁰ In addition, many human rights treaties state these rights; Article 21 of the ICCPR¹³¹ provides guarantees to peaceful Assembly, whilst Article 22 protects Freedom of Association.¹³² Any restrictions on these rights should be necessary and provided by law. In order for individuals to fully realise their rights to freedom of association, both organisations themselves must be able to freely function without unreasonable governmental interference. Article 8 of the ICESCR¹³³ requires State parties to ensure 'the right of the trade union to

¹²⁹ UDHR, above note 6

¹³⁰ Article 20 is '1-Everyone has the right to freedom of peaceful assembly and association. 2- No one may be compelled to belong to an association.'

¹³¹ Above note 40; Article 21 is 'The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (order public), the protection of public health or morals or the protection of the rights and freedoms of others.'

¹³² Article 22 is '1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (order public), the protection of public health or morals or the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right. 3. Nothing in this Article shall authorise States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.'

¹³³ International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of December 16, 1966 entered into force January 3, 1976, Article 8 is '1. The States Parties to the present Covenant undertake to ensure: (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organisation concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organisations; (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country. 2. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State. 3. Nothing in this Article shall authorise States Parties to the International Labour Organisation Convention of 1948

function freely'. Although this specifically refers only to trade unions, it nevertheless shows an understanding that the right to 'form and join' an organisation may not be sufficient so as to enable an individual to fully realise his or her right to freedom of association, as is mentioned by the European Court of Human Rights.¹³⁴

Article 11 of the ECHR¹³⁵ states that, 'everyone has the right to freedom of association with others, including the right to form and to join trade unions for the protection of his interest'. Article 15¹³⁶ and Article 16¹³⁷ of the American Convention¹³⁸ guarantee these rights and provide further detail of freedom of association 'for ideological, religious, political, economic, labour, social, cultural, sports, or other purposes'. As such, no restrictions shall be placed on the exercising of these rights other than those which are prescribed by law and are which are ultimately deemed necessary in a democratic society, such as for the interests of national security or public safety, the prevention of disorder or crime, or for the protection of health or morals, or for the protection of the rights and freedoms of others. Moreover, this right should not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.¹³⁹

The International Labour Organisation (ILO)¹⁴⁰ has adopted a number of conventions concerned with the rights of workers to organise and bargain through trade unions. The ILO convention 87 concerning freedom of association and protection of the right to organise

concerning Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.'

¹³⁴ See Case of *United Communist party of Turkey and others v. Turkey* (1998) 26 E.H.R.R. 121 at para. 24,

¹³⁵ Above note 90

¹³⁶ Article 15 is 'The right of peaceful assembly, without arms, is recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedom of others.'

¹³⁷ Article 16 is '1. Everyone has the right to associate freely for ideological, religious, political, economic, labour, social, cultural, sports, or other purposes. 2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others. 3. The provisions of this Article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.'

¹³⁸ American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 adopted in 1969, entered into force July 18, 1978.

¹³⁹ Article 11 of European Convention on Human Rights, above note 91

¹⁴⁰ The international Labour Organisation (ILO) is the United Nations special specialised agency which seeks the promotion of Social justice and internationally recognised human and labour rights. It was founded in 1919.

(1948)¹⁴¹ asserts the rights of workers and employers to establish and join organisations and to be free to elect representatives and accordingly draw-up rules and constitutions as they wish, all without the interference of public authorities. The Declaration of Fundamental Principles and Rights at Work (1998)¹⁴² asserts that, even if ILO members have not ratified this convention, they nevertheless still have an obligation as members of the ILO to promote principles of fundamental rights — including the freedom of association. Moreover, Article 12 of the Charter of fundamental rights of the European Union (2000)¹⁴³ upholds the rights to assembly and association.

The Freedom of Association not only concerns the right to form a political party, but also guarantees the right of such a party, once formed, to freely continue with its political activities.¹⁴⁴ The Right to Freedom of Association also includes the right to independence from Government and employer interference, and the right for trade unions to elect officials and organise their own affairs as they see fit. Freedom of Association has also been held to embody the right to strike.

The Freedom of Association comprises two correlated rights: the right to join, and the right not to join;¹⁴⁵ this also involves the right of a person to be protected from the rule of the majority or those in associations. They cannot be prejudiced by their decision not to take advantage or to otherwise utilise the right to join or form associations which others make. Whilst this can be viewed as an expansion of the right of equal protection and due process in that a person cannot be prejudiced for acts that the individual chooses not to take advantage of, it must also be highlighted that not joining is an important right which must be respected.

¹⁴¹ convened at San Francisco by the Governing Body of the International Labour Office, and having met in its thirty-first Session on June 17, 1948

¹⁴² Adopted in 1998, 37 I.L.M. 1233 (1998). The Declaration commits Member States to respect and promote principles and rights in four categories, whether or not they have ratified the relevant Conventions. These categories are: freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation. Available at <http://www.ilo.org/declaration/thedeclaration/lang--en/index.htm> accessed May 5, 2008

¹⁴³ This Charter was signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on December 7, 2000. Available at http://www.europarl.europa.eu/Charter/default_en.htm accessed May 5, 2008. Article 12 is '1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests. 2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.'

¹⁴⁴ *ibid* at Para 33.

¹⁴⁵ Article 20 of UDHR is '1-Everyone has the right to freedom of peaceful assembly and association. 2- No one may be compelled to belong to an association.'

In cases where certain establishments have labour unions, cooperatives and associations, those who choose not to join cannot be forced to forfeit employment or certain benefits because of their decision not to join.¹⁴⁶ Fundamentally, people have the right to select the groups that they choose to associate themselves with: by prejudicing them and depriving them of certain benefits when they choose a different association or a different group, the individual is then deprived of his freedom to form and join associations of his choice.

In the case of *Good vs. Associated Students of the University of Washington*, a US Court held that a requirement that a student must pay to be a member of the association violated the first amendment freedom of association because ‘freedom to associate carries with it a corresponding right to not associate’.¹⁴⁷

3.1.5. Equality¹⁴⁸

The terms ‘colour blind’ and ‘diversity’ are both widely used in discussions concerning equality, but they are not synonymous. Applied properly, colour blind should be taken to mean ‘without distinction to colour’; this means that policies — such as affirmative action — should neither advance nor protect the interests of any race. As compared to diversity, this is understood to provide the necessary preferential treatment in order to advance the interests of all races; being colour blind is not related to racial relations but rather advocates

¹⁴⁶ M Marshall & T Gurr, *Peace and Conflict*, 2005: A Global Survey of Armed Conflicts, Self-Determination Movements and Democracy. p. 54

¹⁴⁷ *Good v. Associated Students of University of Washington*, 86 Wash.2d 94, 542 P.2d 762 (1975) (student organisation's political activity and financial contributions) The ECtHR read Article 11 of the ECHE (1950) as implying a negative freedom of association in *Young, James and Webster v. United Kingdom* in 1981, Application no. 7601/76; 7806/77 .a case that involved mandatory union membership imposed on employees of British Rail. The same Court made a similar ruling in a 1994 case, *Sigurjonsson v. Iceland*, 16 E.H.R.R. 462 (1993) which involved forced membership in an organisation of taxi drivers. For more see C Baird, *On Freedom of Association*, July, 2002, the freeman Press.

¹⁴⁸ J Fears, *Freedom: the History of an Idea*. June, 2007, Vol.12, No.19, available on line at <http://www.fpri.org/footnotes/1219.200706.fears.freedomhistory.html> Foreign Policy Research Institute, Philadelphia; R Garner, P Ferdinand, and S Lawson, *Introduction to Politics: Jeremy Bentham, 1748-1832*, Oxford University Press; R Brown, *Racism and immigration in Britain*, Issue 68 of International Socialism Journal Published, Autumn 1995, p. 235; S Fredman, *Discrimination and Human Rights*, 2001, Oxford University Press; W Mckean, *Equality and Discrimination under International Law*, 1983, Oxford University Press. and C Hewitt, *The Effect of Political Democracy and Social Democracy on Equality in Industrial Societies*, June, 1977, American Sociological Association, Vol. 42, No. 3, p. 450

the lack of any racial undertones. As such, equality in the concept of Western Liberal Democracy is more pervasive than simply being colour blind or diverse.

In conjunction with its focus on the rights and freedom of the individual,¹⁴⁹ liberal democracies also place a high value on the principle of equality. The English philosopher Jeremy Bentham asserted that ‘everyone should count for one and no-one for more than one’.¹⁵⁰ This creed has stood as one of the fundamental foundations for both the theory and subsequent practice of Liberal Democracy.

In this respect, equality is referred to as all people being viewed as equal before the law, and must therefore receive equal opportunity to improve their lives.¹⁵¹ Thus, despite the fact that individuals within a liberal democratic society may have different abilities and interests, it is nonetheless imperative that each person is afforded the same opportunities and facilities as their fellow citizens. Therefore, even if there is ongoing debate over the exact meaning of democracy and exactly what equality stands to mean, as G Sartori says, ‘if we are to seek equality, we can never afford to relax’.¹⁵² All liberals agree that equality, by definition, bars discrimination on the grounds of race, gender, religion, or any other factor. Furthermore, equality in a liberal democracy ensures political equality through guaranteeing universal suffrage for all its citizens. In this context, equality denotes many liberal democratic thinkers voting parity, or the principle of one person one vote, social equality in terms of

¹⁴⁹ Individual freedom is a complex of values. As J Fears said ‘In its most basic form individual freedom is the freedom to live as you choose as long as you harm no one else, Each nation, each epoch in history, perhaps each individual, may define this ideal of individual freedom in different terms. In its noblest of expressions, individual freedom is enshrined in our Bill of Rights. It is freedom of conscience, freedom of speech, economic freedom, and freedom to choose your life style.’ J Fears, above note 148.

¹⁵⁰ R Garner, P Ferdinand, and S Lawson, *Introduction to Politics: Jeremy Bentham, 1748-1832*, Oxford University Press, at p. 239.

¹⁵¹ There are some of the theoretical and empirical difficulties of this normative claim. Theoretically, it is questionable to what extent liberal democracy provides equal opportunity, despite its assurance of formal legal equality, due to its emphasis on hereditary economic disparity. Empirically, there is not a single liberal democratic community that is not plagued by ethnic, class, or religious divisions affecting the principle of equal opportunity Such as institutionalised racism in the United States against African-Americans and Hispanics or in Europe of the institutional racism toward Eastern European immigrants. See R Brown, *Racism and Immigration in Britain*, Issue 68 of International Socialism Journal Published, Autumn 1995, and S Fredman, *Discrimination and Human Rights*, 2001, Oxford University Press, at p. 20.

¹⁵² G Sartori, *the Theory of Democracy Revisited*, 1987, Chatham house publishers.at p. 337; as A McConnachie said ‘equality before the law meaning each citizen has an equal ability to seek and receive justice.’ See A McConnachie, *The Five Principles of Democracy*, 2003, soverienty.org, available online at <http://www.sovereignty.org.uk> accessed on July 24, 2008; some democratic countries has set out act of equality such as the act of equality 2006 in the UK; To establish the Commission for Equality and Human Rights CEHR; To make discrimination unlawful on the grounds of religion or belief in the provision of goods, facilities and services, the disposal and management of premises, education, and the exercise of public functions., To create a duty on public authorities to promote equality of opportunity between men and women, and to prohibit sex discrimination in the exercise of public functions.

status and consideration, and the presence equal opportunity for all citizens to advance themselves. The enjoyment of the rights and freedoms set forth in international treaties shall be equally secured without discrimination on any grounds, such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.¹⁵³

The UN Charter's¹⁵⁴ endorsement of the principle of equality comes in the form of Article 1 (3), which encourages respect for human rights and for the fundamental freedoms of all without distinction as to race, sex, language, or religion.¹⁵⁵ The first Article of the UDHR proclaims the principle whereby all human beings are born free and equal in dignity and rights. Article 2 proclaims that everyone is entitled to all rights and freedoms set forth in this declaration, and entitled without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 7 states that all are equal before the law and all are therefore accordingly entitled to equal protection of the law without any form of discrimination. All are entitled to equal protection against any discrimination in violation of this declaration and against any incitement to such discrimination. All human rights documents — both international and domestic — include an equality guarantee.¹⁵⁶ The two United Nation covenants,¹⁵⁷ for instance, include clauses on equality between men and women.¹⁵⁸ Article 26 of the Civil and Political Covenant mentions an equality clause based on Article 7 of the Universal Declaration.¹⁵⁹ The commitment to equality of treatment led to specific international instruments on the main types of discrimination aimed at their elimination.¹⁶⁰ Examples of instruments include the International Convention on the Elimination of All Forms of Racial Discrimination, which came into force in 1969, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) in 1981,¹⁶¹ and the

¹⁵³ Article 14 of ECHR

¹⁵⁴ The Charter of the United Nations was signed on June 26, 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organisation, and came into force on October 24, 1945.

¹⁵⁵ See in addition to Article 1, 3 Article 13, 1, b and 55, c. see W. Mckean, *Equality and Discrimination under International Law*, 1983, Oxford University Press. pp. 54-55.

¹⁵⁶ S Fredman, above note 148, at p. 9

¹⁵⁷ International Covenant on Economic, social and Cultural Rights (ICESCR), above note 133, and International Covenant on Civil and Political Rights (ICCPR) above note 40

¹⁵⁸ Ibid, Article 3 of both covenants

¹⁵⁹ Article 26 is 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

¹⁶⁰ S Fredman, above note 148, at p. 140

¹⁶¹ GA Res. 34/180 (1979)

Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities.¹⁶²

The participation of people in political life should be equal. The Declaration on Fair and Free Election states, in this regard, that ‘every voter is entitled to exercise his or her right equally with others and to have his or her vote accorded equivalent weight to that of others’.¹⁶³ Furthermore, the drawing of electoral boundaries and the methods of allocating votes should not distort the distribution of voters, nor should they discriminate against any group. Furthermore, it must not unreasonably exclude or restrict the right of citizens to freely choose their representatives.¹⁶⁴

As we have seen, Article 25 (b) of ICCPR demands ‘equal suffrage’. The CCPR, for instance, has ruled that, in this regard, Hong Kong’s electoral system does not meet the requirements put forward in Article 25 of the Covenant. In particular, it points to the fact that only 20 of the overall 60 seats in its Legislative Council are subject to direct popular election, and that the concept of functional constituencies — which gives undue weight to the views of the business community — discriminates amongst voters on the basis of property and functions: this is a clear violation of Article 25 (b).¹⁶⁵ Moreover, persons who are considered eligible to stand for election should not be excluded by unreasonable or discriminatory requirements, such as education, religion, residence, descent, or due to reasons of political affiliation. In addition, no person should suffer from discrimination or be unduly disadvantaged by another person’s candidacy; even restrictions designed to prevent certain elective officers (e.g. the judiciary, high-ranking military office, public service) from holding particular positions based on the potential for conflict of interest should be limited as much as possible so as not to interfere with the individual rights as detailed within Article 25 (b). Moreover, the grounds for the removal of elected office holders should be established by laws based on objective and reasonable criteria, as well as incorporating fair procedures within its decision-making processes.¹⁶⁶

¹⁶² GA Res. 47/135 (1992)

¹⁶³ Article 2 / 6 of Declaration on Fair and Free Election, above note 54

¹⁶⁴ para.10 of CCPR general comment, above note 38

¹⁶⁵ UN doc, 1995, CCPR/C/ 79/Add 57.para.19, for similar case see *Istvan Matyus v Slovakia* Communication No 923/2000, UN Doc. A/57/40 (Vol. II) at 257, 2002

¹⁶⁶ S Joseph & others, *The International Covenant on Civil and Political Rights, Cases, Materials and Commentary*, 2005, Oxford University Press. p. 650

On a national level the UK has established an Equality and Human Rights Commission, a non-departmental public body established under the Equality Act, 2006, which eliminates discrimination, reduces inequality, protects human rights, and builds good relations, ensuring that everyone has a fair opportunity to participate in society. The new commission brings together the work of the three previous equality commissions (the Equal Opportunities Commission, the Commission for Racial Equality, and the Disability Rights Commission), and also further takes on responsibility for other aspects of equality, age, sexual orientation and religion or belief, as well as human rights¹⁶⁷.

This right not to be discriminated against is not absolute, and that is one problematic aspect of formal equality.¹⁶⁸ Furthermore, discrimination can be justified if it is necessary to achieve a legitimate aim, as was the case of *Sahin v. Turkey*.¹⁶⁹ The Court found that the University of Istanbul's regulations, which imposed restrictions on the wearing of Islamic headscarves and the measures taken to implement them, were justified in principle and proportionate to the aims pursued and, therefore, could be regarded as 'necessary in a democratic society'. Consequently, the ECtHR held that there had been no violation of Article 9 of the Convention.¹⁷⁰

Importantly, however, equality here does not deny that people are different and have varying characteristics and abilities which could lead to be treated divergently. *Weatherall vs. Canada* is an example of a case where being treated differently did not lead to substantive inequality.¹⁷¹ In this case, the male appellant had challenged the fact that male prisoners in

¹⁶⁷ It has been opened in first of October, 2007, for more detail see Equality and Human Rights Commission's website at <http://www.equalityhumanrights.com> accessed August 18, 2008.

¹⁶⁸ S Fredman, above note 148, at p. 16.

¹⁶⁹ *Sahin v. Turkey* (2007) 44 E.H.R.R. 5 in the similar case of *Karaduman v Turkey*, no.16278/90, Commission decision of 3 May 1993, DR 74, the applicant was refused a degree certificate because she had supplied a photograph showing her wearing a headscarf, contrary to the rules, the former European Commission of Human rights rejected the applicant's claim of a violation of her freedom of religion under Article 9. ECHR, No 1627/90 74 DR 93(1993) Fredman said regarding the latter case, 'it is arguable that whilst the aims of the Turkish state and University were legitimate, the measures used were disproportionately heavy handed'. Refers to what she already said that 'the wearing of a headscarf for a photograph could not in itself create conformist pressures for other students and the Commission accepted that the certificate was only used for employment purposes'. S Fredman, above note 148, at pp. 41-42

¹⁷⁰ Strasbourg in June 29, 2004: Article 9 of European Convention on Human Rights is '1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.'

¹⁷¹ *Weatherall v. Canada.*, (1993) 2 S.C.R. 872

penitentiaries were searched and patrolled by female guards, but that female prisoners were supervised only by members of their own gender. The unanimous judgment of Court held that the male prisoners had not been discriminated against relative to female prisoners. The Court noted the historical, biological, and sociological differences between men and women, the history of women's disadvantages in relation to society, and the realities of male violence against women, all of which were deemed factors contributing to this decision. Furthermore, because of these factors, it is also believed that cross-gender searches do not have the same effects on men as they would have on women. The Court's judgment, which upheld the different treatment of male and female prisoners, demonstrates that equality may sometimes allow or require differential treatment.

However, this diversity does not detract, and is ultimately irrelevant, to equal status of all individuals as members of a democratic community. A state or Government is required to show that its aims are legitimate and that differentiation is appropriate in order to achieve that aim. The ECtHR maintained that a difference of treatment is only discriminatory if it has no objective or reasonable justification.¹⁷²

Racism, as the main reason for discrimination, is 'not about objective characteristics, but about relationships of domination and subordination, about hatred of the 'other' in defence of "self", perpetrated and apparently legitimated through images of the "other" as inferior, abhorrent, even sub-human'.¹⁷³ The acceptance of equality for all individuals gives disadvantaged groups the right against sex discrimination and racism. The prohibition on slavery was the first momentous step in this direction, and the real expansion of the right to a political voice to include working classes and women continued onwards in this direction.¹⁷⁴

In relation to the administration of justice, equality means that everyone is, and should be, entitled to justice: no single person should be deprived of the right to justice just because of certain characteristics they possess which are ultimately inherent in them. Furthermore, just because a person belongs to a certain economic class or that a person belongs to a certain

¹⁷² Belgian Linguistic Case I ECHR 252 at para. 10; *Marckx v Belgium* 2 ECHR 330 at para 33; *Abdul-Aziz v UK* (1985) 7 ECHR 491 at para.72 *X v UK*(1978) 14 Dec and Rep 234, at 235, and the same rule has been taken by the Canadian Supreme Court, see *Bhinder and Canadian Nation Railway Co* (1986) 23 DLR (4th series) 481 , see *Singh Bhinder v. Canada*, Communication No. 208/1986 UN Doc. CCPR/C/37/D/208/1986 (1989); Report of the HRC (1990) II,50

¹⁷³ S Fredman, above note 148.p. 10.

¹⁷⁴ S Fredman, above note 148.p. 15.

racial class does also not mean that they are entitled to more under the law. Equality, as espoused and enshrined in the law, contemplates providing everyone with an equal opportunity under the law. Subsequently, as it has been said, everyone is equal under the eyes of the law.

The concept of equality in the context of justice can be best understood in-line with the concept of equal protection. Equal protection has been deemed as a derivative of sovereignty, and as recognised by the United Nations Human Rights Council, equal protection considers a situation where every class in society can avail of the certain basic rights under the law.¹⁷⁵ Moreover, there is no class that is considered better or more significant than any another, and there is no class that has more privileges than the other. As far as the law is concerned, there is no distinction under the law that can be used as a basis for depriving one of his or her rights without just cause or due process.

3.1.6. Separation of Powers

One of characteristics of Liberal Democracy is having Separation of Powers as an underlying structuring of its Government; Separation of Powers is the constitutional doctrine which ultimately requires the partial or complete assignment of executive, legislative, and judicial powers to distinct branches of Government. It also provides different means for selecting officers in these branches, prohibits individuals from simultaneously serving in more than one branch, and grants each branch with sufficient checks and balances so as to prevent the usurpation of power by the others.¹⁷⁶ In 1690, John Locke wrote in his *Second Treatise of Civil Government*, that ‘it may be too great temptation to human frailty apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community’.¹⁷⁷

¹⁷⁵ B Mesquita & G Downs, *Development and Democracy*. September/October 2005, *Journal of Foreign Affairs*, p. 27; S Joseph, W Michael, and H Morton, *Why Democracies Excel*, September/October, 2004, *Journal of Foreign Affairs*, P. 44.

¹⁷⁶ J Krieger, *The Oxford Companion to Politics of the World*, 2001, Oxford University Press, at p.762; for more about the definition of separation of power, see A Bradley & A Ewing, *Constitutional and Administrative Law*, 2003, Longman, at p. 92.

¹⁷⁷ R Cox (ed) *Second Treatise of Civil Government*, 1980, Hackett Publishing Company, Ch xii, Para 143, p. 89

The doctrine of separation of powers was first developed by the French philosopher, Montesquieu (1748), who said in his book *The Spirit of Laws* that, ‘in every Government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive, in regard to things that depend on the civil laws (judiciary power)’.¹⁷⁸ Furthermore, he declared further that ‘constant experience shows us that every man invested with power is apt to abuse it; he pushes on till he comes to the utmost limit...When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be then no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner’.¹⁷⁹ Montesquieu’s analysis argues that, for the simple or relative Separation of Powers between the executive, legislature, and judiciary, and not an absolute one, since ‘these three powers should naturally form a state of repose or inaction. But as there is a necessity for movement in the course of human affairs, they are forced to move, but still to move in concert’.¹⁸⁰

The two common constitutional frameworks implemented within the democratic world are those of the parliamentary and presidential concepts. The parliamentary framework is characterised by a fusion of powers and a mutual dependence between the executive and the legislative powers. The reasoning behind this is that the chief executive (usually a Prime Minister) emanates from the legislature after elections and requires the confidence of the legislature in order for his Government to survive. Moreover, the same person can be a member of both Parliament and the Cabinet.¹⁸¹

The presidential framework, on the other hand, is in stark contrast to that previously described. It is a system characterised by the Separation of Powers and a mutual independence of the executive and legislative powers. The chief executive (a popular elected president) and the legislature are elected independently of each other, and both can survive for their respective terms without the other’s approval.¹⁸² By the mid-1990s, a new kind of

¹⁷⁸ D Carrithers (ed), *Montesquieu, The Spirit of Law*, 1977, book xi, Chapters 4,6 pp. 200-202

¹⁷⁹ *ibid*

¹⁸⁰ *Ibid* p. 211, for more detail about the idea of Separation of Power in view of Montesquieu see L Claus, *Montesquieu’s Mistakes and the True Meaning of Separation*, 2005, *Oxford Journal of Legal study*, 25 (3): pp. 419-451.

¹⁸¹ A Lijphart, above note 9, at p. 125

¹⁸² C Skach, *the Newest Separation of Powers: Semi Presidentialism*, 2007, *IJCL*, vol. 5, pp 93-121

democracy had appeared, taking some elements of the presidential framework (e.g. a popularly elected president with a fixed term of office) and taking one of the essential criteria of a parliamentary framework (a Prime Minister who is subject to a vote of no confidence in Parliament).¹⁸³ Poland and Russia are considered as examples of the new kind.¹⁸⁴

The debate in constitutional matters surrounds the question whether or not a Separation of Powers is to the advantage or disadvantage of the nation and its citizens. This section will therefore discuss the various advantages and disadvantages of such a rule within the framework of Western Liberal Democracy.

The most obvious advantage of Separation of Powers is the fact that this prevents certain abuses or tyranny. The consolidation of power in a single source has shown to be detrimental to the growth of a country. Furthermore, when there is no accountability, there is also a tendency for corruption to be present. By instituting a system of Separation of Powers, there is a system of checks and balances which are implemented. In this system, several branches of Government are created, and power is shared between them. At the same time, the powers of one branch can be challenged by another branch.¹⁸⁵ This system of checks and balances is ultimately crucial, essentially because it is an internal control which actively prevents a single branch of the Government from consolidating too much power. Although it is argued that the Presidential form of democracy still grants too much power to a single person, in this case the head of the executive, the other branches are not without recourse as they are granted by their organic laws and statutes with the right to review the decisions of the head of the executive and to accordingly hold him accountable for them, if the need arises¹⁸⁶.

In checking on the other branches of the Government, the system of checks and balances is also useful because it devolves the power of Government to different branches. By implementing this, no single branch can completely control the operations of the

¹⁸³ According to A Lijphart, 'the most widely accepted concept of semi-presidential democracy is depending on whether or not the president's party has a majority in the legislature'. See A Lijphart (ed) *Parliamentary versus Presidential Government*, 1992, Oxford University Press, introduction p. 8.

¹⁸⁴ Ibid at p. 96

¹⁸⁵ T Persson, G Roland, G Tabellini, *Separation of Power and Political Accountability*, 1997, the QJE, Vol. 112, (4) pp. 1162-1202.

¹⁸⁶ L Claus, above note 180 p. 430

Government; each branch has a set of powers which are unique to its position, which also allows the separate bodies to ensure that no one branch has complete control over the country.

It is clear from the foregoing that the main advantage of the Separation of Powers is that it creates a system of accountability. Within this feature, no single branch can act wantonly and in utter disregard for the effects of its actions, purely because they can be reviewed and nullified by the other branches of Government.¹⁸⁷ Furthermore, the implementation of a system of checks and balances also ensures the devolution of power: as has been shown in the discussion, there are several dangers which can ultimately arise when power rests solely within a single person or branch.

On the other side, whilst it may seem that implementing the Separation of Powers has subsequently made democracy the ideal form of Government, there are obvious drawbacks to this principle, as with any — there are always sacrifices to be made in order to ensure the protection of the general public. In an effort to curtail and curb the abuses of monarchs, this system of Separation of Powers was created in order to add another level.¹⁸⁸ Furthermore, during this time, it was theorised by political scientists that in order to prevent abuses, accountability and devolution of powers was ultimately necessary; this is what led to the creation of Separation of Powers.

Under the current set-up, no single branch can unilaterally exercise all of its powers without having to seek the approval of other branches of departments within the same Government. Furthermore, this additional layer of bureaucracy understandably makes it difficult to implement certain priority measures owing to the Separation of Powers. The main problem with the Separation of Powers, therefore, is that it breeds a bureaucratic form of Government which subsequently makes it difficult to implement plans which are immediately required. The inefficiency that it causes often makes the Government non-responsive to the real issues and, in this vein; it is, therefore, inflexible, which can be detrimental to the progress of any democracy.

¹⁸⁷ Ibid.

¹⁸⁸ S Fredman, above note 148 pp. 23-29

Another problem associated with the Separation of Powers within the framework of Western Liberal Democracy arises from the fact that it breeds competition and animosity within the Government. As with any political structure, there are always factions and parties which are lobbying for position and so, in an effort to gain control, these parties may sometimes leverage their position by ultimately making it difficult for other branches of Government to exercise their functions in order to achieve they want.¹⁸⁹

Finally, the Separation of Powers runs counter to the political central theory which states that a country is deemed more efficient and adaptable in terms of dealing with the demands of an ever-changing political landscape if it has a central governing policy. As the Separation of Powers shows, there is no central political theory in that the President is not assured that his agenda can be implemented if he cannot gain the support of the legislative. Similarly, without the support of the President, several functions of the legislative and measures can be blockaded and rehashed into the legislative machinery. Moreover, it is clear that it is necessary that a central agency that plans the framework of the democracy to make it more effective is fundamental. However, this criticism itself may only refer to the overuse of the Separation of Powers. In any event, traditionally, the presence of a separation of power, along with the other principles, such as the Rule of Law, has been seen as critical to the achievement of liberal democracy. This view was exemplified perhaps most famously in Article 16 of the French ‘Declaration on the Rights of Man’ where it unequivocally states that, ‘a society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all’.¹⁹⁰

3.1.7. Rule of Law¹⁹¹

Another central principle of liberal democracy is its commitment to the Rule of Law.¹⁹² A. V. Dicey (1885) describes the Rule of Law as having three primary characteristics: the first

¹⁸⁹ *ibid*

¹⁹⁰ French Declaration on the Rights of Man (August 26, 1789) see <http://www.hrcr.org/docs/frenchdec.html> accessed December 12, 2008

¹⁹¹ A Dicey, *Introductory to the Study of the Law of the Constitution*, 1886, Macmillan and CO; B Tamanaha, *On the Rule of Law: History, Politics, Theory*, 2005, Cambridge University Press; J Farrall, *UN Sanctions and the Rule of Law*, 2007, Cambridge University Press; B Weingast, *The Political Foundations of Democracy and the Rule of Law*, Jun., 1997, *The American Political Science Review*, Vol. 91, No. 2, pp. 245-263; and O Donnell & A Guillermo, *Why the Rule of Law Matters*, *Journal of Democracy*, Volume 15, Number 4, October, 2004, pp. 32-46.

¹⁹² There are link between the Rule of Law and equality, as the council of Europe state ‘the Rule of Law provides for the equality of all before the law, regardless of wealth or power.’ See Res 1418, 3 Assembly debate on January 25, 2005 (3rd Sitting).

is that no man could be punished or lawfully interfered with by the authorities except for breaches of law — in other words, all Government actions must be authorised by the law;¹⁹³ secondly, no man is above the law and everyone, regardless of rank, is subject to the ordinary laws of the land;¹⁹⁴ and finally, the general principles of the constitution are the result of judicial decisions determining the rights of the private person.¹⁹⁵

The Rule of Law and not of men is the phrase which best characterises the Rule of Law. One will be hard-pressed to imagine living life without having one form of Government or another. Even in the early civilisations, there was always the existence of some form of authority which carried the purpose of leading the masses, or at least a certain group of individuals: the Egyptians had their Pharaohs, the Romans had their Caesars and Senates, the Greeks had their Governments, and even the Middle Ages had their royalty. Suffice it to say; at virtually every point in man's history, there has always been one form of Government or another that has existed for the purpose of managing the affairs of the people and protecting them from oppressors. With all of these Governments, there is one common factor that weaves them all together, this is the Law. The Law is arguably the backbone of all society: it is the set of rules which governs the affairs of men and regulates the activities between human beings. Without law, the world would be plunged into utter chaos as the powerful would oppress the weak, and the rule of man would be nought. The law is an integral element in the preservation of peace and order in society; as such, great emphasis is placed upon the relevance of the Rule of Law.

The Rule of Law demands that no power exists above the law.¹⁹⁶ As such, a comprehensive legal system is required which actively ensures that all citizens are equal before the law, including Government,¹⁹⁷ and that everyone is considered innocent until proven guilty, and that judgements are made independently and without prejudice. Moreover, the Rule of Law guarantees legal equality, not only between individuals but also between individuals and

¹⁹³ A Dicey, *Introductory to the Study of the Law of the Constitution*, 1886, Macmillan and CO, at p. 174

¹⁹⁴ Dicey *ibid* at p. 179

¹⁹⁵ Dicey *ibid* at p. 210

¹⁹⁶ Tamanaha on this regard define the Rule of Law as the Government is limited by the law; see B Tamanaha, *On the Rule of Law: History, Politics, Theory*, 2005, Cambridge University Press, at p. 76.

¹⁹⁷ On this regard, Secretary General K Annan described the Rule of Law as 'a principle of governance in which all person, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards' his 2004 report to the council on the Rule of Law and Transitional Justice in Conflict and post conflict societies S/2004/616. August 23, 2004, para.6

institutions. The Rule of Law therefore depends on the fundamental bargain between the individual and the state, the governed and the governor, by which both sacrifice a measure of the freedom and power which they would otherwise enjoy.¹⁹⁸ The Rule of Law, as such, requires legal certainty as well as a popular legitimacy derived from an electoral system that allows for popular, free and frequent elections with the highest possible franchise. Additionally, essential for the attainment of the Rule of Law is the enshrinement of legal equality for all members of society.

In fact, the Rule of Law includes many principle of democracy, as is described by the former Secretary General of the UN: ‘the Rule of Law requires measures to ensure adherence to the principles of law, equality before the law, accountability to the law, fairness in the application of the law, Separation of Powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency’.¹⁹⁹

The importance of the Rule of Law has been reinforced at multiple high-level UN meetings. In September, 2000, world leaders gathered for the Millennium Summit where they adopted the Millennium declaration,²⁰⁰ which included the objective of strengthening respect for the Rule of Law in international affairs.²⁰¹ In the 2005 World Summit, leaders reaffirmed the Millennium Declaration²⁰² and accordingly acknowledged that ‘good governance and the Rule of Law at the national and international level are essential for sustained economic growth’,²⁰³ and they recognised that the Rule of Law belonged to ‘the universal and indivisible core values and principles of the United Nations’.²⁰⁴ Furthermore, the former UN Secretary General Kofi Annan has observed that the Security Council has a ‘heavy responsibility to promote justice and the Rule of Law in its efforts to maintain international peace and security’.²⁰⁵ Undoubtedly, the Rule of Law is the most important political concept today.²⁰⁶

¹⁹⁸The Rt. Hon Lord Bingham of Cornhill KG, House of Lords, lectures of the Rule of Law, November 16, 2006· available online at <http://www.cpl.law.cam.ac.uk>, accessed on Aug 19, 2007.

¹⁹⁹ UNGS, K Annan 2004 report, above note 197

²⁰⁰ United Nation Millennium Declaration, A/RES/55/2, September 18, 2000.

²⁰¹ Ibid at para, 7 & 9

²⁰² A/RES/60/1, October 24, 2005: world summit outcome, para. 3.

²⁰³ Ibid, para.11

²⁰⁴ Ibid para.119

²⁰⁵ J Farrall, *UN Sanctions and the Rule of Law*, 2007, Cambridge University Press. p. 21.

²⁰⁶ B Tamanaha, above note 196.

Conclusion

As this brief discourse shows, Western Liberal Democracy is an improved kind of democracy in Western society. The foundations of liberal democracy lay in the protection of individual freedoms which are fundamentally enshrined and protected within their organic and critical laws. The furtherance of the type of Government is predicated upon the successful institution of certain forms that are needed. Freedom of expression, Freedom of Association, Equality, Equal Protection and the Rule of Law, are all important hallmarks of any democracy. The unifying theme which these principles have is the fact that they allow for transparency and representation wherever possible and available.

Both upholding and protecting these principles remains the key to the success of any democracy; perhaps the key here lies in preserving the one concept that drives all of these, which is that sovereignty rests within the people. It must never be forgotten that the existence of Governments — both democratic and otherwise — is due to the exercise of sovereignty by the people. There is no other power which legitimises the power of Governments, even democracies. Since the key in any democracy is representation and freedom, it stands that it is still the people who exercise this right and it is the people who ultimately must be protected. Based on that, democracy has been recognised by international law as the next chapter will examine democracy in international law with consideration to many regional treaties in addition to the international treaties.

3.2. Chapter Five: Democracy in International Law

Introduction

Not only the principles of democracy have developed as a central model of governance in Western society, they have also increasingly become the subject of International Law. After elaborate study of principles of democracy in the previous Chapter it is necessary to examine democracy in international law to know whether human rights or the previous principles can be found without democracy or not. This chapter is concerned with considering democracy in International Law by considering attitude of United Nations towards democracy and international and regional instruments will be examined; International Law instruments, such as UDHR¹ and ICCPR², and regional instruments, such as ECHR³, American Convention on Human Rights⁴, and African Charter on Human and People Rights⁵.

3.2.1. The Beginnings of Democracy in International Law

The debate concerning the significance of democracy in International Law has only really begun to take shape during the period following the Cold War.⁶ Previous to that time, such debate had been considered a ‘domestic’ issue, and not something that fell within the realms of International Law.⁷ As early as 1917, however, Elihu Root argued the need for the promotion and protection of democracy in International law in order to remedy the wrongs of the international system.⁸ Indeed, the word ‘democracy’ does not appear in the Charter of the United Nations, nor was it mentioned in the Covenant of the League of Nations that preceded the United Nations.⁹ Moreover, various human rights focused on international

¹ Universal Declaration of Human Rights (UDHR) (adopted 10 December 1948 UNGA Res 217.A III).

² International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force March 23, 1976) 999 UNTS 171.

³ European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), (ETS 5), 213 UNTS 222, Rome, 4.XI.1950 entered into force 3 September 1953, as amended by Protocols No. 3, 5, and 8, which entered into force on September, 1970, December 20, 1971, and January 1, 1990 respectively.

⁴ American Convention on Human Rights (O.A.S. Treaty Series No. 36) 1144 UNTS 123, 9 ILM 99 (1969) entered into force July 18, 1978.

⁵ African Charter on Human and People’s Rights, Adopted June 27, 1981, entered into force October 21, 1986, UNTS 1520 OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

⁶ For history democratisation see J Nagle & A Mahr, *Democracy and Democratisation*, 1999, Sage publications; D Potter & Others, *Democratisation*, 1997, Cambridge University Press.

⁷ R Burchill, *Democracy and International Law*, Publication Review by Cecile Vandewoude, 2008, European Journal of International Law at p. 234

⁸ E Root, *The Effect of Democracy on International Law*, 1917, Carnegie endowment for international peace, 1917, 2-11

⁹ R Rich, *Bringing Democracy into International Law*, 2001, 12:3 Journal of Democracy., pp. 20-34 at p. 20.

agreements which have been in existence for a number of decades proposed democracy and the right to vote as rights to which all persons are entitled, but the conception of democracy as a principle of International Law to which all states were subject did not come into existence until after the fall of the Soviet Union. As such, in consideration of the present era, International Law considers democratic governance a universal right — one which furthermore is essential to international peace. Based on this belief, many contend that existing enemies of democracy must be removed.

The acceptance of democracy in Eastern Europe in 1989-1991 was a key turning point in the emergence of democracy as a key principle of International Law. Samuel Huntington has described the spread of democracy to Eastern Europe as the ‘Third Wave of Democratisation’.¹⁰ The fall of the Soviet Union subsequently led many scholars to begin to view democracy as a universal concept, rather than merely one of several political systems embraced in different parts of the world, as had been the case during the Soviet era. From this, the concept of democracy as a right began to emerge. Pippan and Fellow note that ‘one of the most notable trends in international relations and International Law since the end of the Cold War has been the increasing degree to which the democratic ideal has gained importance both as a political leitmotif and as a legal principle’.¹¹ The manifestation of this principle is to be found in the growing extent to which states have accepted that they have a responsibility to ‘respect democratic principles within the realm of their domestic constitutional order’,¹² and the importance of democracy can therefore be seen as a product of international and domestic law working in symbioses.

To some extent, the importance of democracy in International Law has been a product of the increasing emphasis on human rights within international and regional agreements. Indeed, international agreements providing for the protection of democracy which are discussed below all act as instruments with the protection of human and civil rights at their

¹⁰ R Burchill, above note 7, p. 238. A wave of Democratisation is a group of transitions from nondemocratic to democratic regimes that occur within a specified period of time; see S Huntington, *The Third Wave*, 1991, University of Oklahoma Press, Norman p. 21. in the twenty years between 1980 and 2000, according to the UN Human Development Report, eighty-one countries took significant steps towards democratisation, two-thirds of states are now democracies, but democracy has not taken deep root, many countries are re-establishing ‘soft authoritarian’ regimes- with all the trappings of democracy but none of its substance, see A Kuper, *Democracy and Rule of Law Endangered*, Carnegie Council on Ethics and International Affairs, Promoting Democracy Through International Law, 2004, Carnegie Council.

¹¹ J Ibegbu, *Right to Democracy in International Law*, Publication Review by C Pippan and E Fellow 2004, European Journal of International Law, 213 at p. 213.

¹² Ibid. at p. 214.

centre. Although democracy has emerged as a principle of a number of international agreements and instruments, it has nevertheless been suggested that there is no accepted definition of what the principle of democracy requires in practice, or what the focus of democracy should encompass, consequently making it difficult to formally implement. Armin Von Bogdandy has suggested that there is no universally accepted answer to the question of 'whether democracy is concerned with the self-determination of a people or of affected individuals (the emphatic or emancipatory conception of democracy) or whether it simply requires effective controls over those who govern (the skeptical understanding of democracy)';¹³ therefore, although International Law does now broadly recognise democracy as a fundamental right, the common ground between the international agreements that provide for democracy is that citizens have the right of participation in free and fair elections to determine their Government.

International law is currently facing new challenges in its relationship with democracy: although democracy is now firmly enshrined as a principle in the Western Liberal Democratic world in terms of domestic Government, the global power paradigm is increasingly shifting away from the domestic Government and moving towards international and supranational organisations. In this context, International Law faces the challenge of reconstructing its notions of democracy in such a way so as to embrace globalisation. In some ways, this has already begun to occur with the increasing emphasis in the structure of the European Union towards making the system of governance more democratic; however, some academics have suggested that democracy as we understand the concept is not compatible with the process of globalisation.¹⁴ Nevertheless, there is a range of areas where democracy has had an influence on International Law, such as in terms of justifying the use of force against non-democratic regimes, thus, increasing its emphasis on the rights of minorities and the incorporation of democratic principles within intergovernmental organisations. Moreover, democracy has become a dominant value in both domestic affairs and for the international system in a general sense. According to these principles, the purpose of International Law should be to ensure the respect and protection of individual human beings based on the idea of popular not state sovereignty.

¹³ A Bogdandy, *Globalization and Europe: How to square Democracy, Globalization and International Law*, 2004, *European Journal of International Law*, 885 at p. 890.

¹⁴ See for example A Bogdandy, above note 13, p. 885; and J Crawford, *Democracy and International Law*, 1993, Oxford University Press, p. 117, Crawford has mentioned six examples of such non-democratic elements.

3.2.2. Democracy in International Law

At the annual conference of the American Society of International Law Elihu Root, the President of the Society gave a speech entitled ‘the effect of democracy on International Law’, in which he stated that democracy was an existential condition for International Law,¹⁵ and that it had entered as a notion in International Law through its importance as a part of human rights protection. Principles of democracy have sought to encourage all people to live under a democratic regime through promoting a large number of treaties and international agreement to achieve these ends: these include the UN Charter¹⁶, the UDHR¹⁷, the ICCPR¹⁸, and the ICERD.¹⁹ Furthermore, these democratic principles are all supplemented by regional instruments, such as the ECHR²⁰, the American Convention on Human Rights²¹, the African Charter on Human and Peoples’ Rights²², the Paris Charter²³, and the revised version of Arab Charter on Human Rights.²⁴ Through making democratic

¹⁵ See E Root, *the Effect of Democracy on International Law in American society of International Law*, proceedings of the American society of International Law. 1917, pp. 2-11.

¹⁶ This Convention was signed on June 26, 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organisation, and came into force on October 24, 1945. See <http://www.un.org/aboutun/Charter/> accessed December 12, 2008. However, the word ‘Democracy’ does not appear in this Charter.

