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