¹⁷ UDHR above note 1

¹⁸ ICCPR, above note 2

¹⁹ International Convention on the Elimination of all Forms of Racial Discrimination (ISERD) (adopted December 21, 1965, entered into force January 4, 1969) 660 UNTS 195.

²⁰ ECHR above note 3.

²¹ American Convention on Human Rights above note 4.

²² African Charter on Human and People’s Rights above note 5.

²³ Charter of Paris for a new Europe and supplementary Document to give effect to certain provisions of the Charter, Nov,21, 1990

²⁴ Adopted by the Arab league in 1994, the revised version of the Arab Charter on Human Rights was adopted by the league of Arab states in 2004, came into force in 2008. Arab league was formed in 1954, Member states of Arab league are Algeria, Bahrain, the Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen , See <http://www.arab.de/arabinfo/league.htm>. Accessed December 12, 2008. As this Charter was criticised at the time by some Human Rights organisations both locally and internationally as failing to meet international human rights standards, For example; Cairo Institute for Human rights stated that the original 1994 Charter stems from a logic that considers the Arab person at a lower level than other people. See Statement by the Cairo Institute for Human rights, ‘The Cairo Institute Calls on the Arab League to Adopt the Draft Charter Prepared by the United Nations’, January 5, 2004 (Arabic). Available at <http://www.cihrs.org/Arabic/> accessed December 12, 2008. Amnesty international made comments on the 1994 Charter, December, 2003, The International Commission of Jurists (ICJ) stated that the 1994 Charter ‘is marred by fundamental deficiencies: it contains important omissions, guarantees rights only superficially, offers expanded possibilities for restrictions and derogations to the rights guaranteed, and above all contains no real mechanism to monitor respect of these rights’. See ‘The Process of ‘Modernising’ the Arab Charter on Human Rights: A Disquieting Regression: Position Paper of the International Commission of Jurists’, December 20, 2003. and the UN High Commissioner of the Human Rights, said that her office ‘does not endorse these inconsistencies and we continue to work with all stakeholders in the region to ensure the

governance a criterion for membership — as we are going to see next — organisations in these regions have ensured that democratic standards remain an international legal obligation for all states. As such, the right to democracy has been universally guaranteed within International Law for all citizens. Furthermore, for example, no state can legally deny their citizens the right to free and open elections, as this would be in direct violation of international norms relating to human rights and democratic transparency. The promotion of democratic practices in global and regional organisations, supplemented by a diverse number of non-governmental organisations, has accordingly allowed democracy in a more general sense to experience a high degree of legitimacy within International Law.

Due to its status as a universal organisation seeking global membership, the UN only requires that states be ‘peace-loving’ in order to become a member. The neutral attitude of the UN was based on the near- absolute freedom enjoyed by states as to the choice of their own system of Government, as is stated in Article 2, 7 of the UN Charter.²⁵ This attitude has been reconfirmed on resolutions of the General Assembly²⁶ and by the jurisprudence of the International Court of Justice (ICJ).²⁷ As it stated, ‘a state’s domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of International Law. Every state possesses a fundamental right to choose and implement its own political, economic and social systems’.²⁸ Moreover, as we have seen, this was based

implementation of universal human rights norms’ see N Mackenzie, *Religious Intelligence, Arab Human Rights Charter criticised*, January, 2008. In 2002 the Council of Arab League adopted resolution encouraging the modernization of the Charter to correspond with international human rights standards,(see Resolutions of the Council of Ministers of the Arab League 6184, March. 2002 and 6243, September. 2002, and 6302/119 (part II)only available in Arabic at: <http://www.arableagueonline.org/arableague/index.jsp> accessed December 12, 2008. In 2003 the council of Arab league instructed the Arab standing Committee on Human rights to modernise the Arab Charter on Human Rights. (See Decision 6302/119 (Part II) of the Council of the Arab League, March 24, 2003. See Report of the Arab Group of Experts who are Members of United Nations Human rights Bodies to Review the Draft Modernization of the Arab Charter on Human Rights, December, 2003, at para. 2, the Arab league called its standing committee on human rights for meeting in July 18-26, 2003’ The Office of the High Commissioner for Human rights (OHCHR) reached a bilateral agreement with the Arab League to assemble a group of ‘independent Arab experts’ as a Committee of Experts to carry out the task. In December 26, 2003 the committee submitted its recommendations regarding the Arab Charter on Human Rights to OHCHR. (see M Sharif, arguments regarding the Arab Charter on Human Rights, swissinfo.ch, 6/Feb/2004) In the 16th Ordinary Session of the Arab Summit which was held on May 23, 2004 in Tunis, the revised version of the Arab Charter on human right was adopted by the league of Arab states.

²⁵ Article 2, 7 is ‘Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.’

²⁶ For example: A/res.36/103 of December 9, 1981 on the inadmissibility of intervention and interference in the internal affairs of states.

²⁷ The International Court of Justice (ICJ) is the principal judicial organ of the United Nations (UN) It was established in June, 1945 by the Charter of the United Nations and began work in April, 1946.

²⁸ *Nicaragua v. United States* (1984) ICJ REP. 392 June 27, 1986, para. 258

on principle of state sovereignty and non- intervention; however, at the end of the 1980s, the attitude of UN changed²⁹ and became based on principle of individuals' sovereignty, human rights, and democracy. The Vienna Declaration,³⁰ which was the outcome of the world Conference on Human Rights in 1993, states that, 'democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. In the context of the above, the promotion and protection of human rights and fundamental freedoms at the national and international levels should be universal and conducted without conditions attached. The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world'.³¹

In brief, even in practice, there are no obligations to introduce democratic Government under International Law, as the international Court of justice concluded that 'in the absence of a specific legal obligation, there was no commitment on the part of the state to hold free and fair elections'.³²

The first international instrument to proclaim democracy in International Law was the UDHR. That instrument was adopted by the United Nations General Assembly on December 10, 1948, and was the first global expression of rights to which all human beings are inherently entitled. It forms a constituent part of the International Bill of Human Rights, along with the ICESCR and the ICCPR and its two Optional Protocols.

Article 21(1) of the UDHR states that 'Everyone has the right to take part in the Government of his country, directly or through freely chosen representatives'³³ This clearly

²⁹ See K Martin, *International Law and Democracy*, 2008, sage publication, 33-55 at p. 34.

³⁰ Adopted by the World Conference on Human Rights on June 25, 1993

³¹ World Conference on Human rights, Vienna, June 14-25, 1993, Vienna Declaration, A/CONF.157/23 para.8,

³² Nicaragua Case, ICJ Rep 1986, 14, at para. 261, the UN Secretary General has argued that 'individual societies decide if and when to begin democratisation' UN Doc A/51/761, 20 Dec 1996, at para. 4.

³³ Universal Declaration of Human rights 1948, available at <http://www.un.org/Overview/rights.html>. Accessed August 18, 2008 Article 21 is (1) everyone has the right to take part in the Government of his country, directly or through freely chosen representatives. (2) Everyone has the right of equal access to public service in his country. (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

identifies the process of political participation with democracy³⁴. Article 21 also identifies the method by which democracy should manifest itself; ‘periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures’³⁵. Significantly, Article 21 provides for universal suffrage. This Article speaks not only about the individual rights to take part in Government but also of the principle that the will of the people shall be the basis of the authority of Government.³⁶ This international provision affirms and protects the popular sovereignty. As Reisman puts it ‘the sovereignty protected by contemporary International Law is the people’s sovereignty rather than the sovereign’s sovereignty’³⁷.

The right to democracy has also been legally protected under the aforementioned ICCPR.³⁸ The International Covenant on Civil and Political Rights is a United Nations instrument adopted by the United Nations General Assembly in 1966. The ICCPR adopted similar provisions to those provided for in the UDHR in terms of the protection it affords to democracy. Article 25 of the Covenant clearly enshrined as universal all the most important principles associated with democracy. As noted by Thomas Frank, when the ICCPR entered into force, the fight for democratic entitlement entered a new phase as it made the rights of political participation applicable to all citizens equally. Moreover, it shifted the focus from people to persons and from processes of decolonization to democratisation.³⁹

Article 25 of ICCPR stated that, ‘every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2⁴⁰ and without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free

³⁴ J Wouters, B Meester and C Ryngaert, *Democracy and International Law*, June, 2004, Leuven Interdisciplinary Research Group on International Agreements and Development Working Paper No 5. p. 7.

³⁵ Article 21(3) UDHR, above note 1.

³⁶ GA Res. 217 III 1984

³⁷ W Reisman, *Sovereignty and Human Rights in International Law*, American Journal of International Law, 84, 1990, p. 869.

³⁸ ICCPR, above note 2

³⁹ T Franck, *Legitimacy and the Democratic Entitlement*, in G Fox and B Roth (ed) *Democratic Governance and International Law*, Cambridge University Press, 2000, p. 34.

⁴⁰ Article 2 is ‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.

expression of the will of the electors; (c) to have access, on general terms of equality, to public service in his country'.⁴¹

The rights set out in this Article were also mentioned in Article 21 of the UDHR.⁴² Both articles (25 of ICCPR and 21 of UDHR) list citizenship as a requirement for enjoying democratic rights whilst simultaneously ensuring that citizenship is legally defined in accordance with these rights.⁴³ This emphasis on citizenship in Article 25 of ICCPR is mirrored in Article 3 of protocol 1 of the European Convention on Human Rights⁴⁴ and in Article 23 of the American Convention on Human Rights.⁴⁵

The first clause of this Article pertaining to the right 'to take part in public affairs' has been widely discussed in the years since the Covenant's ratification. The general comment adopted by CCPR at its 1510th meeting (fifty-seventh session) on July 12, 1996 contends that 'the conduct of public affairs, referred to in paragraph (a), is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs is protected by Article 25 and should be established by the constitution and other laws'.⁴⁶ This official position ensures — at least on the formal level — that individuals are protected from abuses of public power, including those supported by the majority at the expense of the minority.

Article 25(b) of ICCPR guarantees the right to universal suffrage: 'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 [race,

⁴¹ http://www.unhchr.ch/html/menu3/b/a_ccpr.htm accessed August 18, 2008.

⁴² Article 21 is 'A-Everyone has the right to take part in the Government of his country, directly or through freely chosen representatives. B-Everyone has the right to equal access to public service in his country. C-The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.' UDHR Adopted and proclaimed by General Assembly resolution 217 A (III) of December 10, 1948,

⁴³ General comment NO.25, Adopted by the Human Right committee, UN DOC.CCPR/C.21/Rev.1/add.7 (1996) : the right to participate in public affairs, voting rights and the right of equal access to public service 12/07/96,

⁴⁴ Above note 3

⁴⁵ Above note 4

⁴⁶ <http://www.unhchr.ch/tbs/doc.nsf/0/d0b7f023e8d6d9898025651e004bc0eb?OpenDocument> accessed August 18, 2008.

colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status] and without unreasonable restrictions...(b) to vote...' Democracy, in the form of the right to vote, is, therefore, protected under the ICCPR.

Article 25 of ICCPR has provided standards for the conduct of elections. Other universal treaties also provide standards for the conduct of elections;⁴⁷ Article 25 mandates that within a democracy everyone has the right to partake in the management of public affairs. For this reason it therefore demands the existence of representative institutions at all levels and, in particular, a Parliament in which all components of society is represented. Furthermore, these institutions must have the necessary power and means to express the will of the people by legislating and overseeing Government action.⁴⁸ Elections must be held on the basis of the European electoral Heritage which comprises two aspects. The first aspect revolves around the constitutional principles of electoral law that have been mentioned by Article 25 of ICCPR such as universal, equal, free, secret and direct suffrage. The second aspect stems from the principle that true democratic elections can only be held if certain basic conditions of the democratic state are based on the Rule of Law, such as fundamental rights, stability of electoral law and effective procedural guarantees are met.⁴⁹

Furthermore, the third part of the Universal Declaration on Democracy⁵⁰ places emphasis on democracy to be recognised as an international principle, applicable to international organisations and to States in their international relations. Moreover, this does not only

⁴⁷ For example see the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPWD)

⁴⁸ Article 11 of Universal Declaration on Democracy, Declaration adopted without a vote by the Inter-Parliamentary Council at its 161st session (Cairo, September 16, 1997), available at <http://www.ipu.org/cnl-e/161-dem.htm> accessed December 16, 2008.

⁴⁹ Explanatory Report adopted by the Venice Commission at its 52nd Plenary Session (Venice, October 18-19, 2002)

⁵⁰ Above note 48. The Inter-Parliamentary Union as we can see in Article one of Statutes of the Inter-Parliamentary Union Adopted in 1976, and entirely revised in October, 1983, is the international organisation of the Parliaments of sovereign States. As the focal point for worldwide parliamentary dialogue since 1889, the Inter Parliamentary Union shall work for peace and cooperation amongst peoples and for the firm establishment of representative institutions, To that end, it shall: (a) Foster contacts, coordination and the exchange of experience amongst Parliaments and parliamentarians of all countries; (b) Consider questions of international interest and express its views on such issues with the aim of bringing about action by Parliaments and their members; (c) Contribute to the defence and promotion of human rights, which are universal in scope and respect for which is an essential factor of parliamentary democracy and development; (d) Contribute to better knowledge of the working of representative institutions and to the strengthening and development of their means of action. The Union, which shares the objectives of the United Nations, supports its efforts and works in close cooperation with it. It also co-operates with the regional inter-parliamentary organisations, as well as with international, intergovernmental and non-governmental organisations which are motivated by the same ideals. See <http://www.ipu.org/strct-e/statutes-new.htm#1> accessed December 16, 2008

mean equal or fair representation of States, but also extends to the economic rights and duties of States⁵¹.

Democratic systems cannot be legitimately replaced by one that is authoritarian; nevertheless, modern democratic societies accept that there is nothing within International Law that legally binds states into adopting and maintaining a particular form of Government — a fact exemplified in the Nicaraguan case (1986).⁵² In 1999, the former UN Commission on Human Rights⁵³ adopted a resolution entitled ‘a right to democracy’⁵⁴ the title was the object of debate, and a subsequent Cuban proposal to remove the ‘right to democracy’ from the title was rejected by a majority of 28 votes against 12 and 13 abstentions, resulting in developing countries expressing their fear of foreign interference, and stating that, taking into account the disparate historical backgrounds, different forms of democracy are possible.⁵⁵

What is important, however, is that democratisation presupposes more than democratic elections alone; it also requires all the criteria or principles of democracy that have been protected on a regional basis as a whole to be as a condition for membership of international organisation, such as North Atlantic Treaty Organisation (NATO).⁵⁶ The preamble of this treaty provides that members are determined to safeguard the freedom, common heritage and civilisation of their peoples, founded on the principles of democracy, individual liberty

⁵¹ Third part of Article 24 of Universal Declaration on Democracy, <http://www.ipu.org/cnl-e/161-dem.htm>, accessed December 16, 2008. In this part ‘25. The principles of democracy must be applied to the international management of issues of global interest and the common heritage of humankind, in particular the human environment. 26. To preserve international democracy, States must ensure that their conduct conforms to International Law, refrain from the use or threat of force and from any conduct that endangers or violates the sovereignty and political or territorial integrity of other States, and take steps to resolve their differences by peaceful means. 27. A democracy should support democratic principles in international relations. In that respect, democracies must refrain from undemocratic conduct, express solidarity with democratic Governments and non-State actors like non-governmental organisations which work for democracy and human rights, and extend solidarity to those who are victims of human rights violations at the hands of undemocratic regimes. In order to strengthen international criminal justice, democracies must reject impunity for international crimes and serious violations of fundamental human rights and support the establishment of a permanent international criminal Court’

⁵² Nicaragua Case, at para. 259 see S Wheatley, *Democracy in International Law*, ICLQ, 51, p. 234

⁵³ UNCHR was a functional commission within the overall framework of the United Nations until it was replaced by the UN Human rights Council. It was a subsidiary body of the UN Economic and Social Council (ECOSOC), and was also assisted in its work by the Office of the United Nations High Commissioner for Human rights (UNHCHR). It was the UN’s principal mechanism and international forum concerned with the promotion and protection of human rights. On March 15, 2006, the UN General Assembly voted overwhelmingly to replace UNCHR with the UN Human rights Council. See <http://www2.ohchr.org/english/bodies/chr/index.htm>

⁵⁴ E/CN.4/1999/L.55/Rev.2, in April 26, 1999,

⁵⁵ HR/CN/99/61

⁵⁶ North Atlantic treaty, signed in Washington D.C. on April 4, 1949.

and the Rule of Law.⁵⁷ Moreover, the statute of the Council of Europe reaffirms the members' devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the Rule of Law, principles which form the basis of all genuine democracy. Article 3 nevertheless states that every member of the Council of Europe must accept the principles of the Rule of Law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms⁵⁸, the European Union⁵⁹ was also additionally founded on the principle of democracy and, as such, every member state must conform to this principle in its domestic governance.⁶⁰ Failing to do so would place it in breach of International Law; the same is the case with the organisation of American States (OAS).⁶¹ As such, the peoples of the Americas and Europe have a right to democracy and their Governments have an obligation to promote and defend such values.⁶² Another example of such legal obligation is the pledge members of the OSCE under the Charter of Paris made to co-operating and supporting each other in ensuring that democratic gains were irreversible.⁶³ This commitment was further borne out in the International Covenant on Civic and Political Rights signed by 184 countries to show their dedication to upholding democracy.⁶⁴

Democracy is enshrined as a fundamental principle in a number of regional instruments. Perhaps the best example of this is the European system of human rights. The ECHR — which, it should be noted, is not an instrument of the European Union but rather of the separate entity of the ECtHR — protects democracy as one of the fundamental rights that all persons in Member States of the Convention are entitled to. Article 3 of the First protocol to

⁵⁷ Available online at <http://www.nato.int/docu/basicxt/treaty.htm> accessed November 9, 2008.

⁵⁸ See statute of council of Europe, London, 5.V.1949

⁵⁹ EU is A unique economic and political partnership between 27 democratic European countries, available online at http://europa.eu/abc/panorama/index_en.htm accessed November 9, 2008

⁶⁰ Article F (1) Treaty on European Union, The Treaty on European Union (TEU), signed in Maastricht on February 7, 1992, entered into force on November 1, 1993

⁶¹ The OAS is the region's principal multilateral forum for strengthening democracy, promoting human rights, and confronting shared problems such as poverty, terrorism, illegal drugs and corruption. It plays a leading role in carrying out mandates established by the hemisphere's leaders through the Summits of the Americas. One of the essential purposes of this organisation as regional obligations is to promote and consolidate representative democracy as in part 1 chapter 1 article 2 (b) see <http://www1.umn.edu/humanrts/iachr/oasCharter.html> accessed November 9, 2008. OEA/Ser.P/AG/doc.11 (XVI-E/92) in 14 Dec 1992 'Charter amendment providing for suspension from participation in the OAS General Assembly of a state whose democratically-elected Government is forcibly overthrown'

⁶² Article 1 of Inter-American Democratic Charter, Lima, September 11, 2001, OAS Doc. OEA/SerP/AG/Res.1 (2001)

⁶³ Conference on security and co-operation in Europe, Charter of Paris for a new Europe, Nov 21,1990,30 I.L.M 190,195 (1991)

⁶⁴ See UN doc CCPR/C/21/Rev/Add 8.

the Convention states that ‘The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions that will ensure the free expression of the opinion of the people in the choice of the legislature’⁶⁵ On November 18, 2008, the ECtHR in case of *Tanase and Chirtoaca v. Moldova*,⁶⁶ held unanimously that there has been a violation of Article 3 of Protocol No. 1 to the Convention. The applicants alleged that the ban preventing Moldovan nationals holding other nationalities from being elected to Parliament consequently interfered with their right to stand as candidates in free elections, and to accordingly take their seats in Parliament if elected, thus, ensuring the free expression of the opinion of the people in the choice of legislature. They relied on Article 3 of Protocol No. 1. Furthermore, the applicant also complained that in banning him from standing for elections and takings his seat in Parliament if elected the authorities had subjected him to discrimination in comparison with other Moldovan nationals.

The right to vote has been upheld in decisions of the ECtHR, such as the decision in *Hirst V. UK* (No 1),⁶⁷ and *Hirst v. UK* (No 2),⁶⁸ which was a challenge by a British prisoner to the UK’s blanket ban on prisoner voting rights. In *Hirst* (No.1), the ECtHR determined that the blanket voting ban was disproportionate and was accordingly outside the margin of appreciation allowed to states by the European Convention. The Court noted that the indiscriminate application of the ban violated the principle of proportionality and pointed to the example of a person sentenced to one week in prison, who would lose his right to vote only if his or her sentence coincided with an election. The Court therefore found the UK to be in violation of Protocol 1, Article 3 of the Convention. In *Hirst* (No. 2), on appeal by the United Kingdom the European Court sitting as a Grand Chamber upheld the decision of the Court in *Hirst* (No. 1), holding that ‘the right to vote is not a privilege,⁶⁹ and that ‘the presumption in a democratic state must be in favour of inclusion’⁷⁰. The Court also upheld the reasoning of the lower Court that the blanket ban was arbitrary, indiscriminate in its application and violated the principle of proportionality.

⁶⁵ Article 3 Protocol 1 of European Convention on Human Rights and Fundamental Freedoms, (ETS 5), 213 UNTS 222, Rome, 4.XI.1950 entered into force 3 September 1953, as amended by Protocols No. 3, 5, and 8, which entered into force on September, 1970, December 20, 1971, and January 1, 1990 respectively.

⁶⁶ Application No.7/08 (Judgment of September 16, 2009)

⁶⁷ *Hirst v. United Kingdom (Hirst No. 1)* 30.6.2004, Rep 2004

⁶⁸ *Hirst v United Kingdom (Hirst No 2)* Application no. 74025/01, ECHR 681 October 6, 2005

⁶⁹ *Ibid*, *Hirst* (No. 2) at 59

⁷⁰ *Ibid*.

In addition to the ECHR, other regions of the world have established instruments that protect democracy within the region. Democracy is, for example, protected as a fundamental right for citizens in the Americas under the American Convention on Human Rights and the Rights Charter of the Organisation of American States, breaches of which are enforced by the Inter-American Court of Human Rights. Article 23 of the Convention protects the right to participate in Government, stating that every citizen shall have the right to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters.⁷¹

The African Charter on Human and Peoples' Rights⁷² also provides for the protection of the participation of people in political affairs. Article 13(1) states that, 'every citizen shall have the right to participate freely in the Government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law'. In 2007 the Assembly of Heads of State and Government of the African Union adopted the African Charter on Democracy, Elections, and Governance. One of the main objectives of this Charter was to promote the establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs.⁷³

Moreover, international institutions have aided the gradual process of democratisation for many states through such actions as monitoring elections. Organisations like the UN⁷⁴ and the OAS have monitored elections not only in colonial territories⁷⁵ but also in independent nation states including in Nicaragua in 1989 and in Haiti in 1990. This monitoring function has further been institutionalised through the creation of the office of fair elections created by the Paris Charter during the Conference on Security and Co-operation (CSCE) and the establishment of the Organisation of American States resolution on representative democracy.⁷⁶ This role was reinforced in 1992 when the UN General Assembly endorsed

⁷¹ American Convention on Human Rights, above note 4, Article 23(1)(b)

⁷² The African Charter on Human and Peoples' Rights, above note 5.

⁷³ Article 2 of African Charter on Democracy, Elections, and Governance, Adopted by the eighth ordinary session of the assembly, Held in Addis Ababa, Ethiopia January 30, 2007

⁷⁴ For more about the UN's promotion of democracy see E Newman and R, Rich, *The UN Role in Promoting Democracy*, 2004, United Nations University Press, New York; P Schraeder, *Exporting Democracy*, 2002, Lynne Rienner.

⁷⁵ See T Frank , *The Emerging Right to Democratic Governance*, 1992, American Journal of International Law, 86, p. 69.

⁷⁶ AG/Res. 1080 (XXI-O/91) Resolution adopted at the fifth plenary session, held on June 5, 1991.

guidelines for the observation of elections, to be applied on a case by case basis⁷⁷. In 1991 the European Court of Human Rights observed that democratic Governments should afford the possibility for countries to resolve their problems through dialogue as opposed to violence.⁷⁸ Additionally democracy can be seen as central to the overall purpose of the UN, seen especially in the opening words of its Charter 'we the people' which reflect values of popular sovereignty.

The right to democracy got an extra boost in 1996 when the former UN Secretary-General Boutros Ghali submitted an agenda for democratisation to the general assembly. He stated that the activities of the UN would not be aimed at enforcing models of democracy, but to provide support and advice concerning democratisation.⁷⁹

To this end, the organisation's legitimacy revolves around principles of democratic legitimacy as it gains its mandate from the 'will of the people'. Democracy is also considered a basis for international judgments against a country's actions. For example, in a complaint by three Mexican citizens regarding electoral fraud, the inter-American Commission on Human Rights refused to accept the argument that these matters were essentially domestic and, therefore, not subject to judgement under International Law.⁸⁰

Yet whilst democratic values became increasingly dominant globally, it remained ambiguous whether it was legitimate to enforce these principles unilaterally through external force under International Law. Article 2 of the UN Charter made such action illegal, a position reinforced when the UN and the OAS condemned the US invasion of Grenada and Panama.⁸¹ Another problem with this method is the fact that democracy cannot be achieved in a short space of time. Thus, if intervention is deemed necessary it should be done through the auspices of an international multi-lateral coalition including regional organisations acting under part VIII of the UN Charter.

⁷⁷ GA Res 47/138, December 18, 1992

⁷⁸ *Socialist Party and Others v Turkey*, 20/1997/804/1007 (Judgment of may 25, 1998) Reports 1998-III, at para 45

⁷⁹ See B Ghali, *An Agenda for Democratisation*, presented to the General Assembly by the Secretary-General on December 20, 1996 as a supplement to two previous reports on democratisation, and has been circulated as an official document (A/51/761) of the fifty-first session of the General Assembly under agenda item 41, 'Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies' at para. 11.

⁸⁰ Mexico Elections decision cases 9768,9780,9892 (1990)

⁸¹ E Herman, *the Media's Role in US Foreign Policy*, Summer 1993, Journal of International Affairs, Vol. 47, p. 27.

Conclusion

Democracy has been increasingly acknowledged at the international level in the period following the Cold War. During this time the attitude of UN has changed⁸² from the neutral attitude of the UN that was based on the near- absolute freedom enjoyed by states as to the choice of their own system of Government, to the new attitude based on principles of individuals' sovereignty, human rights, and Democracy. Enhancing the effectiveness of the principle of regular, periodic and genuine elections, will indeed tempt states to legitimize the way elections are carried out. Currently, however, it remains an option not an obligation.⁸³

⁸² See K Martin, *International Law and Democracy*, 2008, sage publication, 33-55 at p. 34. available online at <http://dio.sagepub.com/cgi/reprint/55/4/33> accessed January 3, 2009

⁸³ See G Fox and B Roth, *Democratic Governance and International Law*, Cambridge University Press, 2000, at pp. 43-44.

Part Four: Democracy and Islamic Law

- **Sources of Islamic Law**
- **The Form of Government in Islamic Law**
- **Islamic Law and Democracy**
- *Al-Shura*

4. Part Four: Democracy and Islamic Law:

4.1. Chapter Six: Sources of Islamic Law:

Introduction

Islamic Law, also referred to as *Sharia*,¹ consists of five parts- belief or faith, morals, worship, punishments, and dealings such as the contracts, marriage, and trades. Some have called Islamic Law a Fiqh.² However, since Fiqh does not include beliefs or faiths,³ Shariah is more general than Fiqh. Nevertheless, this topic (the sources of Islamic Law) has been found in Islamic Law under what it is called the science of Asol al-Fiqh. As renowned Asol Al-Fiqh scholar *Al-Gazali* famously wrote in his book on the subject the ‘core of Asol Al-Fiqh is the rule’.⁴

The study of the sources of Islam revolves around four historical periods: The first is the Prophet Mohammad period, also known as the period of beginning of Islamic Law. At this time there were only two sources of Islamic Law — Qu’ran and Sunna⁵. The Prophet managed to practice Islamic Law correctly because he managed to achieve the principles of Islamic Law with respect to personal and social diversity. This allowed him to establish Islamic Law, both as a religion and as compatible with what was then modern life.

Second is the period of the Prophet’s companions which saw an increase in the sources of Islamic Law. Yet despite differences in interpretation scholars and followers still managed to practice Islamic Law as a religion and a way of life.

Third is the period from the Eighth Hegry Century until the end of the Tenth Hegry Century, during which a huge number of what is now considered reference books on Islamic Law were written as well as the emergence of many influential Islamic schools of

¹ Shariah is the body of Islamic religious law. The term is in Arabic language, it means ‘way’ or ‘path’. See Islam web, Fatwa centre, *Meaning of Sharia and Fiqh*, Fatwa No 15620, April 22, 2002.

² The word Fiqh is an Arabic term meaning ‘deep understanding’ or ‘full comprehension’. Technically it refers to the science of Islamic Law extracted from detailed Islamic sources; it does not include the beliefs or faiths part of Islamic Law, See *Meaning of Sharia and Fiqh*, above note 1.

³ Almost all books of Fiqh that have been written did not include the beliefs part.

⁴ Al-Gazali, *Al-Mustasfa*, 1889, Dar Al-Kitab, at p. 45.

⁵ Qu’ran and Sunna are two sources of Islamic Law will be explained in the next section.

thought (Madhab). These schools appeared as a response to the variety of new ideas arising from the growth of Islamic sources. Consequently, as the sources of Islamic Law increased so too did the number of different schools (Madhab) in Islamic Law, leading to much argument between these schools as to who was interpreting and practicing the religion correctly. From this period there was no distinguishing between Islamic Law and the views of Muslims' scholars, a fact causing much conflict and a lack of social progress within Muslim society. It also was the root of current misunderstandings of Islamic Law which see the religion as incompatible with the values of modern democracy.

Finally, during the following period, the majority of Islamic scholars sought to explain existing Islamic sources rather than how the religion should be understood and practised in their present age or in the future.

4.1.1. Primary sources of Islamic Law

During the previous brief historical period, there are two kinds of sources of Islamic Law—primary sources and supplementary sources. The primary or main sources are the Qu'ran and the Sunna.

Al-Qu'ran, literally meaning 'the recitation', is the central religious text of Islam. Muslims believe the Qu'ran is an eternal miracle. It is the last Book of Allah sent for the guidance of humanity through the last Prophet, Muhammad. Historically, the Qu'ran was revealed piecemeal throughout an approximately twenty-three-year period. The Prophet received the first revelation in the Cave of Hira, in the Mountain of Light (Jabal AL-Noor), in 610 CE.⁶ Al-Qu'ran is divided into thirty equal divisions, called the Juz in Arabic. There are 114 chapters, of varying length.⁷ The chapters revealed before the migration of the Prophet to Madina are called Makky, whereas those sent down following the migration are called Madany.⁸ Makky chapters generally stress the Unity and Majesty of Allah, the Most Exalted, Most High, denounce idol worship, promise paradise for the righteous and warn wrongdoers of their punishment in Hellfire, confirm the Prophethood of Muhammad, and remind humanity of the past Prophets and events of their time. On the other hand, the

⁶ It is two and a half miles away from the holy mosque of Makkah in Saudi Arabia.

⁷ The longest chapter is Al-Baqarah consisting of 286 verses and the shortest chapter is Al-Kawthar consisting of three verses only. The whole Qu'ran has 6,236 verses.

⁸ This division is the best; however there are some who claimed wrongly that what it is sent down in Makkah is Makky whilst those in Madina is Madany. In fact there are some verses set down in Makkah but it is Madany. See M Ibin-othaimeen, *Interpretation of Qu'ran*, 2000, Shaikh bin-othaimeen Charity Press, p. 7

Madany chapters are lengthy and are concerned with outlining the ritualistic aspects of Islam, such as Zakah, Fasting, and Hajj, lay down moral and ethical codes, criminal laws, social, economic, and state policies, and give guidelines for foreign relations. They also contain descriptions of some of the early battles of Islam, condemn hypocrites, emphasise the unified basic message of all the past Prophets, and confirm that the process of Prophethood and revelation is complete. In this respect, it affirms that Muhammad is the final Prophet, to be followed by no one else, and as such no new book will be revealed, and finally that Allah's religion is, therefore, complete through the Al-Qu'ran. Thus Allah uses the text to exhort the followers of truth to make Al-Qu'ran their only guide for living a righteous life in line with his divine desires.

The Qu'ran was revealed piecemeal, according to the needs of the time. Angel Jibrail brought it to the Prophet to memorise. It was then preserved in two ways: first, through memorisation, whereby a number of early Muslims memorised each revelation as soon as it was revealed and, as such, had the whole Qu'ran committed to memory at the time of the final revelation — this tradition of memorising the entire Qu'ran continues to this day;⁹ and second, the Qu'ran was preserved through writing. Whenever any revelation took place, it was written at once on tablets, palm branches, shorn of leaves, or animal skin. This was done primarily by Zaid bin Thabit, the primary scribe out of the total 42 scribes of the revelation. The Prophet based the chapter order on the advice of the Angel Jibrail and, therefore, ordered his companions to maintain this order. Abu Bakhr, the first caliph of Islam, compiled the Qu'ran, and Othman, the third caliph, made numerous copies, sending one to each state capital. During the period of over 1,400 years since the Qu'ran was revealed, not a single letter had been changed, which is one of the greatest miracles of the Qu'ran.

There is no doubt within Islam that the Qu'ran is the main source of Islamic Law. However, few have claimed it is the only source of Islamic Law;¹⁰ whereas the most

⁹ It came from Prophet time till now under chain of persons

¹⁰ This few called themselves Qu'ranion, because they accept only Qu'ran as source of Islamic Law, this idea has established in India at the end of 19th Century, because they refuse second sources of Islamic Law which is Sunna, in fact they refuse the Qu'ran as well, because Qu'ran has mentioned in many verses Sunna as second source, as the God said in Qu'ran 'take what the Messenger assigns to you, and deny yourselves that which he withholds from you' Sura Al-Hasher, verse 7. See M Mazroah, *Claims of Qu'ranion regarding Sunna*, 2007, available online at <http://www.al-islam.com>, accessed on March 10, 2008.

verses are clear in their meaning, others are ambiguous, consequently leading to debate amongst scholars as to their proper interpretation.

The second source of Islamic law is Sunna. Sunna literally means ‘trodden path’ and, therefore, the Sunna of the Prophet means ‘the way of the Prophet’. Terminologically, Sunna denotes sayings (qawl), actions (fi‘l), approvals (taqrîr) or attributes (sifa), whether physical (khilqiyya) or moral (khuluqiyya) in nature, ascribed to the Prophet Mohammad. The Sunna in this sense both helps to explain the Qur’an whilst also providing additional rules and guidance for Muslims. The Qur’an in many places says to obey the Prophet, and thus, it is wrong—as some deviant sects claim—that the Qur’an is sufficient and that there is no need for the Sunna. Sunna, in the context of identifying textual sources, is synonymous with Hadith¹¹ as it is used to distinguish one’s source from that of the Qur’an.¹² The two most famous works of Hadith are Sahih Bukhary and Sahih Muslim. Each of these is named after the person who compiled it, i.e., Bukhary and Muslim. The word Sahih in these titles refers to the fact that the books’ compilers sought to discover the genuine reports concerning the Holy Prophet from often unfounded and unreliable stories, so that only the most accurate and trustworthy accounts were included. There are many other books of Hadith, also named after their compilers, such as Tirmidhi, Abu Dawud, and the Musnad of Ahmad Ibn Hanbal.

There were many teachings of the Holy Qur’an which the Holy Prophet had to illustrate by his practice and actions (such as how to perform prayer ‘*Salaat*’). His followers learnt from him and copied what he did, and then by their example taught the next generation how to carry out these practices properly. Apart from this practical side of his teaching, the Holy Prophet’s sayings on various matters, along with details of his life, were also

¹¹ Linguistically the word ‘hadith’ means: that which is new from amongst things or a piece of information conveyed either in a small quantity or large. However, Hadith is very similar to Sunna, but not identical. A hadith is a narration of Sunna - narration of Prophet’s sayings, actions, and approvals.

¹² There is another meaning of Sunna which is often mixed up by Muslims when the term arises in discussions. This meaning of Sunna is in the context of Sharia rulings, in which Sunna is synonymous with the Mandub or ‘recommended’, meaning something that one deserves a reward in the next life for doing such as using the *Miswak* to clean one’s teeth before prayer but it is not punished for not doing. It can be contrasted in this context with the ‘Wajib’ or obligatory, meaning something that one is rewarded in the next life for doing such as performing the prescribed prayers and deserves punishment in the next life for not doing. The Sunna in this sense is at the second level of things Allah has asked of us, after the Wajib or obligatory. One should note that this is quite a different sense from the above-mentioned meaning of the word Sunna, though sometimes people confuse with the two, believing that the Qur’an determines the obligatory, whilst the hadith determines what is merely Sunna or recommended but in fact, rulings of both types are found in the Qur’an, just as they are in the hadith.

remembered by those who saw and heard him which they then related to others. However, unlike the Holy Qu'ran, these details were usually not written down, and so these traditions were passed down from one generation to the next by practical example (as in the case of prayer) and through word of mouth. Approximately 150 years following the Holy Prophet's death, scholars attempted to verify these traditions by following the chain of people who had passed down each report from the Prophet's death up until the present time; from their great research, the Hadith emerged.

The scholars of Hadith investigated each and every report of a saying or action attributed to the Holy Prophet to verify whether the names of all the persons involved in passing it down from his time were known; they also investigated the lives and character of people said to be involved with its propagation to determine whether it was historically possible for them to have passed the information down to one another as well as if they were trustworthy and had good memories (that is called Isnad). The Hadith was thus, divided on this basis. Bukhary and Muslim, for instance, held stricter standards than other compilers for accepting a report as genuine: this is why these two books are regarded as the most reliable Hadith collections. Qu'ran and Sunna as the main sources of Islamic Law are acceptable by the entirety of Muslims, but the debate is in some of the next supplementary sources.

4.1.2. Secondary Sources of Islamic Law

The primary sources of Islamic Law deal almost exclusively with religious matters, such as worships and beliefs. By contrast, concerning issues regarding the interpersonal aspects of human life (like political, economic, and social issues), they restrict themselves only to the determination of the basic limits of what is considered proper and religiously acceptable.¹³ The details, extensions and applications of these limits have been largely left for the individuals to determine based on their own particular situation and circumstances. At the same time those primary sources refer to other sources as the 'supplementary sources'. These supplementary sources are meant to give people greater guidance as to how to practice Islamic Law, not only as a religion but also as a way of life compatible with their given time and place.

¹³ For more detail regarding these limits see topic of Ijtihad in the next section.

Ijma is the third source of Islamic Law.¹⁴ It is Arabic term denoting community consensus. There are different definitions of Ijma, the most famous one being agreement of scholars regarding the legal rule in the generation after Mohammad's death.¹⁵ From this historical basis, the majority of scholars concur that for a consensus to exist it must be approved by all relevant experts¹⁶ There is a lot of evidence on the validity of Ijma within the primary sources of Islamic Law, most notably found in a Hadith where the Prophet states that, 'my community will never agree upon an error'.¹⁷

Ijma can only occur after a period of the Prophet, since in his life there only two primary sources of Islamic Law – Qu'ran and Sunna-. Moreover, for there to be an Ijma there only has to be consensus between scholars of the same historical period, not necessarily between scholars of all times and period. Ijma also only refers to those matters related to legal affairs,¹⁸ as Islamic Law grants people the right to decide over behaviour in their personal life based on the Prophet's teaching that 'you have more knowledge in matters of your life'. However, despite this general rule, Ijma can and has been applied to all aspects of an individual's life. Consequently, whilst evidence should be based on the primary sources of Islamic Law this does not mean there is no place for Ijma in the affairs of modern life.¹⁹ In practice there has been a number of Ijma's dealing with temporal issues such as the Ijma that existed amongst the companions of Prophets regarding the proper way to choose the Head of State.

¹⁴ There are some examples of Ijma such as Ijma on collect of Qu'ran, and prevention of marrying at the same time a woman and her paternal aunt. However, Al-Natham is only one scholar who does not accept Ijma as source of Islamic Law and he mentioned no sufficient evidence for that, see A Al-Amedi, *Al-Ehkam*, Beirut, 2004, Dar Arabic Book Press, at 1/102. On the other side there are some scholars such as Imam Malik accept Ijma people of Madina city, some accept Ijma from specific people such as Abu bakr and Omar, or as al- Sheia accept Ijma of the family of Prophet. And Al-thaheria accepts Ijma of companions of Prophet. See M Imam, *Ijma on the Light of Different Islamic School*, 2000, al-Blagh ORG. p. 231.

¹⁵ A Al-Gazali, *Al-Mustasfa*, above note 4 at p. 138; A Al-Amedi, *ibid*, 1/280; A Zaidan., *Al-Oajez in Asol al-Fiqh*, 2002, Dar Gortba, at p. 150

¹⁶ There is an argument if there is no completed consensus, the majority of scholars said in this situation there is no Ijma see Al-Gazali *ibid* at p. 117, whilst some scholar such as Al-Razy said it is Ijma even if there is minority who refuse the majority's decision, see M Ibn Gudama, *Ruthat Al- Nather*, 1884, Dar Al-Elm, p. 71. In fact Ijma has to be by all scholars to be binding decision because the right may be in the side of the opposite minority, and because as we going to see Ijma is only source of Islamic Law if it is occur in completed consensus.

¹⁷ This hadith mentioned by more than one of the Prophet's companions, see M Ibn Gudama *ibid* at p. 68, and A Al-Amedi above note 14, at 1/112.

¹⁸ This is the idea of majority of scholars see A Al-Gazali, above note 4 at p. 139; Ibn Gudama, above note 16 at p. 67, however, There is minority of scholars such as Ibn al-hajb who belief that Ijma is in all affairs, see Ibn al-hajb, *Montaha Al-Asol*, 1982, Dar Al-Maarif, p. 37

¹⁹ 'There is no place for Ijma in modern life affairs' This idea belongs to some Islamic writers see A Mutually, *Principles of Govern in Islam 'Mabadi Al- hokum in Islam'* Al-Maarif Press, 1976, Egypt, p. 189.

4.1.2.1. Is Ijma equal to Democracy?

John L Esposito and John O Voll note that ‘simple correlations like identifying ijma with public opinion are the core of the analysis of some of the famous earlier discussions of democracy and Islam’.²⁰ Although there may be some parallels to be found between the approaches of democracy and Ijma, they are not the same.

The first disparity between Ijma and democracy is that the Mujtahidun, who are the equivalent of the democratic Government, are not freely and fairly elected by the majority, as required by democracy. Rather, a Mujtahid is generally approved by a Muslim ruler as a result of the great learning they possess. The choice of the majority is, therefore, substituted for the choice of the ruler. As such, the democratic principle of power being possessed by the majority of citizens who, in turn, elect their representatives, is substituted for power being possessed by those of great learning, elected ultimately by an individual, the ruler. As such, Ijma involves power being in the hands of a very small minority.

Secondly, whilst Ijma has unanimous consensus of the Mujtahid as its key tenet, democracy is ‘the rule of maximum consensus’²¹ As such, democracy is based upon the decision of the numerical majority, which is then applied to and binding over the whole group. This crucial difference between approaches could be seen to stem from the Prophet Muhammad’s assertion that the Muslim community, ‘would never agree on an error’. Following this principle, the election of the Mujtahid could be considered to supersede the democratic requirement for elections, as Muslim citizens will presumably agree with their ruler. However, such a presumption is at odds with and unacceptable in the democratic system. Disagreement and even diametrically opposed opinions are occurrences inherent and fundamental to the democratic system.

In the modern era even if it is impossible to achieve consensus amongst all Muslims, there is nevertheless the possibility to realise Ijma within specific countries and Islamic communities. For instance, a number of existing Islamic unions, such as Organisation of

²⁰ J Esposito & John Voll, *Islam and Democracy*, 1996, Oxford University Press, p. 31.

²¹ Y Ro’I (ed), *Democracy and Pluralism in Muslim Eurasia*, 2004, Routledge. P. 67.

the Islamic Conference (OIC)²² as the second largest inter-governmental organisation after the United Nations which has membership of 57 states spread over four continents.²³ The International Islamic Fiqh Academy established in 1981 in Jeddah, Saudi Arabia and the European Council of Ifta and Islamic research in 1997 in Dublin in Ireland can help further this process. Parliaments or as they are called in Islamic Law -council of *Shura*- remain the best place in modern society to practise Ijma. Therefore, decisions emerging from these bodies should be considered as Ijma for particular countries or regions. Current examples of Parliaments are Arab Inter-parliamentary Union, established in 1974 in Damascus, and Islamic parliamentary union, established in 1999 in Tehran.

The second supplementary source of Islamic Law is Al-Qiyas. Qiyas is a method that uses analogy, comparison, to determine Islamic legal rulings for new worldly developments. It can be defined as taking an established ruling from Islamic Law and applying it to a new case, in virtue of the fact that the new case shares the same essential reason (Illah) for which the original ruling was initially applied.²⁴ Qiyas also refers to the extension of a Sharia ruling from an original case (Asl) to a new case (Far') when the new case has the same effective cause (Illah) as found in the original case.²⁵ Qiyas, therefore, is a method that Muslim jurists use to derive a ruling for new situations not addressed by the Qu'ran and Sunna.

Qiyas has some pillars to guide its rulings including the original case (Asl), new case (Far), the same effective cause in original and new cases link them into one rule, and, therefore, a single ruling.²⁶ The reason or cause linking the original case with the new one has to be effective and have real resonance with the original case. Consequently, it is called effective cause, in comparison with other types known as cancelled cause. The

²² The Organisation was established upon a decision of the historical summit which took place in Rabat, Kingdom of Morocco on 12th Rajab 1389 Hijra (September 25, 1969) as a result of criminal arson of Al-Aqsa Mosque in occupied Jerusalem.

²³ See N Abiad, *Sharia, Muslim states and international human rights treaty obligations*, 2008, BICL at p. xix Introduction. For website of OIC see <http://www.oic-oci.org/home.asp>

²⁴ This definition belongs to W al-Ajaji, *AL-Qiyas*, 2001, Al-Imam Islamic University Press, p. 216. According to this method, the ruling of the Qur'an and Sunna may be extended to a new problem provided that the precedent (*Asl*) and the new problem (*far*) share the same operative or effective cause (Illah). The Illah is the specific set of circumstances that trigger a certain law into action.

²⁵ See For example the next example: *ASL* (original case) is Wine drinking, *Far* (new case) is taking narcotic drugs, *Illah* (cause of ruling) is Intoxicating Effects, and *Hukm* (ruling) is Prohibition

²⁶ For more about the pillars of Qiyas see A Al-Amedi, above note 14, at p. 482, and A Aodah, *Islamic criminal constitute*, 1994, Al-Resalah Press, at 1/182.

original case must be based on a rule found within Islamic Law in order for it then to apply to the new case.

There are two major categories of Qiyas²⁷ with respect to its evidentiary strength: overt and obscure.

A. Obvious Comparison (Qiyas Jali): This is where the new situation under investigation is identical in its essentials to a matter that Islamic Law already has a clear and established ruling for. This is especially the case when there is clearly no difference between the original and new case being examined, or where the primary sources clearly spell out the reason for the original ruling. This is also true when there is unanimous agreement amongst Muslims regarding this reasoning. In such cases, there is no need for the jurist to deduce a quality in the new situation as a basis for comparison with existing precedents in Islamic Law. The examples of such situations are as follow:

1. The ruling for when the guardian of the orphan's estate burns the entire orphan's property. Though there is no direct textual evidence that discusses burning the orphan's property, the ruling is patently clear. It complies the same ruling as when the guardian squanders the orphan's wealth on himself. Allah says: 'Lo! Those who devour the wealth of orphans wrongfully, they do but swallow fire into their bellies, and they will be exposed to burning flame'.²⁸ It is prohibited for the guardian of the orphan's estate to wrongfully spend the orphan's wealth on himself. The reason for this ruling is obvious — it brings loss to the orphan's property. This is precisely what would happen if the guardian burns the orphan's property. The orphan will suffer the loss. There is, therefore, no material difference between the two cases. Since the two cases share an identical reason for judging an individual liable they are ultimately considered under the same ruling. In this instance, it is unquestionably prohibited for the guardian to burn or otherwise vandalise the orphan's property.

2. The ruling on smacking, or assaulting, one's parents for which there is no direct guidelines within primary sources for addressing this action. However, despite this lack of

²⁷ For more examples and categories of Qiyas, see S Abdul-Hannan, *Usul Al-Fiqh*, 2006, witness-pioneer org, p. 135.

²⁸ Sura Al-Nisa, verse 10.

textual evidence, there is no doubt that it is absolutely prohibited and sinful to engage in such behaviour. In the Qu'ran, it is sinful to even mutter 'ugh' or 'uff' to parents in exasperation when they ask us to do something for them. Allah says: 'And your Lord has commanded that you shall not worship any but Him, and that you show kindness to your parents. If either or both of them reach old age with you, say not to them so much as 'ugh' nor chide them, but speak to them a generous word'.²⁹ It is, therefore, deemed abusive to even utter 'ugh' to one's parents. At the very least, it hurts their feelings. Shoving them or smacking them is even more abusive and hurtful. Since the reason for prohibition is even more evident here, it goes without question that smacking our parents is unlawful and very sinful. From these examples, there should be no question that Qiyas should be accepted as a legal means for establishing Islamic legislation whenever the comparison is overt and self-evident.

Some scholars do not consider these examples to even fall under the heading of Qiyas due to how clear and obvious they are, but consider such rulings to be part of what the texts themselves communicate.

B. Obscure Comparison (*Qiyas Khafi*) occurs where the new situation being investigated is not so overtly similar in its essentials to the established matter in Islamic Law it is being compared to. Scholars cite as an example the question of whether the criminal liability for murder with a bludgeon is the same as that for murder with a knife since in both cases there is 'an intentional and hostile act of killing'. However, unlike the examples above the shared reason upon which the ruling is grounded is one that has been deduced by the jurists based on laws prohibiting murder. The formula 'an intentional and hostile act of killing' is a legal construct developed by legal theorists to define when a killing is legally an act of murder. It is not, therefore, explicitly stated in sources of Islamic Law but rather something that is deduced from their previous rulings and larger moral frameworks. In such cases, there is a greater burden upon the jurist, who is required to extrapolate and explain the cause of the established ruling as related to the present case under investigation.³⁰ This kind of Qiyas is called Obscure Comparison³¹.

²⁹ Sura Al-Isra, verse 23.

³⁰ These examples and many others have been mentioned in most of books of *Asol al-Fiqh*, see W al-Ajaji, above note 24.

³¹ AL-Sheia refuse al-Qiyas, they claims that Qiyas either Obvious Comparison (*Qiyas jaliy*) then there is no need for Qiyas because the link or cause is clear between the original and new case, so the rule that given for

Muslims are all agreed that Qiyas is a valid approach for judging worldly matters. For instance, it can be used to compare one medicine to another or for pricing one product on the basis of the price of similar products in the market. Any Qiyas carried out by the Prophet is also considered valid since it was done in a context of certainty.

There are some scholars who refuse to accept Qiyas because they may conflict with one of the primary sources or may be misused by scholars or jurists. In light of these criticisms supporters of Qiyas have set out strict conditions to ensure that these rulings are just and in keeping with Islamic Law. Qiyas must be compatible with the primary sources or Ijma and decided by a knowledgeable and educated person trained in the science of sources of Islamic Law (Asol Al-Fiqh) as well as the pillars of Qiyas. Many Islamic scholars do not reject Qiyas outright but simply there is some who refer to it as Ijtihad. However, as we will see in the next section, Ijtihad is more general in nature than Qiyas, covering a wider set of worldly phenomena. In this respect, according to imam Al-Shafai, Qiyas is only one type of ruling found in the broader legal category of al-Ijtihad.³²

The third supplementary source of Islamic Law is Istishab, which literally³³ means to order one to look for companionship. In Asol-al-Fiqh, Istishab means the presumption of the existence or non-existence of facts. It can be used in the absence of other specific proofs (*dalil*). It has been validated by a large number of scholars. In its positive sense, Istishab assumes the continuation of a fact (for example; marriage or a transfer of ownership) until disproved by the clear demonstration of its opposite. However, the continuation of a fact does not apply if a contract is of temporary nature (for instance, lease (*Ijara*)). Istishab also presumes the continuation of negative.

Because of its basis in probability, Istishab is not considered to be a strong ground for deducting the rules of Sharia. Hence when it comes in conflict with other forms of proof (*dalil*), the latter takes priority. Below are types of Istishab:

the original one should be for the new one without need for Qiyas, or Obscure Comparison (*Qiyas khafiy*) in this situation as well there is no need for Qiyas because the link between the original and new cases is not clear. See M Hakeem, *Al-Fiqh Al-Mogarn*, 1984, Al-Najaf Press, p.326.

³² See A Ibn Al-Athir, *AL-Bdayah and al-Nehayah*, 1981, Beirut Press, 1/219.

³³ In Arabic language, there are many words start with the letters I, S, T that means to order or look for something. There are three of sources of Islamic Law start with these letters which are Istishab, Istihsan, and Istislah.

a. Presumption of an original absence (*Istishab al-Adam al-asli or al Baraaah al- asliyah*). This refers to the contention that a fact or rule which has not existed in the past is assumed not to exist in the present. An example of this is the rejection of the addition of a sixth daily prayer for which there is no past precedence in Islamic history. This ruling, referred to as the quittance or Barrat al-Dhimmah and accepted by all four schools of Islamic Law, declares that an individual has no duty to anyone except to those which have already been approved.

b. Presumption of original presence (*Istishab al-wujud al-asli*). This means that the presence of evidence (source of Islamic Law) is taken for granted until contradicted. This form of proof, commonly referred to as *Istishab*, is accepted by all Islamic scholars. However, some reject to call it *Istishab* since the rule occurs in the original proof.

c. *Istishab al-Hukm* assumes the continuity of general rules and legal principles. For instance, when there is a ruling in the law (whether propitiatory or permissive), it will be presumed to continue to be in effect after its original ruling. It is called *Istishab al-wasf* (continuity of attribute) which means to take for granted the continuity of an attribute until the contrary is established (e.g. clean water will persist in being viewed as clean until proven dirty). There is conflict on the validity of this kind of *Istishab* between Islamic scholars.

d. *Istishab* also refers to rulings based not on one of the primary sources or *Ijma* but on individual reasoning (*Aql*). This form of proof is not widely accepted within the broader Muslim community. Those who do are called *Al-Mutazilah*.³⁴

There is also in Islamic Law what it is called principles or rules (*quaid*) of *Fiqh*.³⁵ Principles based *Istishab* include the convictions that:

³⁴ *Mutazilah* is one of Islamic ideology based its idea on the mind (*Ijtihad*) and give it priority on the other sources. *Mutazilah* has originated in the 8th Century. See *Al Mutazilah*, Article prepared by the World Assembly of Muslim Youth, available in Arabic language at <http://www.saaaid.net/feraq/mthahb/3.htm>. accessed in November 12, 2007

³⁵ Principles of *Fiqh* is considered independent science that is collected by scholars of Islamic Law include many phrases. The main different between *Asol Al-Fiqh* (fundamentals of *Fiqh*) and *Quaid Al-Fiqh* (principles of *Fiqh*) the former one is about sources of Islamic Law and who can find out the rule from them, in other words it is about the foundations of Islamic Law, whilst the latter one is some phrases have been

- a. Certainty cannot be disproved by doubt (*Al-Yaqin la Yazul bi Al- Shakk*).
- b. Presumption of original freedom from liability (*Baraat al-Dhimmah al-Asliyyah*).

In the view of many Islamic scholars Istishab is not independent or separate from the sources of Islamic Law but instead confirms its overall truth, and is, therefore, considered as part of the larger principles of Fiqh.

The fourth supplementary source of Islamic Law is Istihsan which literally means to deem something preferable. In the juristic sense, Istihsan has many definitions³⁶ stemming from two types of cases dealing with analogy- Qiyas Jali (obvious analogy) to Qiyas Khafi (Hidden analogy). In these instances an exception is made to the general rule for the sake of equity and justice based on some 'nass' (textual evidence), approved custom, Darurah (necessity) or Maslahah (public interest). From this broader definition Istihsan can be placed into many subdivisions. Istihsan is accepted by three out of the four schools of Islamic Law, the exception being the Shafai. However, Shafai jurists Al-Gazali and Al-Amedi have declared that the school now recognises Istihsan when based on the Qu'ran and the Sunna.³⁷

The fifth supplementary source of Islamic Law is Al-Urf. Derived from the custom (Urf), it is a source of Islamic law which applies to situations like many in modern life³⁸, not explicitly addressed by the primary texts of the Qur'an and Sunna. Urf can also specify something generally established in the primary texts³⁹. Scholars of Islamic Law have used to Urf to establish a number of now common Islamic principles such as the principle that;

collected by Islamic Law regarding branches of Islamic Law, such as (no harm in Islam). For more see M Al-Dedew, 2005, *the Principles of Fiqh*, dedew Press, at p. 149.

³⁶M Ibn al-Arabi defined Istihsan in Ahkam al-Qur'an as 'the use of the stronger of two pieces of evidence.' Ibn al-Arabi mentioned in another definition, 'Istihsan is to prefer to leave what the proof entails by relaxation because of something which contradicts some of its requirements.' He divided it into four categories: leaving the proof in favour of custom and leaving it in favour of consensus; leaving it in favour of a benefit; leaving it in favour of making things easy; and removing hardship and preferring expansion. See H Al-Taoeel (ed) *Ibn Al-Arabi, Al-Mahsul*, Dar Al-Hadith, Morocco, at p. 277.

³⁷ See A Al-Amedi, above note 14, at 1/142, and A Al-Gazali, above note 4, at p. 172.

³⁸ For example Al-Aorbon, (deposit) this means to give deposit for something that you want to buy.

³⁹ For example word Al-Dabbah, it is came in many verses in Qu'ran, it is mean in Arabic language everything walk on the ground, but the Urf (custom) specify that by animal only and exclude people, the Islamic rule in this situation is based on Urf.

what is proven by Urf is the same as that proven by Shariah⁴⁰. Some consider Urf as an actual source of Islamic Law whilst others consider it only as means for clarifying the principles of Islamic Law⁴¹. Regardless of this discrepancy, for Urf to occur it must be common and recurrent, in practice at the time of transaction (i.e., past instances of Urf are not relevant), not violate the primary text or any clear stipulations given by the Qu'ran and the Sunna, and finally must not contravene the terms of a valid agreement (as determined in accordance with Sharia)⁴².

Scholars of Islamic Law commonly invoke the Hadith declaring that *whatsoever that is considered good by Muslims is also perceived as good with Allah* as a testament to the validity of Urf. In fact this Hadith speaks more to the validity of Ijma (consensus) than Urf. However, support for Urf can be found in a number of other sources including verse extolling that *keep to forgiveness and enjoin custom*⁴³ as well as from other sources of Islamic Law such as Maslahah Mursalah.

The sixth supplementary source of Islamic Law is Istislah literally means to order or look for a benefit or interest. Where there is no clear legal precedent for deciding justice in relation to issues concerning the public interest it is called Maslahah. It is considered to be a general standard, since it is not based on any clear textual evidence for the basis of its judgement. Maslahah has been further sub-divided into three categories: the first, al-Maslahah al-Mutabarah refers to Maslahah upheld in the Sharia; for example, the upholding of the right ownership through the penalizing of a thief. The second, Maslahah Mursalah, connotes rulings which do not uphold or nullify the Sharia such as the current legal provisions in many Muslim countries demanding documentary evidence to prove the marriage or property ownership. The third and final type Maslahah Mulgha, directly nullifies past Maslahah rulings which are deemed to contradict either explicitly or implicitly the Sharia. Most relevant to this discussion is the second type of Maslahah, the Maslahah Mursalah. One of the principles of Islamic Law is securing a benefit and preventing harm. To this end, the main purpose of Sharia is to protect the five necessities-life, religion, intellect, lineage and property, all of which are also the concern of the Maslahah. Examples of using Maslahah in Islamic Law include the compiling of the

⁴⁰ W Al-Zohili, *Urf between Sharia and Law*, 2000, al-Blagh ORG, p. 63.

⁴¹ Such as the supreme council for Islamic affairs in Egypt, Resources of Fiqh, the supreme council for Islamic affairs in Egypt, Fiqh Encyclopaedia available online at <http://www.islamic-council.com/index.html>

⁴² W Al-Zohili, above note 40, at p. 119.

⁴³ Sura Al-Aaraf, verse 199.

Qu'ran in time of Caliph Abu Bakr and the uniting of all Muslims in favour of the one recitation of the Qu'ran during the reign of Caliph Othman.

The seventh supplementary source of Islamic Law is blocking the Means (*sadd Al-Dharai*) which means to block or obstruct something in order to prevent people from encountering it. *Dharai* is the plural of *Dhariah* which denotes the means or the expediency towards which something is forbidden.⁴⁴ The majority of Islamic Law scholars accept this source. However, there remains conflict between them regarding whether *Dharai* connotes that something must necessarily be forbidden or simply prevented against.

An example of this source is when God said 'and you insult not those whom they worship besides Allah lest they insult Allah wrongfully without knowledge'.⁴⁵ In this verse Allah forbids the insulting of idols and the Gods of disbelievers because this would be an excuse for insulting Allah. Another example is when the Prophet declared the 'testimony of adversaries and suspect individuals was unacceptable' leading him to prevent the testimony of fathers for their sons due to issues of bias.

The eighth supplementary source of Islamic Law is *Shara man Qablana* (Previous legal system) which refers to the laws of nations before us. God says that 'the same religion has He established for you as that which He enjoined on Noah - that which We have sent by inspiration to thee - and that which We enjoined on Abraham, Moses, and Jesus: Namely, that ye should remain steadfast in religion, and make no divisions therein: to those who worship other things than Allah, hard is the (way) to which thou callest them. Allah chooses to Himself those whom He pleases, and guides to Himself those who turn (to Him)'.⁴⁶ In this verse, God mentions other religions existing before Islam. The Hadiths similarly discuss rulings associated with legal rulings that predate Islam called *Shara man Qablana* (Previous legal system). Regarding the validity of this source in Islamic Law, it is divided into four types:

1- *Shara man Qablana* refers to rulings which according to the Qu'ran or Sunna are just as binding for Muslims as they were for previous nations. Scholars of Islamic Law agree that

⁴⁴ Some said *Dhariah* is the means or the expediency toward something whether forbidden or permissible; see M Abo Zahra, *Asol Al-Fiqh*, 1992, Cairo, at p. 228. It is claimed that, the source of Islamic Law only about what it is lead to something forbidden see M Ibn Al-Arabi, *Ahkam Al-Qu'ran*, Beirut, Dar Al-Maarif Press, at 2/798.

⁴⁵ Sura Al-Anaam, verse 108.

⁴⁶ Sura Al-Shura, verse 13.

these rulings should be valid and binding for all Muslims. Example of this include Gods decree that ‘O ye who believe! Fasting is prescribed to you as it was prescribed to those before you’⁴⁷

2- *Shara man Qablana* which has been mentioned previously, denotes those things forbidden to Muslims which were permitted to previous nations, as for instance when God says ‘Say: ‘I find not in the message received by me by inspiration any (meat) forbidden to be eaten by one who wishes to eat it, unless it be dead meat, or blood poured forth, or the flesh of swine’⁴⁸

3- *Shara man Qablana* which was not mentioned in Qu’ran or Sunna (Islamic sources) and is, therefore, not binding for Muslims.

4- *Shara man Qablana* refers to those cases which despite being mentioned in Qu’ran or Sunna there remains no definitive evidence for whether or not they should be authoritative for Muslims. An instance of this is when God says ‘we ordained therein for them: ‘Life for life, eye for eye, nose or nose, ear for ear, tooth for tooth, and wounds equal for equal’. But if any one remits the retaliation by way of charity, it is an act of atonement for him. And if any fail to judge by (the light of) what Allah hath revealed, they are (No better than) wrong-doers’.⁴⁹ There exists much disagreement over this type amongst Muslim scholars, as the majority of Islamic Law considers that what is valid for Muslims must be clearly mentioned within Islamic sources.⁵⁰ In short, *Shara man Qablana* (Previous legal system) is considered as a source of Islamic Law except when it is contradicted by other primary sources.

The ninth supplementary source of Islamic Law is the Sayings of the Prophet’s Companions (*qawl Al-Sahabi*). The companion of Prophet refers to individuals who saw the Prophet, believed in him and accompanied him for a period of time, be it short or long. The fact that companions of Prophet made Ijtihad during this time confirms the validity of this type of ruling for Islamic Law. Consequently, the Qu’ran and Sunna cannot be considered the only sources for Islamic Law. However, the validity of these Sayings

⁴⁷ Sura Al-Baqarah, verse 183.

⁴⁸ Sura Al-Anaam, verse 145.

⁴⁹ Sura Al-Maeda, verse 45.

⁵⁰ A Al-Zarkashi, *Al-Bahr Al-Muhit*, 1989, Dar Al-Kutob Al-Elmeah Press, at 1/45.

remains in contention. Is it considered as a proof and evidence in Islamic Law or not? The next steps are very important for answering this question correctly:

Firstly, even if this case under review is found compatible with the standards of the science of Asol Al-Fiqh there is still a matter of whether the Prophet's companions are credible and honest. All scholars of Islamic Law agree that all companions of Prophet are equity and honesty.⁵¹ Secondly, the specific content of the saying is not always verifiable by independent opinion (*Ijtihad*), such as when he or she started his or her saying, or their recollection of what was ordered and forbidden by the Prophet or the Sunna. Thirdly, the saying of one companion is not binding of the other companions. Fourthly, the saying of the companion is a proof and evidence if there was agreement on this statement from the other companions (*Ijma*). Fifthly, a saying of the companion is considered binding if it is widely accepted amongst companions without disagreement. This kind of *Ijma* is referred to as silent *Ijma* (*Ijma Skoti*).⁵² Sixth, the saying of the companion is considered valid if it agrees with what is already present in the Qu'ran, Sunna, or *Ijma*. In this instance the validity is not attributed to the sayings themselves but the valid proof in the text which it confirms. Seventh, a saying of the companion is consider not valid proof if it contradict the Qu'ran, Sunna, *Ijma*, or sayings other companion. This is also the case if a companion changes his or her saying such as when Ibn Masaud altered his idea about a kind of marriage referred to as Al-Mutaah.⁵³ Eighth, if none of the above conditions apply then the authenticity and interpretation of the companion's saying becomes a matter for Islamic scholarship. A majority of scholars deem it as valid, based on clear supporting evidence⁵⁴. By contrast, there exists the idea that a saying of the companion in this situation should not be considered as proof or as an independent source of Islamic Law. This position is advocated primarily by the school of Shafai, as well as some members of Hanafi, Motazelah and Al-thaheria. In my opinion, a saying of the companion should not be considered an independent source of Islamic Law because there is no specific valid

⁵¹ Shia made Ahl Al-Bayt in high level, the Ahl al-Bayt or household of Muhammad refers to his daughter Fatima al-Zahra, and his cousin Ali, their two sons Hasan Ibn Ali and Husain Ibn Ali, and the Imamah (Shia doctrine) from the lineage of Husain Ibn Ali and Hasan Ibn Ali's daughter. They mention 12 imams. They are considered as sources of Islamic Law in Shia idea. See R Brunner and W Ende, *Twelfth Shia in modern times*, 2001, Brill Press, p. 140.

⁵² Silent *Ijma* (*ijma Skoti*) means If an opinion is expressed by some and no comments either in favour or against, see A Shafaat, the meaning of *Ijma*, 1984, Islamic perspectives, available online at <http://www.islamicperspectives.com/MeaningOfIjma.htm>, accessed on May 12, 2008.

⁵³ Mutaah is temporary marriage; it is illegal in Islamic Law except in Shia idea. See S Murata, *Temporary Marriage in Islamic Law*, Al-Serat Volume XIII, No. 1, 1979, Tehran, p. 37.

⁵⁴ See M Ibn Al-Qaym, *Elam Al-Moaqayn*, 2003, Dar Ibn Al-Jozi, at 1/67.

evidence for such a claim. Additionally, it is shown that the Companions allowed for others to discuss and possibly contradict their ideas.⁵⁵

4.1.3. Al-Ijtihad

Knowledge of *al-Ijtihad* is essential for all those who seek to understand Islamic Law. Unfortunately, the misinterpretation of this subject has led many to claim that Islamic Law is incompatible with modern life⁵⁶ and condemn those who attempt to adapt Islam to contemporary society despite these efforts being firmly based on the principles and sources of Islamic Law.

Al-Ijtihad is not one source of Islamic Law, as claimed by many, but it is a method to know the rule of Sharia. According to the lexicographers, Ijtihad is derived from *'juhd'*, which means the employment of effort or endeavour in performing a certain activity. More technically, Ijtihad is the putting in of all one's effort to reach presumption regarding one of the *Ahkam* of the Sharia in such a manner that one feels he can do nothing more.⁵⁷

4.1.3.1. Is the Rule of the Main Sources of Islamic Law Changeable?

Prophet Mohammad declared that since people have more knowledge of their life than others and must reach decisions concerning their own personal affairs themselves. However, even if Islamic Law grants people the right to *Ijtihad*, it nevertheless determines which areas fall within the sphere of *Ijtihad*.⁵⁸ *Ijtihad* is available only in cases not dealt with in the Qu'ran, Sunna, and Ijma.⁵⁹ It also may occur in cases addressed ambiguously

⁵⁵ A Al-Gazali, *Al-Mustasfa*, above note 4, at p. 169.

⁵⁶ See for example A Shorosh, *Islam revealed*, 1988, US, however, in debate in Kansas City, US, between this book's author and D. G Badawi, the latter claims that this book should be named as misunderstanding of Islam, Debate available in Arabic language online at http://www.archive.org/details/Debate_about_the_Prophet_Muhammad_PBUH

⁵⁷ A Al-Amedi, above note 14, at 4/218.

⁵⁸ There is Idea that Ijtihad is only in what it is called the actual rules of the God or Al-Ahkam which is six hundred verses and two thousand Hadiths, see *Ijtihad*, special report of United States institute of peace, in March 19, 2004, available at <http://www.usip.org/pubs/specialreports/sr125.html>. However, this idea not accurate not only because there are argument about the amounts of verses or Hadiths, but also because the person who eligible to Ijtihad can do Ijtihad and take the rule from other verses and Hadiths, see I Al-Haythami, *Al-Tuhfa*, 1988, Beirut Press, at 1/108.

⁵⁹ Al-Sheia does not accept Ijtihad and Qiyas as sources of Islamic Law as Al-Tosi who is one of scholars of Sheia said in his book *Aoddat Al-Asol* 1/37, Qum, however, Sheia give the right to Ijtihad only for what they are called Imams and they are 12. The idea of Imam is considered not Ijtihad only but as the primary sources, However, regarding the rule of cases which has no rule in primary sources, Sheia make Ijtihad but they called it Al-Aql (brain) and they consider it as one of their sources, instead of Ijtihad, the rule which has been reached by that is considered not the rule of Allah but for exception case has to solve in this way, see M Al-kararani, *Al-Ijtihad in School of Shia*, paper presented in to conference of '*Ijtihad in Islam*' in Amman in 12

or only tangentially in these texts. In order to explain this more fully it is first necessary to understand the difference in Islam between definite sources and probable sources in relation to the Qu’ran and Sunna. All verses in the Qu’ran attributable by known individuals and which can be traced back from the original source — the angel Gabriel — are considered to be definite knowledge. All such knowledge was recorded in a single book — the Qu’ran. By contrast, information which comes from the second source regarding the words and actions of the Prophet (Sunna) viewed as either probable or definite sources and are collected in the Sunna (*Hadith*). For this reason scholars of Hadith differentiate between the parts of the Hadith linked to clear and definite sources and all others referred to as probable sources. Additionally, in both the Qur’an and Hadith, some statements have definite meanings, whilst others have probable meanings. Thus, all statements in the Qur’an and Hadith can be divided into four categories, those with

- definite source, definite meaning;
- definite source, probable meaning;
- probable source, definite meaning; and
- Probable source, probable meaning.

There is no place for Ijtihad in situations where there is either a definite source or meaning. Instead Ijtihad becomes important in cases where there are only probable sources or meanings available. Furthermore, it is also applicable in instances which have not been mentioned in the Qu’ran, Sunna, or Ijma.⁶⁰ In Islamic sources definite meaning apply to beliefs and worships whilst probable ones to the affairs of life. The latter retains this flexibility since it changes according to place and time and pertains to situations whose complexity cannot be confined to legal strictures such as the case with interpersonal relationships as well as political, administrative, and judicial issues.

Dec 1998. However, in previous reference and other references, they have mentioned Ijtihad as one of sources in Islamic Law, in fact as I mentioned before, Ijtihad not one of references of Islamic Law but it is the way that can we find out the rule in cases which have no rule in primary sources of Islamic Law, so Ijtihad include Qiyas and all of the next sources of Islamic Law such as Istishab, Al-Maslah Al-Morsalah and so on.

⁶⁰ There are Some who mentioned another division which is: Qu’ran and Sunna either give us the rule in obligatory way or in permitted way, regarding the obligatory one there is no place for Ijtihad, see M Shams al-dean, *Place of Ijtihad*, 2000, available online at <http://www.al-balagh.com> accessed online at Aug 16, 2007. However, this division is included in the one that has been mentioned above in the text, because obligatory one is under what it is called definite meaning whilst the permitted one is consider as probable meaning.

4.1.3.2. Who is eligible for *Ijtihad*?

To be eligible for *Ijtihad*, an individual must be expert in some important sciences, such as Jurisprudence (*Fiqh*)⁶¹, the fundamentals of jurisprudence (*Asol Al-Fiqh*)⁶² Qu'ran and Hadiths, and Arabic grammar and eloquence.⁶³ In modern life the eligible person, or Mujtahid, should also be open-minded and be knowledgeable of new technology and international relations.

Ijtihad is present throughout Islamic Law. For instance, in many verses in the Qu'ran, Allah explains the role of Sharia for every aspect of life: *And we revealed the Book unto thee as an exposition of all things. (16:89) we have neglected nothing in the Book (of our decrees). (6:38) And in whatsoever ye differ, the verdict therein belongeth to God.(42:10) This day We have perfected your religion for you and completed Our favour unto you and have chosen for you as religion al-Islam...(5:3)*. However, since Islam is not a sacerdotal religion it can be implemented universally and simultaneously in all times and places. This is due to the fact that every earthly occurrence can be explained by a rule in Islamic Law, even if the primary sources have not addressed this phenomenon explicitly. Consequently, people of all ages have the right to determine which rule and interpretations of Islam are suitable for their own historic context This point is underscored in the famous Hadith story concerning when the Prophet sent his companion Muaadh as a judge to Yemen. The Prophet asked Muaath 'On what shall you base your judgements?' Muaadh replied: 'On the Book of God'. The Prophet asked: 'But what if you don't find it there?' Muaadh said: '(Then I will act) according to the Sunna of the Apostle of Allah'. The Prophet again asked: 'What if you don't find it there [too]?' Muaadh said: (I will exert my own *ray*). The Prophet said: 'Thanks to God who gave success to, Messenger of his Messenger'. The necessity for *Ijtihad* in modern times is, perhaps, more important than ever due to the many new situations which have arisen not directly addressed within Islamic sources.

⁶¹ This science means the knowledge of the Sharia's Ahkam (legal rules), pertaining to conduct, that have been derived from their specific evidences, it is the way of creating a law system in accordance with the principles of Islam as based on the central religious scripture, it is consist of number of branches including worship *Ibadat*, contractual law *Muamalat*, criminal law *Taazir* and *Hudud*, and family and personal law *Ahwal-Shaksiyya*.

⁶² This science is very important for person who can used *Ijtihad* because it explains how can deal with sources of Islamic Law, especially, when there is conflict between them, so he or she has to know the topics under this science such as *Al-Nasik* and *Al-Mansok*, *Al-Mujmal* and *Al-Mubayn*, And *Asbab Al-Nzool* however, one of the most important reason for the variety of *Ijtihad* in modern life either in individuals or groups of scholars is the lack of knowledge in this science.

⁶³ All of scholars of Islamic Law under topic of fundamentals of Jurisprudence *Asol Al-Fiqh* have mentioned these conditions; see for example M Ibn Gudama, above note 16 at pp. 190-191.

4.1.3.3. Examples of *Ijtihad*

There are many examples of *Ijtihad* within Islamic Law and history. Despite not being prevalent in many previous eras, *Ijtihad* has a long history within the Muslim tradition stretching back to the period of the Prophet. Notable instances of *Ijtihad* during the companions time include the choosing of Abo Bakhr as caliph (Head of State) following Mohammad's death, which was decided not according to primary sources but the companions' own judgement. After this period there were two schools of *Ijtihad*; Al-Hadith school in al-Hejaz⁶⁴ and Ahl al-Ray. Al-hadith does not allow for *Ijtihad* except when absolutely necessary. The Ahl Al-Ray School in Iraq by contrast extended the practice of *Ijtihad*, leading to what is now referred to as the golden age of *Ijtihad*. During this period the famous Madhabs (schools) of Islamic Law such as Hanafi, Maliki, Shafai, and Hanbali were established. It was also in this period when the references of Fiqh and Asol al-Fiqh were written and compiled. In the present age, *Ijtihad* is practiced both by individuals and groups alike. As previously mentioned, there now exists union, or Parliaments, for *Ijtihad* throughout the world. Modern topics being discussed as cases for *Ijtihad* include the prevention of Cloning which has been debated both by individual *Mujtahid* and by groups including the union of Islamic Fiqh during its 10th conference in Jeddah from June 28, 1997 to July 3, 1997. A medical organ transplant is another issue within modern society decided by *Ijtihad*. Over the past three decades, organ transplants have been accepted within Islamic Law by a number of Muslim scholars and bodies, perhaps most notably during the union's 8th conference in Makkah in 1985. In short, *Ijtihad* is an important concept for the application of Islamic Law especially in modern life as many developments unique to the present period fall under its remit. However, *Ijtihad* must compliment the still essential work of Muslim scholars who assess cases based on the sources of Islamic Law.

Conclusion

⁶⁴ Hejaz is region in the west of Saudi Arabia; it has significance in the Arab and Islamic historical and political landscape, because it includes the two Muslim holy cities Makkah and Madina.

To conclude, in order to understand Islamic Law it is necessary to know its sources, currently the main basis of disagreement between Islamic scholars.⁶⁵ It is the failure to do so that for instance has led to the current belief by many that Islamic Law is incompatible with modern democracy. By contrast when the sources of Islamic Law were clearer during the period of Prophet;⁶⁶ Islamic Law was seen as more compatible with what is now understood as the principles of modern democracy. This shift reveals that we should distinguish between Islamic Law itself and the historical interpretations of Islamic Law⁶⁷. Thus, even if the ideas of Muslim scholars are considered one of the sources of Islamic Law that does not mean that they should be accepted without question since such understandings are intricately linked to their own time and situation and are, therefore, changeable.

Two main sources of Islamic Law- the Qu'ran and Sunna have explained the fundamentals of Islamic Law and are the basis for other sources such as Ijma and Qiyas which exist as references for Muslim. Since Islam is universally valid regardless of time or location, the main sources of Islamic Law consist of both fixed matters which are unchangeable such as beliefs and worships and flexible matters which are changeable including most political matters. The former matters are addressed explicitly within the main sources of Islamic Law and, therefore, have definite meaning. The latter matters have been explained by probable meaning and thus, its validity depends on its time and place. However, supplementary sources can be used only in probable meaning in the absence of definite meaning.⁶⁸

In modern life there have been a number of cases which have had to be newly judged according to Islamic Law. In addition to the use of primary sources for this task, Muslim scholars have also relied on other sources such as Urf, Istihsan, Istislah, Istishab, and Shara man Qablana. Many scholars only accept the first four sources, Qu'ran, Sunna, Ijma and Qiyas, considering the rest as either subdivisions of these original sources or as irrelevant for their judgements since they denote principles, and not sources, of Islamic

⁶⁵ On this base we have seen different schools in Islamic Law (which is called *Madhab*) such as Hanafi and Maliki, the basic of these schools is the variety of way to understand and deal with Islamic sources.

⁶⁶ His Prophethood for 22 years between 610 - 632 CE, during this period there are only two main sources of Islamic Law which are Qu'ran and Sunna, as there is no need for the other sources which appeared after that.

⁶⁷ Prof Shaheen Ali, '*Islam, Rights of Women and the Girl Child: Human rights, Security and Media in the context of Talabinisation of Pakistan*' seminar at Brunel University on March 3, 2009.

⁶⁸ For more about definite and probable sources and meaning see the previous section about Ijtihad in this chapter.

Law.⁶⁹ Scholars of Islamic Law through Islamic organisation such as OIC⁷⁰ as the second largest inter-governmental organisation after the United Nations which has membership of 57 states spread over four continents⁷¹ should play the main role. It would be a good idea for organisations such as this to consider Ijma in modern time and would allow a variety of Muslim countries to choose their representatives and to consider Islamic Law under one umbrella without any discrimination for race, sex, location, or school.

This chapter concludes that there is no evidence in sources of Islamic law to prevent Islamic government to practice democratic principles, however, the next chapter going to explain the form of government under Islamic law and attitude of Islamic law towards forms of government.

⁶⁹ Al-Gazali in his famous book *Al-Mustasfa* has mentioned only the first four sources as real sources of Islamic Law then he has mentioned the others as not sources but as he called them *Al-Asol Al-maohuma*, this means that these sources have been claimed as sources but they are not. See A Al-Gazali, above note 4. at p. 168.

⁷⁰ Above note 22

⁷¹ N Abiad, above note 23

4.2. Chapter Seven: The Form of Government in Islamic Law

Introduction

In order to approach this topic we should investigate whether the sources of Islamic Law have mentioned this topic or not. Specifically what is the form of Government under Sharia (Islamic Law)? What is attitude of Islamic Law towards the variety of forms of Government in modern life? These questions will be the subject of this chapter.

The relationship between religion and Government has increasingly been questioned from within Islam, with the question of whether Islam could be compatible with a secular Government.¹ Some, such as Hasan Eshkevari have reached the conclusion that from the start the caliphate was not a religious matter, but emerged out of the social needs and conditions of the time; therefore it is neither necessary nor obligatory to follow that form of Government.² Egyptian scholar Muhammad Abduh (1849-1905) believed that Islam should not be based on simply following traditional laws, but that it taught its followers to be independent and exercise their powers of reasoning. By using reason, he believed, men will arrive at the right moral judgement.³ Abduh's teachings contributed to the growing school of thought that sees Islam as compatible with a secular form of Government — based on reasoning and consultation, rather than traditional religious rulings. A clear parallel can be seen here between Abduh's belief and that of many European intellectuals of the same period; both champion reason as a guide for human affairs over a leader who derives his authority from God.

However, scholars of Islamic Law have addressed Government matter in what is referred to as the legitimacy policy topic. The legitimacy policy is of a general nature and includes Constitutional Law. It is not limited to what was mentioned in the Qu'ran and Sunna. According to imam Al-Joainy 'Most Caliphs' topics did not mention in main sources of Islamic law⁴ reflecting the lack of discussion of this issue within the Qu'ran or Sunna. However, despite not being mentioned in the text any ruling must not contravene what is laid out in the Qu'ran, Sunna, the nation's consensus, or the rules of Sharia. To this end, Imam Ibn Qaym has said 'who said that no politics except what was mentioned in Qu'ran

¹ H Eshkevari, Islamic democratic government, in Z Mir-Hosseini & R Tapper (eds), *Islam and Democracy in Iran: Eshkevari and the Quest for Reform*, 2006, I B Tauris, pp. 73-100; at p. 74.

² Ibid.

³ See M A Zaki Badawi, *The Reformers of Egypt*, 1980, Routledge, p. 63.

⁴ A AL-Joainy. *Gyath AL-Umam*, 1979, Dar Al-DAOAH Press, p. 8.

or Sunna is wrong and misunderstanding the companions and this group thought the Sharia limited and it cannot achieve the people's interests'. Similarly, Imam Ibn Aqeal Alhanbali has argued that the 'policy is the behaviour which will make the people act in the right way and keep away from the wrong even though it was not mentioned in Qu'ran or Sunna'⁵.

A number of Muslim scholars have nevertheless addressed this topic, perhaps most notably A Al-Maoardy (450H) in his books *Al-Ahkam Al-Sultaniah*, *Al-Soluk in Seasat Al-Moluk*, *Tashel Al-Nather* and *Tajel Al-Thafar*. Other scholars who have dealt with this issue include Imam Abo Yala Al-Farra (458H) in *Al-Ahkam Al-Sultaniah*, Imam Aljoaeny (478H) in *Gyath Al-Aomam*, Imam Ibn Taymea (728H) in *Al-Seasah Al-Sharia* and in *al Husba*, as well as Imam Ibn Qaym Al-Josiah (751H) in *Al-Torq Al-Hukmeah*, Ibn Jamaah (733H) in *Tahrer Al-Ahkam*. And Abo Abdullah Al-Azraq (896H) in *Baday Al-Selk*

As presented above the Sharia (Islamic Law) as sources of Islamic Law consists of two parts. The first concerns unchangeable matters related to worship and belief in general. The second regards changeable matters related to public life, including Constitutional Law. The misunderstanding of this division has led to confusion amongst some writers who claim that Islam is either compatible with or incompatible with modern democracy.⁶ However, the sources of Islam provide guidelines for dealing with changeable matters, which are detailed further.

4.2.1. Principles behind Formation of Government in Islamic Law:

Al-Shura

Al-Shura is the main principle in Islamic Law. The Head of State must therefore always take it into account in all his actions and decisions. This principle will be elaborated further in a different chapter.

⁵ M AL-Josiah, *AL-Torq AL-Hukmeah*, AL-Madina Press, 1985, p. 13.

⁶ Some who said Islam is compatible with democracy tried to involve any matters of modern democracy in Islamic Law even if it is not acceptable in Islamic Law, that led them to said Islamic Law did not talk about Constitutional Law as we can see in book of Islam and fundamentals of rule *Islam and Asol Alhukm* by A Abd Al-Razaq, 1925, Aufq Press, Egypt. However, Panel of High Scholars in Egypt denied this book and sent some notes to his author. This book is considered as references for majority of writers who has no well known about Islamic Law especially what were written in English language. On the other side, there are some who said Islamic Law incompatible with modern democracy, and claimed there is no compatability between them at all.

Justice

It is first important to understand how justice is defined in the Qu'ran. There are many verses in the Qu'ran ordering governors to judge people, especially in the context of disputes, justly. As God said 'Allah doth command you to render back your Trusts to those to whom they are due; and when ye judge between man and man, that ye judge with justice: Verily how excellent is the teaching which He giveth you! For Allah is He Who heareth and seeth all things'.⁷ This call to justice includes all responsible individuals as part of the legislative authority, executive authority, judicial authority or as acting Head of State. '(They are fond of) listening to falsehood, of devouring anything forbidden. If they do come to thee, either judge between them, or decline to interfere. If thou decline, they cannot hurt thee in the least. If thou judge, judge in equity between them For Allah loves those who judge in equity'.⁸

God said to his Prophet David 'O David! We did indeed make thee a vicegerent on earth: so judge thou between men in truth (and justice): Nor follow thou the lusts (of thy heart), for they will mislead thee from the Path of Allah. For those who wander astray from the Path of Allah, is a Penalty Grievous, for that they forget the Day of Account'.⁹

Ibn Katheer argues in his interpretation of this verse that 'this is a recommendation from God to the Government to judge between people justly'. There are many other verses in the Qu'ran which demands that rulers be just not only to their subjects but also to their enemies. God says in this regard 'O ye who believe! stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to piety: and fear Allah for Allah is well-acquainted with all that ye do'.¹⁰

The Sunna also addresses the issue of justice. Abo Huraera reported that the Prophet Mohammad said seven will be protected by God and he mentioned 'the just governor'.¹¹ The Prophet further warns against injustice in many Hadiths. For example he says to his

⁷ Sura An-Nisa, verse 58.

⁸ Sura Al-Maeda, verse 42.

⁹ Sura Sad, verse 26.

¹⁰ Sura AL-Maeda, verse 8.

¹¹ The Hadith was mentioned by Bukhary, Muslim. S Al-Sheq (ed) *The six books*, 1999, Dar al-Salam, Riyadh, p. 643.

companion Moadh, right before leaving for Yemen ‘be aware of the prayers of victims of injustice, there is no partition between them and God’¹² Justice is, therefore, a significant principle in Islamic Law with regard to all people, one which should be universally respected by all times and Governments, even when against their interests. Imam Ibn Al-Qaym declares in this respect that ‘the policy is of two kinds- the injustice policy which is prevented in Sharia and the justice policy which is part of Sharia. It is wrong to say to any justice policy, it is opposite to the Sharia’.¹³

Equality:¹⁴

A central element of justice is equality, especially regarding the treatment of individuals. According to Islam, all people are equal in the eyes of the law. God said ‘O mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that ye may know each other (not that ye may despise (each other)). Verily the most honoured of you in the sight of Allah is (he who is) the most righteous of you. And Allah has full knowledge and is well acquainted (with all things)’¹⁵. The Prophet Mohammad further declares ‘the people equal the same as the comb’s teeth’, and adding ‘they who before you ruined because if the noble stole they did not punish him whilst they punished the lowly if he did. If my daughter stole, I would cut off her hand’¹⁶. There are many stories in the age of The Prophet Mohammad and his companions confirming this principle.

Freedom¹⁷

God said ‘It is He Who hath created for you all things that are on earth’¹⁸. This is one of the most important and well known principles in Islamic Law. It declares that nothing is forbidden except what is explicitly mentioned within Islamic sources. Put differently, all is

¹² The Hadith was mentioned by Bukhary and Muslim. above note 11

¹³ M AL-Jozeah, *AL-Torq AL-Hukmeah*, above note 5 at p. 4.

¹⁴ Shaikh A Bin Humaid, *Equality in Islam*, available online at www.islaam.net, accessed on March 16, 2008; Imam M Baianonie, *Islam Declared Equality Amongst People*, Speech was delivered at the Islamic Centre of Raleigh, N.C., on February 20, 1987, available online at www.islam1.org. accessed on March 16, 2008.

¹⁵ Sura AL-Hujrat, verse 13.

¹⁶ Hadith was mentioned by Bukhary and Muslim, above note 11.

¹⁷ A Soroush, *Reason, Freedom & Democracy in Islam*, 2000, Oxford University Press; B Tibi, *Islam, Freedom and Democracy in the Arab World*, 2005, Centre for European Policy Studies, Brussels, available online at www.ceeol.com; H Saeed, *Freedom of Religion*, 2004, Ashgate publishing limited, England; R Ghannūshī, *Al-Hurriyat Al-Ammah fi Al-Dawlah Al-Islmiyah*, 1993, Lebanon Press.

¹⁸ Sura Al-Baqarah verse 29

allowed unless specifically forbidden by sources of Islam. More precisely the Qu'ran commands Muslims to keep their religious obligations and avoid that which is directly prohibited, however permits followers freedom to enjoy and undertake all activities not explicitly addressed in its contents. The Prophet Mohammad for instance prohibits Muslims from asking about subjects of which the Sharia is silent upon. Imam Ibn Taymea, his student Ibn Al-Qaym, Ibn Gudama, Al-Qasaly and Al-Shatby in Al-Moafaqat and others have discussed this topic in detail. God said 'it is He Who has made the earth manageable for you, so traverse you through its tracts and enjoy of the Sustenance which He furnishes: but unto Him is the Resurrection'¹⁹. Prophet Mohammad explained that blood, possessions, and honour, all have sanctity. And Omar Ibn Al-Khattab said the famous words to the governor of Egypt Amr Ibn Alas 'when did you enslave the people whilst they were born free?' Islam seeks instead to regulate this natural freedom so that it may be used correctly. For example according to Islam freedom does not mean that a person has the right to harm others. Consequently, its laws punish those who are guilty of defamation. This ruling also finds its basis in the Islamic principle stating 'I mean no harm in Islam'. Indeed any form of Government which improves society and achieve its desires is permissible as long as it does not contradict the principles of the Sharia. However, an issues much debated by scholars of Islamic Laws is the appointment of the Head of State. Imam Al-Maoardy contends ²⁰that 'Islamic Scholars agreed unanimously (consensus) on the obligation of the appointment of a Head of State'.²¹ Omar Ibn Al-Khattab argues similarly 'if you are three you should make one of you as governor'.²²

4.2.2. Forms of Governments in Islamic Law

Imam Abo Baker Al-Baklany declares 'the governor comes into this position because of people who accept him'.²³ This issue of governance first emerged following the death of the Prophet. The Prophet Mohammad did not appoint a successor nor did he reveal how one should be chosen after his passing. He thus, left the matter for the people to decide based on principle of Islamic Law such as the *Shura*. To this end, God describes Muslims in Qu'ran as 'who (conduct) their affairs by mutual Consultation'²⁴, therefore commanding that people choose a leader according to their own judgement based on what

¹⁹ Sura Al-Mulk, verse 15.

²⁰ A AL-Maoardy, *AL-Ahkam AL-Sultaniah*, 1909, AL-Saada Press, p. 5.

²¹ There is controversy on how this obligation comes to us- by mental evidence or lawful evidence?

²² A AL-Sannany, *Musanaf Abd-Al-Razaq*, 1972, the Islamic Office Press, at 11/341.

²³ A AL-Baklany, *AL-Melal and AL-Nehal*, 1947, Dar AL-Fekr AL-Arabi Press, P. 185.

²⁴ Sura AL-Shura, verse 38.

is best in regards to their own changeable times and conditions. In Islamic Law, there is an accepted method for choosing the Head of State referred to as the Pledge of Allegiance. This method was used to choose the first caliph after the Prophet Mohammad *Abo Bakhr Al-Sedeq* and consists of two steps. The first is the agreement of a leader by the *Ahl AL-Shura*, from which it gets its name, who is equivalent to a modern national parliament. The second is the confirmation of this choice by the general populace.²⁵

The pledge of allegiance is contract between *Ahl AL Shura* and the Head of State. It is also on the part of the people to obey the Head of State. The pledge of allegiance is very important for all Muslims since the Prophet Mohammad said explicitly that ‘anyone who died without pledge of allegiance died in pre Islam time’.²⁶ As such, there are many Hadiths which explain the significance of the pledge of allegiance. The question remains however how do deal with individuals who have no desire to partake in this process. As Imam Abdullrahman Ibn Hasan has said ‘not everyone has to attend that and it is enough for him to believe that he has to obey the governor and that it is illegal to revolt against him’²⁷. This reality was understood by the Prophet Mohammad’s companions, leading them to enact the pledge of allegiance to Abu Bakr following the death of the Prophet. Traditionally there has been three different ways in which the pledge of allegiance has been undertaken. The first consists of gathering together interested individuals to discuss who deserves this position following which he or she is given their pledge of allegiance. This is what occurred after the death of the Prophet Mohammad when his companions gathered in Saqefat Bani Saeda to discuss who should be caliph upon which they decided to pledge their allegiance to Abo Bakhr. This method resembles what it is now referred to as a general election since all have the right to voice their opinion if they so choose. The second way in which to choose a Head of State is to let the reigning Caliph decide as was done by Abo Baker when he named Omar Ibn Al-Khattab to be his successor. However, this method should not be seen as an excuse to deny the people’s political rights for two reasons. On the one hand, Abo Bakr did not choose him on the basis of his own judgement but only after consultation with the *Ahl Al-Shura*.²⁸ On the other hand, it was a conditional decision contingent upon the agreement of the wider populace based on whether they

²⁵ See M AL-Kudary, *Itmam AL-Ofa in Serat AL-Kholafa*, 1983, Dar Science Books, p. 51.

²⁶ S Al-Tabarany, *AL-Mugam AL-Khabeer*, 1993, Dar Riyadh Press, at 19/334.

²⁷ A Ibn Qasim, *AL-Durer AL-Saneah*, 1965, Dar AL-Efta Press, at 9/11.

²⁸ M AL-Kudary , above note 25 at pp. 50-51.

thought the choice had the ability to rule wisely.²⁹ For this reason, a number of Muslim scholars contend that a governor cannot choose a relative for a successor since it may cause suspicion of nepotism which contravenes his responsibility to make this decision in accordance with the public interest.³⁰ However, in the case of Omar it was permissible since he was accepted by the people as opposed to being merely picked by his predecessor Abo Baker. The third and final way in which to decide succession is to bring together a group of people specifically selected to determine who should be Caliph. It is expected that the people will give their pledge of allegiance to whoever is decided upon by this group. This is how the third Caliph Othman bin Affan was chosen as Omar Ibn Al-Khattab selected six of the original companions to determine who should be the next leader upon his death. This method resembles what it is today referred to as indirect election.

4.2.3. Attitude of Islamic Law towards Forms of Government

4.2.3.1. Monarchy

Prophet Mohammad said ‘it will be caliphate and prophecy thirty years then it will be Monarchy’³¹. Islamic Government held true to this decree with the establishment of a monarchy following the rule of the first four caliphs. The first monarch was Moauia Ibn Aby Sufyan (660-680). The Hadith makes it clear that the monarch should be less powerful than the Caliph, as mentioned by Ibn Taymea.³² In another Hadith, Prophet Mohammad declares ‘it is prophecy then it will be caliphate which will follow the prophecy way then biting monarchy then compulsory monarchy then it will come back to be caliphate on the prophecy way’.³³ In this Hadith, Prophet Mohammad states that Muslims will pass through five different periods or steps the first and best will be the prophecy period. The second will be the time of the caliphate which, as mentioned above, will last for thirty years following the death of the Prophet as foretold in some Hadiths³⁴. This period is referred to as the caliphate period or the prophecy’s caliphate because; as Hamed Ibn Zangoeh says³⁵ ‘the caliphs followed the Prophet in their behaviours and practice the Sharia in their judgements’. The third step or period is *the biting monarchy*

²⁹ A Ibn Taymea, *Mjmo AL-Ftaua*, 1986, Riyadh Press, at 35/48-50

³⁰ See A AL-Maoardy, above note 20, at p. 11.

³¹ *Sunan Abo Daood*, above note 11, No 4646.

³² A Ibn Taymea, above note 29, at 35/20

³³ Musnad Ahmad, above note 11, NO 273/4

³⁴ See Musnad Ahmad Hadeth NO (21919), Sunan Abo Daood NO (4647) • Sunan AL-Tirmithi NO (2226) and Sahih Ibn Habban NO (6943), above note 11.

³⁵ A AL-Baqaoe., *Sharh AL-Sunna*, the Islamic Office Press, 1983, p. 138.

during which there will be some injustice. The fourth period is the compulsory monarchy marked by tyranny and compulsion. In the final stage political rule will be returned to caliphate based on prophecy.

The Hadith praises the rule of the caliphate over the monarch based on several undesirable traits inherent to political monarchy. Thus, when asked which he would it rather be the Prophet Muhammad chose being a servant (of God) and a Prophet over being monarch.³⁶ Ibn Saad recorded that Omar Ibn Al-Khattab asked Salman Al-Farisy ‘what is the different between the monarch and the caliphate?’ To which he responded ‘if you obtain any money from the state and you spend it in a wrong way, you are a monarch, whilst with the caliphate there is justice between people and he deals with them equally, and has mercy upon them in the same as he would have with his family and his son’.³⁷ However, in practice, Kings can rule justly just as Caliph, an example of which is Omar Ibn Abdul-Aziz. Additionally, it is legal and often expected to refer to Kings as a caliphate. Abo Huraera records in this respect that the Prophet said ‘No Prophet after me but there will be many of caliphates’³⁸.

There are two dominant perspectives concerning the attitude of Islamic Law towards monarchy. On the one side, it is argued that the caliphate is necessary and that therefore the monarchy system is illegal unless the people are unable to choose a caliphate. Supporters of this position point to the Prophet’s declaration to ‘follow my way and the caliphates after me’³⁹ On the basis of this statement, they argue monarchy is incompatible with Islamic since it is neither the Prophet’s way nor one of his caliphates preceding him. On the other side, scholars contend monarchy should be considered legal since there were a number of Prophets before Mohammad who were Kings such as Suleiman, Daud and Josef. In light of this fact, and in accordance with the previously discussed *Shara man Qablana* (previous legal system)⁴⁰, it is argued that monarchy is acceptable as a form of Government since it was permitted accepted in the Sharia⁴¹.

³⁶ As Abo Huraera narrated, see Musnad Ahmad NO 7160 and Sahih Ibn Habban NO 6365.

³⁷ M Ibn-Saad, *AL-Tbakat AL-Kubra*, 1968, Dar Beirut Press, at 3/306

³⁸ Hadith was mentioned by Bukhary NO 3455, and Muslim NO 1842, above note 11

³⁹ Sunan Ibn Majah NO44

⁴⁰ For more about this source see the previous chapter as one of sources of Islamic Law.

⁴¹ See A AL-Gazali, *AL-Mustasfa*, 1902, Dar the Science Books, at 1/165; M Ibn Gudama, *Ruthat AL-Nather* 1981, Dar Arabic Books, at 1/160-161, For more about *Shara man Qablana* (previous legal system) see last chapter under the eighth supplementary source of Islamic Law.

To summarise according to Ibn Taymea the best system in Islamic Law is the caliph system based on concept of *Shura*. However, it is incorrect to assume on this basis that the monarch is never permissible according to Islamic Law such as in times when a caliphate system cannot be found. The creation of a caliphate therefore cannot be considered an obligation for Muslims and consequently it is not sinful to pledge allegiance to a monarch.⁴²

4.2.3.2. Dictatorship

According to many Islamic scholars who have addressed this topic since Islam is a religion and dictatorship a form of Government, and as such a political issue, there is no direct relation between the two. Yet, as shown above, the primary sources of Islamic Law often discuss political issues, even if they do not necessarily do so by name such as is the case with dictatorship or monarchy. On the other hand, a number of writers have inaccurately referred to the existence of ‘the Islamic dictatorship’ based on the existence of dictatorship in Islamic countries. However, simply because something exists in Muslim states does not mean it is sanctioned by Islam or in accordance with its laws. Indeed almost all other religions, including Christianity and Buddhism, have seen dictatorships established in their name yet this does not mean that these religions support such a Government.⁴³

Islamic Law is incompatible with dictatorship for many reasons. Firstly, it contravenes one of the primary principles of Islamic Law, the *Shura* which based the decision on opinion of people. Secondly, Islam cannot be imposed by force for as God said, ‘Let there be no compulsion in religion’⁴⁴ Non-Muslims within Islamic society can thus, never be coerced into converting. Only individuals who freely accept Islam are bound by its teachings. Connected to this principle, just as God’s rule cannot be forcefully imposed on people by anyone dictators similarly have no right to impose their own rule on people through the use of force.⁴⁵ Moreover, in the Qu’ran, the Prophet Muhammad is commanded: ‘...to take counsel with them (i.e. the people) in matters (of public concern)’.⁴⁶ The fact that the

⁴² See A Ibn Taymea, above note 29, at 35/24-27

⁴³ M Akbar, *Linking Islam to Dictatorship*, 2004, the Dawn Press, p. 56.

⁴⁴ Sura Al-Baqarah, verse 256.

⁴⁵ A Shafaat, *Military Dictatorship has no place in Islam*, 1983, Islam the modern religion Org.

⁴⁶ Sura Al-e-Emran verse 159.

Prophet did not appoint a specific successor reveals the rejection of dictatorship within Islam. The best description of true Muslims therefore in the Qu'ran is that '...their affairs are run by mutual consultation'.⁴⁷ One of the sources in Islamic Law is the consensus of the nation (Ijma), which has to be obeyed by everyone, including the Head of State, thus, reinforcing the unacceptability of dictatorship within Islam. Furthermore, Islamic Law invites people to run their affairs by mutual consultation based both on their inherent right to do so and the fact that decisions made by a single are more likely to be mistaken.

4.2.3.3. Aristocracy

Aristocratic Government is based on the validity of racism and race superiority, which is rejected in Islamic Law. The Qu'ran says in this respect, 'O mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that ye may know each other (not that ye may despise (each other)). Verily the most honoured of you in the sight of Allah is (he who is) the most righteous of you. And Allah has full knowledge and is well acquainted (with all things)'.⁴⁸ Prophet Mohammad similarly expressed this sentiment, as shown in the previous verse where he directly rejects ideas of racial superiority. Instead he sought to create a universal brotherhood, founded on the principles equality and justice, with no distinction existing based on race, colour or blood: 'You are all brethren, one of another. An Arab has no preference over a non-Arab or a non Arab over an Arab; nor is a white man to be preferred to a black, or a black to a white'. Thus, the issue of the racial superiority has no place within Islam. Islam rejects the idea of a chosen people, a good race or a devil race,⁴⁹ which means, in other words, that there is no place for aristocracy in Islam.

4.2.3.4 Existing Form of Government in Islamic States Does Not Mean it is Acting in Accordance with Islamic Law.

There are a number of reasons why scholars or individuals may misinterpret Islam as being supportive of aristocracy. The first is similar to the faulty reasoning used to link Islam to dictatorship based on its existence within Islamic countries. However, as argued previously, simply because a state refers to itself as Muslim does not mean it is acting in accordance with Islamic Law. Consequently, there are a number of non-Muslim countries

⁴⁷ Sura AL-Shura, verse 38.

⁴⁸ Sura Al-Hujrat, verse 13.

⁴⁹ I Abd-AL-Haq, *Legal Definition of Islam*, 1996, Journal of Islamic Law, 1, p. 140; M Bassiouni, *Islam: Concept, Law and World Habeas Corpus*, 1 Rutgers-Cam L.J.1969, p. 161.

which practice the requirements of Islam better than self-proclaimed Muslim countries.⁵⁰ To this end, one must always bear in mind that Islamic Law, not the law of the specific area or country, is the basis for judging whether a society are properly adhering to the laws of Islam. Many people have no accurate knowledge of Islamic Law or simply misunderstand it. As the Prince of Wales has said, ‘our common attitude to Islam suffers because the way we understand it has been hijacked by the extreme and superficial. To many of us in the west, Islam is seen in terms of the tragic civil war in Lebanon, the killings and bombings perpetrated by extremist groups in the Middle East, and by what is commonly referred to as ‘Islamic fundamentalism’. Our judgement of Islam has been grossly distorted by taking the extremes to be the norm ...we need to study its actual application before we make judgements’.⁵¹

Conclusion

Scholars of Islamic Law have addressed the matter of forms of Government in what is referred to as the legitimacy policy topic. Sources of Islamic Law have provided guidelines regarding most political matters in modern life. However, these rulings must be flexible and acceptable according to differing historical and cultural contexts. Yet, despite not mandating a specific form of Government, all Muslim politics must conform to Islamic principles such as *Shura*, justice, equality, and freedom. On this basis, it can be deduced that dictatorships and aristocracy are not acceptable forms of Government according to Islamic Law. Most principles of liberal democracy have been known to Islamic Law as justice, equality, freedom, and a specific principle which is *Al-Shura* as the next chapter will indicate.

Islamic Law knew the pledge of allegiance as the way for choosing the Head of State which in many respects resembles the way the Head of State is chosen in democratic society today. Monarchy, dictatorship, and aristocracy as forms of Government have been criticised in many aspects by Islamic Law. However, existing form of government in Islamic states does not mean it is acting in accordance with Islamic Law. The next chapter will examine democracy under Islamic law.

⁵⁰ S Siddiqui., *the Challenges of Visiting Muslim countries*, 2000, available online at <http://www.soundvision.com/Info/misc/summer/sum.oldcount.asp> accessed on March 13, 2007

⁵¹ H.R.H, the Prince of Wales, *Islam and the West*, Arab Law Quarterly 9, 1994, pp. 237-238.

4.3. Chapter Eight: Islamic Law and Democracy

Introduction

Continuing on from the last chapter, which explained the attitude of Islam towards different forms of Government, this chapter will focus on the relationship between Islam and democracy, currently the most accepted type of Government internationally. There is much debate surrounding this topic. Many argue that Islamic Law is incompatible with democracy; this is especially true of Muslim writers who reject democracy not due to its principle but its Western origins¹. By contrast there are a number of scholars and Muslims who contend that democracy and Islamic Law are harmonious in their principles,² with some even going so far as to say their co-existence is inevitable.³ These individuals blame the lack of democracy in many Muslim countries on historical, political, cultural, and economic factors as opposed to religious ones.⁴

Before examining this issue in more detail it must be remembered that the more appropriate question is whether it is possible for democracy to exist in a Muslim society?, The best way to approach this question is by investigating the attitude of Islamic Law towards features of democracy, as there exists both agreement and disagreement between Islamic Law as a religion and democracy as a modern form of Government.

4.3.1. Islamic Law and Modern Human Rights

Traditionally, the relationship between human rights law and Islamic Law has been seen to be discordant or incompatible.⁵ It is this 'discordant' view which has been reflected in the opinions of some regional Court such as the ECtHR. In the case of *Refah Partisi (The Welfare Party) and others v. Turkey*⁶ the Court upheld the decision of the Turkish Constitutional Court to ban an Islamist Party. The party (The Welfare Party) was the

¹ See for example H Thakaru, *Is Islam Compatible with Democracy?* June 14, 2006, Minivan news.

² A Turner, *Muslim Grassroots in the west Discuss Democracy*, 2007, the UN High-level group, the Alliance of Civilizations; in this project the opinions of Muslims throughout Britain and the US were sought in discussions on democracy, human rights and the Rule of Law amongst 400 lay Muslims. In conclusion A Turner found Muslims did not find democracy incompatible with Islam. See Panel Discussion: *Islam & Democracy: Theory, Perception and Practice*, Tuesday, May 12, 2009 6:45pm At the Dialogue Society. this project available online at <http://www.muslim-grass-roots-discuss-democracy.com/index.php?page=the-argument> accessed on July 21,2009.

³ See for example R Wright, *Islam and Liberal Democracy*, Journal of Democracy, 1996, pp. 64-75; M Farooq, *Islam and Democracy*, June 16, 2002, The Independent Bangladesh Press.

⁴ See special report of the United States institute of peace, *Islam and Democracy*, 93, September, 2002

⁵ M Baderin, *Human Rights and Islamic Law: the Myth of Discord*, 2005, EHRLR, p. 165.

⁶ *Refah Partisi (The Welfare Party) and others v. Turkey* (2002) 35 E.H.R.R. 3; (2003) 37 E.H.R.R. 1

largest single party in Turkey at the time of its dissolution. There was nothing in the party's programme which provided evidence of an anti-democratic purpose. However, in a series of speeches by Welfare Party leaders, it was alleged that the party had demonstrated that it intended to set up a plurality of legal systems; that it wanted to apply *Sharia* to the Muslim community and that it advocated *jihad* as a political method.⁷

The Grand Chamber unanimously decided that there had been no violation of Article 11.⁸ This decision was based on the ECtHR's belief that *Sharia* is irreconcilable with democracy, as conceived by the Convention. Particular regard was held to the criminal law and the status of women.⁹ Thus, any plan to implement a plurality of legal systems would also be incompatible. It was said by the Court that 'sharia is incompatible with the fundamental principles of democracy'¹⁰ and the Chamber Court's statement that 'it is difficult to declare one's respect for democracy and human rights whilst at the same time supporting a regime based on Sharia, which clearly diverges from Convention values'¹¹ was approved.¹²

This approach may be seen in the European Human Rights institutions dealing with particular aspects of Islamic Law. For example, the ECtHR has been reluctant to offer protection for those who wish to abide by Islamic rules of prayer. In *Ahmad v UK*¹³ a teacher sought accommodation of his obligation to attend Friday worship by his employers. The claim was rejected as manifestly ill-founded on the basis that he could resign if and when he found his religious duties to be in conflict with his work.¹⁴

Similarly, the Court has been asked to determine issues relating to the Qu'ran requirement to wear a headscarf.¹⁵ In *Karaduman v Turkey*¹⁶ a student having completed her University

⁷ P Harvey, *Militant Democracy and the European Convention on Human Rights*, 2004, ELREV 407, 417

⁸ B Olbourne, *Refah Partisi (The Welfare Party) v Turkey*, (2003) EHRLR, pp. 436-442.

⁹ *Refah* case, above note 6 at 123, for more see D McGoldrick., *Multiculturalism and its Discontents*, 2005, HRLRev, Vol. 5, p. 27

¹⁰ *Refah* case, above note 6 at 123.

¹¹ *Refah* ibid

¹² P Macklem, *Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination*, 2006, IJCL, p. 488.

¹³ (1982) 4 E.H.R.R. 126.

¹⁴ A McColgan, *Class wars, Religion and (in) Equality in the Workplace*, 2009, ILJ 1, p. 16.

¹⁵ T Lewis., *What not to Wear: Religious Rights, the European Court, and the Margin of Appreciation*, 2007, ICLQ, p. 395.

¹⁶ Application no.16278/90, Commission decision of 3 May 1993, DR 74

studies was not allowed to graduate for failing to submit a photograph of herself without her headscarf. Her claim for a breach of Article 9 was rejected as she had chosen to pursue her education in a secular University. It was said that restrictions on the freedom of students to manifest their religion were ‘intended to ensure harmonious coexistence between students of different beliefs’.¹⁷

Similarly, in *Sahin v Turkey*¹⁸ the Court held that a University regulation banning a student from wearing a headscarf at lectures and exams was justified as being prescribed by law, having the legitimate aim of protecting the rights and freedoms of others and of protecting public order and being necessary in a democratic society.¹⁹ The Grand Chamber reiterated that constitutionally enshrined secularism was ‘consistent with the values underpinning the Convention’.²⁰ It also stated that, ‘There must be borne in mind the impact wearing [the headscarf], presented as a compulsory religious duty, may have on those who choose not to wear it... the issues at stake include the protection of the ‘rights and freedoms of others’ and the ‘maintenance of public order’.²¹

Despite academic criticism of this case for an inconsistent approach when compared with the right to freedom of expression, its emphasis on sexual equality without considering the free adoption of a woman’s choice to wear a headscarf, and the majority’s failure to provide examples of the pressures which it was alleged it would cause on society,²² the case has recently been followed by the Court.

In *El Morsli v France*²³ the applicant, a veil-wearing Muslim, was asked to raise her veil at the French consulate as part of a visa application. She refused and was not permitted to enter the consulate compound. The Court held that Article 9 was engaged but that her complaint was manifestly ill founded as the requirement to lift the veil was aimed at achieving the legitimate aim of guaranteeing public safety and order. Although the applicant would have been happy to raise her veil in the presence of a woman only, the

¹⁷ Ibid, at 108.

¹⁸ (2005) 41 EHRR 8.

¹⁹ M Hill, R Sandberg, *Is Nothing Sacred? Clashing Symbols in a Secular World*, 2007, Public Law, p. 488.

²⁰ Above note 18, at 114.

²¹ Ibid at 115.

²² Case Comment *Freedom of Religion: University Ban on Students Wearing Headscarves*, 2006, EHRLR 227, 231, and S Fredman (ed), *Discrimination and Human Rights*, 2001, Oxford University Press, at pp. 36-42

²³ [2008] ECHR 15585/06.

state would have been within its margin of appreciation if no female official had been assigned.²⁴

However, despite the European Court of Human Rights obvious reluctance to embrace Islamic Law as compatible with Human Rights, and to offer protection for those who wish to abide by Islamic Law, it should not be thought that the Court always agrees to offer protection to individuals of Islamic faith. In the recent case of *A and Others v UK*²⁵ compensation was ordered against the UK to be provided to individuals who had been discriminated against in relation to their detention as terrorist suspects. Although the UK argued that it was legitimate to confine the detention scheme to non-nationals in order to reduce the chances of recruitment by extremists, the Court held that there had been an unjustifiable discrimination.²⁶

In conclusion, the approach of the ECtHR has tended to perceive Islamic Law generally as being discordant with human rights²⁷, without embracing a detailed analysis of which Islamic Law and which aspects of Islamic Law may or may not be compatible with the ECHR's construction of those rights.

Democracy is considered a key component of one's overall human rights. Specifically it is perceived as a universal political right. It is commonly argued that the principle barrier preventing Muslim communities from realising human rights and instituting democracy

²⁴ Case (2008) EHRLR 535.

²⁵ [2009] ECHR 3455/05.

²⁶ See Times, February 20, 2009.

²⁷ In para 123 In the case of *Refah Partisi*, the ECtHR declared 'Sharia is incompatible with the fundamental principles of democracy' the Court has justified its statement by 'Sharia faithfully reflects the dogmas and divine rules laid down by religion is stable and invariable' however, Sharia as it is analysed in this part of this thesis is flexible and diverse both in theory (different historical schools of interpretation) and in practice, in most countries where it is applied, it is largely limited in scope to personal status and family, therefore the Islamic Law of Pakistan is not that of Saudi Arabia, Malaysia, or Sudan. That could raise question of which Islamic Law does the Court mean? The Court justified its statement further by saying that 'Sharia intervenes in all spheres of private and public live'. However, Even there is idea in Islamic Law that Sharia is not intervenes in all spheres of private and public live.(See for example A An'naim, *the future of Sharia*, Annual Currie Lecture, The Centre for the Study of Law and Religion, Emory School of Law, January 29, 2007, he claims that 'Sharia does not intervenes in state matters,' available online at http://sharia.law.emory.edu/en/why_islamic_state_un) However, Intervenes of Sharia is flexible and only to give guidelines. The Prophet who is considered as one of the main sources of Sharia said when he was asked about matter of the public life 'you have more knowledge of your life' that means the role of Islam in that cases based on the interests of people in variety places and times. See Saheh Muslim, hadith No, 2363, 84795, and 84076, see N Al-Albany, *Saheh Al-Jama*, 1984, Dar Arabic Book, p. 767; M Ibn Majah, *Sunan Ibn Majah*, Eisa Al Halabi Press, Cairo, at 2/825, Hadeth NO 2740-2741

are religious in nature.²⁸ For this reason it is necessary to firstly explore the attitude of Islamic Law regarding human rights. Whilst the 1948 Universal Declaration of Human Rights has been accepted by Islamic countries²⁹ it has not been without reservations, namely over the right to freedom of beliefs and individual equality.

Article 18 of the Universal Declaration of Human Rights states ‘Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance’.³⁰ In fact, Islamic Law recognised freedom of belief before its modern enshrinement in the UDHR. Scholars of Islamic Law point to God’s declaration in the Qu’ran that there should be ‘no compulsion in religion’³¹, thus, establishing freedom of religion as an important religious principle for all Muslims. This basic right is reinforced throughout Islamic texts. For instance, in one verse God states ‘Say, ‘The truth is from your Lord’: Let him who will believe, and let him who will, reject (it)’³². In other verse God says to his Prophet ‘Say: ‘O ye men! Now Truth hath reached you from your Lord! Those who receive guidance, do so for the good of their own souls; those who stray, do so to their own loss: and I am not (set) over you to arrange your affairs’. Omar Ibn Al-Khattab, one of the Prophet’s most famous companions and the second Caliph in Islam, for example did not try to convert an elderly Christian woman who came to him for help since he feared her acceptance of Islam might be done under compulsion due to her impoverished circumstances.³³ Similarly whilst scholars debate whether a Muslim husband may try to convert his non-Muslim wife, all agree that it is unlawful for him to prevent her in any way from practising her religion. This reflects the principle of non-compulsion and religion freedom inherent to Islamic Law³⁴. In this respect it is important not to confuse the intolerant practices of specific Muslims who force their religion on non-Muslims with

²⁸ See A Mayer, *Islam and Human Rights*, 1989, geocities.com p. 4, available at <http://www.geocities.com> accessed July 23, 2008.

²⁹ See for example Cairo Declaration on Human Right in Islam, 1990, adopted in Cairo, and Arabic Declaration of Human Rights, 1997, Saudi Arabia has reserved on articles 16 and 18 of UDHR, see the first report of National Society for Human Rights in Saudi Arabia, 2006. available online at <http://nshr.org.sa/english>

³⁰ UDHR Adopted and proclaimed by General Assembly resolution 217 A (III) of December 10, 1948,

³¹ Sura Al-Baqarah, verse 256

³² Sura Al-Kahf, verse 29

³³ M Al-Qurtby, *Al-Jami le Ahkam Al-Qu’ran*, 1974, Dar Al-Qad Press, at 5/1203.

³⁴ Some western writers wrote about freedom of belief in Islam such as: Gustav Lobon in the *Civilisation of the Arabs* and Montgomery Watt in his book *Mohammad Prophet and Statesman*. See E Al-Dhabi, *Dealing with Non-Muslim in Muslim Society*, 1993, Egypt, Qareeb Press, at p. 46.

the true intention of Islamic Law based on its actual sources. However, there is no evidence that Islamic Law prevents the freedom to worship. Instead it declares that even if Muslims are prohibited from practising Islam in non-Muslim countries they should still grant non-Muslims the freedom to practise their religion in Muslim countries. It is argued that the existence of other religions does not threaten the rights of Muslims sincere in their belief. It is for this reason that Islam promotes a principle of non-compulsion, asking its followers not to eliminate different religions but instead to study their own more deeply so as to avoid misinterpretation. Indeed it is believed such religious freedom serves an important role for the promotion of Islam, for the true advantages of Islam will only emerge in comparison to other religions, thus, simultaneously converting non-Muslims and reinforcing the convictions of existing Muslims.

Article 22 of Islamic Declaration of Human Rights is ‘Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Sharia. According to the norms of Islamic Sharia Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil. Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith. It is not permitted to arouse nationalistic or doctrinal hatred or to do anything that may be an incitement to any form of racial discrimination’.³⁵

Islamic Law is a religion that can be practiced by all people. It must therefore be respectful of different religions in order to give confidence to existing believers. Apostasy³⁶ and War are considered as the most controversial issues within modern Islamic Law. Some scholars argue that Islamic Law is incompatible with modern human rights based on its rejection of apostasy. To this end, apostasy and war in Islam will be the primary examples used to investigate this issue.

³⁵ The Cairo Declaration on Human rights in Islam Adopted and Issued at the Nineteenth Islamic Conference of Foreign Ministers in Cairo on August 5, 1990.

³⁶ Apostasy is the total renunciation of religion by one who has been educated in or professed that faith within this realm. See A Said, *Freedom of Religion Apostasy and Islam*, 2004, Ash gate Press, p. 35.

4.3.1.1. Apostasy in Islamic Law

The first source of Islamic Law -Qu'ran- did not mention any punishment for apostasy despite it being mentioned as a grave sin in many of its verses. The Qu'ran states for instance '...And if any of you Turn back from their faith and die in unbelief, their works will bear no fruit in this life and in the Hereafter'.³⁷ Similarly, it declares 'O ye who believe! If any from amongst you turn back from his Faith, soon will Allah produce a people whom He will love as they will love Him....'³⁸ as well as 'Any one who, after accepting faith in Allah, utters Unbelief, - except under compulsion, his heart remaining firm in Faith - but such as open their breast to Unbelief, on them is Wrath from Allah, and theirs will be a dreadful Penalty'.³⁹ However, many verses confirm individuals' right to believe as they wish free from compulsion or external pressure. The Qu'ran states for example 'If it had been thy Lord's will, they would all have believed, - all who are on earth! Wilt thou then compel mankind, against their will, to believe!'⁴⁰ 'Say: 'O ye men! Now Truth hath reached you from your Lord! those who receive guidance, do so for the good of their own souls; those who stray, do so to their own loss: and I am not (set) over you to arrange your affairs'.⁴¹ 'Say, 'The truth is from your Lord': Let him who will believe, and let him who will, reject (it)....'⁴² 'Therefore, do thou give admonition, for thou art one to admonish. Thou art not one to manage (men's) affairs'⁴³ and 'Let there be no compulsion in religion: Truth stands out clear from Error'.⁴⁴ These verses reveal the importance of freedom of belief within Islam, a principle reinforced by the fact that the Qu'ran does not set out any worldly punishment for those guilty of apostasy. However, apostasy can be prosecuted if it threatens social stability. Consequently, normal apostasy must be distinguished from forms of apostasy which are of a terrorist nature and thus, endangers Government and society.

³⁷ Sura Al-Baqarah, verse 217.

³⁸ Sura Al-Maeda, verse 54.

³⁹ Sura Al-Nahl, verse 106.

⁴⁰ Sura Yunis, verse 99.

⁴¹ Sura Yunis, verse 108.

⁴² Sura Al-Kahf, verse 29.

⁴³ Sura Al-Kashia, verses 21-22.

⁴⁴ Sura Al-Baqarah, verse 256.

A number of Islamic Law scholars argue that the punishment for apostasy should be death penalty, quoting the Prophet as saying ‘Whoever changed his religion, then kill him’.⁴⁵ They also point to a similarly themed Hadith by Ibn Masaud declaring ‘The blood of a Muslim who confesses that none has the right to be worshipped but Allah and that I am His Apostle, cannot be shed except in three cases’ one of which is ‘the one who reverts from Islam (apostate) and leaves the Muslims’.⁴⁶ In addition to that some Muslim scholars report an Ijma (agreement) on this principle. Moreover, the four famous schools (Mathhab) in Islamic Law agree that the death penalty should be given to males who apostate.

There thus, appears to be a contradiction within Islamic Law between the right to freedom of belief and the punishment of apostasy. One way in which scholars have attempted to resolve this contradiction is by questioning the legitimacy of the previously mentioned Hadith promoting such harsh repercussions against apostasy. To this end, scholars contend that this Hadith is attributed to a single person known as Ahaad and, therefore, cannot be accepted by Muslims, particularly as related to matters of belief.⁴⁷ However, despite such criticism this kind of Hadith -Ahaad- must be accepted if it is proven correct even in respect to matters of belief, a tradition which has spanned from the time of the Prophet to the present age.⁴⁸ This Hadith is nevertheless challenged by the facts that this punishment was not recommended in the Qu’ran and was not practiced by the Prophet. Consequently, it must be understood that the Hadith can be interpreted in a variety of ways, leaving it open to question. For instance, is this punishment valid for both males and females? Does it relate only to Islam or all religions? Is there a set amount of time for apostates to repent? And is this punishment considered as discretionary (*ta’zeer*) or a *hadd* (*fixed penalty*)? Given that there is no clear and definite meaning for this crime, it can best defined in two ways⁴⁹.

⁴⁵ Hadith was narrated by Bukhary 84/57.

⁴⁶ Hadith was narrated by Bukhary and Muslim 83/17.

⁴⁷ This belong to some writers such as M Shaltot, see S Al-Jarah, *Islam and Declaration of Human Rights*, 2007, USA, Centre of Study Islam and Democracy, at p. 11.

⁴⁸ This is the idea of scholars of hadith such as Ibn Hajr, Bukhary, Muslim, and in modern time Al-Albany (the famous scholar of Hadiths) he has book about validity of this kind of hadith, available at <http://s203841464.onlinehome.us/books/07/0622/0622.rar> .imam Al-Shafai said there is Ijma (agreement) on that, see 1/457, in fact , most of Hadiths have narrated in this way as Ibn habban said, this idea lead to refuse most of Hadiths, see M Ibn Habban, *Al-Ihsan in Taqreeb Sahih Ibn Habban*, 1962, Egypt, at 1/156.

⁴⁹ See K Al-Masri, *Apostasy*, 2002, available online at <http://www.islamonline.net>

Our earlier apostasies refer to the so-called ‘simple apostasy’ which is not related to treason and sedition, or the abuse and slander of the God or his Prophet. The second apostasy which does involve treason or sedition should be punished by the death penalty, as mandated by Islamic Law. This distinguishing of apostasy has been mentioned by many Islamic Law scholars such as Ibn Taymea.⁵⁰ This is also shown in the statements and actions of the Prophet for example in the case of Abdullah bin Abi Al-Sarh when the Prophet refused to punish him for his apostasy following the intercession of Othman bin Affan on his behalf. However, within Islamic Law there is no intercession in instances of Al-Hadd (fixed penalty), which refers to present apostasy involving sedition or treason. Moreover, the previously mentioned Hadith Ibn Masaud refers to apostasy only in relation to other abuses thus, demonstrating that it should not be punished when committed by itself.⁵¹

In conclusion, Islamic Law promoted freedom of belief before the universal declaration of human rights, demanding that there be no religious compulsion in Islam. Furthermore, Islamic Law states that Muslim’s guilty of the grave sin of apostasy will be punished in the afterlife and, therefore, should be given leniency during their lifetime unless such an offense also involved the crimes of treason or sedition.

4.3.1.2. How Can Wars in Islam be justified if there is No Compulsion in Islam?

There are many who claim there is compulsion in Islam as there is war, moreover some have called Islam as the religion of war⁵², and claimed that on some websites⁵³. This section is going to investigate the attitude of Islamic Law towards war and how can we reconcile no compulsion in Islam and war in Islam.

First, there is no verse in Qu’ran about war as the right of individuals but as the right of society, so the verses of war in Qu’ran have been formulated in the plural not in the singular. On the other hand, the verses that consider tolerance and invite other people to Islam mostly analyse this of saying about individuals such as ‘Invite (all) to the Way of

⁵⁰ A Ibn Taymea, *Al-Sarm Al-Mslol*, 1981, Beirut Press, at pp. 376,377.

⁵¹ Hadith Ibn Masaud was mentioned by Aisha (wife of Prophet) and she mentioned more description for apostate who deserves the death penalty such as slander of the god and his Prophet, see A Ibn Hajr, *Bloog Al-Maram*, the Crimes Chapter, 1988, Dar Al-Kutob Al-Elmeah Press, p. 439.

⁵² See for example speech of Vatican Benedict XVI, delivered to scientists at the University of Regensburg, Germany on 12,09,2006. Available at <http://www.zenit.org/article-16955?l=english> however, many Islamic countries and organisations criticised that see *Al-Jazeera* net, 15,09,2006. and the Middle East Newspaper *Asharq Al-Awsat* issue 10154 on 16,09,2006,

⁵³ See for example this website <http://romanos.150m.com/english.htm>, accessed on March 23, 2008.

thy Lord with wisdom and beautiful preaching; and argue with them in ways that are best and most gracious: for thy Lord knoweth best, who have strayed from His Path, and who receive guidance⁵⁴. And ‘Hold to forgiveness; command what is right; But turn away from the ignorant’.⁵⁵ Whilst the verses of war refer to the society as a group, the only verse which talks about war refers to the leader only, as the God says ‘Then fight in Allah’s cause - Thou art held responsible only for thyself - and rouse the believers. It may be that Allah will restrain the fury of the Unbelievers; for Allah is the strongest in might and in punishment’.⁵⁶

Second, war in Islamic Law is allowed only if it is for the good and advantages of Islam. If it is for some interests of life it is not allowed as the Prophet answered the one who asked him about the definition of war for the God.⁵⁷ Third, the war in Islam is an exceptional case. It is allowed only to prevent what it is called the necessities in Islam which is the propriety, the blood, the religion, and family. As the Prophet in many Hadiths promised, the one who died for preventing one of the previous matters to be in paradise and he is called a Martyr or Shaheed.⁵⁸

Fourth, the prophet who stayed in Makah for thirteen years invited people to Islam without war but in wisdom and beautiful preaching; and argued in ways that are best and most gracious. Many of Muslims at that time were amongst poor people and the Prophet at that time had no temptation of life such as money. They nonetheless entered Islam with strong confidence. Moreover they faced many kinds of punishment from unbelievers in Makkah, but that did not prevent them to keep their faith. The belief therefore was that the war had been allowed not to compel people to enter into Islam but to prevent people against attack of their enemies. Therefore, God said about unbelievers who did not set up war on Muslim ‘Allah forbids you not, with regard to those who fight you not for (your) Faith nor drive you out of your homes, from dealing kindly and justly with them: for Allah loveth those who are just’.⁵⁹ What this means is that Muslims not only prevent to set up war on

⁵⁴ Sura Al-Nahl, verse 125.

⁵⁵ Sura Al- Araf, verse 199.

⁵⁶ Sura Al-Nisa, verse 84.

⁵⁷ Hadith was narrated by Abo Mosa al-Ashari, Sahih Muslim hadith No 1904.

⁵⁸ Meaning of *Shaheed* (Martyr) is description for the person who died by one of the ways that have been promised by the Prophet to be in the paradise. Such as the person who killed whilst he or she defending against his or her religion or blood.

⁵⁹ Sura Al-Mumtahina verse 8.

unbelievers but should dealing kindly and justly with them. War in Islam should only take place when it is necessary to prevent disasters from occurring to Muslims. As the God said ‘Fight in the cause of Allah those who fight you, but do not transgress limits; for Allah loveth not transgressors’.⁶⁰

There are some procedures there have to be taken into account during an Islamic war. First as Islam is a global religion, then when the enemy of Islam accepts becoming a Muslim, it means he/she accepts peace and can no longer be fought against. Therefore, when one of the Muslims killed an unbeliever who said ‘I certify there is no God except Allah and Mohammed is his messenger’ he justified that he said it only to prevent himself to be killed, the Prophet did not accept that⁶¹ and God said ‘say not to anyone who offers you a salutation: ‘Thou art none of a believer!’ coveting the perishable goods of this life: with Allah are profits and spoils abundant. Even thus, were ye yourselves before, till Allah conferred on you His favours: Therefore, carefully investigate. For Allah is well aware of all that ye do’⁶²

The first procedure in war is, therefore, to invite your enemy to Islam/ If Islam has been accepted then there is no war. Second if Islam is not accepted there should be no compulsion. However if he or she would like to live in a Muslim society there are some structures that must be followed including having to pay al Jiziah.⁶³ It is important however to realise that when either one of these two procedures has taken place there is no war.

It is the case today that war is not allowed⁶⁴ as there are no advantages for Islam only many disadvantages. It can therefore be seen as wrong that many today have invited people to war in reaction to terrorism and tried to cover their work under the umbrella of Islam.

⁶⁰ Sura Al-Baqarah, verse 190.

⁶¹ Hadith was narrated by Ibn Abas, Sahih al-Bukhary, No 4315.

⁶² Sura Al-Nisa, verse 94.

⁶³ Al-Jiziah refers to amount of money to be paid by Non-Muslims who living in Muslim society. However, it is going to explain in this part in more detail see p 162.

⁶⁴ See A Al-Gazali, *Al-Ehea*, 1982, Lebanon Press, at 2/319.

In conclusion, the main sources of law mean that war must be approached by considering what is right to occur in a specific place and time. It is conceded that war may be an important issue when it is felt as necessary but the main point to take from the above is that rules on war must be decided by countries not by individuals or groups of people.

4.3.2. Features of Democracy in Islamic Law

In order to assess whether democracy can be practised in Muslim societies it is first necessary to understand the attitude of Islamic Law toward democracy. Whilst the relationship between justice, equality, and freedom within Islamic Law were discussed in the previous chapter, this section will investigate Islamic Law in relation to features of democracy currently debated. Specifically, the features to be discussed in this section are political rights, the right of Non-Muslims in Muslim society, the right of women, and the right for multiple parties to exist.

In democracy sovereignty belongs to the people, allowing them to practise their political rights. Similarly, in Islamic Law sovereignty is granted to the people in regards to their personal affairs. The Prophet tells people in this respect that ‘you have more knowledge of your life.’⁶⁵ Consequently, Islamic Law does not specify a particular form of Government for Muslims. Instead it allows individuals to choose the Government which is most suitable to their own historical time and place. Many Muslims contend that according to Islamic Law sovereignty belongs to God. However, what they are in fact alluding to is that Muslims must obey the orders given by God and his Prophets. Yet such obedience only refers to religious affairs, thus, leaving people to decide the form of Government which is best for them. More generally sovereignty within Islamic Law belongs to its main sources whilst politically sovereignty belongs to the people. Therefore, all democratic decision-making is allowable within Islam so long as it does not contradict Islamic Law. The political rights including the right to be elected in fair and genuine election is accepted in Islamic Law. However, it is permitted not as a universal ideal for Government but due to it being the best way in the current historical period for achieving political equality between people. Thus, it is wrong to refuse democracy as a Western system or as incompatible under Islamic Law. Islamic Law encourages people to accept good ideas no matter where

⁶⁵ Saheh Muslim, hadith No, 2363, 84795, and 84076, see N Al-Albany, *Saheh Al-Jama*, 1984, Dar Arabic Book, p. 767; M Ibn Majah, *Sunan Ibn Majah*, Eisa Al Halabi Press, Cairo, at 2/825, Hadeth NO 2740-2741

they come from, thus, allowing contemporary Muslim societies to take advantage of improvements originating in the West.

4.3.2.1. The Right of Non-Muslim in a Muslim Society

In order to understand the right of non-Muslims in a Muslim society it is necessary to investigate the status given to human beings by Islam. Islamic Law honours humans, as reflected in a number of verses in the Qu'ran such as, 'we have honoured the sons of Adam (human); provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favours, above a great part of our creation'.⁶⁶ 'We have indeed created Human in the best of moulds'.⁶⁷ Similarly, God ordered the angels to bow down before the first humans as a mark of respect and honour: 'thy Lord said to the angels: I am about to create man, from sounding clay from mud moulded into shape; When I have fashioned him (in due proportion) and breathed into him of my spirit, fall ye down in obeisance unto him. So the angels prostrated themselves, all of them together'.⁶⁸ all what have been created are for human to explore them and take their advantages, as the God said 'Do ye not see that Allah has subjected to your (use) all things in the heavens and on earth'.⁶⁹ The word for humanity (Al-Naas) was mentioned in the Qu'ran 240 times whilst human being (Al-Insan) was mentioned 65 times.⁷⁰ This demonstrates the importance of these words within Islam, especially in relation to the equality and honour given to the entire human race regardless of colour, ethnicity, or religion. Consequently, a number of principles similar to human rights can be found within the sources of Islamic Law. For example, God says 'if any one slew a person - unless it is for murder or for spreading mischief in the land - it would be as if he slew the whole people'.⁷¹ This passage illustrates an original promotion of the right to life within Islamic Law, a right guaranteed to Muslims and non-Muslims alike. This principle is reinforced in the famous Hadith calling on Muslims to stand up during the funeral of a Jewish person.⁷² The Prophet thus, treated Non-Muslims as equals to Muslims in a number

⁶⁶ Sura Al-Isra, verse 70.

⁶⁷ Sura Al-Teen, verse 4.

⁶⁸ Sura Al-Hijr, verses 28-30.

⁶⁹ Sura Luqman, verse 20.

⁷⁰ H Mujahid, *The Political Ideology*, 1992, Egypt Press, p. 165.

⁷¹ Sura Al-Maeda, verse 32.

⁷² Hadith was Mentioned by Bukhary through Jabir bin Abdullah, Al-Jnaiz book.

of social matters, explaining to his companions how to live peacefully with other religions in society.⁷³

Religious and ideological differences are a natural part of life. God says in this regard ‘To each amongst you have we prescribed a law and an open way. If Allah had so willed, He would have made you a single people, but (His plan is) to test you in what He hath given you’.⁷⁴ ‘If thy Lord had so willed, He could have made mankind one people: but they will not cease to dispute. Except those on whom thy Lord hath bestowed His Mercy: and for this did He create them’⁷⁵ it is against nature to make all people under one religion ‘If it had been thy Lord’s will, they would all have believed, - all who are on earth! Wilt thou then compel mankind, against their will, to believe!’⁷⁶ Moreover, it is commanded that Muslims treat other people with respect. Islamic texts say ‘Invite (all) to the Way of thy Lord with wisdom and beautiful preaching; and argue with them in ways that are best and most gracious: for thy Lord knoweth best, who have strayed from His Path, and who receive guidance’.⁷⁷ ‘Call (them to the Faith), and stand steadfast as thou art commanded, nor follow thou their vain desires; but say: ‘I believe in the Book which Allah has sent down; and I am commanded to judge justly between you. Allah is our Lord and your Lord: for us (is the responsibility for) our deeds, and for you for your deeds. There is no contention between us and you. Allah will bring us together, and to Him is (our) Final Goal’.⁷⁸ Muslims furthermore are not responsible for judging the deeds of others, leaving such judgements to God on the Day of Judgment ‘If they do wrangle with thee, say, ‘(Allah) knows best what it is ye are doing. (Allah) will judge between you on the Day of Judgment concerning the matters in which ye differ’.⁷⁹ Islamic Law therefore affirms that Non-Muslims in Muslim societies must be allowed to keep their rights thus, giving a good impression of Islam. Moreover, justice within Islamic Law demands that people be treated well and be permitted to keep their rights.

The violation of Non-Muslims is, therefore, considered to be unjust and is thus, prohibited by Islamic Law. God says ‘do not think Allah to be heedless of what the unjust do; He

⁷³ A Al-Hufi, *Magnanimity of Islam*, Cairo, 1958, pp. 87-88.

⁷⁴ Sura Al-Maeda, verse 48.

⁷⁵ Sura Hud, verses 118-119.

⁷⁶ Sura Yunis, verse 99.

⁷⁷ Sura Al-Nahl, verse 125.

⁷⁸ Sura Al-Shura, verse 15.

⁷⁹ Sura Al-Hajj, verses 68-69.

only respites them to a day on which the eyes shall be fixedly open'.⁸⁰ For this reason the Prophet prevents injustice against one of the Jewish, God tells his Prophet 'We have sent down to thee the Book in truth, that thou mightiest judge between men, as guided by Allah. So be not (used) as an advocate by those who betray their trust; But seek the forgiveness of Allah. For Allah is Oft-forgiving, most Merciful. Contend not on behalf of such as betray their own souls; for Allah loveth not one given to perfidy and crime'.⁸¹ Justice also must be applied in every case. Islamic texts argue 'O you who believe! Be upright for Allah, bearers of witness with justice, and let not hatred of a people incite you not to act equitably; act equitably, that is nearer to piety, and be careful of (your duty to) Allah; surely Allah is Aware of what you do'.⁸² Ibn Taymea (one of the most famous Muslim scholar) contends that a just Government must be respected even if composed of non-Muslims whilst an unjust Government must be abolished even if made up of Muslims.⁸³ A Muslim further must treat his Non-Muslim wife (Jewish or Christian) fairly and preserve all her rights, as demanded by Islamic Law when it states 'And do not dispute with the followers of the Book except by what is best, except those of them who act unjustly, and say: We believe in that which has been revealed to us and revealed to you, and our Allah and your Allah is One, and to Him do we submit'.⁸⁴

The treatment of Non-Muslim in Muslim society is based on the Islamic Law principle that 'they have the same rights and duties as Muslim'.⁸⁵ This principle is understood to be the true understanding of this Islamic principle and those Non-Muslims are called an Ahl al-dhimmah⁸⁶. In practice this ideal is seen in equal; sanctity granted to the blood, property, and honour of Muslim and non-Muslims;⁸⁷ their rights to practise their religion and worship as they please, the freedom given to Muslims to marry non-Muslims (Ahl al-

⁸⁰ Sura Ibrahim, verse 42.

⁸¹ Sura Al-Nisa, verses 105-107.

⁸² Sura Al-Maeda, verse 8.

⁸³ A Ibn Taymea, *Order of Favour and Forbid of Abominable*, 2001, Cairo, Qaymah Library Press, pp. 42-43.

⁸⁴ Sura Al-Ankabut, verse 46, there are many examples of the good dealing with Non-Muslim in Muslim society from the Prophet and caliphs after him, see E Al-Dhabi, above note 34 at p. 110.

⁸⁵ A Al-Kasani, *Baday Al-Sana'a*, 1984, Lebanon Press, at 7/111, And M Tantaoy, *Islam Dealing with Ahl al-Dhimmah in this Concept*, News Magazine, issue July 19, 1991, p. 8.

⁸⁶ Ahl Al-Dhimmah is Non-Muslim who lives in Muslim society under pledge which gives him the right to life as one of society and practises his worship. See M Ibn-Othaimeen, *Al-Sharh Al-Mumta*, Bin-Othaimeen Charity Press, 2004. p.427.

⁸⁷ A Al-Maododi, *Rights of Ahl Al-Dhimmah*, Chapter of Al-Muktar, Lebanon Press, 1964, at p. 16.

Ketab)⁸⁸ and eat from their sacrifices; their right to conduct business as well as their personal affairs;⁸⁹ and finally their right to participate in public affairs. whilst a number of Islamic scholars deny such rights under Islamic Law they are nevertheless confirmed in the following three verses ‘Let not the believers take the unbelievers for friends rather than believers; and whoever does this, he shall have nothing of (the guardianship of) Allah, but you should guard yourselves against them, guarding carefully; and Allah makes you cautious of (retribution from) Himself; and to Allah is the eventual coming’.⁹⁰ ‘O you who believe, do not take for intimate friends from amongst others than your own people; they do not fall short of inflicting loss upon you; they love what distresses you; vehement hatred has already appeared from out of their mouths, and what their breasts conceal is greater still; indeed, We have made the communications clear to you, if you will understand’.⁹¹ And ‘O you who believe! Do not take the Jews and the Christians for friends; they are friends of each other; and whoever amongst you takes them for a friend, then surely he is one of them; surely Allah does not guide the unjust people’.⁹² However, these verses refer either to Non-Muslims considered to be enemies of Islam and those who actively fight against Muslims or to those not found in Muslim societies. Therefore, these verses do not relate to non-Muslims in Muslim society.⁹³ Furthermore, the correct interpretation of Islamic Law does not restrict the rights of non-Muslims to participate in the political affairs of Muslim society except in matters dealing with religion such as in cases of the choosing of an *Imam* to lead Muslim in worship of prayer.⁹⁴ Non-Muslims

⁸⁸ Ahl Al-Ketab is Qu’ran expression which means people who have holy book that means Jews they have Torah (Old Testament) and Christianity they have the New Testament. Fatwa of A Ibn-Baz, *Who is Ahl-Al-Ketab?* Fatwa in April 10, 1987, book 4.

⁸⁹ Khalid Ibn-Al-Oalyd (prince of Iraq at that time) wrote to Caliph Abu Bakr, regarding Christians there, ‘any one who cannot work should the enough money for him and his family’ even if that has known by the companions of Prophets no one deny that, which is considered as Ijma, see Y Al-Qardaoy, *Non-Muslims in Muslim Society*, 1984, Qatar Press, at pp. 16-17.

⁹⁰ Sura Al-Emran, verse 28.

⁹¹ Sura Al-Emran, verse 118.

⁹² Sura Al-Maeda, verse 51.

⁹³ See f Hoamedi, *Citizens no Themion*, 1985, Egypt, at p. 157. And Y Al-Qardaoy, *Non-Muslims in Muslim Society*, above note 89 at p. 69

⁹⁴ From this kind what it is called *Al-Shahadah* (witness) in Islamic Law, some has claimed that Islamic Law did not give Non-Muslim their right in al-Shahadah because their Shahadah is unacceptable, in fact meaning of al-Shahadah in Islamic Law is more general than what they thought, it is considered as more than recommendation, especially in criminal matter it has great affect in Islamic Law, therefore, the person who going to do it has to understanding that affect and make sure about it, subsequently, there is some cases which require more knowledge in Islamic Law, in some cases *Al-Shahadah* not accept even from Muslim who has weakness in knowledge and practise of Islamic Law *Faseq* because he or she may not appreciate the importance of al-Shahadah in Islamic Law. But that does not mean to misused their right in fair trial, because they have the same right as Muslim in fair trail, so in famous case of Omar Ibn Al-Khattab who approve that; the son of Amr Ibn Al-aas who is prince of Egypt hit his Christian friend, when Omar Ibn Al-Khattab knew

thus, have the right to fully participate in public and political affairs such as the right to vote and even to be elected.⁹⁵ Since there is nothing within Islamic Law preventing non-Muslims from partaking in politics they must be allowed to do so in Muslims societies.⁹⁶ Moreover, the Prophet granted the Jews in Madina the same rights and duties as Muslims.⁹⁷ Specifically, he made a contract with them considered to be a constitution which, granting the entire population the same status as citizens regardless of religion, the Constitution of Medina — the constitution written by the Prophet Mohammed in 622 A.D., setting out the rules of the community of Medina, in which equal rights are granted to the Jews and Muslims within its society.

The Prophet said a Jewish person has the right to support from Muslims without any injustice.⁹⁸ Furthermore when sources of Islamic Law mention the mistakes of non-Muslims this should not be interpreted as justification for denying them their rights or treating the unjustly as this directly contradicts the actions of the Prophet and his companion and thus, contravenes Islamic Law.⁹⁹

For instance, within Islamic Law there is the concept of Al-Jiziah which refers to an amount of money to be paid by non-Muslims living in Muslim society. Al-Jiziah is one of the most misunderstood topics in Islam in regard to modern life. The Qu'ran mentions Al-Jiziah, saying 'Fight those who do not believe in Allah, nor in the latter day, nor do they prohibit what Allah and His Messenger have prohibited, nor follow the religion of truth, out of those who have been given the Book, until they pay the tax (Al-Jiziah) in acknowledgment of superiority and they are in a state of subjection'.¹⁰⁰ There is, therefore, much debate concerning Al-Jiziah, especially over when and who should be exempted, and the manner of its collection. Al-Jiziah did not originate within Islamic Law. It existed

about this case insisted to give him his right back and said his famous word 'when did you enslave people while they were born free' see A Al-Sharqawy, *Al-Farog*, 1987, Beirut Press, at p. 23.

⁹⁵ A Al-Maoardy, in his famous book in Islamic Law *Al-Ahkam Al-Sultaniah*, has mentioned that Non-Muslim can be appointed in executive ministry not representative one, however he means by executive one the normal ministry whilst representative one the prime minister, see A Al-Maoardy, *Al-Ahkam Al-Sultaniah*, 1982, Beirut, chapter of the Ministry, see A Zaidan, *Rule of Themiyin and Mustamaneen in Dar Al-Islam*, Cairo University Press, 1962, p. 80, and O Al-Zohili, *System of Islam*, 1974, Beirut Press, at pp. 265-270.

⁹⁶ For examples see H Al-Aoadat, *The Arabic Christian*, 1989, Cairo Press, at p. 107,108.

⁹⁷ M Al-Aooa, *the Christian and Islam*, 1987, Egypt, at p. 37.

⁹⁸ This agreement has been done by Prophet after he came to Al-Madina, between Muslims who came with him *Muhajreen* and who life in Al-Madina *Ansar* and included agreement with Jews who lived in Al-Madina. This agreement has been mentioned by Ibn Hisham, see A Ibn-Hisham, *History of Prophet*, 1987, Lebanon Press, at 3/35.

⁹⁹ K Khalid, *My Story with Life*, Al-Wafd Newspaper, issue Nov 19,1992, p. 6.

¹⁰⁰ Sura Al-Tuba, verse 29.

before the founding of Islam with many claiming it originated in the Persian language and was first established by the King of Persia. It also existed in Athens during the 5th century BC, most famously as a payment to the victors by the defeated.¹⁰¹

The previous verse described who was eligible to pay for Al-Jiziah, saying ‘do not believe in Allah, nor in the latter day, nor do they prohibit what Allah and His Messenger have prohibited, nor follow the religion of truth, out of those who have been given the Book’. For this reason it has been argued that Al-Jiziah only applies to those who fit this description.¹⁰² However, many who wrote on this topic did not take into account the basic principle of Islamic Law demanding equality and justice for non-Muslims. This is particularly relevant for how Muslims deal with non-Muslims with Ahl Al-Ketab. According to M Retha (Islamic scholar) thus, ‘some interpreters have said in this verse sayings which are unsuitable with justice and mercy of Islam’.¹⁰³

Within Islamic Law there is debate regarding the reason for enforcing Jiziah. Many claim it is necessary to protect these individuals and others claim to punish them. By contrast others contend non-Muslims should pay this since they do not have to pay Al-Zakah like Muslims.¹⁰⁴ The first position is most compatible with the sources and principles of Islamic Law. Therefore, when Muslims are unable to protect non-Muslims there should be no Jiziah. Additionally there should be no Jiziah when Ahl Al-Ketab (Jewish or Christian) support Muslims in times of war.¹⁰⁵ In contemporary time as Muslim pay tax to Non-Muslim government Jiziah can be paid by Non-Muslim as a kind of tax because they are not obliged to pay zakat. It is claimed that there is no place for Jiziah in modern life as the reasons for Jiziah no longer apply. In Islamic Law Jiziah should only be imposed on non-Muslims when it is appropriate, as when the reason for Jiziah exists it should be implemented. However, as shown previously this kind of rule is flexible and changeable based on the principles of Fiqh (Islamic Law) which state ‘no one can deny changing rules based on changing the time’.¹⁰⁶

¹⁰¹ F Hoadi, *Citizens no Themion*, above note 93 at pp. 129-133

¹⁰² M Badr, *History of Law Social Systems*, 1982, Egypt, at p. 634.

¹⁰³ M Retha, *Al-Manar Interpretation*, 1988, Beirut Press, at 10/256

¹⁰⁴ Meaning of Al-Zakah is the third pillars of Islam, which means the amount of money that is paid annually by Muslim who has enough property to other poor people.

¹⁰⁵ O Al-Zohili, *System of Islam*, above note 95, at p. 403, Y Al-Qardaoy, *Non-Muslims in Muslim Society*, above note 89, at p35, and M Al-Fingri, *Economical Ideology in Islam*, 1986, Egypt, at p. 188.

¹⁰⁶ This is one of principles of Fiqh which is ‘the rule is changeable based on change of the time’ as we have seen the rule in Islamic Law has two kinds; fixed rule that relate to one which has explain in detail in sources

4.3.2.2. The Rights of Women under Islamic Law¹⁰⁷

Introduction

The third feature going to be examined in this section is the rights of women. Before the founding of Islam, women were socially repressed and victims of abuse. For instance, the practice of burying girls, often only infants, was common and considered socially acceptable. Islam freed women from this condition, honouring them as equal to man on the basis of their common humanity. Islamic Law states ‘We have honoured the sons of Adam; provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favours, above a great part of our creation.’¹⁰⁸ Furthermore, women were given independent responsibility and duties akin to those of men: ‘If any do deeds of righteousness, - be they male or female - and have faith, they will enter Heaven, and not the least injustice will be done to them’.¹⁰⁹ It was similarly declared ‘And women shall have rights similar to the rights against them, according to what is equitable’.¹¹⁰ Women were active members of the first Muslim communities, revealed in the fact that many of the Hadiths are based on female sources. Moreover, the rights of women are maintained heavily even during and immediately following pregnancy, sharing responsibilities for childcare with her husband. Islamic Law states ‘Let the women live (in iddah) in the same style as ye live, according to your means: Annoy them not, so as to restrict them. And if they carry (life in their wombs), then spend (your substance) on them until they deliver their burden: and if they suckle your (offspring), give them their recompense: and take mutual counsel together’.¹¹¹

of Islamic Law such as the worships and beliefs and what is obligation and prevention and the punishments which specify in Qu’ran or Sunna, this kind is unchangeable, the other is flexible which sources of Islamic Law gave only guidelines such as some of new constitutional matters and the punishments which not specify in Qu’ran or Sunna, the latter kind of rule is place of practice for this principle which is can change based on change of time. For Example when Prophet prevented people to reserve their sacrifices more than three days because there are some poor people they came to Madina at this time then after that allow for them to do what they ever want in their sacrifices. See M Al-Qurtby, above note 33 at 12/48. and M Ibn Al-Qaym, *Eqathat Al-Lahfan*, 1975, Dar Al-Marefa Press, at 1/330

¹⁰⁷ This section will examine the rights of women under Islamic law, however the right of women to participate in shura will be explained in the next chapter about *Al-Shura*. For more about this topic see S Ali, *Gender and Human Rights in Islam and International Law: Equal before Allah, Unequal before Man*, 2000, The Hague: Kluwer Law International; investigating islam website, *Ideals and Role Models For Women in Qur’an, Hadith and Sirah*, available online at <http://www.islamic.org.uk/womright2.html> Accessed March 23, 2009; A Engineer, *The Rights of Women In Islam*, 1992, C.Hurst & Co Ltd. London.

¹⁰⁸ Sura Al-Isra, verse 70.

¹⁰⁹ Sura Al-Nisa, verse 124.

¹¹⁰ Sura Al-Baqarah, verse 228.

¹¹¹ Sura Al-Talaq, verse 6.

Rights of Women in Islamic Law: In assessing the rights of women under Islamic Law it is necessary to discuss specifically their right to life, legal rights, and their right to political participation. The relationship between Islamic Law and these rights will be examined therefore in more detail below.

Right to Life: According to the sources of Islamic Law both men and women should be honoured equally as human. Islamic Law maintains the rights of all individuals to preserve their life, a right which extends to men and women alike. Consequently, the death penalty is imposed against any person who threatens an individual's life, regardless of whether they are a man or woman. However, there does seem to be gender inequality under Islamic Law in the case of manslaughter, which demands that the compensation *Dyah* for such an offense against a woman should be half that given for a man. Yet this punishment has less to do with Islamic Law, which considers the *Dyah* flexible and changeable according to circumstance, and more to do with the historical norms and realities of the time it was written¹¹². Specifically, it was assumed that since the compensation was levied at least in part to help pay for the families damages, that the fine should be higher for males given their larger financial role in the family at the time.¹¹³ Therefore, this gender inequality was not based on Islamic Law but the temporal interpretation of its mandates. However quran did not give a woman half that has been given for a man in *Dyah*, as God said '*Never should a believer kill a believer; but (If it so happens) by mistake, (Compensation is due): If one (so) kills a believer, it is ordained that he should free a believing slave, and pay compensation to the deceased's family, unless they remit it freely. If the deceased belonged to a people at war with you, and he was a believer, the freeing of a believing slave (Is enough). If he belonged to a people with whom ye have treaty of Mutual alliance, compensation should be paid to his family, and a believing slave be freed. For those who find this beyond their means, (is prescribed) a fast for two months running: by way of repentance to Allah. for Allah hath all knowledge and all wisdom.*'¹¹⁴ Even the Hadiths that have been given women half of men in *dyah* are considered as a weak Hadiths.¹¹⁵

¹¹² M Hezam, *Diyat women in Islam*, 2005, Dar Al-Shoroq press, p 295.

¹¹³ E Al-Minify, *Woman Compensation 'Dyah'* available in Arabic language at <http://www.womengateway.com> accessed February 17, 2008.

¹¹⁴ Sura Al-Nisa, vers 92.

¹¹⁵ Y Al-Qardaoy, *Is Dyat woman half of man?* Conference in Qatar on December 22, 2004, available online at www.islamonline.net accessed on December 21, 2009.

The Right to Legal Capacity: Women in Islamic Law have the right to hold property and make contracts identical to those of men. Critics however have pointed to the fact that the testimony of female witnesses is worth half that of male witnesses as it is in quran ‘*get two witnesses, out of your own men, and if there are not two men, then a man and two women*’.¹¹⁶ Yet this disparity does not necessarily diminish the legal rights of women according to Islamic Law, since differing cases require differing levels of expertise often based on gender. Put differently, the value granted to a witness is based on the specific case being tried, with men in certain instances not being heard at all if not appropriate. A witness *Al-Shahadah* thus, in Islamic Law must be accurate and certain in his or her testimony otherwise it will be considered illegitimate. For instance, the Prophet said to his companion ‘make sure about your witness as you are sure that this is the sun otherwise do not do witness’¹¹⁷. Accordingly, it is decreed that all witnesses without proper knowledge are unacceptable, including men who testify falsely and women who are asked to speak about a case which due to the nature of their sex will be more informed about than men. This is also in effect for non-Muslims who are not familiar with Islamic Law.¹¹⁸ Consequently, such exclusion is not based on a violation of legal rights but on the need to ensure that witnesses are accurate and knowledgeable in their testimony.

The Right to participate in public and political affairs: Islamic Law has given women the same rights as men to participate in public and political affairs. It declares in this respect that ‘The Believers, men and women, are protectors one of another: they enjoin what is just and forbid what is evil: they observe regular prayers, practise regular charity, and obey Allah and His Messenger. On them will Allah pour His mercy: for Allah is exalted in power, wise.’¹¹⁹ Indeed Prophet in some Hadiths was assembled into one body requiring everyone to participate and decide upon social issues. Furthermore a woman has the right to financial support, including housing, if she desires to surrender her community role in order to look after her children, a responsibility undertaken by the father. However, if a woman would prefer to participate in public life jointly with her husband this is acceptable under Islamic Law which invites all people to be active in their society. According to the Prophet ‘the powerful believer is better than the weak one.’¹²⁰ Despite this political

¹¹⁶ Sura Al-Bagara, verse 282.

¹¹⁷ This hadith was narrated in weak way (*sanad*) however the hadith was corrected by Al-Hakem; see Ibn udi, *AlKhamel*, Hadith No 6/2213.

¹¹⁸ For more about witness *Shahadah* of Non-Muslim See footnotes No 94.

¹¹⁹ Sura Al-Tuba, verse 71.

¹²⁰ Sahih Muslim, hadith No 2664.

equality, many claim that the rights of women to participate in public and political affairs are restricted under Islamic Law. First, supporters of this position argue, that God said ‘And stay quietly in your houses, and make not a dazzling display, like that of the former Times of Ignorance; and establish regular Prayer, and give regular Charity; and obey Allah and His Messenger’.¹²¹ They interpret this verse as meaning that women should stay in their houses and not go out unless absolutely necessary. Secondly, they contend that the participation of women could ultimately be abused therefore it is disallowed under what is referred to in Islamic Law as Sadd Al-Dhariah.¹²² Thirdly, it is said that if women exercised this right they would gain control over men which would be unacceptable under Islamic Law based on God’s command that ‘Men are the maintainers of women because Allah has made some of them to excel others and because they spend out of their property...’¹²³

However, these reasoning are based on misinterpretations of Islamic Law. The first verse mentioned was addressed to the Prophet’s wives, who were known to participate in public life. In fact his wife Aisha was a highly regarded scholar of Islamic Law. Consequently this verse was not meant to exclude women from participating within public life. Instead it merely encouraged them to stay in their houses unless they needed to leave to deal with personal affairs. As regards the second reason given, the oft invoked ‘sadd Al-Dhariah’, many scholars have objected to the use of this concept for this purpose since as they point out it is also possible for men to make mistakes or commit crimes whilst participating in public life yet no one has argued for the barring of men from politics on this basis. Moreover, according to Islamic Law it is not only the right of women to participate in politics but required due to their prominent social role. The last argument levied, based on the verse which has mentioned curatorship or maintenance of men, relates only to relationships inside the family, as can be inferred by the last part of the statement ‘because they spend out of their property’. Yet this does not give men the right to prevent their wives from the participating in public life since as the head of the family the patriarch must listen and be advised by their female partner. God said ‘if both (wife and her husband) desire weaning by mutual consent and counsel, there is no blame on them...’¹²⁴ this statement however does not speak to whether or not women should be involved in

¹²¹ Sura Al-Ahzab, verse 33.

¹²² Sadd al-Dhariah has been explained in this part as a seventh supplementary source of Islamic Law.

¹²³ Sura Al-Nisa, verse 34.

¹²⁴ Sura Al-Baqarah, verse 233.

public life. By contrast during the Prophet's own time it was interpreted so that women could participate in education, even to the extent that as mentioned above some became leading Islamic scholars.

Based on their right to be included in public life under Islamic Law, women also are guaranteed the right to participate in politics, such as through voting in elections. Indeed there is no clear prohibition within Islamic Law against women partaking in politics. Quite the opposite, there are many examples within Islamic Law which support the right of women to make decisions and participate in politics. For instance, Islamic Law allows women to freely choose their husband and give shelter to enemies of Muslim, as shown when the Prophet allowed the mother of Hani (*Um Hani*) to do so without punishment.¹²⁵ Finally, women are permitted to participate in the pledge of allegiance of Al-Aqaba,¹²⁶ which includes political affairs.

In conclusion, women have the right to participate in public and political affairs under Islamic Law. Whilst some Muslim writers have exaggerated aspects of Islamic Law to prevent this right, based on the need to prohibit abuses of power, this is ultimately a misinterpretation of Islam. However, Islamic Law have guidelines for protecting both men and women from such mistakes and the possibilities of corruption thus, invalidating the specific targeting of women in this regard.¹²⁷ Additionally society should facilitate the right for all citizens to participate in politics free from pressures or social barriers with the aid of modern technology.

4.3.2.3. The Right of Multiple Parties to Exist

The existence and protection of a multiparty system is an important component of modern democracy as well as for freedom of political participation more generally as it prevents

¹²⁵ It is famous Hadith has been mentioned in most books of Hadiths; see for example Musnad Ahmad No 26936.

¹²⁶ pledge of allegiance of Al-Aqaba, is pledge between Prophet Mohammad and two tribes; Al-Madina which are *Al-Aos* and *Al-Kazraj*, in place in Makah called *Al-Aqaba*, then they come next year with more people after they belief in Islam, so they are called the first and second pledge, this verse came down for the first pledge 'O Prophet! When believing women come to thee to take the oath of fealty to thee, that they will not associate in worship any other thing whatever with Allah, that they will not steal, that they will not commit adultery (or fornication), that they will not kill their children, that they will not utter slander, intentionally forging falsehood, and that they will not disobey thee in any just matter,- then do thou receive their fealty, and pray to Allah for the forgiveness (of their sins): for Allah is Oft-Forgiving, Most Merciful' Sura *Al-Mumtahina*, verse 12.

¹²⁷ Islamic Law gave man and woman the right to participate in political and public life, but they have to follow the structures of Islam, such as women has to wear what is it acceptable in Islam and man has to keep his eyes in what it is allow for him. And that should not affect on their others duties.

an illegitimate single party rule. Moreover, considering the world's natural plurality in terms of beliefs and viewpoints, it is necessary to have a multi-party system so as to represent this diversity.

The idea of multi party is much debated within Islamic Law. On the one hand, it is argued that there should be no competing parties according to Islam since the Muslim nation must be united and free from conflict. This idea is supported in a number of verses such as the one stating, 'this brotherhood of yours is a single brotherhood, and I am your Lord and Cherisher: therefore serve me (and no other)'.¹²⁸ The reasoning behind this position is that conflict between individuals and parties could weaken the nation. This is an historical assessment linking past experiences with multi-party systems which were not ideal within Islamic countries. Moreover, there are some sources of Islamic Law which invite people to come together as one nation and thus, avoid conflict between them.¹²⁹

On the other hand, there is no clear evidence in Islamic Law demanding the rejection of multi-party systems. The stated desire in Islam for people to be united nationally and shun conflict concerns religion and belief as these verses followed discussions of the history of Prophets and asked only that individuals live together under the shared belief in God the creator who is deserving of worship. They are therefore unrelated to the political issue of whether or not it is right to have a multi-party system. Instead it is shown that if a multi-party system can best realise the desires and interest of the people, and is, therefore, considered essential for their happiness, then it is acceptable under Islamic Law.

Conclusion

To conclude, as it is stated by Institute of Peace, Islam and Democracy 'the lack of democracy in many Muslim countries is due to historical, political, cultural and economic factors rather than religion ones'.¹³⁰ Unfortunately, misunderstanding of Islamic Law has led many to claim that Islamic Law is incompatible with instruments of international human rights. Both Islamic Law and international human rights instruments have the same aim which is to safeguard the rights of human beings. Apostasy and war are two topics misunderstood in Islamic Law. However, Islamic Law promoted freedom of belief before the universal declaration of human rights, demanding that there be no religious

¹²⁸ Sura Al-Anbya, verse 92.

¹²⁹ M Al-Aooa, *Subjects of Islam Today*, 2007, Centre Study of Islam and Democracy, pp. 77-78.

¹³⁰ See Special Report of United States Institute of Peace, *Islam and Democracy*, 93, September, 2002.

compulsion in Islam. Furthermore, Islamic Law states that Muslims guilty of the grave sin of apostasy will be punished in the afterlife and, therefore, should be given leniency during their lifetime unless such an offense also involved the crimes of treason or sedition. The main sources of Islamic Law have organised many cases in general ways as we have seen, but people have the right to behave as it is suitable for Islam in that time and place. The variety of cases and times has to be taken into consideration to give rule in Islam. However, such rules have to be decided today by countries not by individuals or by groups of people.

The rights of Non-Muslim in Muslim society have been guaranteed by Islamic Law. Whilst in an Islamic society there are duties that have to be done, Non-Muslims beliefs must nonetheless be considered and they therefore cannot be enforced by some Islamic requirements such as Al-Zakah. They may however be required to pay what it is called Al-Jiziah.

It has finally been argued that women under Islamic Law largely have the same rights as man. Some misunderstood topics regarding women in Islamic Law have led to claims that their rights are underestimated in Islamic Law such as compensation (Dyah), testimony (witness), and curatorship or maintenance of man.

The matter of multiple parties' governance has also been analysed as a flexible matter in Islamic Law including that it is acceptable in Islam to support participation of people in political rights. This chapter has explained attitude of Islamic law towards many aspects of modern democracy, the next chapter will focus on *Shura* as aspect of Islamic law that has similarity with democracy.

4.4. Chapter Nine: *Al-Shura*

Introduction

As we have seen many principles of Islamic law, this chapter will examine one of the most important principles of Islamic law that has similarity with democracy; it is *Al-Shura*.

Al-Shura is an Arabic word which means in its noun form consultation and as the verb *Shaor* to consult or ask and seek advice. *Al-Shura* is used in a number of different expressions within Islamic Law such as when elites in consultation say ‘*Ahl Al Hal and Al Aqd*’ on behalf of the nation in regards to a binding decision.¹ However, *Al-Shura* is also considered to be a principle in Islamic Law which commands governors not to be autocratic but instead make decisions in consultation with others. This chapter will examine in more detail the presence of *Shura* within Islamic references. Specifically it asks whether or not *Shura* is an obligation? Who should be a member of *Shura*? How are th members of *shura* chosen? This discussion will be preceded by a brief review of the previous research done on the role of *Shura* within Islamic Law.

The research on the *Shura* can be placed into the following categories: (1) those dealing with the Holy Qu’ran, focusing on two previously mentioned verses in Sura *Al Emran* and *Al-Shura* mentioning this concept; (2) books which attempt to explain the Hadiths in which the *Shura* is explicitly discussed; (3) books that exclusively concern *Shura* and finally (4), books that discuss *Al-Shura* in relation to Islamic Law.

The first two categories deal with the importance of *Shura* for Islamic rule. It also covers the people involved with *Shura* and the stories about *Shura* within Islam. These stories have already been covered extensively within the available history books. The last two categories address the topic from a variety of angles based on the writer’s knowledge of *Shura* within Islam. In addition, those who write about *Shura* can be divided into two categories the first category covers writers with little to no knowledge of Islamic Law and who therefore often on specious references which misinterpret Islamic Law (mostly written in English). The second category refers to writers who ignore all evidence of *Shura* not directly referenced within sources of Islamic Law. These scholars are especially hostile to what they perceive to be Western influences, regardless of whether or not these practices are acceptable

¹ A Al-Qamdi, *Fekh Al-Shura*, 2001, Dar Taebah Press, p. 29.

according to Islamic Law. The difficulties involved in discussing *Shura* are largely attributable to the fact that those who write on this topic are either not experts in Islamic Law or specialise in the law more generally but do not have in depth knowledge of any specific aspect of the subject. Moreover, it is a vast subject thus allowing authors to approach and interpret it in a wide variety of ways. Additionally, relying exclusively on the written references of Islam can cause scholars to ignore a number of important details necessary for explaining this concept. Therefore, the *Shura* is very much open to interpretation. Lastly, the lack of references on *Shura* is also problematic due to the fact that it has not been implemented in modern Muslim societies in accordance with Islamic Law.

4.4.1. *Shura* in Sources of Islamic Law:

There is an entire Sura in the Qu'ran called the *Shura*. *Shura* is also mentioned in the Qu'ran twice. The first is when God described believers as '*Those who hearken to their Lord, and establish regular Prayer; who (conduct) their affairs by mutual Consultation; who spend out of what we bestow on them for Sustenance*'.² According to the interpreters of the Qu'ran this verse proves that *Shura* is necessary in Islamic Law since it was mentioned in the description of believers and after the prayer which is considered the most important act in Islam.³ The second time *Shura* is discussed in the Qu'ran is when God ordered his Prophet to practice the *Shura* during his life. 'It is part of the Mercy of Allah that thou dost deal gently with them Wert thou severe or harsh-hearted, they would have broken away from about thee: so pass over (Their faults), and ask for ((Allah)'s) forgiveness for them; and consult them in affairs (of moment). Then, when thou hast taken a decision put thy trust in Allah. For Allah loves those who put their trust (in Him)'.⁴

The Prophet Mohammad went on to construct a set of practices associated with *Shura* based on in his life and his Caliphs that followed him. This is reflected in the books of Hadith where the Prophet was consulted in most of life's affairs.⁵ Caliph Omar Ibn-Al-Khattab said '*No one can become caliph without Shura*'.⁶ There is thus, a consensus between Muslim's scholars on the importance of *Shura*.⁷ However, whilst the *Shura* is an important concept in

² Sura Al-Shura, verse 38.

³ E Ibn-Katheer, *Interpretation of Holy Qu'ran*, 1973, Lebanon Press, at 4/105-106

⁴ Sura Al Emran, verse 159.

⁵ See I Al-Asqalani, *Fatah Al-Bari*, 1984, Al-Salafeah Press, at 13/351; *Sahih Muslim*, Hadeth NO 1779.

⁶ See Al-Bukhary NO 6830.

⁷ M Al-Qurtby, *Al-Jama Le-Ahkam- Al Qu'ran*, 1967, Dar Egypt Books, at 4/249; A Ibn-Ateah, *Al-Muharrar Al Oajez*, 1982, Al-Doha Press, at 3/397.

Islamic Law, this concept must be practised in a flexible way. Consequently, there is no specific way to choose people of *Shura* or any set number for a *Shura* Council. All the procedures and practices of this important concept are therefore changeable based on what is best for people in accordance with their own time and place. However, there remain controversial parts of *Shura* within Islamic Law which will be discussed below.

4.4.2. Rules and Importance of *Shura* in Islamic Law:

There are three opinions regarding the importance or Rule of *Shura* in Islamic Law. The first states that *Shura* is obligatory. This is the opinion of the majority of Muslim scholars.⁸ They support this position through reference to a number of Islamic texts. For instance, they point to the previously quoted verse where God mentions *Shura* as being between the two pillars of Islam prayer and charity.⁹ It is also written in this second verse in the imperative tense used in Arabic to discuss obligations. Additionally, the fact that it was said by the Prophet further reinforces its importance for all Muslims who have followed him.¹⁰ Moreover, the Prophet Mohammad practiced the *Shura* in his own life leading his companion Abo-Huraera to say '*I have not seen any person more doing Shura (counsel) than him.*'¹¹ The Prophet Mohammad ordered his companions to practice the *Shura* and prevented them from becoming autocratic. This is seen in the discussion between the Prophet Mohammad and Ali-Ibn-Abi- Talib. When he asked the Prophet Mohammad what he should do if he is confronted with an experience not covered within Islamic Law. The Prophet's responded that he should '*Counsel people and do not make your absolute decision*'.¹² For this reason his companions followed *Shura* and used it to decide the important issue of who should succeed the Prophet as the Head of State.

The second opinion argues that *Shura* is not an obligation but optional. Supporters of this position refer to scholars such as Imam Al-Shafai. However, it is important to remember that Imam Al-Shafai's mention of *Shura* in his book *Al-Aom* was in relation to a judge.¹³ They have also sought to prove this opinion by arguing that the Prophet only requested that

⁸ M Abo Fares, *The Rule of Shura in Islam*, 1988, Dar Al-Furqan Press, p. 20.

⁹ A Al-Jasas, *Ahkam Al-Qu'ran*, 1984, Dar Arabic Book Press, at 3/386; A Al Qamdi, *Fekh Al Shura*, above note 1 at p. 50.

¹⁰ F Al-Razy, *Al-Tafseer Al-Khabeer*, 1985, Dar Al-Bean Press, at 9/67; S Qutb, *Fe- Thelal Al-Qu'ran*, 1977, Dar Al Shuroq Press, at 4/501.

¹¹ Jama Al Tirmithi, Hadith No 4/213. For more practice of *Shura* in the Prophet period, see A Al Qamdi, above note 1 at p. 51; M Abo- Fares, above note 8 at p. 50.

¹² A Al-Haythami, *Mojama Al-Zoaid and Manba Al-Foaid*, 1982, Dar The Arabic Book Press, 1982, at 1/178.

¹³ M Al-Najjar (ed) *Al-Shafai, Al Aom*, 1961, Dar Al-Marefa Press, at 6/203 & 7/95

his companions follow *Shura* as a general principle, not an obligation in all action. ¹⁴For example the Prophet Mohammad did not practice the *Shura* in some situations such as in the case of Solh-Al-Hudaebea, ¹⁵ thus, proving that *Shura* is not obligatory. Moreover, they contend that- in Islamic Law nothing is considered obligatory unless proven with clear evidence for which there is none regarding *Shura*. For this reason, *Shura* must remain optional as opposed to obligatory.

The third opinion attempts to combine the ideas contained within the previous two. Its proponents state that since each situation and ruler is different so too must *Shura* change according to circumstance. Put differently, if a ruler has no knowledge and ability to make decisions then he must rely on the *Shura*. However, if this is not the case, and the ruler does not need counsel, then *Shura* is optional. This opinion is supported by Al-Hasan Al-Basry and Al-Thahakh. As evidence for this position we refer to a reading of Ibn-Abass whose last verse states ‘*and consult them in some affairs*’. Ibn Abass stresses the word *some* from this verse¹⁶.

Discussion of the previous opinions

It is commonly assumed that the first verse mentioning *Shura* is a description of Muslims. However, although it refers to the two pillars of Islam many contend that it is not obligatory. In fact, an examination of Islamic Law reveals that *Shura* is obligatory. Regarding the second verse, a number of scholars mistakenly argue that the ‘verse that talked to only two of the Prophet’s companions, Abo Baker and Omar as Ibn Abas said’.¹⁷ In fact, this verse is not speaking exclusively of these two companions but the entire group of companions who participated in the conflict of Uhud. This falls under the Sharia principle that demands Muslim consider the general intent of the verse as opposed to the specific reason it was uttered.¹⁸ Moreover, the Prophet Mohammad counselled others in addition to these companions reflecting the more general, and, therefore, obligatory, character of this principle. It is said ‘The aim of the order in this verse is only to satisfy the Prophet’s companions and to make them participate with him in the decision. This does not mean it is obligatory, especially as the Prophet did not need to counsel them because his

¹⁴ M Al-Qurtby, above note 7 at 4/250.

¹⁵ See M Abo Fares, *Qazoat Al-Hudaebea*, 1984, Dar Al-Furqan Press, p. 115.

¹⁶ Ibid p.132.

¹⁷ A Al-Byhaqy, *Al-Sunan Al-khubra*, 1978, Majles Dairat Al-Maarif Press, at 10/109.

¹⁸ F Al-Razy, above note 10, at 9/67

God will direct him'. In fact, it was meant not only to appease his companions but based on the Prophets authentic need for their advice. This is reflected in the fact that he acted on their council such as in the case of Salman Al-Farsi's conflict with Al-Ahzab. Specifically the Qu'ran and the Sunna show the need for counsel and multiple perspectives when dealing with worldly issues. The Prophet Mohammad said 'you have more knowledge of your life'.¹⁹ Moreover, a requirement of Islam is to work for the public interest. This principle can only be realised when leaders consider of their opinions of their subjects. Furthermore, by taking into account popular opinion they are less likely to go against the people's interest.²⁰

The importance of *Shura* is reflected in the Prophet's own practising of it during his lifetime, such as in the case Abo Huraera mentioned above. However, when the sources of Islam do not mention the Prophet practicing *Shura* it is either due to their own oversight on the issue or because the situation did not require it.²¹

In conclusion, the *Shura* is an obligation under Islamic Law and it is regarded as one of its principles. As Ibn-Ateah said '*Shura* is principle of Sharia and who does not counsel has to be deposed without disagreement'.²²

4.4.3. Status of *Shura* Decisions

An important debate amongst scholars of Islamic Law is whether or not a *Shura* decision is binding. Scholars such as Ibn-Taymea,²³ Al-Jassas²⁴, Ibn-Ateah,²⁵ Al-Qurtby²⁶ contend that the *Shura* is not binding and, therefore, that the ruler is not obligated to follow its decision. They make this claim for a number of reasons. Firstly, they reference the aforementioned verse where God declares '*And consult them in affairs (of moment). Then, when thou hast taken a decision put thy trust in Allah*'. They interpret this verse as meaning that whilst counsel (*Shura*) is important a leader is not required to follow its conclusions and instead

¹⁹ Saheh Muslim, hadith No, 2363, 84795, and 84076, see N Al-Albany, *Saheh Al-Jama*, 1984, Dar Arabic Book, p. 767; M Ibn Majah, *Sunan Ibn Majah*, Eisa Al Halabi Press, Cairo, at 2/825, Hadeth NO 2740-2741.

²⁰ A Al- Jassas, above note 9, at 2/41.

²¹ M Al-Mrdaoy, *Al-Caliph between Theory and Practice*, 1982, Dar Al Bayareq, pp. 227-228. *Shura* is not in all cases as we going to see, for example cases has been decided clearly in sources of Islam such as most of matters of worship such as the numbers of prayers.

²² M Al-Qurtby, above note 7 at 4/249

²³ A Ibn Taymea, *Al-Seasah Al-Shariah*, 1951, Dar The Arabic Book Press, p. 170.

²⁴ A Al- Jassas, above note 9, at 2/41.

²⁵ A Ibn Ateah, above note 7, at 3/399.

²⁶ M Al-Qurtby, above note 7, at 4/252.

can make his or her own decisions. Proponents of this position further point to the Prophet Mohammad's statement to his companions Abo-Baker and Omar 'Whatever you agree on I will obey it'.²⁷ In their view this means that the Prophet will accept the idea of his companions even if it goes against majority opinion thus, showing *Shura* as non-binding.²⁸ Moreover, there are some situations from the Prophet's life which shows that the *Shura* is not binding²⁹ especially when such decisions contradict rulings made by the Caliph. God ordered people to obey the Caliph as he said 'O ye who believe! Obey Allah, and obey the Messenger, and those charged with authority amongst you'.³⁰ In this respect, by making the *Shura* binding it is going against God's command that we obey the Caliph.

However, other Islamic scholars argue that the *Shura* is binding. In contrast to those who view *Shura* as non-binding they argue that the verse where God says 'And consult them in affairs (of moment). Then, when thou hast taken a decision put thy trust in Allah' actually makes *Shura* binding for two reasons. Firstly, it reveals as previously discussed that *Shura* is an obligation and, therefore, must be considered binding. Secondly, that a decision is made by the members of a *Shura* not by a ruler after it listening to council.³¹ They also argue that the Prophet's own statements and actions concerning *Shura* clearly show his desire for it to be binding. Significantly, the Prophet continuously ordered his companions to practice *Shura* and prohibited them from making decisions without counsel.³² This is further seen in the companions adhering to *Shura* following the Prophet's death, such as in their compiling and writing of the Qu'ran or their creation of the Hejra calendar. Finally, the proffering of the *Shura* as non-binding can lead to autocratic rule preventing people from being able to participate in public life and politics as guaranteed by Islamic Law.

Discussion of the previous Opinions:

In order to assess whether *Shura* should or should not be binding it is first important to examine the verse dealing with God's command that we seek counsel which is central piece of evidence for both positions. Importantly, within the verse there is no accurate explanation whether the ruler is obligated to accept the decision of the *Shura*. However,

²⁷ A Shaker, *Omdat Al-Tafseer*, 1957, Dar Al-maaref Press, at 3/63; I Al-Asqalani, above note 5, at 13/340-341

²⁸ Y Al-Mlegy, *Shura in Islam*, The Cultural University Press, p. 135.

²⁹ H Hoydi, *Al-Shura in Islam*, 1975, the Islamic Manar Library Press, pp. 10-14.

³⁰ Sura Al-Nisa, verse 59.

³¹ M Retha, *Tafseer Al-Manar*, 1973, Al-Manar Press, at 4/199-205.

³² A Al-Haythami, above note 12.

since the Prophet was ordered to counsel people this does imply that he should base his decision on their counsel as opposed to his own. Indeed, if the Prophet, and by association leaders, were allowed to make decisions on their own there would be no need for a *Shura*. This is reflected in the Prophet's counselling of his companions during their conflict in *Aohud* where he accepted their position even though it conflicted with his own. Moreover, the Prophet explicitly told Ali Ibn Abi Talib that the verse should be interpreted as the need to '*counsel a chosen people then follow their opinion*'.³³

Secondly, when the Prophet said to Abo-Bakr and Omar '*Whatever you agree on I will obey it*',³⁴ he did not mean that they should do as they please even if it were contrary to the opinion of the majority. Instead the Prophet was referring to the fact that since their different ideologies often caused them to disagree when they were in agreement this was reflective of the broader will of the people.³⁵ However, whilst some have argued that the Prophet was referring only to his two companions, in fact the verse as well as his own behaviour shows that the Prophet desired this principle to apply to all people.³⁶

Thirdly, there is no contradiction between obeying the *Shura*'s decision and obedience to the caliph's decision, because the caliph has to obey the *Shura* as well. This means one should obey the Caliph when he or she has followed the advice of *Shura* or in situations where the principle of *Shura* does not apply. There is thus, no clear evidence, either in the Qu'ran or Sunna, showing whether the *Shura* is binding or non-binding. However, based on the discussion above it does appear that the *Shura* should be considered binding, especially in the modern context where that is viewed as the best way of participation of people in political life.

4.4.4. Eligibility to become a member of the *Shura*

Who is eligible to become a member of the *Shura* has long been a matter of debate amongst Muslim scholars. Under the Caliph or Imamah this issue was much discussed by scholars since it was the *Shura*, or as they were called *Ahl Alhal and Alaqd*, who were responsible for choosing and when necessary deposing the Caliphs. It is, therefore, necessary to

³³ M Assad, *Menhaj Al-Islam in Al-Hokum*, 1985, Dar Al-Elm Lilmalayin Press. See M Al-Saleh *Al-Shura in ketab and Sunna*, 1998, Egypt Press, p. 65.

³⁴ A Shaker, above note 27 at 3/63, and I Al-Asqalani, above note 5 at 13/340-341

³⁵ A Al-Ansary, *Al-Shura and its Affect on Democracy*, 1992, Modern Library Press, p. 42.

³⁶ A Al-Alosi, *Roh Al-Maany*, 1995, Dar the Arabic Traditional Press, at 4/107.

understand what was meant by the terms *Ahl Alhal and Alaqd*? Al-Maoardy divided people into two categories, those who chose the leaders (referred to as the choosing people) and those who were eligible to become the Head of State. Al-Maoardy then set out different principles for regulating these groups. The three values integral for the so called choosing people (also known as *Ahl Alhal and Alaqd*), they are equality, knowledge, and wisdom.³⁷ Abo Yala referred to the people in this group as Ahl Al-ijtihad, denoting the people of endeavour, the people of choosing and *Ahl Al-hal and al-Aqd*.³⁸ Scholars of the Hanafi School are considered the people of *Shura*, the nobles and the lords³⁹

Modern scholars describe the *Shura* as a representative body that works on behalf of the nation. According to Shaltot members of the *Shura* should be individuals who are both knowledgeable and genuinely concerned with the public and nation's interest.⁴⁰ Al-Maododi argues that they gain the people's trust based on their hard work and their commitment to equality.⁴¹ Al-Nahoy contends that membership into the *Shura* may be widened to include the entire nation or it may equally be limited to include a few people or even a single person. The size of the *Shura* is based on the topic under discussion, especially concerning its national importance.⁴² Consequently, it is understood that the people of *Shura* are referred to by some Islamic scholars as *Ahl Alhal and Alaqd*.

There are three conditions necessary for *Shura*: knowledge, honesty and justice, and selflessness. These will be looked at in more detail below.

Knowledge: God praised scholars for their knowledge, '*Those truly fear Allah, amongst His Servants, who have knowledge*'.⁴³ In another verse God said '*Are those equal, those who know and those who do not know?*'⁴⁴ Throughout the Qu'ran and Sunna people are told of the importance of knowledge and warned against becoming ignorant. Accordingly, all members of the *Shura* representing the nations must be knowledgeable and experienced. A number of Islamic scholars argued that there should be an age requirement for members of the *Shura*, namely the reaching of puberty. This would ensure that members are having

³⁷ A Al-Maoardy, *Al Ahkam Al Sultaniah*, 1984, Dar Al-Kutob Al-Elmeah, pp. 5-7.

³⁸ M Al-Farra, *Al Ahkam Al Sultaniah*, 1987, Dar Al-Watan Press, pp. 19-23.

³⁹ M Ibn Abdeen, *Hasheat Ibn Abdeen*, 2003, Dar Science Books Press, at 5/364.

⁴⁰ M Shaltot, *Islam Ideology and Shria*, 1980, Egypt, at 372.

⁴¹ A Almaododi, *Tadween the Islamic Constitution*, 1972, Hind Press, at p. 58.

⁴² A Al-Nahoy, *Shura and its Ideological Practice*, 1994, Lebanon Press, at p. 59.

⁴³ Sura Fater, verse 28.

⁴⁴ Sura Az-Zumar, verse 9.

enough experience. Indeed some Islamic scholars even say that between the ages of thirteen and fourteen the power of the body and mind is at its strongest.⁴⁵ Al-Maoardy argues in this regard ‘*Everything needs brain and brain needs experiences*’.⁴⁶

Honesty and justice: All members of the *Shura* must counsel free from outside pressure and do so in the general interest of the nation. God said ‘*Allah doth command you to render back your Trusts to those to whom they are due; And when ye judge between man and man, that ye judge with justice: Verily how excellent is the teaching which He giveth you! For Allah is He who heareth and seeth all things*’⁴⁷ In the view of a number of scholars one of the most important virtues for a *Shura* member is the ability to stand up for what they think is right even if unpopular. God said ‘*O ye who believe! stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just*’.⁴⁸ This requires that the members of *Shura* have a good reputation and an authentic commitment to the people’s interest.

Selfless: A person must have a selfless attitude if they are to be a member of *Shura*. Specifically, they must be open to the ideas of others and be willing to discuss issues without prejudice. As representatives of the nation they must also be familiar with the ideas and opinions of the people they serve. Islamic Law specifically condemns self-conceit and arrogance for as the Prophet Mohammad said ‘The most hated person in the sight of Allah is the most quarrelsome person’.⁴⁹

4.4.5. Methods for Choosing Members of the *Shura*

Islamic scholars look to the Prophet Mohammad’s own life to discover the appropriate method for choosing members of the *Shura*. A number of writers mention that he had a council, even going so far as to list some companions as members of this council.⁵⁰ By contrast the majority of Islamic Law scholars have mentioned that there was no specific council for *Shura* and as such there is no specific method for choosing its members. However, they note that the Prophet was counselled by various people at various times in his life, deciding the nature of such council according to what was appropriate for the

⁴⁵ S Qutb, above note 10, at 6/3262

⁴⁶ A Al-Maoardy, *Adb Al-Dunya and Al-Dean*, 1979, Dar Al-Shab Press, p. 272.

⁴⁷ Sura An-Nisa, verse 58.

⁴⁸ Sura Almaida, verse 8.

⁴⁹ Al-Bukhary, *Al-Ahkam Book*, Hadith No 290.

⁵⁰ M Al Ajlany, *Abqreat Islam in Asol Al-Hokum*, 1987, Lebanon Press, at p. 97.

specific situation. In addition he sometimes counselled the public in the Mosque. On other occasions he received ideas from other people and he would put into practice what they would suggest. Nevertheless there were certain companions who were famous for their knowledge and experience thus, earning the people's trust. For the reason the Prophet often relied on these companions for counsel. The selection of these companions, known as *Ahl Alhal and Alaqd*, did not have to be based on election because within their small society they were universally accepted as being worthy of this position. In the modern time we have two methods for selecting members of the *Shura*-either through election or appointment as will be shown in more detail in the next section some writers prefer election and others the use of appointment.⁵¹ Those who prefer the appointment method argue that it helps minimize many of the problems found in election.⁵²

An examination of Islamic Law shows that there is no specific method for choosing members of the *Shura*. All methods are therefore permissible as long as they adhere to the general principles of Sharia. Thus, such methods are changeable based on context. The aims of the *Shura* should be to provide wise council regardless of the method used to choose its members. In modern times, the best way for choosing the members of the *Shura* is through an election for it best allows people enjoy political freedom whilst preventing autocracy. Additionally, elections are legal for Muslim countries based on the rule that all is permissible by Islam unless expressly forbidden by Islamic Law.

4.4.6. Elections and *Shura*

There are two dominant viewpoints amongst Islamic scholars concerning the issue of elections and *Shura*. Proponents of the first position argue that *Shura* accepts all election regardless of their type. They should its practice will differ according to time and place and ultimately should be organised so that it best meets the needs of the society it is in. This is the view of most modern Islamic scholars. Al-Maododi declares 'We can use today every legal way that can find out people who are trusted, no doubt that election is one of those legal ways which we can use if we use it in the correct way.'⁵³

⁵¹ A Metwali, *Concept of Shura in Islam*, 1972, Dar the world of Books Press, p. 38.

⁵² M Authman, *Preside State in the Islamic Law*, 1996, Dar Book of University, p. 361.

⁵³ A Almaododi, above note 41, at p. 48, see A Laga, *Shura and Democracy*, 1983, Beirut Press, p. 144.

Furthermore, these Muslim scholars contend that there should be a direct method available for all people to express their ideas and choose their political representative. No one therefore, has the right to prevent individuals from voting, whether it be for a national leader such as a President or a representative on a local council. However, elections must nonetheless be regulated to ensure against cheating and forgery which contradict Islamic Law.

Supporters of this view refer within Islamic Law to the previously mentioned verse where said ‘those who (conduct) their affairs by mutual Consultation.’⁵⁴ Whilst this verse does not specify any specific group for *Shura*, its plural phrasing reflects its intention to include everyone within this process, revealing it as a right for all citizens in the nation. God also said ‘Ye are the best of peoples, evolved for mankind, enjoining what is right, forbidding what is wrong’.⁵⁵ From this verse it can be interpreted that all people should participate in this task as it was referring to the entire nation not just a single individual or group within society. However, since elections are considered by Islamic Law to be a political issue, their form is changeable based on its historic context.⁵⁶

On the other hand, other Muslim scholars argue that elections are not required as part of the *Shura* in Islamic Law.⁵⁷ Moreover, a number of writers criticize elections due to their perceived Western connotations. They note ‘Some who admire western societies for their improvement and at the same time weakness of Islamic societies, try their best to follow whatever comes from the western society and describe that as the Islamic way’. Additionally, they contend that elections unfairly allow for votes of uneducated non-scholars to be equal to that of informed scholars.⁵⁸ They also object to elections as they separate religion from social and personal issues.⁵⁹

In fact Islamic Law does not specify how *Shura* must be practised. Therefore, its form will be different between societies and historical periods. Therefore, it is unacceptable in Islamic Law to set out permanent practices of *Shura*. Despite these many practices, which may benefit Muslim societies, have been rejected by Islamic scholars simply due to their non-

⁵⁴ Sura Al-Shura, verse 38

⁵⁵ Sura Al-Imran, verse 110.

⁵⁶ A Metwali, above note 51, p. 40.

⁵⁷ M Shaker, *the Islamic Rule*, 1986, the Islamic Office Press, p. 118

⁵⁸ Ibid, p. 120.

⁵⁹ M Al-khaldi, *The Western Democracy in the Light of Islamic Law*, 1986, Modern Letter Library Press, p. 59.

Muslim heritage.⁶⁰ These scholars protest elections as being uninformed by Islamic Law and implying that religion has no place within modern society. By contrast others argue that democratic elections actually originated in Muslim societies.⁶¹ Importantly, elections should not be viewed as an end in themselves but simply as a means for choosing the members of the *Shura* who can best represent the nation. To my mind, elections remain the best way to choose the *Shura* within modern society and as linked to modern Constitutional Law. Thus, no matter what its origins it should be embraced by Muslim society for as the Prophet Mohammad said ‘*Wisdom is the goal of Muslim wherever who find it should get it*’,⁶²

In conclusion, there is no specific method for choosing members of a *Shura* in Islamic Law. Sources of Islamic Law leave such decisions to the people based on what best serves their own particular needs. *Shura* in Islamic Law should thus, adopt modern Parliamentary Government, as used in the Western democracies, due to their obvious benefits. To this end, since elections are considered to be the best way for selecting members of a representative council in political life they should be therefore considered a requirement of *Shura* under Islamic Law.

4.4.7. Voting and Elections under Islamic Law

Voting in elections is equivalent to Islamic Law notions of witnessing since voters are witnessing, or testifying, in support of their representatives. Specifically, by voting an individual is affirming the ability of a representative to fulfil his or her duties well. In Sharia (Islamic Law) the witness plays an important role, as God commanded all people to ‘Give upright testimony for Allah’.⁶³ Consequently, witnessing should always be done in the service of Allah not personal interest. There are a number of rules concerning the practice of witnessing within Islamic Law. The first rule regards giving evidence or testimony as a witness. Islamic scholars argue that offering testimony is a collective as opposed to individual duty. Put differently, the entire society is called to testify, serve as witness, not just a single individual. God says ‘The witnesses should not refuse when they

⁶⁰ Ibid, p. 60

⁶¹ A Shelby, *Menbar Islam Newspaper*, year 54 edition 6 Oct/Nov 1995, p. 43.

⁶² M Ibn Majah, above note 19, Hadeth NO 4169. However, this Hadith was narrated in weakness way, see M Al-Magdesi, *Al-Adab Al-Shareiah*, 1981, Dar Al-Maarif Press, p. 132.

⁶³ Sura Al-Talaq, verse 2.

are called on (For evidence)'.⁶⁴ God also declares '*Do not conceal testimony, and whoever conceals it, his heart is surely sinful; and Allah knows what you do*'.⁶⁵ These verses reflect how an individual's refusal to participate in an election may be considered illegal under Islamic Law, according to some scholars, as a type of concealment. The reason for this is that if you avoid voting for a qualified person this could lead to an unqualified candidate person being elected.⁶⁶

The witness must always keep in mind his or her responsibilities. Consequently, when a person votes he or she should choose the most qualified person who is most able to achieve the national interest. To not do so would be to give false witness which is considered a great sin in Islam. God said '*Shun the abomination of idols, and shun the word that is false*'.⁶⁷ Therefore, a person must only be witness when he or she is certain regarding his or her testimony. As the Prophet Mohammad responded to the person who asked him about witnessing, 'make sure about your witness as you are sure that this is the sun otherwise do not do witness.'⁶⁸ Voting for an unqualified person is not only giving false witness but is also dangerous to the nation as it may create a breach of trust between citizens and rulers. As Prophet Mohammad said to a person who asked him about the Hour of Resurrection 'if affairs are entrusted to unqualified then waiting the Hour of Resurrection'. This verse shows how important elections are in terms of the witness process, especially as there is no force able to regulate elections to ensure that they are more just. Everyone should therefore participate in elections. No one is exempt from such political participation except when a voter feels pressured or coerced into voting and thus, acting out of fear. God said 'Let no harm be done to scribe or witness. If ye do (harm to them) it is a sin in you'.⁶⁹ In addition, the Prophet Mohammad said '*There is no harm in Islam*'.

4.4.8. The Function of *Shura*

As shown above there are no specific functions associated with *Shura* due to its flexible and open character within Islamic Law. The main role of *Shura* within Islamic Law centres on choosing the Head of State. However, within modern society there are a number of

⁶⁴ Sura Al-Baqarah, verse 282.

⁶⁵ Sura Al-Baqarah, verse 283.

⁶⁶ Y Al-Qardaoy, *From Fekh Country in Islam*, 1997, Dar Al Shuroq, p. 139.

⁶⁷ Sura Al-Hajj, verse 30.

⁶⁸ This Hadith was narrated in weak way (*sanad*) however the Hadith was corrected by Al-Hakem; see Ibn Adi, *AlKhamel*, Hadith No 6/2213.

⁶⁹ Sura Al-Baqarah, verse 282.

functions, currently performed by parliament and democratic legislatures, which should incorporate the principles of *Shura* Council.

Legislation:

Legislation refers to the creation of law by a legislative body. Within Islamic Law there exist a range of debates regarding this issue. The first debate centres on the nature of law and the people's attitude toward it. The Arabic word for law is *Qanon*. However, this word is the cause of much controversy within the broader Muslim community. For this reason a number of Arabic countries prefer not to use it. For instance, in Saudi Arabia, legislation uses the term *Netham* (system) when referring to the law, in Tunisia state uses *Al-majalah* (pandect), and in Morocco state uses the term *Moduanah* (code). Many scholars question whether *Qanon* is in fact an Arabic term.⁷⁰ Others however have challenged this objection, arguing that *Qanon* did indeed originate in Arabic.⁷¹ Regardless of where it comes from, within Arabic dictionaries it is described as being both Arabic and non-Arabic, it has been used by a number of Islamic scholars such as Ibn Taymea⁷² in relation to Islamic Law. Second, it must be asked why some Muslims object to this word? Whilst a number reject the word due to its perceived non-Arabic roots, many criticize it as a law which contradicts *Sharia*, the main and unquestioned authority for all Muslims. Yet this argument is based on a misinterpretation of both the *Sharia* and the law, thus, preventing certain modern day practices which are acceptable under Islamic Law from being practices. *Sharia* is complete and thorough as a religious source. God says in this regard '*This day have I perfected your religion for you, completed my favour upon you, and have chosen for you Islam as your religion*'.⁷³ However, that does not mean people do not have the right to legislate what it is suitable for them, a decision which will be different according to historical and social context. Within the *Sharia*, as shown previously, there is only one rule for Islamic Law which is that *Islamic regulations are changeable based on change of time*. Consequently, Muslim societies must always be improved, and adapted to modern life, through the creation of new legislation and the incorporation of new social ideas. However, there are also certain aspects of Islamic Law which are eternal in their truth, therefore existing as unchangeable pillars of Islam. Most political issues fall under the first category. Specifically, whilst based on the general principles of Islamic Law, they can be changed

⁷⁰ Arabic language community in Cairo, *Al-Mugam Al-Wasyt*, 1989, Islamic Library Press, at 2/763.

⁷¹ H Al-Firozabad, *Al-Qamus Al-Muhit*, 1974, Al-Resalah Press, at 4/121

⁷² I Al-harbi, *The Administrative Law in Saudi Arabia*, 2004, Riyadh, al-Humid Press, p. 9.

⁷³ Sura Al-Maeda, verse 3.

according to what people think is best suited for their own time and place.⁷⁴ Moreover, given the social importance of legislation it should be performed by specific social bodies, such as a parliament or *Shura* Council.

The right to propose and amend the law: *Shura* council should have the right to propose, reject and amend any law regardless of when it was enacted.

Control of the Government: The members of the *Shura* or parliament have the right to control, or act as head of, the Government. This is based on an Islamic Law which firstly demands that there exist *Order in a friendly manner and prohibition of abomination*. God says ‘*Let there arise out of you a band of people inviting to all that is good, enjoining what is right, and forbidding what is wrong*’.⁷⁵ Secondly, it requires a *Duty of advice* for as the Prophet said ‘*religion is advice*’. To this end, in addition to past practices originating in the Prophet's period, social issues should be decided by the Head of State under the control of the nation for the realisation of the population's interest.⁷⁶

In conclusion, many legislative functions should be performed by the parliament or other national body (such as a *Shura* Council) according to the Islamic principle of *Shura*. They should also be responsible for all that concerns the larger national interest of the people.

4.4.9. The Attitude of Islamic Law towards Political Parties

As discussed above democracies are multi-party systems. This is essential for representative democracies as it prevents single-Party rule and, therefore, the formation of policy without consultation or challenge. However, it still must be investigated whether multi-party systems are allowable under Islamic Law as related to *Shura*. As shown in the last chapter, a number of Islamic writers have argued that the Party system is acceptable under Islamic Law. Moreover, they contend that Islamic Law actually encourages people to establish a multi-party system, giving as evidence a number of textual versus such as ‘*Let there arise out of you a band of people inviting to all that is good, enjoining what is right, and forbidding what is wrong*’.⁷⁷ On the other hand, many scholars say that Islam rejects the multi-party system since it commands individuals to come together under one nation. They

⁷⁴ For more detail see Sources of Islamic Law in chapter six.

⁷⁵ Sura Al-Emran, verse 104.

⁷⁶ See A Al-Fenjery, *Political Freedom in Islam*, 1983, Dar Al-qalam Press, p. 43.

⁷⁷ Sura Al Emran, verse 104.

point to God's statement 'Verily, this brotherhood of yours is a single brotherhood, and I am your Lord and Cherisher: therefore serve me (and no other)'.⁷⁸ They argue that this means society should be united under one party; otherwise there would be conflict between people which goes against Islam.⁷⁹ As God says in this respect 'And hold fast, all together, by the rope which Allah (stretches out for you), and be not divided amongst yourselves; and remember with gratitude Allah's favour on you; for ye were enemies and He joined your hearts in love, so that by His Grace, ye became brethren'.⁸⁰ To prevent further conflict God said 'Be not ye amongst those who join Gods with Allah, Those who split up their Religion, and become (mere) Sect - each party rejoicing in that which is with it self!'⁸¹

In conclusion although Islam invites people to be united as one group and is concerned with preventing conflict this does not mean it rejects the existence of multiple political parties. Instead, parties are acceptable if they benefit society and do not contribute to conflict, which according to Islamic should not occur if people have the correct knowledge. Yet on the other hand, there is no clear evidence that Islamic Law encourages multi-party systems. In this respect, Islamic Laws only provide general principles, leaving the specifics of Government and social relations largely up to the people themselves. Thus, if a political party is able to ensure the people's interest then they should be allowed to do so. However, Shia can be recognised as party in Islam.

4.4.10. Participation of Women under *Shura* System⁸²

Similar to the issue of whether or not to allow for multi-party systems, the subject of whether women should be able to participate in the *Shura* remains controversial amongst Muslim scholars. A number of Islamic scholars contend that women cannot participate in *Shura* and should not be consulted on general social issues. They support this argument through a misinterpretation of Islamic Law, declaring that 'the involvement of women could lead to some illegal issues in Islam'.⁸³ However, this may also be true of men, thus, invalidating the singling out of women for this reason. Instead what is needed is the

⁷⁸ Sura Al Anbya, verse 92.

⁷⁹ S Al-Mubarkfury, *Political Parties in Islam*, 1987, Dar Al Saha Press, p. 35; J Afanah, *The Right Idea in Multiparty*, 1992, the Public Library Press, p. 23.

⁸⁰ Sura Al Emran, verse 103.

⁸¹ Sura Al Rum, verses 31-32.

⁸² This section about participation of women in Shura system, the right of women to participate in public and political affairs has been explained in section 4.3.2.2.

⁸³ S Al-Mubarkfury, above note 79, at p. 76.

creation of perfect procedures On the other hand; many scholars believe that women and men should have the same right to participate in *Shura*. Furthermore, they argue that there are a number of situations which should be decided by women alone. However, Islamic Law gives women the right to participate in *Shura* the same as men do, as was the case during the Prophet's period when women were counselled in important issues. It was only after this period that women were excluded from public affairs.⁸⁴

To conclude, *Shura* is a principle of Islamic Law inviting people to participate in political and public affairs, it seems to be an obligatory principle As Ibn-Ateah said '*Shura is principle of Sharia and who does not counsel has to be deposed without disagreement*'.⁸⁵ Based on the discussion above it does appear that the *Shura* should be considered binding, especially in the modern context where that is viewed as the best way of participation of people in political and public life, there are some requirements to be a member of *Shura* such as Knowledge, honesty and Justice. There is no specific method for choosing members of a *Shura* in Islamic Law. Sources of Islamic Law leave such decisions to the people based on what best serves their own particular needs. *Shura* in Islamic Law should thus, adopt modern Parliamentary Government, as used in Western democracies, due to their obvious benefits. To this end, since elections are considered to be the best way for selecting members of a representative council in political life they should be therefore considered a requirement of *Shura* under Islamic Law. However, voting in Islamic Law is considered as kind of testimony (witness) which has been known by Islamic Law and there is separate part in Fiqh that has been called testimony-witness *Shahadah*. *Shura* Council should play the same role as parliament has done in modern time, and should be more active in Muslim countries to achieve its aim. As there are some similarities between *Shura* and democracy; next is a brief comparison between them.

4.4.11. Conclusion, Comparison between *Shura* and Democracy

1. *Shura* is an Islamic expression which encourages governors not to be autocratic but to include others in decisions. By contrast Democracy is a form of Government which attempted to give people back their rights after past abuses.

⁸⁴ J Afanah, above note 79, at p. 23.

⁸⁵ M Al-Qurtby, above note 7, at 4/249.

2. Democracy is established and improved by people whilst the idea of *Shura* was established by the God and his Prophet with flexibility in practise to be suitable for a variety times and places.

3. In democracy there is no restriction, so whatever has been accepted by majority should be in practice whilst in *Shura* all the issues have to adhere to the Islamic principles.

4. Democracy is based on the interests of individuals and as controlled by the people, whilst *Shura* is based on the interest of individuals and society. In *Shura*, if there is a conflict between society and individuals then interests of society are given priority.

5. Democracy achieves the best results in the modern world since it has been practised correctly in the West and improved over time to benefit the people. *Shura*, on the other hand, is practised in some Muslim countries but exists as a council of advice as opposed to a binding legislative body like the parliament.⁸⁶ Moreover, to improve *Shura* in order to adapt to modern conditions requires scholars who are experts in both democracy and Islamic Law. The lack of such experts has hampered this process.

6. *Shura* and democracy are linked in their objective. They encourage people to participate in the public and political life. For this reason many believe that *Shura* is democracy.

⁸⁶ There is now improvement in Council of Shura to practise their rules as legislative body such as Shura Council of Saudi Arabia after amendment No A/198 in Wednesday Nov 26, 2003, Shura Council of Egypt after Constitutional amendments of 2007, and Shura council of Qatar after Constitutional amendment of 2005.

Part Five: Practice of democracy in Saudi Arabia

- **Authorities in Saudi Arabia**
- ***Shura* Council in Saudi Arabia**
- **Steps of Improvements of *Shura* Council as Legislative Authority in Saudi Arabia:**

5. Part Five: Practice of Democracy in Saudi Arabia

5.1. Chapter Ten: Authorities in Saudi Arabia

Introduction:

Since becoming an independent country on September 18, 1932¹, Saudi Arabia has been ruled by three authorities including the Al Hejaz² where there was a council of *Shura* and legislation laying out the basis structures of its monarchical system known as the Kingdom of Hejaz.³ However, its rule by an absolute monarch does not allow for a clear separation of power. The King is considered the final authority in the Government.⁴ Specifically, he has the right to intervene in legal decisions⁵, serves as the country's prime minister⁶, and appoints all members of the *Shura* as well as national ministers.⁷

As a Muslim country Saudi Arabia's constitution is directly based on the Qu'ran and the Sunna, as stated in the first and seventh Article of its basic laws. Given this fact there should be no conflict between the laws of country and the main sources of Islamic Law.⁸ For this reason the country should be based on Constitutional Law as most nations are in the modern era. According to a number of commentators and scholars; there is no Constitutional Law in Saudi Arabia since its legal system is based on the Qu'ran and Sunna. By contrast others argue that Constitutional Law does exist after the adoption of basic laws of Saudi Arabia in 1992.

¹ *Om Al-Qura*, (official newspaper in Saudi Arabia), issue 406 in Sep 23, 1932

² It is important part of Saudi Arabia as it was consist of Najd and Al-Hejaz, based on that Saudi Arabia from 1926 to 1932 was called the Kingdom of Hejaz, Najd and its supplements. *Om Al-Qura* Newspaper issue 121 in April 8, 1927.

³ It has been written to organise the public affairs in Hejaz by eight representatives of Hejaz' cities and five were appointed after King Abdul-Aziz has dominate Al-Hejaz in 1926. It was published in *Om Al-Qura* Newspaper in issue 90 in Sep 2, 1926.

⁴ The Basic Law of Saudi Arabia adopted on: March, 1992, Article 44 states that 'the authorities of the state consist of the following: the judicial authority; the executive authority; the regulatory authority. These authorities cooperate with each other in the performance of their duties, in accordance with this and other laws. The King shall be the point of reference for all these authorities.'

⁵ Article 50 of the Basic Law of Saudi Arabia states 'The King, or whoever deputises for him, is responsible for the implementation of judicial rulings.' The King is responsible for appointing judges see Article 52 of the Basic Law of Saudi Arabia, above note 4.

⁶ Article 56 of the Basic Law of Saudi Arabia, above note 4.

⁷ Article 57 of the Basic Law of Saudi Arabia, above note 4, and Article 3 of Law of Shura Council adopted on March 1992.

⁸ Article 8 of the Basic Law of Saudi Arabia.

Since its founding there have been attempts to introduce Constitutional Law into Saudi Arabia.⁹ On March 21, 1980 a committee was appointed to write the basic law, *Shura* Council law, and law of territories. This was meant to serve as the basis for the country's Constitutional Law, supplementing the already existing council Law for the Ministries. In 1992 the previous laws were officially adopted and in 1994 the new council of ministers' law were adopted. This led to the modern establishment of the *Shura* Council in Saudi Arabia. Those four laws, in addition to the law of allegiance institution adopted in 2006, are considered the basis for the Constitutional Law in Saudi Arabia. However, this Constitutional Law must be compatible with the main sources of Islamic Law. In fact the idea that there is no need for Constitutional Law as the main sources of Islamic Law is the Constitutional Law is incompatible with the realities of modern life as social issues must be decided upon in accordance with recent improvements in governance. Yet this does not mean that the main sources of Islamic Law are incompatible with modern life. As shown previously the main sources of Islamic Law provides the general guideline and principles for political and public live. It leaves the details and practices to be decided by the people based on what is most suitable to their own society. This, therefore, shows how Islamic Law is indeed universally valid, adaptable to all times and places.

In Saudi Arabia the previous five laws represent the Constitutional Law of Saudi Arabia. They were issued specifically by the King, with particular regard to his use of the royal decree (*Amr Malaki*), whilst the others laws in Saudi Arabia used to be issued by royal legislative decree (*Marsoom Malaki*)¹⁰. The five laws offer constitutional concepts and organise the country's governance. There are three types of governing authorities in Saudi Arabia-judicial, executive, and legislative. They will be discussed in more detail below.

5.1.1. Judicial Authority

The King is considered the ultimate judicial authority and he has been given the legal right to participate and intervene in the judiciary as he sees fit.¹¹ However, Saudi Arabia has two kinds of Courts-the general Courts and administrative Courts. Judges in Saudi Arabia base their judgment on Islamic Law. Yet this can be difficult since there is often more than one

⁹ See *Om Al-Qura* newspaper issue No 144 in 1962.

¹⁰ See Royal decree No M23 in 1992.

¹¹ See above note 5.

idea of Islamic Law appropriate for ruling on each case¹². It is thus, often a matter of interpretation rather than clear judgement. This problem is compounded by the fact that many judges are unqualified¹³, especially considering that most of them are appointed at the age of 24. Moreover, past rulings are not published yet so that judges may use them as references for deciding upon current cases. These issues led for the call to reform the system. New statutes based on the 2001 law of legal procedures, and reinforced in the new judicial law of 2007, were created whereby the new high Court and specialised Court have been established. On 14, February, 2009¹⁴, the new members of high Court were appointed, and the head of legislative authority (Majles Al-*Shura*) was appointed as the head of the high council of judiciary. Moreover a new minister has been appointed as minister of judicial authority in Saudi Arabia. All of these changes can be seen as the beginning of improvement in judicial authority in Saudi Arabia. The 2001 law of legal procedures were compatible with Article 14 of ICCPR¹⁵ and should now be in practice. However, regulation of implementation should be considered in the near future to help the country join international instruments of fair trial.

¹² The Judiciary authority in Saudi Arabia based on *Hanbali* school but still the Judges have the right to choose another school idea if the idea has been approved by valid evidences, the best way is to codify Sharia to improve judiciary authority, unfortunately, codification of the Sharia has been rejected by the majority of the Council of Senior Islamic scholars in Saudi Arabia, see F. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia*, Brill, 2000, chapter 8; N Al-Miman, *Selection in Interpretation and Imitation*, 2002, Al-Adl journal, Vol.11, pp 15-26. However, the idea of scholars of Islamic Law has been discussed in *Administrative Law of Saudi Arabia*, and concluded that now Sharia in Saudi Arabia should be codified, see I Al-harbi, *Administrative Law in Saudi Arabia*, 2005, Riyadh, at p. 12.

¹³ See A Al-Ghadyan, *the Judiciary in Saudi Arabia*, 1998, ALQ, Vol. 13, p. 235.

¹⁴ See *Al-Riyadh* Newspaper, February 15, 2009, issue 14846.

¹⁵ Saudi Arabia has not yet ratified the ICCPR, although commission on Human rights urge Saudi Arabia, to ratify the ICCPR without reservations, see, Fifty-fourth session Item 13 of the provisional agenda, at para. 16. E/CN.4/1998/NGO/45 March 11, 1998, available on line at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/07ffec6162dcb31802566640052186e?Opendocument>

In 1998, the Saudi Government established a committee to consider the ratification of the ICCPR and ICESCR, see Y A-Ssaman, *the Kingdom of Saudi Arabia and Human Rights*, (foreign policy of the Kingdom over 100 years) Riyadh, Diplomatic institute 1999, p. 779. However, Saudi Arabia remains a non-member state to both covenants; see report on the mission to the Kingdom of Saudi Arabia, submitted pursuant to commission on human rights resolution 2002/43, UN ESCOR, commission on human rights, 59th Sess, Item 11(d) of the provisional agenda UN Doc. E/CN.4/2003/65/add.3, para. 81.

For more about this topic see, D. Arzt, *the application of international human rights law in Islamic states*, HUM. RTS. Q, Vol.12 (1990), 202, pp 216-217, and A Al-Hargan, *Saudi Arabia and the ICCPR*, December 2005, the International Journal of Human Rights, vol.9, No 4, pp. 491-505.

5.1.2. Executive Authority

The Cabinet (council of ministers) continues to be the dominant authority in Saudi Arabia. It holds both executive and legislative authority. However, it has shared legislative authority with the *Shura* Council since its establishment in 1994. Nevertheless, it still has more power than the *Shura* Council, reinforced by the new law of council of ministers in 1994.¹⁶ The King of Saudi Arabia is the prime minister of the Cabinet (council of ministers).¹⁷ All decisions made by the Cabinet must be approved by the King.¹⁸ Cabinet term last for four years, ministers are appointed and removed by the King.¹⁹ Each minister is responsible for his ministry to the King. The Council of Ministers is composed of the Chairman of the Council, Deputy Chairman of the Council, Ministers, and Ministers of State who are appointed as members of the Council of Ministers by Royal order. Advisers to the King are also appointed as members of the Council of Ministers by Royal order.²⁰

The Council of Ministers plans the internal, external, financial, economic, educational and defence policies as well as all other public affairs of the state. It also oversees their implementation. It additionally investigates the decrees of the Consultative council. It has executive power and is the point of reference for financial and administrative affairs in all the ministries and other governmental bodies.²¹ As the direct executive power, the council has total control over executive and administrative affairs.

Its full responsibilities can be described as the following:

- (1) Monitoring the implementation of statutes, rules and decrees.
- (2) Creation and organisation of public services.
- (3) Following up the implementation of the overall development plan.
- (4) Establishing committees to evaluate the performance of the different ministries, Government bodies, and specific issues. These committees submit their judgement to the council based on a schedule provided to them by the council. The council investigates these findings and if needed may create committees to further examine and decide upon the fate

¹⁶ It is the fourth amendment on Law of Council of ministers as the first and second ones were adopted in 1954, and the third one in 1958, see M Al-Marzoqi, *the Legislative Authority in Saudi Arabia*, 2004, Riyadh, Obekan Library Press, at p. 45.

¹⁷ Article 1 of Law of the Council of ministers, adopted by Royal Decree No A13 in 1993.

¹⁸ *Ibid*, Article 7.

¹⁹ *Ibid*, Articles 8 and 9.

²⁰ *Ibid*, Article 12.

²¹ *Ibid*, Article 19.

of ministries deemed to be underperforming. This must be done in accordance with the existing statutes and rules of Financial Affairs²²

The council of ministers is also the main legislative authority in Saudi Arabia. Statutes, international treaties, and agreements and franchises are issued and amended in accordance with Royal Decrees after having first studied and discussed by the Council of Ministers. However, every minister has the right to propose a draft statute or rule pertaining to his ministry's work. Every member of the Council of Ministers will have the right to propose whatever he believes to be appropriate for discussion at the Council of Ministers after being approval of the Chairman.²³ This provides the Council of ministers greater legislative authority in Saudi Arabia than the *Shura* Council. Specifically, every Minister has the right to propose a draft statute, a right which is not afforded as will be shown to members of the *Shura* Council.²⁴ The Council of Ministers furthermore has sole control over the country's budget, responsible for voting and approving through a Royal Decree. The Government moreover is not permitted to sign a loan (agreement) without the approval of the Council of Ministers and the issuance of a pertinent Royal Decree.²⁵

The King thus, is considered the highest authority in all branches of the Government. He is able to appoint and dismiss all members of the Government whilst the council of ministers, for which he is head, is the country's most powerful executive authority. Additionally, there is no clear separation of power within the legislative branch between the council of ministers and *Shura* Council. However, following the adoption of Article 17 and 23 of the *Shura* Council's law in 2004, there has been a move to grant the *Shura* Council greater legislative authority.

²² Ibid, Article 24.

²³ Ibid, Articles 20 and 22.

²⁴ There were amendments in the Law of Shura Council in 2004, giving the Shura Council more power as a legislative body. Article 17 of Shura Council's law states in this regard that 'The decisions of the Shura Council will be submitted to the chairman of the Council of Ministers for deliberation, If the views of both Councils are concordant, they will be issued following the King's consent; if the views are different, the King has the right to decide what he deems fit.' But after amendment is 'if the views are different, the Shura Council going to decide its view then submitted it to the King' The second one regarding Article 23 which was 'Every ten members of the Shura Council have the right to propose a new draft law or amendment of an executive law and submit them to the chairman of the Shura Council; the chairman should submit the proposal to the King.' To give the Shura Council the right not only to propose that but also to study that then to be submit it to the King by the chairman.

²⁵ Ibid, Articles 25 and 26.

5.1.3. Legislative Authority:

Legislative authority began in Saudi Arabia after King Abdul-Aziz conquered Hejaz — which consists of the two most famous mosques in the world - when he demonstrated that *Shura* is the best form of Government in accordance with the basic references of laws found in the Qu'ran, Sunna, and Fiqh.²⁶ The *Shura* Council was thus, established in 1924 to wield not only the legislative authority²⁷ but also executive power. However, as will be shown in the next chapter, this council lasted for less than thirty years before the council of ministers superseded it as the dominant governing power in the country. The *Shura* Council was not reconvened until 1993.

In 1932 the country was renamed the Kingdom of Saudi Arabia. During this time Article 6 was adopted as part of this larger declaration ordering for the creation of a new set of basic laws to serve as the framework for the country's Constitutional Law.²⁸ Over the next four years this law had been written about in 140 articles. In 1936 the King's approval for the law was published by the country's official newspaper (Om Al-Qura) in issue 610. Unfortunately, for a number of reasons, including international conflicts and financial instability-this law did not fully come into effect even after Council of Ministry has been established in 1954. The law of Council of Ministry was strengthened in 1962 with improvements to the council. In this year the Prime Minister Faisal declared the continued importance of drafting a basic law for Saudi Arabia.²⁹ However, this law was not fully realised until 1992 when the basic law was finally officially passed in its entirety.³⁰

Council of ministers was the main legislative authority in Saudi Arabia since it was founded in 1954.³¹ Members of the council of ministers are appointed by the King. The Council of ministers was the country's sole legislative authority from 1954 until 1993. During this time there was no *Shura* Council. Significantly the council of ministers initially drew its power from the original *Shura* Council. Article 7 of the Council of ministers's law in 1954 states 'it has the right to adopt, amend, and reject laws which come from *Shura*

²⁶ See *Om Al-Qura* Newspaper, the first issue, December 12, 1924.

²⁷ See Article 6 of *Shura* Council Law, published in *Om al Qura* Newspaper, issue 135 in 1927.

²⁸ *Om al-Qura* Newspaper, issue 406 in 1932.

²⁹ This Declaration was published in *Om al-Qura* Newspaper issue 1944 in 1962.

³⁰ As the King Fahd said in interview with *Al-Belad* Newspaper the reason behind this delay were, the international conflicts, see *Al-Belad* Newspaper issue 551 in April, 1977.

³¹ There was a representatives council (*Al-Ocala council*) established in 1932 consisting of Ministers of interior, foreign, finance, and president of *Shura* Council, in 1953, this council was improved to be Council of ministers. See *Om Al Qura* Newspaper, issue 370 in 1932 and issue 440 in 1934.

Council³². Article 18 of the law of council of ministers adopted in 1956 further granted legislative power exclusively to the council of ministers. The *Shura* Council was re-established in 1993 to share legislative authority with the council of ministers. Article 17, approved as an amendment to the country's laws in 2004, reinforced this power sharing between the Council of ministers and the *Shura* Council declaring 'the decisions of the *Shura* Council will be submitted to the chairman of the Council of Ministers for deliberation. If the views of both Councils are concordant, they will be issued following the King's consent. If the views are different, the *Shura* Council will raise its view after consideration to the council of ministers's view-to the King who has the right to decide what he deems fit'. This move shows the attempt to grant more legislative authority to the *Shura* Council, as power is being divided between the two councils.³³

Article 67 of the basic law of Saudi Arabia describes the responsibilities of the two legislative bodies. It states 'the regulatory authority lays down regulations and motions to meet the interests of the state or remove what is bad in its affairs, in accordance with the Islamic Sharia. This authority exercises its functions in accordance with this law and the laws pertaining to the Council of Ministers and the Consultative Council'. Bills are submitted to the Council of ministers only after they have been studied and discussed by the *Shura* Council in accordance with Article 20 of the council of ministers's law which declares 'taking into consideration the stipulations of the statute of the Consultative council, statutes, international treaties, and agreements and franchises will be issued and amended in accordance with Royal Decrees after having been studied by the Council of Ministers'. Each minister also has the right to propose laws relevant to his or her own ministry. However, this is only the first step in a longer process toward its eventual adoption.

In addition to the *Shura* Council, and Ministry Council, there are two other parts of the legislative branch in the Saudi Arabian Government. Firstly, there is the King. Since 1965, when the King was made the prime minister, he has been the highest legislative authority in country. As laid out in Article 70 of the basic law of Saudi Arabia all the laws in Saudi Arabia must be issued by royal decree 'International treaties, agreements, regulations and concessions are approved and amended by Royal decree'. Yet this does not include the

³² *Om Al-Qura* Newspaper issue 1508 in 1954.

³³ Administrative Judicial was part of Council of ministers until nearly 1983 when its new Law was adopted to be separated sector.

basic laws of Saudi Arabia which were granted an exception from this process by royal decree M23 in 1993. The reason for this is that the basic law was issued by royal order which unlike royal decrees is not deliberated on by the *Shura* and council of ministers but decided solely by the King.³⁴ This reveals the importance of the King as the highest legislative body in country. This is reaffirmed in Article 44 of the basic law of Saudi Arabia which describes the King as the most powerful member of Government, one who can appoint and dismiss other members of the Government at his discretion.³⁵ He also has the legal right to invite both councils to share information with each other and with him³⁶.

The second sector consists of a panel of the high scholars. The law in Saudi Arabia has to be compatible with Islamic Law as dictated by Article 1 and 7 of the basic law of Saudi Arabia. Therefore, the religious scholars act as a guideline for all people in religious matters. In 1971 the panel of the high scholar was established to officially interpret and implement Islamic Law. It is composed of Muslim scholars who have advised the people and the Government on matters relating to Islamic Law. However, importantly their rulings are not binding. Many view this panel as a separate and distinct part of the legislative branch.³⁷ Yet in the mind of this author this opinion is incorrect for a number of reasons. In the first place the basic laws of Saudi Arabia declared that the legislative body are Ministers and *Shura* Councils³⁸ and in Article 45 the panel of the high scholar was mentioned only as a legal reference. Moreover, a number of decisions made by the ministers and *Shura* Council have contradicted the opinions of the panel such as the law of insurance No 222 in 2001 adopted by Council of ministers which is incompatible with the decision of panel of the high scholars no 51 in 1977. Therefore, the panel of the high scholars in Saudi Arabia is a consultative body advising the Government on matters pertaining to Sharia.³⁹ However, the Government does require its opinion even if it is not binding.

³⁴ M Al-Marzoqi, above note 16, p. 355.

³⁵ Article 8 of the Ministry council's Law, and Article 3 of Shura Council's Law.

³⁶ Article 69 of the Basic Law of Saudi Arabia

³⁷ See for example A Al- Shelhop, *Constitutional law in Saudi Arabia*, 1999, Riyadh, Al-Farazdaq Press, p. 217.

³⁸ See Articles 67, 70 of the Basic Law of Saudi Arabia, Article 20 of the Council of ministers' Law, and Article 15 of Shura Council's Law.

³⁹ See M Al-Marzoqi, above note 16, p. 180.

Conclusion

To conclude, although recent criticism of Human Rights Watch⁴⁰ to Saudi Arabia regarding human rights⁴¹, Saudi Arabia has witnessed improvement in a variety of aspects of political life, for instance the five new laws; the basic law of Government 1992, law of council of ministers 1994, law of *Shura* Council 1992, law of territories 1992, and law of allegiance institution 2006 are considered as Constitutional Law for the country. The King in Saudi Arabia is considered as the highest authority in country and considered as reference for all authority whilst the Cabinet play the main rule as executive authority and part of legislative authority. However, there is gradual improvement in the role of *Shura* Council but as we are going to see in the next chapter, Saudi Arabia still needs some more time. As an Islamic country, Saudi Arabia relies on a panel of high religious scholars to advise the Government on religious issues. Their opinions are nonetheless not binding and the panel has no formal authority. There is now a tendency in Saudi Arabia towards improving the judiciary authority and its regulation. It is my view that not only the judiciary procedures should be regulated but also Sharia law should be put into codification in Saudi Arabia to reach the implementation of a fair trial. However, in November 2007, King Abdullah initiated judicial reform, mandating new, specialised Courts and training for judges, with a budget of US\$1.9 billion. On 14 February 2009, the new experts have appointed a Minister of Justice, the head of highest judiciary council, first members of the new high Court, all in order to improve the judicial authority. Another revolutionary step is the addition of the first woman as the vice-minister of education.⁴² As this chapter has explained the authorities in Saudi Arabia, the next chapter will focus on *Shura* Council as a legislative authority of Saudi Arabia.

⁴⁰ Human Rights Watch is one of the world's leading independent organisations dedicated to defending and protecting human rights. For more see <http://www.hrw.org/en/about>

⁴¹ See UN Human rights Council to Review Saudi Record, February 4, 2009, available online at <http://www.hrw.org/en/news/2009/02/04/saudi-arabia-un-deliver-promises-rights-reforms> and list of recommendations for the Universal Periodic Review of Saudi Arabia at the UN human rights Council, February 4, 2009, available on line at <http://www.hrw.org/en/news/2009/02/04/list-recommendations-universal-periodic-review-saudi-arabia-un-human-rights-council>, accessed on June 25, 2009.

⁴² See *Al-Riyadh* Newspaper, February 15, 2009, issue 14846.

5.2. Chapter Eleven: *Shura* Council in Saudi Arabia

5.2.1. A Historical Background¹

Shura (consultation) in Saudi Arabia has progressed as we have seen in the previous Chapter through several stages since it was called into order by late King Abdul-Aziz upon his arrival into Makkah in 1924. King Abdul-Aziz made *Shura* the basis for his Government as part of his larger goal of fulfilling his religious obligations by implementing Shariah (Islamic Jurisprudence). He intended to establish an Islamic *Shura* state applying Shariah as it is prescribed in the Qur'an and authentic Sunna (deeds and teachings of Prophet Mohammad, peace be upon him). It may be helpful to review how *Shura* historically developed from its inception under King Abdul-Aziz in 1924. The Kingdom has a long standing and deep connection to *Shura*. In this respect, it does not differ substantially from the experiences of other countries with parliamentary councils in regard to its evolution and governing function. However, its evolution can be traced back largely to the country's unique historical condition. This chapter will examine Council of *Shura* in Saudi Arabia since its beginning till contemporary time.

First stage: The National Council in 1924

The first elected council was established in 1924 and was known as The Consultative National Council. It was led by Sheik Abdul Gadir Al-Shebi. The council consisted of twelve members. At that time, since the state's political structure was not yet fully formed, the council was entrusted with drafting the basic laws for the administration of the country. During this early period of the country's development, there were no specific laws setting out the council's function. The council lasted for six months.

Second stage: The Consultative National Council in the year 1925

To increase participation and expand its overall representation, the previous council was dissolved. It was replaced by a Sultanic decree calling for a new elected council representing all 12 districts of Makkah. Two religious scholars and one member representing commerce were to be amongst the twelve elected members. The council

¹ See N Al-Assaf (trans) *the Shura Council in the Kingdom of Saudi Arabia, Parliamentary Practice*, 2004, Riyadh, Shura Council Press, pp. 18-25. For more detail about historic background of Shura Council see A Al-Zahrani, *Historic of Shura in Saudi Arabia*, 2000, Riyadh, Hala printing Press; F Hamzah, *Saudi Arabia Country*, 1968, Al-Nasr Press.

included three additional members nominated by the Sultan from the distinguished citizens of Makkah. The membership was thus, chosen through a combined process of election and nomination. This council was more organised than its predecessor. In addition to its members it also had a vice president and a secretary. The instructions to form the council came in six articles which set out the qualifications for membership, the closing date for voting, and voting eligibility. The council's jurisdiction was formulated in seven articles. These articles set out guidelines for regulating all affairs in Courts, municipalities, endowments, education, security, and commerce. Additionally it formed permanent committees to solve problems related to the social traditions that did not contradict Shariah.

Third Stage: Majles Al-Shura in the year 1926

In order to unify the country King Abdul-Aziz enacted a new Basic Law of Governance in 1926. Amongst the new laws was a special section for councils, including Majles Ash-Shura. This section dealt with issues including council locations, the council title (renamed *Majles Al-Shura* from its original title of *National Council*), the formation of its membership (composed of 12 members), when the council will convene, those eligible for membership, and term limits for its representatives (one year). These issues were not addressed in formation instructions of the previous National Council. Majles Al-Shura was established on 6 July 1927,

Fourth Stage: Majles Al-Shura in 1927

Two days after the dissolution of the previous council, a royal decree was issued to amend the fourth section of the Basic Law of Governance dealing with Majles Al-Shura. This amendment allowed the council to work according to a new revised system. The council now consisted of 8 members each serving two-year terms. The new law required the council to consist of four members elected by the Government after consultation with eminent experts, and four members appointed by the Government, two of whom had to be residents of Najd region. The new council law was issued in 15 articles reflecting the council's previous experience. This new law represented the first law drafted for Majles Al-Shura. The law stipulated that membership should consist of eight full-time members presided over by the deputy of the King, His Royal Highness Prince Faisal Bin Abdul-

Aziz. The council had to convene twice a week, though it could convene more than this upon the request of its president when necessary. *Majles Al-Shura* was considered to be founded during the reign of King Abdul Aziz who inaugurated the council's first session on Sunday 17 July 1927.

Fifth Stage: *Majles Al-Shura* in 1928

Due to the large number of tasks entrusted to the council a new amended law was needed so that it could better serve the public interest. The new law consisted of 14 articles. The number of the council members was increased to 12 instead of 8. The second Article mandated that a permanent vice president for the council would be appointed by the King whilst a second vice president would be elected by the council. The eighth Article specified that the council sessions should be held every day instead of twice a week. That same year, the council issued an appendix of seven articles for its law. The new appendix was intended to facilitate the council's works. This appendix was developed and issued as internal by-laws for *Majles Al-Shura*. It consisted of 24 articles. The council continued working under the above mentioned law without any amendments, and went on exercising wide jurisdictions until the founding of the Council of Ministers in 1953 when many of the jurisdictions of *Majles Al-Shura* were distributed between the Council of Ministers and other Government apparatuses developed according to their regulations. However, *Majles Al-Shura* continued to hold sessions and to look into issues referred to it albeit at a reduced level of power. From the reign of the late King Abdul-Aziz to the reign of the late King Khalid, the old council held a total of 6222 sessions and issued 9349 decisions in 51 council terms.

Sixth Stage: the Modern *Majles Al-Shura*

As Saudi Arabia become more economically developed, the Custodian of the Two Holy Mosques, the late King Fahd bin Abdul-Aziz, issued decrees to modernize all major laws in the country. In his historical speech, delivered on 2 March 1992, he introduced three major laws: the Basic Law of Governance, the Provincial Councils' Law, and the *Majles Al-Shura* Law. The modernization of *Majles Al-Shura* updated the council's already existing frameworks and methods. It was meant to increase the council's efficiency, organisation, and overall vitality. This was done to ensure that the council could cope with the country's rapid developments the country in all fields and to keep pace with the

demands and requirements of modern times. This started a new page in the long history of *Shura* in the Kingdom of Saudi Arabia.

King Fahd fortified the foundations of *Shura* in the kingdom by issuing the new Majles Al-*Shura* Law in 2/3/1992, which replaced the old law which issued in 1927. It also approved the council's bylaws and their supplements in 21/8/1993. He launched the first term of the council with a speaker and 60 members. In the second term, the council consisted of a speaker and 90 members. In the third term, the council included a speaker and 120 members. In the fourth term and the fifth term², the council consisted of a speaker and 150 members, representing people who had knowledge, experience, and competence.

On 1 August 2005, the Custodian of the Two Holy Mosques King Abdullah bin Abdul-Aziz came to power. Since he was the Crown Prince, King Abdullah paid much attention to the council and supported its goals. As the Crown Prince, he delivered a number of royal speeches on behalf of the King which began the council's agenda for several years in their third and the fourth sessions. He also showed his support of the council through amending some articles of its law to keep up with the Kingdom's growing positive changes and allow it to better provide for the welfare of the nation and its citizens. The elite group of members, from which this modern council is formed, has proven its worthiness over the past four terms. It has many great achievements and made many important decisions within a very short time period. In its new form, the council has held 925 sessions and issued 1300 decrees beginning in the third year of its fourth term 2008.³

5.2.2. Aim of *Shura* Council under Saudi Law

Since the establishment of the first Saudi state, the leaders of the country have committed themselves to a virtuous Islamic course. Saudi leaders have clearly tried to apply the principles of *Shura* in accordance with the Islamic Law. More than a century ago, King Abdul Aziz Al-Saud, once again confirmed that Saudi Arabia would follow the legislation of the Holy Qu'ran and Authentic Sunna. *Shura* would remain the foundation stone for the management of the country's affairs.

² The new term of Shura Council have been formed on February 14, 2009

³ See website of Shura Council <http://www.Shura.gov.sa> Regarding the third year 2007-2008 see the Annual Report No 15th of Shura Council, issued by Department of Information and Studies the Council at pp. 64,65.

The history of the *Shura* Council foundation passed through various stages since 1925, the most remarkable of which, as previously mentioned, occurred in 1992 with the modernization of the country's laws. During this time the *Shura* Council law was reformed to increase its efficiency, the regularity of its meeting, and its overall vitality. These changes were intended to modernize the institution so that it could cope with the country's growing socio-economic development. This was thus, marked the beginning of a new era of *Shura* in the kingdom of Saudi Arabia.

The aim of *Shura* Council in Saudi Arabia is apparent in the first Article of its law which states that the council has been established in order to fulfil the order desired by God and his messenger.⁴ The *Shura* in its current form within the kingdom of Saudi Arabia is an institution intended to allow the citizen to participate directly in the planning, administration, and implementation of the country's policies. The new law of *Shura* Council in 1992 represents an important step in the council's attempts to keep up with the latest developments of modern society. However, continued work is needed for this task, as the institution must continue to develop and modernize as well as adapt to changing conditions as they arise each year.⁵

The *Shura* Council draws its legislative framework and strength from the Qu'ran, the Sunna, and the basic law of Saudi Arabia adopted in 1992. Article 8 of the basic law stipulates that the 'Government in the Kingdom of Saudi Arabia is based on the premise of justice, consultation (*Shura*), and equality in accordance with the Islamic Shariah'. Article 68 moreover states that 'A Consultative Council is to be created. Its statute will specify how it is formed, how it exercises its powers and how its members are selected'.

⁴ Article one of Shura Council Law states that 'In compliance with Allah Almighty words 'Those who respond to their Lord, and establish regular prayer; who (conduct) their affairs by mutual consultation; who spend out of what we bestow on them for sustenance' Sura Al-Shura, Verse 38. And 'It is part of the Mercy of Allah that thou dost deal gently with them. Wert thou severe or harsh-hearted, they would have broken away from about thee : so pass over (their faults), and ask for (Allah's) forgiveness for them ; and consult them in affairs (of moment) . Then, when thou hast taken a decision, put thy trust in Allah. For Allah loves those who put their trust (in Him)' Sura Al-Emran, Verse 159. And following His Messenger Peace Be Upon Him in consulting his Companions, and urging the (Muslim) Nation to engage in consultation. Shura Council shall be established to exercise the tasks entrusted to it, according to this Law and the Basic Law of Governance whilst adhering to Qu'ran and the Path (Sunna) of his Messenger, maintaining brotherly ties and cooperating unto righteousness and piety.

⁵ *Al-Shura in Islam: Saudi Arabia Experience*, Department of Information in Shura Council, 2003, Riyadh, Shura Council Press, p. 21.

These two articles show the importance of *Shura* in the administration of Saudi Arabia. Article 44 of the basic law sets out the differing powers of the judiciary, executive, and legislative branches of Saudi Arabia's government; The legislative power entrusted to the *Shura* Council and council of ministers as laid out in Article 67 of the basic law. The law of *Shura* is issued in thirty articles which define the details of its task and the manner of its formation. The council's own internal regulations dictated the council's method for decision-making and governing practices more generally. However, the council in Saudi Arabia has tried to conform to the Islamic principles of *Shura*. Of course, it is not the only form of Islamic *Shura*. Members of the *Shura* Council have multiple specialisations which serve to enrich discussions on issues and ensure that they are debated in a highly professional and scientific manner.

5.2.3. Membership of *Shura* Council

In the first session of the *Shura* Council, held in 1994, the total number of members was 60. This number was increased by 30 members in every proceeding session (the period of session is four years). It currently has 150 members as required by Article 3 of the *Shura* Council's law. Article 4 determines the terms of their selection by the King. It states that members should be a Saudi national both by descent and upbringing, well known for uprightness and competence, and not less than 30 years of age. As the aim of *Shura* Council is to give people the right to participate in political and public life, in each new session the number of the newly selected members shall not be less than 50% of the entire *Shura* Council members.⁶

The *Shura* Council in Saudi Arabia has followed a different method for choosing its members than originally proposed by the national Council in 1924 which was by election. The council in 1926 by contrast used a combination of nominations and elections to choose its members. It was only in 1927 that the King decided to rely exclusively on nominations for determining the council's membership, a practice which remains intact to the present even with the adoption of the new *Shura* Council in 1992⁷.

⁶ Article 13 of the *Shura* Council's Law

⁷ Article 3 of *Shura* Council's Law declares that 'Shura Council shall consist of a Speaker and One hundred and fifty members chosen by the King from amongst scholars, those of knowledge, expertise and specialists'

The aim of this selection process is to ensure the proper and fair representation of the country's diverse population, specifically regarding its various groups, bands, companies, and factions. It seeks to unite these divisions under a common politics which combines religion and the public interest. For this reason political parties have been abolished to prevent council members from being placed under undue external pressure that would interfere with their independent judgements as to how to best achieve the public interest. This is especially true regarding specific items where their constituents may for their own local interest desire a council member to promote even if goes against the more general interest of the country's citizens. Thus, despite the fact that the selection process for the *Shura* Council seems incompatible with the norms of international democracy dominant in modern society, it nevertheless is the best way to choose its members given Saudi Arabia's various regions and the diverse set of experts needed to address the differing types of issues confronting the country. A number of commentators and scholars feared that increasing the number of *Shura* Council members would lessen the quality of its membership.⁸ However, as people have no experience with elections, the Government tried to introduce elections on a limited basis in 2007. Citizens were allowed to vote for members of municipalities. From this beginning it is expected that there will be elections for members of *Shura* Council in the near future. Through this gradual introduction of elections it is hoped will allow people to gain enough practice with democracy in order to elect the most qualified and best officials to the *Shura*. When this occurs there will be popular elections for one of the nation's bicameral council. The members will hail from the country's 13 provinces. Members of the second body will be appointed and not elected so as to ensure that the most qualified experts are selected to address specific national issues. This would lead to the establishment of an elective council who can support the institute of allegiance founded recently in 2007 under the new law of allegiance.

As the members of *Shura* Council are appointed by the King they are dissolved by the King, Article 5 of Saudi Arabian law which states 'a member may submit a request to resign his membership to the Speaker, who in turn shall bring it before the King'.

The members of *Shura* Council by law shall be as follows:

A- A Saudi national by birth and descent. The law limits the membership of the council to the Saudi citizens only.

⁸ A Al-Shbeely, *Practice of Shura in Saudi Arabia*, 2008, Al-Goof Press, p. 93.

B- A man of knowledge, experience, and specialisation.

C- Not younger than 30 years of age.

However, there are Rule and Procedures for investigating the conduct of *Shura* Council Members.⁹ If a member of the *Shura* Council fails to perform his duties, the General Panel should form a three-member committee from amongst its members excluding the Chairman and the Vice Chairman, to try the member accused of misconduct. This committee may impose the penalty of reprimand or deduction. If a member of the *Shura* Council neglects the duties of his work, he shall be investigated and tried. Thus, he is subject to one of the following penalties:

A- A written reprimand should be directed to him.

B- A deduction of one months' remuneration.

C- Revocation of membership.

If the committee decides that membership be revoked, the matter shall be referred to the Chairman of the Council who shall, in turn, bring it before the King.

5.2.3.1. Participation of Women

Despite the fact that at present all *Shura* members have been men, there is nothing within Saudi Arabian law preventing women from serving as council members. As shown previously Islamic Law allows women to participate in parliament or *Shura* Council. Thus, although there are no current female members many do provide advice to the council and represent it at international parliamentary meetings. A number of women have been appointed as advisors in the council. For instance, there were women representatives chosen to be part of the council, including to the *Shura* Council's delegation at the Executive Committee for International Parliamentary Union (IPU) held in Geneva on 19-20 February 2003.

- In June 1998, the council recommended giving women more opportunities in governmental careers.
- In March, 1999, the council recommended upgrading the girls' colleges to universities, reviewing women rehabilitation centres increasing the admission rate for handicapped women in these institutions through the establishment of specialised academic programs.

⁹ Royal Order No A/15 in Aug 31, 1992.

- In June, 2000, the Council voted on a motion adopted by a group of women that included a request to approve early retirement for female employees of the Government who have served less number of years than the minimum required for men to retire.
- In 2000, the UN Convention on the Elimination of All Forms of Discrimination against Women has been ratified.
- In 2002, the Council recommended to expand female specialty fields at Saudi universities.
- More important, the Council has approved, in conjunction with a special conference created to address this issue, a ruling which rejected all forms of discrimination against women¹⁰.
- On 30 and 31 October 2007 female advisors of *Shura* Council participated in a parliamentary women meeting in the Arab gulf countries in the United Arab Emirates which aimed to allow these women to share their experiences in order to lessen discrimination in the region.¹¹

However, in some cases women participate in political life in Saudi Arabia as in the case of the woman who has been appointed recently as a deputy minister¹². As seen in the second part of the thesis there is nothing in Islamic preventing women from participating in the *Shura* Council. New technologies can further increase the participation of women in the *Shura* Council. However, those against the inclusion of women in the council have not sufficiently argued their position.

5.2.4. Competences of *Shura* Council

The council exercises its competences in accordance with the basic law of Government as well as its own law, and its internal regulations; Article 16 of the *Shura* Council's law states that 'no meeting shall be considered official without a quorum of at least two-third of its council members, including the chairman or his deputy'. In addition, resolutions shall not be considered official without the majority approval of its council members. During its four sessions the council has never delayed any of its meetings due to a lack of

¹⁰ S Al-Malik., *the Shura Council of Saudi Arabia*, 2004, Shura Council Press, at pp. 83-84.

¹¹ See *Annual Report of Parliamentary Relationship Department in Shura Council for 2008*, Shura Council, 2008, Riyadh, at p. 15.

¹² She has appointed on February 14, 2009. See *Al-Riyadh* Newspaper, February 15, 2009, issue 14846

a quorum.¹³ However, the increase in the number of council members, expected to rise to a total 180 members next session. The second Article of *Shura* Council's law determines that the aim of its members. It also sets out the relationship between the council and Islamic sources. It states that the *Shura* Council shall hold fast to the bond of Allah and adhere to the sources of Islamic legislation. All members of the Council shall strive to serve the public interest, and preserve the unity of the community, the entity of the State and nation interests. This represents an advantage of the *Shura* in Islam, as it does not separate the political system from its society's moral and religious values.

Before discussing the competences, or responsibilities, of the *Shura* Council it is first important to bear in mind that the ministry council acts in conjunction with the *Shura* Council for deciding upon legislation. Article 15 of the *Shura* Council's law lays out the competences of *Shura* Council. Primarily the council is responsible for expressing its opinion on the State's general policies to the country's Prime Minister. The Council shall specifically have the following rights and duties:

- (a) Discuss and review the general plan for economic and social development.
- (b) Revise laws and regulations, international treaties and agreements, concessions, and provide whatever suggestions it deems appropriate.
- (c) Analyse existing and new laws.
- (d) Discuss Government agencies annual reports and attaching new proposals when appropriate.

Additionally, Article 18 describes the council's responsibilities as, 'Laws, international treaties and agreements, and concessions shall be issued and amended by royal decrees after being reviewed by the *Shura* Council.' From that we can divide competences of *Shura* Council into the following categories:

5.2.4.1. First, the Regulation Role.

As the legislative authority *Shura* Council has the right to study and amend all of the country's laws in countries except for, as mentioned above, the five basic laws issued by royal order. However, most laws are transferred to the *Shura* Council from the

¹³ Department of public relation and information in Shura Council, *the Shura Council in the Kingdom of Saudi Arabia*, 2004, Shura Council Press, p. 37.

Government to be studied. Moreover, Article 15 gives *Shura* Council the right to interpret the laws, with the exception again of the five basic laws of Saudi Arabia.¹⁴ The review of draft laws and related issues occurs in two stages following their initial discussion by their respective committee. In the first stage the president of the selected committee reads the draft, and then the Chairman gives the floor to the members to express their remarks on the draft idea and its expected interests. This is referred to as adaptation. The selected committee then responds to the remarks raised by the members after the draft is initially voted on for approval. In the second stage, the issue is put forward to the council for a more detailed discussion where it is debated item by item in the fourth-coming session. When the items are completely studied the committee replies to proposals, remarks, and inquiries of the members, prior to voting. It is admissible to reply and vote on some articles in the same session, however, it could only be possible upon the request by the president of the selected committee and the approval of the Council Chairman.

The previous two stages relate to when issues have been transferred to the council from the Government. The new amendment passed in 2004 gave the *Shura* Council the right to study new drafts of the law or amend any valid law by itself.¹⁵ For this reason in this case there is no need for the first stage.

The *Shura* Council can propose a draft of a new law or amend an existing law and study these within the council. The *Shura* Council chairman may also submit the council's resolution of the new or amended law to the King. As shown above, this right recently given to the *Shura* Council in 2004, made *Shura* Council as the highest legislative body in the country. Since the *Shura* Council may require documents and information from various Governments' body in order to complete its work, the law allows the Speaker of *Shura* Council to submit a request to the Prime Minister for providing the Council with documents and data in the possession of Government agencies.¹⁶

The right to proposition a draft law or amend an existing law is conducted through a two stage process. The first, which began with the start of the *Shura* Council in 1993, is described in Article 23 of the legal code which states 'Any group of ten members of The *Shura* Council have the right to propose a new draft law or an amendment to a law already

¹⁴ See Royal Decree No M/23 in March 1, 1992.

¹⁵ Amendment of Article 23 of Shura Council's Law.

¹⁶ Article 24 of Shura Council's Law.

in force and submit it to the Chairman of the Council. The Chairman shall submit the proposal to the King'. This right is initiated after the King approves a proposal supported by at least ten members of the *Shura* Council. However, in practice this occurs rather rarely. Nevertheless, this right was intended to give the *Shura* Council greater legislative authority, illustrated in the 2007 amendment Article 23 which grants the council the legal ability to draft new laws or amend existing ones within their own body. The speaker must submit the Council's resolution on a new or amended law to the King for his consideration. This amendment is very important as it increases the power of the legislature, as before there was no legislative authority in Saudi Arabia who had the right to create or amend laws. Even Article 22 of law of council of ministers states that 'every minister may propose a draft law or regulation related to work of his ministry. Every member of the Council of Ministers may propose what he deems worthy of discussion in the Council of Ministers' meetings after the approval of the Prime Minister'.

5.2.4.2. Second, the Study of International Treaties, Agreements and Concessions.

As mentioned previously the council law stipulates that international treaties, agreements, and concessions must be presented to it for their consideration before their approval. Article 15 and 18 of the *Shura* Council's law clearly state that the 'approval of international treaties and agreements falls under the responsibility of the *Shura* Council'. This is further mandated within Article 20 of the council of ministers's law and Article 70 of the basic law of Saudi Arabia. However, there remains confusion as to the difference between agreements and treaties. Moreover, does the term international refer to agreements alone or include treaties as well?

According to the 1969 Vienna convention on the law of treaties¹⁷, treaties are an international agreement concluded between States in written form and governed by International Law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.¹⁸ From this definition it becomes clear that it is unnecessary to add the word international to the term treaty. However, International Law does need to be added in regard to agreements as they may not

¹⁷ Vienna Convention on the Law of Treaties, (adopted on May 22, 1969 entered into force on January 27, 1980). United Nations, Treaty Series, vol. 1155, pp. 331. However, Saudi Arabia is part of this convention since 2003; see Royal Decree No M/25 in Sep 3, 2002.

¹⁸ Article 2, 1 of Vienna Convention on the Law of Treaties, above note 17.

necessarily be between countries but private non-state actors. For this reason agreement has been described in Saudi law as international.

Whilst both international agreement and treaties can thus, be between countries, a treaty, as shown above, is exclusively between groups of countries whilst an agreement can be between two countries in which case it is referred to as a dual agreement or convention.¹⁹ Furthermore, a treaty is always between countries whilst agreements can be between countries or private actors. However, the differences between a treaty and agreement are not always so clear cut. For instance, the previously mentioned Vienna convention was not called a treaty despite being between groups of countries. The terms convention or agreement thus, may often refer to treaties and are therefore considered a more general designation. Differing types of treaties are dealt with in different ways within Saudi Arabia

Treaties between groups of countries are usually studied by the *Shura* Council in one stage where it is decided whether the treaty is acceptable, acceptable with reservation, or unacceptable. Dual-agreements by contrast must pass through four stages since they are agreements between two parties.²⁰ The first stage consists of the appropriate minister presenting the agreement to the Government. In the second stage ministers are asked to give their final approval to the agreement. However, this ministerial authorisation does not mean the agreement is approved. Instead it only means that the agreement can be introduced to the broader constitutional processes for its enactment. In the third stage all the ministers have to give their final approval in writing to the agreements. The final stage consists of the King giving the agreement his royal approval after it has been studied and discussed by both the *Shura* and ministerial councils.

5.2.4.3. Third, Control or Auditing Role.

The *Shura* Council exercises its auditing role over the governmental performance in the following ways;

¹⁹ Resolution of Council of ministers, NO 1214, in Sep 7, 1977.

²⁰ These four stages are understood from the rules of international agreements, adopted by Resolution of Council of ministers, No 1214, in Sep 7, 1977, and its amendment in 1992.

1. It can express its opinion on the general policies of the state. whilst general policies are usually universally binding as shown in Article 15 of the *Shura* Council's law they can be questioned by the *Shura* Council when they have been referred to by prime minister, which in Saudi Arabia is the King. According to Article 15 '*Shura* Council shall express its opinion on State's general policies referred by Prime Minister..'
2. It can discuss general development plans. These types of plans deal with larger and comprehensive national projects, including those with broad ranging social, educational, and economic objectives for the country. The *Shura* Council may also discuss how and according to what schedule these plans should be implemented. After such discussion the council ratifies or amends these plans as it deems fit. To this end, national public policies, considered essential for the countries develop and modernisation are categorized as development plans. The first general plan for development in Saudi Arabia was established 9 August 1970.²¹ Each general plan lasts for a five year period. *Shura* Council studied this plan, regulating and watching over its budget. This is not the only responsibility of the *Shura* Council however. As the next section will show the council plays a large role in examining and discussing the annual reports submitted to it by the ministries and other governmental bodies.
3. It discusses the annual reports given to it by the ministries and other Government bodies. Through this process the council obtains a comprehensive knowledge of the government's overall performance ranging from issues of work force efficiency to proper budgeting for national projects. The council of ministers' system requires that all ministries and other Government bodies submit an annual report to the Prime minister within 90 days after the start of the fiscal year. This obligation is set out in Article 29 of the Council of Ministers' law which states that 'all ministries and other governmental agencies shall submit to the President of the Council of Ministers within ninety (90) days from the beginning of each fiscal year, a report of what has been achieved in comparison with the provisions of the general development plan for the previous fiscal year. The report shall include the difficulties encountered and proposals for the proper conduct of their activities'. The report mentioned in this Article is the annual reports which must be first studied and approved by the *Shura* Council as mandated by Article 15 of the *Shura* Council law. This allows the *Shura* Council to monitor the appropriateness of the ministries' general plans as well as their overall performance. However, given that this

²¹ See Resolution of Council of ministers NO 812, in Aug 9, 1970.

practice only began in 1993 and the wide variety of reports more generally, it is often unclear which documents ministries must submit to the *Shura* Council, an issue dealt with in more detail below.

1. *Reports of continuation of plan*: When the first general plan for development was issued in 1970 it was necessary to create criteria and test for planning and judging its implementation. For this reason the council of ministers stipulated all the Government apparatuses must submit performance continuation reports regarding what had been achieved²² which then must be forwarded to the planning ministry. These kinds of reports have specific roles and are therefore not related to Article 29 of the council of ministers's law.

2. *Annual reports*: There are a variety of annual reports mentioned specifically by the current regulations. These can be categorized according to the different authorities these reports must be submitted to.

A. Reports which are submitted to the King. By law some Government departments, namely the judicial and control departments, must submit their annual reports directly to the King.²³ These departments are considered independent departments and thus, must deal with the King directly.

B. Reports which are submitted to the Council of ministers. Some executive departments' reports must be submitted to the council of ministers such as the King Abdul-Aziz City for science and Technology (KACST)²⁴, Saudi ports authority²⁵, saline water conversion corporation²⁶, and Saudi fund for development²⁷.

C. Some reports must be submitted to prime ministers and not to higher executive authorities. These include for instance the council reports on higher education and universities²⁸.

²² Resolution of Council of ministers No 565, in May 22, 1975, which has established some rules to arrange that, see the Resolution of Council of ministers No 1386 in August 18, 1976.

²³ See for example Article 4, 3 of Law of Commission for Investigation and Prosecution, adopted by Royal Decree No M/56 in May 30, 1989, Article 21 of Law of General Auditing Bureau, adopted by royal decree No M/9 in April 7, 1971, and Article 47 of Law of Administrative Court, adopted by Royal decree No M/51 in May 11, 1982.

²⁴ Article 12, Law of King Abdul-Aziz City for Science and Technology, adopted by Royal Decree No M/8 in Dec 31, 1985.

²⁵ Article 13, Law of Saudi Ports Authority, adopted by Royal Decree No M/13 in March 27, 1977.

²⁶ Article 15, Law of Saline Water Conversion Corporation, adopted by Royal Decree No M/49 in Sep 7, 1974.

²⁷ Article 11 of Law of Saudi Fund for Development, adopted by Royal Decree No M/48 in Sep 1, 1974.

²⁸ Article 25 of Law of Council of High Education and Universities, adopted by Royal Decree No M/8 in Nov 18, 1993.

The *Shura* Council has different responsibilities for examining these three types of reports. Reports given directly to the King may on his suggestion be studied by the *Shura* Council in conformity to Article 29 of the council of ministers law. Reports submitted to the council of ministers and prime ministers must also be given to the *Shura* Council for discussion as again mandated by Article 29 of the council of ministers's law.²⁹

3. *Statistical reports*: In regards to statistical reports outlining the performance of a particular Government body, they do not have to be submitted to the *Shura* Council since they do not fall under Article 15 of the *Shura* Council law.

4. *Reports on special cases*: commissioned for a specific such as when a Government committee travels abroad for international negotiations or decree No 7/m/22301 put forth on 3 August 1981 proclaiming the achievements of Saudi Arabia, also do not have to be submitted to and discussed by the *Shura* Council.

5.2.4.4. Fourth- Summons for Government Officials

According to Article 22 of the Council's law, the Speaker must submit to the Prime Minister's request regarding the performance of the government's ministers. When a minister attends a meeting of *Shura* Council, he has the right to participate in such deliberation but not the right to vote. Consequently, The *Shura* Council has the right to summon any Government official and request whatever clarifications and enquiries it deems necessary for this performance reviews. As a result of these responsibilities, more than six ministers attended the *Shura* Council meeting this year alone.³⁰

²⁹ The Highest Decree No 7/b/26345 in March 3, 2002, assured that and included some rules for the annual reports.

³⁰ See *the 15th Annual Report of Shura Council*, 2008, Researches and Information Department in Shura Council, at p. 20

5.2.5. Sessions of *Shura* Council and its Work³¹

5.2.5.1. First- Sessions Administration

The Chairman must supervise all of the Council functions, directing the council's interaction with other agencies and organisations, as well as act as its spokesman. The Chairman must head all sessions of the meetings he attends.³² The Vice Chairman must assist the chairman when present and assume powers in his absence. In 2002 the president of the *Shura* -Chairman- requested the creation of an administrative position in addition to the Vice Speaker in order to cope with the council's growing responsibilities and increased interaction within international parliaments. As a result of this request in March 2004 the new position of Chairman Representative was established responsible for chairing sessions of the council in the absence of the regular chairman or the Vice chairmen.³³

The general panel of the *Shura* Council (Steering Committee), considered to be the highest agency in the council, is composed of the Chairman, the Vice Chairman, the representative of Chairman and the heads of specialised committees. The general panel (Steering Committee) usually meets once a week. Its meetings are not considered to be valid unless at least two thirds of its members are present. Resolutions must pass by a majority vote of the attending members. In the case of a tie, preference is given to the side with whom the head of the meeting votes. All general panel (Steering Committee) meetings must have records which chronicle date, timetable, attendance, discussion topics, and recommendations of the meeting. Proceedings shall be signed by the Chairman and all other present members.

³¹ As one of the important bodies in the country; the Shura Council has its own internal regulation, Article 29 of its law 'Shura Council regulations shall define the functions of the Speaker, Vice Speaker, General Secretary, bodies, methods of meetings conducting, work management, committees' works and voting procedure. The regulations shall also specify rules of debate, responding principles and other matters conducive to order and discipline within Council, so Council shall exercise jurisdiction for the Kingdom welfare and nation prosperity. These regulations shall be issued by Royal Decree.' Based on that in Aug 21, 1993, the internal regulations have been issued.

³² For example, the speaker shall open and adjourn Council sessions, manage and participate in discussions, give the floor, determine the discussion topic, draw the speaker's attention to time limit and subject matter of discussion, end discussion, and put matters to a vote. The Speaker shall do whatever is deemed appropriate and sufficient to maintain order during sessions. The Speaker shall call the Council, the Steering Committee, or any other committee for an emergency session to discuss a specific issue.

³³ See Royal Decree No 86/2 in March 30, 2004.

The internal regulation of *Shura* Council ³⁴ sets out its practices and methods for fulfilling its responsibilities, such as how the council and its commissions should proceed in deliberating and examining issues.³⁵ The council looks into topics, which are included in the schedule and have been prepared by the general panel. All items not included in the schedule by the general panel are not allowed to be discussed by the council unless explicitly approved by the council president. Article 12 of the *Shura* Council's law stipulates that the ordinary session shall be convened at least once every two weeks. However, since the beginning of *Shura* Council there have been two sessions per week. The length of these sessions is decided by the council president who has the right to advance or delay a session when necessary.

Each member has the right to speak on a single topic for not more than ten minutes. Beginning in 2007 this was decreased to five minutes, unless otherwise allowed by the chairman, due to the council's increasing size and responsibility.³⁶ A member should only address the chairman and none of a members but the chairman shall interrupt the member. The chairman should be granted extra time. The chairman also holds the right to call a temporary break to the proceedings lasting no longer than one hour. Since the members of the *Shura* Council are not yet elected, members must be chosen from a wide variety of fields and be qualified enough so that they may serve in the public interest. No meeting therefore of the *Shura* Council is considered official unless there is a quorum of at least two-thirds of its members. Resolutions will also not be considered official without majority approval. The reason for this is to allow for as much participation and deliberation as possible by members. This is especially important considering that the members are not elected.

5.2.5.2. Second- the Discussions

³⁴ Internal regulation of Shura Council were issued by Royal Decree No A/15 in Aug 21, 1993, Article 11 of this regulations gave the general panel the right to formula the rules for work of Shura Council and its committees, based on that the general panel issued that rules by its resolution No 1/1/h in July 13, 1999. As the Shura Council witnessed improvement during that time the new rules have been issued by the general panel resolution No 2/8/H in Nov 15, 2006.

³⁵ the following is some of its regulations: There shall be minutes for each session stating the venue and the date of the session, the time it started, the name of its chairman, the number of members present, the names of those who are absent and the reasons for their absence, if any, a summary of the discussion, the number of those voting in favour and those voting against, the result of the vote, the text of the resolution, whatever is related to the postponement or suspension of the session and the time of its adjournment as well as any other matter that the chairman wishes to record.

³⁶ See Royal Decree No A/181, in Dec 14, 2007. However, if a member wants to deliver inquire or information then he has the right to write to the specific committee which is should reply to the members.

The different councils or parliaments usually set the rules for organising the method of discussions within the council. The form of these discussions proceeds in the following way; the head of the committee first reads the report. The speaker then allows whoever so desires to speak at any time on the following topics:

A- To remind the speakers to adhere to the basic law of Saudi Arabia or the *Shura* Council's law and its internal regulations.

B- To request the tabling of all issues until present issue under discussion have been fully decided upon.

C- To request the return to a previously discussed issue in order to show its relevance to a present deliberation.³⁷

Unless it is for one of these reasons interruptions are not permissible during the sessions except by the speaker. All council discussions are conducted in the following ways:

1- Regulations, internal regulations and related issues: Discussion of draft laws, orders, and related issues occur in two stages. In the first stage the president of the selected committee reads the draft, and then the Chairman allows members to express their opinions on the draft idea and its expected interests. This is referred to as adaptation. The selected committee responds to the remarks raised by the members after the draft is voted on for initial approval. In the second stage, following the initial approval of the draft, the issue is put forward to the council for a more detailed discussion. During this time it is debated item by item. Following this discussion; the committee replies to the various proposals, remarks, and inquiries of the members before voting on the measure again. whilst it is admissible to reply and vote on different articles in the same session this may only happen if requested by the president of the selected committee and with the approval of the council Chairman.

2- Agreements and treaties: Agreements and treaties shall be studied closely by the selected committee, prior to being submitted for deliberation in the council. The committee may respond to the member's remark, inquiries, and proposals during the same session or in an upcoming session. Voting will then be conducted on the agreements and treaties all together. If an agreement or treatment is rejected or passed with reservations, the reasons must be clearly stated so that the council may make an informed final decision.

³⁷ Article 10 of regulating the Council and its Committee's works, Issued by Resolution of General Panel of Shura Council No 2/8/H in Nov 15, 2006.

3- Other issues: Members may express their remarks and proposals on other issues presented before for deliberation by the Council. The selected committee will reply to these remarks and inquiries in an upcoming session unless the President allows for a response in the same session. The issue will then be voted upon. The council may deliberate a resolution after its adoption if agreed upon by a majority of its members and permitted by the Chairman, the selected committee or a request of fifteen members³⁸. However, unless the discussion leads to a new decision, the original ruling by the Government will stand. Although all matters have to be transferred to specialised committee for further study, urgent issues should be decided upon immediately by a majority of attending members if proposed by the chairman without being submitted to a specialised committee.

5.2.5.3. Third- Voting and Decision-Making

A. Voting: Before discussing the council's voting procedures, it must first be noted that decisions are only considered legal only with the approval of the majority of all council members not simply those present at a session. Thus, a meeting of the *Shura* Council is not considered valid unless there is a quorum of at least two-thirds of its members, including the Chairman or whomever he deputizes. Resolutions shall not be considered valid without the approval of the majority of the Council members. Council resolutions concerning matters transferred to the *Shura* Council by Government must be adopted by the majority as set forth in Article 16 of the law of *Shura* Council. When a majority is not attained, the topic shall be rescheduled for voting in the following session. In the event that the topic is not approved in this subsequent session, the issue must be brought before the King along with all relevant information pertaining to the subject and the results of the voting in both sessions. If a draft contains numerous articles the Chairman of the Council has the right to decide whether the resolution should be voted on as a whole or item by item. If a resolution is not approved by the majority in its complete form then the Chairman may call for it to be voted on by article. Additional recommendations submitted to the Council in written form during its deliberation clarifying the reasons for certain revisions and standing objections to a resolution may also be put to a vote. If approved, the council may use such written clarifications within its larger debate.

³⁸ The number increased from ten to fifteen in November 2006. See Article 13 of Regulating of the Council and its committee's work., Issued by Resolution of General Panel of Shura Council No 2/8/H in Nov 15, 2006

In the case that a committee does not adopt a certain recommendation, despite being consented to by a majority of the attending members, its petitioner may bring it up for discussion to a limited number of members who either supported or rejected the motion. It will then be voted on in accordance with Article 31 of the internal regulation of *Shura* Council. According to Article 32 of the internal regulations of the *Shura* Council, no discussion of new opinions shall be allowed during the voting process. In all cases, the Chairman shall vote after the members have voted. Each member must vote on the matter. Importantly, they are not allowed to abstain from voting but instead must choose to affirm or reject the resolution, a problem which hopefully will be amended in the near future. The vote was conducted by a show of hands. However, voting methods are subject to the Chairman's discretion. For the sake of intelligibility the vote will also be done by roll call. The Secretary General assumes the counting of the votes in any way he chooses under the supervision of the Council's chairman, after which he announces the voting result. A specially advanced technique is designed specifically for determining the attendance and absence of council members at a specific session. This technique is also used to decide upon how member's requests should be arranged as well as voting in the council more generally. Currently voting takes place through a mechanical system, whereby a member's voting appears on the screen of the council secretariat that is in charge and has access to the system. In this way voting by a show of hands has been eliminated.³⁹

B. the Objection and the challenge of the result: If a resolution or amendment is rejected by the council member's after being put up for a vote, a member may submit his objection to the chairman within three days of the selected session. The chairman will then submit the objections to the General Panel to be addressed in its first meeting. The objecting

³⁹ The voting system is now linked to a studio system (voice and photo). Moreover, terminal units are now connected to all seats in the main hall. In addition to the terminal units which are connected to the session's Chairman and secretary General, along with his assistants, which enables them full control and arrangement direction. The program also clarifies the nature of the session whether it is an ordinary, emergency, or confidential session. Each of the terminal screens reflects the following lists: the opening of the sound when speaking, requesting the floor, voting, topics that are being cast for discussion, sending text message, sound controlling, along with the curriculum vitae (C.V) of those who are taking part in the meeting and the delineated diagram of the hall. Each member has his own password to operate the terminal specially designed for a member to register his attendance. He can also get full knowledge about the session schedule (agenda) with all its attachment through the system. He can also request the floor during the session; this is requests arranged automatically according to their incoming, voting on the cast issue when the occupant of the chair gives permission, all this done with a touch of a button. The most important properties of the system are: Enabling the general secretariat to retrieve an audiovisual recording to each session, in addition to printed reports as follows: Report on the member's attendance, Reporting on the speaker's time consumptions, and a report on voters that vote by means of (yes) or (no), and the result of the vote for each topic or article.

member shall be informed of the Council's procedures, regulations and the committee rules as stipulated in Article 27.⁴⁰

C. The Issuance of Resolutions: the *Shura* Council's resolutions must be submitted to the formula committee.⁴¹ The resolutions are then shown to the Council before they are submitted to the King who decides which resolutions should be referred to the council of ministers. The formula committee of *Shura* Council must be improved. In fact as considered the most important committee in *Shura* Council its members must be knowledgeable in the entire Laws and Regulations in Saudi Arabia as well as in International Law. For this reason it should be one of the specialised committees. The resolutions are issued only with the approval of the King. If the views of both Councils — Ministers and *Shura*- vary, the issue shall be returned back to the *Shura* Council to decide whatever it deems appropriate and send its new resolution to the King who is given the final decision.

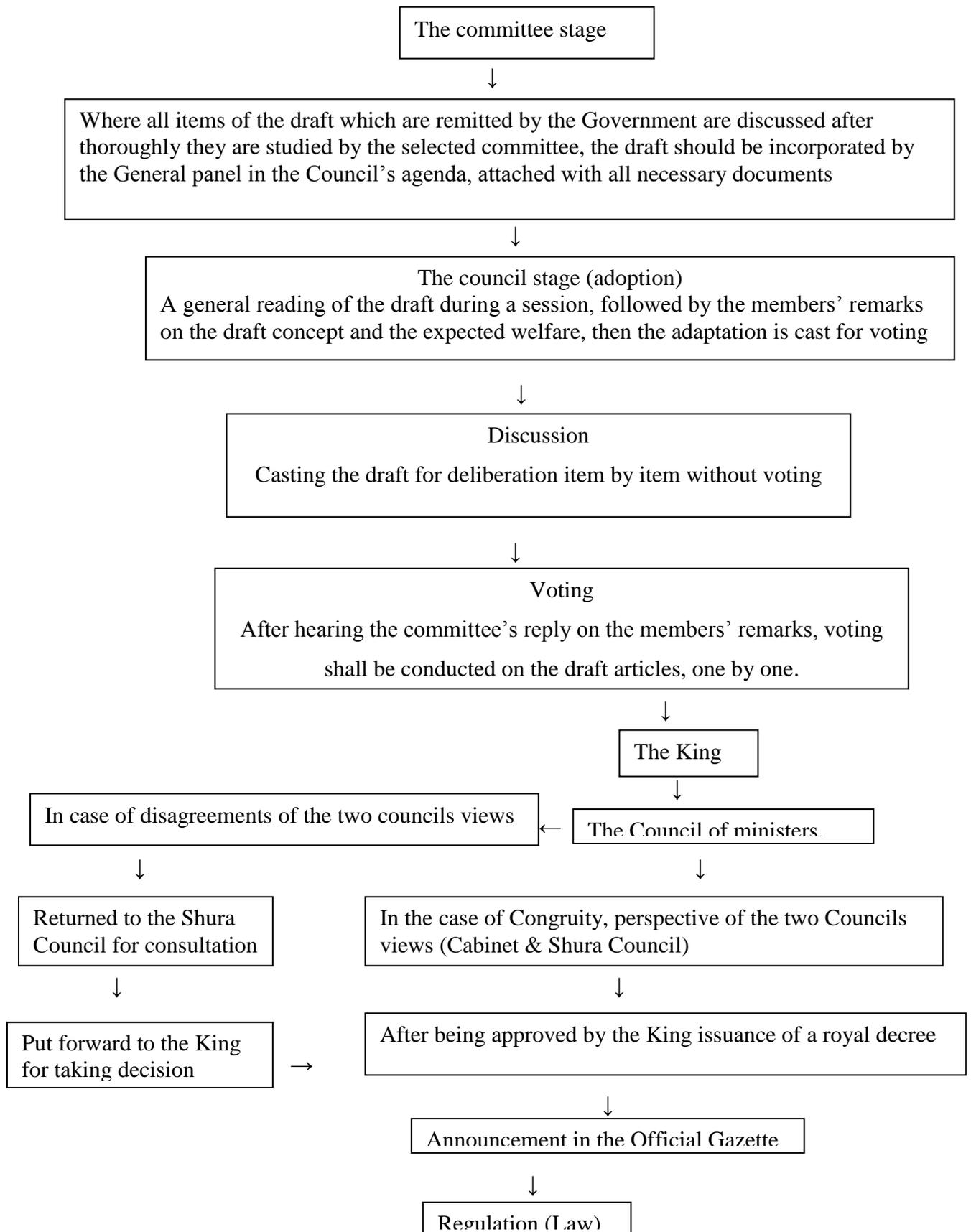
The following figure illustrates the mechanism of decision making within the *Shura* Council

⁴⁰ Article 27 of regulating the council's works and the work of its commissions, Issued by Resolution of General Panel of Shura Council No 2/8/H in Nov15, 2006

⁴¹ Formula Committee is a Committee specialise in formula of Shura Council's Resolutions after they have been discussed in Shura Council before they have been submitted to the King. As one of its members for three years, I think it needs more consideration; it is the most important committee as its members have to be well knowledge in laws of Saudi Arabia.

Proposal of Regulations

The ratification of a law should be set according to the following steps:



Conclusion

To conclude, *Shura* principle has been implemented in Saudi Arabia since King Abdul-Aziz came to the power as one principle of Islamic Law. *Shura* Council has existed in three periods. The first stage was in 1924 when the first elected council was established under the name of the Consultative National Council. Then after that to the *Shura* Council; during which period the deputy of the King in Hejaz, who is his son Faisal, was the president of the *Shura* Council. During this period there was election for the members of the Council, the *Shura* Council had the right to control the government⁴², in addition to its work as legislation authority. It therefore seems to be to have been the best period for *Shura* Council in Saudi Arabia. Next the council of ministers was established in Saudi Arabia around 1953. In this period the council of ministers started to play the main role in country and many authorities of *Shura* Council were practised by the council of ministers as executive and legislative authority at the same time⁴³. During this time the *Shura* Council therefore had no active role in the country.

Finally, the new *Shura* Council was established in 1993. As the new council it is still at the beginning of its age, therefore it is improving gradually, the last and best improvement being the amendment of Article 17 and 23 of its law in 2004. *Shura* Council in Saudi Arabia has been recognised internationally as members of Inter-Parliamentary Union (IPU), Association of Asian Parliaments for Peace (AAPP), Parliamentary Union of OIC Member states (PUOICM), Arab Inter-Parliamentary Union (Arab IPU) Inter-Parliamentarians for Social services (IPSS), and Association of the Senates, *Shura* and Equivalent Councils in Africa and the Arab World. As the new council, *Shura* Council has achieved some improvement but still needs to achieve more to give the best example of practice of *Shura* in association with Islamic Law. This improvement could guarantee the best form of political and public life not only in Saudi Arabia but also in Muslim Countries around the world. However the next chapter will provide Steps of improvements of *Shura* Council as legislative authority in Saudi Arabia.

⁴² See Article 6 and 7 of *Shura* Council's Law 1927, Om Al-Qura Newspaper, issue 135, on July 7, 1927.

⁴³ Article 18 of Council of ministers' Law, 1958.

5.3. Chapter Twelve: Steps of improvements of *Shura* Council as legislative authority in Saudi Arabia

5.3.1. The Relationship between the Two Parts of Legislative Authority in Saudi Arabia (*Shura* and Ministers' Councils):

As shown previously, the *Shura* and Council of ministers participate as a legislative body in Saudi Arabia. This is outlined in Article 17 of the *Shura* Council's law. All *Shura* Council resolutions must be submitted to the King who decides which should be referred to the Council of ministers. If both the *Shura* and the Council of ministers agree on a resolution, it will be adopted and issued to the public following its final approval by the King. If the *Shura* and Council of ministers disagree then the matter will be brought back to the *Shura* Council to decide on as it sees fit. It is then sent to the King for his approval.¹ Moreover, the *Shura* Council may request any documents from the council of ministers² or the attendance records of any minister.³ Additionally, a new position — Minister of *Shura* Council affairs- has been created recently to improve the performance of both councils and to serve as a link between the *Shura* and Council of ministers. If an urgent matter arises when the *Shura* Council is in recess for holiday, a period of 45 days, it may be addressed by the Council of ministers. However, all such decisions must be discussed with the *Shura* Council upon their return.⁴

5.3.2. Steps Required for the Improvement of *Shura* Council

The Saudi Arabian population's lack of experience with elections means that they must be introduced gradually for the selection of *Shura* Council members. In the decade since its founding, the *Shura* Council has increasingly gained power as a legislative authority. The *Shura* Council now for instance, as noted above, has the right to request any Government officials to attend its sessions to advise them on matters which they are currently debating. It also has the right to request any document from all Government institutions. These rights have made the *Shura* Council the highest legislative authority in the country, a fact enshrined in Article 17 and 23 of the *Shura* Council law. This has enabled it to become a member of a wide number of international parliamentary institutions such as:

1. The international Parliamentary Federation.

¹ Article 17 of *Shura* Council's Law.

² Article 24 of *Shura* Council's Law.

³ Article 22 of *Shura* Council's Law.

⁴ Royal Order No A/97, in July 22, 1997.

- 2- The Arab Parliamentary Federation.
- 3- The Asian Parliamentary Federation for Peace.
- 4- The International Parliamentary Federation for information Technology.
- 5- A founding member of the countries council's members Union of the Islamic Conference Organisation.
- 6- Parliamentary Group of Africa and Arab countries for Population and Development.
- 7- Secretary General Association of the Arab Parliaments.

As the Government of Saudi Arabia works to improve the *Shura* Council as a national parliament, there are number of amendments that should be applied to further these efforts, specifically in order to increase the *Shura* Council's power as a legislative authority.

As shown previously most of the issues which have been studied by *Shura* Council are transferred to council by Government. The reason for this is two-fold. Firstly, the link between the *Shura* Council and the country's citizens remain weak, despite an existence of a committee of petitions, and indeed the forming of this committee for handling such popular complaints, the council must improve how it processes and addresses such petitions. In particular members of the petition committee should also be members of the *Shura* Council not regular Government employees who make its staff currently. Moreover, it needs to be more greatly publicized, as most citizens are unaware that such a committee exists. This is also true for the *Shura* Council itself, who due to its relative newness is rather unknown amongst the population, specifically in terms of its roles and responsibilities as a legislative authority.⁵ Furthermore, the law of *Shura* Council does not grant the *Shura*

⁵ During the field trip to Shura Council in October 2008, the president of Media and General Relationships Department said, 'the Shura Council has adopted a tranquil media policy, which aim at representing the true image of the Shura Council and bringing into view the work and the activity of the Shura Council, which are aimed at preventing ambiguity and promoting its purity, and determines its transparency. Thus, attending a Shura Council's session became frequent. In addition, designated seats arranged especially for national and international correspondents and reports. Consequently, some of the local Press have singled out a daily column and other columns appear every other week in the local paper, expounding the activities of the Shura Council, and expressing their views on political, economic, and other affairs to all readers. The Shura Council has prepared a weekly program that is transmitted through the local Saudi radio station, which is concerned with the activities of the Shura Council, hence, it gives an honest account of what has transpired and this is the result of the Shura Council's Perceptions of the influence of the media, both in audio and visual. In addition to the radio station program, a weekly-televised program focuses on the discussion and decision that had occurred in the Shura Council. Furthermore, the sessions will be partially broadcasted, along with the presentation of the ambitious policies, which evaluated and conducted the research and the expert analysis that is supported by the Chairman's administrative staff, for full radio station and full broadcasting TV in the near future. The Shura Council has the desire to provide printed matter, thus, the information is available in several formats including print, publication and volume, which comment on the Shura Council Members' Biographies and the accomplishment of the Shura Council works, in addition to a contemporary library that is equipped with the latest. The Shura Council publishes a monthly magazine under the title of (Shura), which contains the

Council absolute power as a legislative body, which stands as the second reason. In this author's opinion, there should be amendments to give the *Shura* Council more legislative power. These amendments are as follows:

Article 15 states that the, '*Shura* Council shall express its opinion on State's general policies referred by Prime Minister. The Council shall specifically have the right to exercise the following:

- (a) Discuss the general plan for economic and social development and give view.
- (b) Revising laws and regulations, international treaties and agreements, concessions, and provide whatever suggestions it deems appropriate.
- (c) Analysing laws.
- (d) Discuss Government agencies annual reports and attaching new proposals when it deems appropriate'.

This Article lays out the responsibilities of the council. It further declares that all matters to be discussed by the council must be first referred to it by the Prime Minister. The Article also gives the *Shura* Council the right to express its opinion, but not make binding decisions, on a diverse range of social issues. Thus, when Article 23 of the *Shura* Council law is officially adopted in 2004⁶ granting the *Shura* Council more power than the Council of ministers, this will be an acceleration of a process which has already begun.

However, it must be remembered that the members of the *Shura* Council are appointed not elected. As shown earlier in the thesis this is incompatible with modern democratic principles. However, at present the lack of experience by Saudi Arabian citizens with election makes this temporarily impossible, especially as they just began having elections for the municipal council in 2005.⁷ The election of members of the *Shura* Council should

council's news, the analysis of some of its works and some of the important materials. The *Shura* Council has its own web site, which provides a lot of information about the *Shura* Council, its members and its activities. In addition to receiving proposals and petitions, those are dealt with according to the rules and measures of the *Shura* Council regulations.' The website of *Shura* Council is www.Shura.Gov.sa

⁶ Article 23 of Shoura Council's Law after amendment is 'Shura Council shall have the jurisdiction proposing a draft of a new law or an amendment of enacting law and study these within the council. Speaker shall submit the Council's resolution of new or amended law to the King.'

⁷ Since 1963 there was no general election in Saudi Arabia, in October, 1993 the Council of ministers issued a resolution regarding participate of people in public life through the election of municipal's members, the first election held in 2005, to elect half of municipal's members and the other half were appointed, in all 13 districts in Saudi Arabia the number of citizen registered in this election is 793432 of 16529302 citizens, the

proceed in the near future in two stages. The first stage should focus on making these elections widely known to the public. The second should consist of electing members gradually, so that after three sessions the entire council have been elected not appointed.

Moreover, women may not yet legally participate in elections. Many have criticized this fact, noting that according to Article 3 of the Saudi Arabian election's law all citizens over 21 years of age who are not in the military may vote in election. Yet since the country's first election was held in 2005, the procedures for allowing women to vote have not yet been fully established.⁸ Yet many continue to insist that women should be given the right to participate.⁹ Considering that there are currently women advisors to the *Shura* Council, in this author's mind it is time for women to be allowed to fully participate equally in Saudi Arabian politics, beginning with the election of the municipal council in 2009.

Additionally the *Shura* Council should have more power to influence the Government decisions. As shown previously the *Shura* Council has the right to request the presence of any Government official at their sessions.¹⁰ They also have full independence for practicing this right. *Shura* Council should also in the future be able to make this request without the permission of the prime minister. However, even though Article 15 of *Shura* Council law gives *Shura* Council the right to study and discuss the annual reports of Ministries and other governmental agencies, there is still no real control by *Shura* Council over executive authority. Moreover the president of *Shura* Council had declared that *Shura* Council has no right to interfere in executive authority affairs.¹¹

Finally, regarding the internal regulations of *Shura* Council there are two matters which need to be amended. Firstly, the formula committee, as the most important committee in the council, should be given more consideration in their dealing with specialised committees. Additionally, this committee should only be composed of *Shura* Council members and

number of elected is 608 of 9330 candidates for 178 constituencies, see B Menoryh *Election in Saudi Arabia 2005-2006*, and official website of municipality of Riyadh city at <http://www.alriyadh.gov.sa/election/index.asp>

⁸ The president of Election Committee said; 'there is no law prevent women to participate in general election but we stock with time as there is no enough time between the issuance of law and the practice of election', see *Middle East Newspaper*, issue 9451 in Oct 13, 2004.

⁹ This issue is place of search in Saudi Arabia, see Islam online, 2006, , in session of *Shura* Council in April 6, 2008, there were some of members of *Shura* Council who have recommended of participation of women in the next election.

¹⁰ Article 22 of *Shura* Council's Law

¹¹ See *Aljazeera Newspaper*, Oct 19, 2008. Issue No 13170,

since some committees require greater expertise than others, the length of their appointments should also be different. Secondly, as written about previously in the voting section, each member must take part in voting in the following two ways, be either supporting or rejecting a proposal. This should be amended in the future so as to include the abstention option.

In conclusion, there should be two improvements relating to the *Shura* Council. The first involves expanding the council to allow for more citizens, regardless of gender, to become members through elections. The second centres on ensuring that the *Shura* Council can perform its parliamentary duties independently. In the future the *Shura* Council should be the lone legislative authority in the country. These changes must be introduced gradually, hopefully to be fully realised by the beginning of the 2017 session.

Part Six: Conclusions

Democracy has developed over a long and varied history, comprising many forms and with a limited extent of accepted form. However, in the Twentieth and Twenty-First centuries, the conception of Western Liberal Democracy has become synonymous with fundamental human values and its superiority has been gradually represented in and promoted by international and inter-regional bodies. This study has examined the roots of democratic development, and demonstrated the fundamental human rights that democracy has come to embrace and represent in its form as Western Liberal Democracy. Freedom of expression, freedom of association, equality, equal protection and the Rule of Law are the fundamentals that are actively promoted by the democratic institution in its present form, and upholding such principles remains essential to the success of democratic Government.

In International Law, democratic Government and principles have become more prominent and more actively promoted since 1990. The U.N. and E.U., amongst other institutions, have taken significant steps to promote democratic values. The ECtHR in particular has ruled on several occasions against the compatibility of Islam and liberal values, even to the extent of ruling that the wearing of the headscarf threatens freedom of expression, despite never enunciating how this is the case. Sharia law in this instance was classed as fundamentally incompatible with the principles of democracy.¹² The prevailing attitude demonstrated has thus, been that the principles of freedom and liberty that are culturally founded in Western Enlightenment reasoning are at odds with Islamic Law and Islamic cultural practice.

This view has been partly founded in a lack of distinction between Islamic values and teachings in themselves, and the specific cultural practices of some Islamic countries, which have exaggerated certain elements in Islamic texts and sources to justify repressive and autocratic regimes that are indeed at odds with the principles of Western Liberal Democracy. Islam has become associated in popular consciousness with the repression of women, the punishment of non-believers, harsh penalties for crime and repressive dictatorships. However, a reconsideration of the source materials reveals that there is no provision made in Islam for this form of Government. Indeed, Muslims are specifically

¹² (2003) 37 EHRR 1

directed to undertake the form of Government that fits the political and cultural context of their time.

Islamic Law promoted freedom of belief long before the Universal Declaration of Human Rights. Likewise, freedom and protection of women was safeguarded in Islamic society over a millennium before political representation of women became the norm in Western Europe.¹³ Women are guaranteed the right to participate in public and political affairs under Islamic Law. War is only justified under very specific circumstances and not promoted or directed as part of religious doctrine. The multi-party system is not at odds with any element of Islamic Law. In fact, every element of modern human rights law is represented in Islamic sources and rights are safeguarded as part of fundamental aspects of Islamic doctrine. So there is no requirement for Islam to absorb Western liberal doctrine or compromise any element of its law in order to conform to human rights, as these are indigenous to Islam. In many ways, therefore, Islam can be viewed as being much more theoretically progressive than Western Liberal Democracy, which, despite its triumphal rhetoric and presumed monopoly of human rights and freedom, came to such conclusions several centuries after they had been enshrined in Islam.

Saudi Arabia represents an over-criticised case of Islamic autocracy, and modern developments in the country's government offer an interesting case study of the extent to which endogenous political change in an Islamic state is progressing towards the state that is demanded by Western Liberal doctrine. The renewed role of the *Al-Shura* in the constitution of Saudi Arabia represents a new direction for the state, and the constitutional and legal role of the council demonstrates the significant developments that have taken place in recent years.

However, despite the *Shura* Council showing important steps forward in safeguarding the fundamentals of liberty, equality, freedom of expression and the rights of women, its role is still relatively unknown to the Saudi population as a whole. Election to the *Shura* Council is recommended, with a wide publicity campaign in order to gradually introduce the Saudi population to the democratic process. Women should be represented on the *Shura* Council, and more influence should be given to the council on Government decisions. The formula committee should be given more consideration in dealing with specialised committees and a

¹³ Before 1857 Women (with the exception of widows) had no legal rights to property in the UK.

more clarified voting process should be introduced. Legislation should be introduced allowing a greater diversity of individuals to become members, and greater independence should be established. Significantly, however, Saudi politics has shown great developments in the recent decade and its progress is encouraging in demonstrating the fundamental compatibility between Islamic theology and law and International Human rights.

A significant obstacle in perceptions of Islamic Law and its incompatibility with democratic Government has been created by the assumption that apparent Islamic states should embrace a form of Government that has developed in an entirely different cultural context. This demonstrates the presumption of superiority that pervades Western theoretical discussions of the relationship between Islam and the West. This is a significant foundation of tension in relationships between international bodies and Muslim countries. As has been seen in this study, there is no aspect of human rights that is not represented in Islam. This study has demonstrated that democracy and Islam are fully compatible, and that the fundamental principles of Islamic Law embrace the same principles as Western Liberal Democracy. There is, therefore, no need for compromise or cultural submission to the West. Rather than looking for influence from outside, Islamic states can look inward to draw out the strands of Islamic Law that are compatible with international human rights. As such, the future potential for progress is very positive.

Annexe

1. Responsibilities of the Different Committees in the *Shura* Council

The *Shura* Council consists of specialised committees, each composed of knowledgeable committee members. Furthermore, each specialised committee should have at least five members, the exact number to be determined by the council. The president, the vice president, and the members of committee shall be selected to specific committees based on their qualification, given expertise, and the needs of the committee itself. In addition, the council shall form an ad hoc committee to study certain topics. Moreover, each committee is entitled to form a sub-committee from amongst its member to examine a specific topic. It is worth pointing out that the council started with 8 specialised committees, and then became 11, and now there are 12 committees. This number is expected to increase again at the next session of the *Shura* Council.

Each specialised committee lasts for one year. The president and the vice-president of the committee are also selected on a yearly basis, though an incumbent may be reapproved after serving a term. Each member should be part of at least one specialised committees unless otherwise ruled by the council. Selection of the committees' members and president should be as follows:

- 1- The member must list the committee he would most prefer to join along with two substitutes.
- 2- The General secretariat prepares a list of committees candidates based these preferences.
- 3- The proposed list is submitted to the council for discussion in preparation of confirmation.
- 4- Each committee presents its nominated president and vice-president to the council for approval.

In case of appointing a new substitute member, the council determines the committee that he should join. If a committee has for any reason fewer members than mandated by the council's regulations the council will choose an appropriate member to join the committee as a substitute. Committees must review whatever is referred to them by the council or its Chairman. If the topic concerns more than one committee, the chairman of the council

decides which committee is most qualified to review the issue or refers it to a committee comprised of all members deemed knowledgeable on the subject under the authority of the chairman of the council or the vice chairman.

A committee chairman supervises the committees work and speaks on its behalf before the council. In the absence of the chairman, the vice chairman will replace him in these responsibilities. In the absence of the chairman and the vice chairman, the eldest member will chair the committee. Each committee must prepare its agenda upon the request of the chairman. Its recommendations will be decided upon by a majority vote of all present council members at a session. In the event of a tie, the Chair must cast the deciding vote. Any council member may express his opinion on any topic that has been referred to one of the committees, even if he is not a member of that committee. This opinion must be presented in writing to the Chairman of the Council. A specialised committee must convene once a week to review relevant issues. , Decisions on these issues will not be considered valid unless two thirds of the committee members are present.¹⁴

As mentioned previously the Law of *Shura* Council gives *Shura* Council the right to form committees amongst its members in order to study the issues in detail before presenting them to council. Article 19 mentioned two kinds of committees:

First, the Specialised Committees

These committees concern specific issues. So for example the health committee study health matters and so on. These committees are permanent and are formed at the beginning of each year¹⁵. However, only the *Shura* Council has the right to reform and amend these committees.¹⁶ These committees must be composed of at least five members. There are presently 12 existing specialised committees, which are as follows:

1- Islamic, Judicial affairs and Human Rights Committee: this committee specialises in issues are related to religion, Islamic and human rights. Specifically, this committee has the right to do the following:

¹⁴ There shall be minutes for each committee meeting, stating the date and the venue of the meeting, the number of members present and absent, the summary of the discussions and the text of its recommendations. The chairman and the present members shall sign the minutes.

¹⁵ See Article 21 of the Internal Regulation of *Shura* Council.

¹⁶ See Article 23 of the Internal Regulation of *Shura* Council.

A- Study issues related to the supreme judicial council, ministry of justice, ministry of Islamic affairs, religious endowments, mission, and guidance, ministry of Pilgrimage, The senior scholar's institution, General Presidency of legal opinions and scientific Research. The Commission of Prevention of vice the Promote of Virtue, the general presidency of the two holy Mosques and the Chamber of Grievances (administrative judicial).

B- Investigate subjects as well as internal regulations concerning Islam within the judiciary and the Courts. It also organises monetary aid and donations provided for the Islamic minorities. Ensures that money is utilized appropriately. It also examines which current issues are important regarding the need to support hajj and Umrah. Additionally, it investigates whether popular perceptions of Islam are scientific and correct. This Committee further regulates issues that directly related to Islamic Law and custom such as the Alms tax (Zakah) and Islamic Banking. It also helps to make sure that Islam is being used to support human rights. Finally, it ensures that notions of obedience and duty are done in accordance with Islamic Law in order to promote a proper public morality.

2- Social, youth and family affairs committee: this committee studies issues that are related to social, youth and family aspects of society. It does the following:

A- Investigates all the issues concerning the ministry of Labour, ministry of social affairs, the General Presidency of Youth, General Organisation of Social Insurances, (GOSI) and the Council of Work force.

B- Examines issues, systems, and orders that relate to the family, social affairs, youth, sports, and work force. This includes for instance social and family edification, social affairs and social security, as well as labour and social insurance.

C- It is in charge of charitable Associations, Affairs of Handicaps, Rehabilitation Centres, as they relate to family and residential housing along with any other issue deemed appropriate by the committee in this general area.

3- Economic and energy affairs committee: this committee studies economic issues. It does the following:

A- Examines issues concerning the economic ministry, ministry of commerce, ministry of industry, ministry of petroleum and mineral resources with all its sectors, the supreme

economic council, the general Corporation of investment, the general Corporation of Corps Hermitages and Flour Mills. It also oversees the Saudi Arabian standards organisation and the Supreme Corporation for Tourism and archaeology.

B- Investigates existing economic regulations concerning both the domestic and international economic system.

C- Studies the development plans, consisting of the general objectives, strategic principles in addition to the draft plan, and following up reports Islamic, Arab, and international organisations, Diplomatic studies institute, and the parliamentary Federations,, as well as any other issues that the council or its Chairman deem appropriate for study.

4- Security Affairs Committee: this committee studies issues relating military and security. It does the following:

A- Examines issues that concern all sectors of the National Guard, Ministry of Defence all sectors of the air force, all sectors of the ministry of the interior, regional Governments, general intelligence and the general corporation of war industries.

B- Investigates all matters relating to the military and national security including the defence, armed forces, national security, with their systems and orders. Public security, civil defence, boarder guard forces, passport and nationality. It also deals with issues relating to, Military Retirement and other issues submitted to the committee by the Council or its Chairman.

5- Human sources, Administration and petition committee: This committee is concerned with issues relating to administrative matters and petition. A petition in this case means a written request signed by many people, asking someone in authority to do something or change something. Petitions thus, play a role in the collection of proposals, which are submitted by citizens to the Council as well as those that appear on the Council's internet web site on the Internet.

The committee has received valuable proposals, which the council has adopted. This committee specialises in studying issues related to the economic and administrative of society. Specifically it focuses on the following:

A- Studies all issues concerning the royal chambers, ministry of civil service, surveillance, and inspection corps, investigation and general prosecution corps, the general pensioner

corps.

B- Studies matters pertaining to the orderliness and administrative aspects of society such as civil retirement, incoming draft laws or those proposed by the council, civil service, and recruitment, along with any other issues that the council or the Chairman see as necessary.

6- Educational and scientific researches Committee: This committee studies issues related to education and scientific research. It does the following:

A- Examines the issues concerning the ministry of education, ministry of higher education, universities, the general corporation of technical education and vocational training, King Abdul Aziz City for science and technology, and the general administration Institute.

B- Investigates issues concern education such as educational policy, levels of education, universities and higher education, studies and scientific researches, foreign schools, technical education and vocational training in addition to any other issues that the Council and its Chairman might think necessary to be referred to the committee.

7- Cultural and Information Affairs Committee: This committee studies issues related to cultural and information. It focuses particularly on the following:

A- Studies the issues related to the Ministry of Culture and Information, press institutions, King Abdul Aziz Circle, King Fahd National Library and King Abdul Aziz public Library.

B- Examines issues connected to culture and information such as national and international information activity, local press, public libraries, local and foreign cultural activities, satellite channels owned by the public sector, libraries and publishing houses, information tools markets, intellectual patent, Cultural arts institutions, in addition to any other issues that the Council or its Chairman deem necessary to refer to the committee.

8- Foreign Affairs committee: This committee studies issues related to foreign affairs, regional affairs and international organisations

A- This committee deals with the ministry of Foreign affairs and embassies. It also covers Islamic, Arab, and International Organisations, diplomatic studies institutes and the parliamentary federations.

B- Scrutinizes matters, agreements and treaties related to political and foreign affairs such as foreign policy diplomatic representation, relations with countries and regional and international organisations, bilateral and international agreements, international treaties as well as any other issues that the council or its Chairman deem necessary to be referred to

the committee.

9- Public facilities services and water Committee: This committee has jurisdiction over issues relating Municipal and Rural affairs. It deals with:

A- The Ministry of Municipal and Rural Affairs including both cities and municipalities provinces, the Ministry of Agriculture, the Ministry of Waters and Electricity, Irrigation. Sewage Corporation at AL-Ahsa, Saline water Conversion Corporation. The royal Commission for Jubail and Yanbu.

B- It evaluates issues relating to municipalities, water, services. It also covers public institutions such as agriculture and public works, the classification of contractors, services of cities and municipalities, water affairs, and electricity in addition to any other issues that the Council or its Chairman deem necessary to be referred to the committee.

10- Financial Affairs Committee: This committee studies issues related to financial circles. Specifically it focuses on the following

A- It deals with the Ministry of Finance and all its related sectors such as the Custom Department, Alms tax (Zakah) and income Department, Saudi Arabian Monetary Agency, General Surveillance Chamber, Credit and financing Funds, Government Banks. Finally, it also deals with all commercial banks, Government companies, commercial companies, and establishments.

B- It studies issues relate to finance such as the commercial banks, financial circulation, and the public budget. This includes crediting and financial facilities accounting and certified accountants, insurance, taxes and duties in addition to any other issues, that the council or its Chairman deem necessary to be referred to the committee.

11- Transport, Communication, and information technology Committee: This committee concentrates on issues related to transportation, communication and information technology.

A- It deals with the Ministry of Transport, Ministry of Communication, information, and technology, as well as the Saudi Ports Authority, the General Corporation of Railways. Civil Aviation Department, the General Corporation of Saudi Airlines, the Saudi Telecommunication Corporation, sports associations and clubs, the Saudi Telecommunication Company, and any other issues that the Council and its President deem necessary to be referred to the committee.

B- It focuses on issues pertaining to transportation and communication such as telephone and mail services, roads, ports and airports, railways, airways, transport and media as well as any other issues that the Council or its Chairman deem necessary to referred to the committee.

12- The Health and Environment committee: This committee studies issues related to health and the environment. It deals with:

A- All issues pertaining to the Ministry of Health, Saudi red Crescent Association, General Institution of King Faisal specialised Hospital and Research Centre, The national Commission for Wild Life Conservation and Development, (NCWCD) the presidency of Meteorology& Environment, protection of environment affairs

B- Examines all matters related public health including public hygiene, hospitals, health care centres and private health institutions, drugs and pharmaceutical products, health.

Second, Ad-hoc Committees

In addition to the previously mentioned specialised committees, Article 21 of the Council's internal regulation states that the Council has the right to form ad hoc committees to address specific issues. The formation of such committees is normally intended to study extraordinary issues or those requiring figures of the council members with particular expertise in a given field. This may also include the sharing of experts between ad hoc committees. On the other hand, Article 27 permits the president of the council to refer such issues to a committee composed of all committees related to a specific topic. They said the committee must be convened under the chairmanship of the Council President, his Vice-President or any other one of committee members. Ad hoc committees are temporary, lasting only until the issue it was created to address is resolved.

2. Issues for Clarification

First- Calling in Officials

Each committee has the right to request to the President of the Council the attendance of all Government officials at one of their meetings. Invited officials must listen to the explanations and information delivered to the committee. The Speaker may request the evaluation of all ministers to the Prime Minister. When a minister attends the *Shura*

Council he has the right to participate in its deliberations but does not have the right to vote. The committee also has the right to obtain, from any Government institutions, all documents and information it deems necessary.

Second- The Council's Opposition

Frequently asked is where and what is the Council's Opposition? And what is its role? Firstly, it must be noted that there are not opposition parties or opposing minorities. However, there is opposition within the council, though it is not a political party nor does it desire to replace the Government in power. Nevertheless, such opposition differs in size according to the issue being voted on. Thus, an issue is rarely ever passed unanimously, as approval only requires a simple majority. Those who abstain from voting in favour of a certain decision may be labelled as being in the opposition. The system also allows individuals to express its views in writing, even if they are in the minority. This minority report is then read aloud to the Committee.¹⁷ Such opposing positions may in this way influence the final vote, often becoming the majority opinion.

Third-The Council Independence

The relation between the *Shura* Council and the executive state apparatus is an integral one based on both the public interest and adhering to Islamic Law. Whereas the *Shura* Council represents the audit and regulations authority throughout the country, its decisions are submitted to the King¹⁸ who refers them to his Cabinet for their consideration. When the two councils are in agreement, the resolution is issued after being first approved by the King. Should views of councils vary, the issue shall be returned back to the *Shura* Council to decide whatever it deems appropriate. It then sends its new resolution to the King who has the final decision. It is worth mentioning that the Council of *Shura* is a financially and administratively independent institution. It has an independent budget that the Council submits directly to the King for approval.

The next following explains the independence of the *Shura* Council:

1- Preventing membership abuse: Article 8 of *Shura* Council's law prohibits members from using their position for their own personal interest. Individuals therefore are not allowed to

¹⁷ Article 30 of Internal Regulation of Shura Council.

¹⁸ The King in Saudi Arabia is the Prime Minister, therefore, he has two legislative descriptions, and in this case here he is considered as the King not as the prime minister.

join or be part of outside organisations whilst a member of the council unless otherwise authorised by the King.¹⁹ Moreover, members must attend sessions and committee meetings regularly. Members must notify the Speaker or a committee chair in writing when unable to attend a session or a committee meeting. Members must not leave the council session or a committee meeting before it is adjourned without the permission of the Speaker or committee chair respectively.²⁰

2- The Right of *Shura* Council to Organise its Internal system: Article 29 of the *Shura* Council law declares that the ‘*Shura* Council regulations shall define the functions of the Speaker, Vice Speaker, General Secretary, bodies, methods of meetings conducting, work management, committees’ works and voting procedure. The regulations shall also specify rules of debate, responding principles and other matters conducive to order and discipline within Council, so Council shall exercise jurisdiction for the Kingdom welfare and nation prosperity. These regulations shall be issued by royal decree’. The council thus, has organised its own affairs as it sees fit in its internal regulation. The general panel is the highest authority within the council and has the sole responsibility for its administration.

3- Financial Independence: The *Shura* Council has a separate and unique type of budget in comparison with other Government agencies. Article 27 of *Shura* Council’s law stipulates that ‘The King shall allocate *Shura* Council special budget. The budget shall be spending in accordance with rules issued by royal decree’. On August 21, 1993, specific rules were adopted guaranteeing the financial independence of the *Shura* Council. Moreover, the *Shura* Council is not controlled monetarily by any outside force or Government body.

Forth-*Shura* Council Sessions

The *Shura* Council’s law stipulates in its 13 Article that the *Shura* Council sessions should last for four Hegry years, beginning on the date specified by the royal decree approving its meeting. A new Council must be formed at least two months prior to the end of the current Council. This is to ensure that new members are properly prepared. However, in practice the new council are appointed almost always at the end of a session. To guarantee that the council remains effective, the law stipulates that in the event that a council has not been

¹⁹ Article 9 of *Shura* Council’s Law, as there is some difficulty in practice of this article; in January 16, 2000 the Highest Decree No 1/3388 has been issued to arrange that.

²⁰ Article 6 of the Regulation of Rights and Duties of Members of *Shura* Council.

chosen by its successors by the end of its sessions, then the session should be continued until such decisions are reached. However, in order to give more citizens the right to participate in the *Shura* Council, at least half of all council members must be newly selected.

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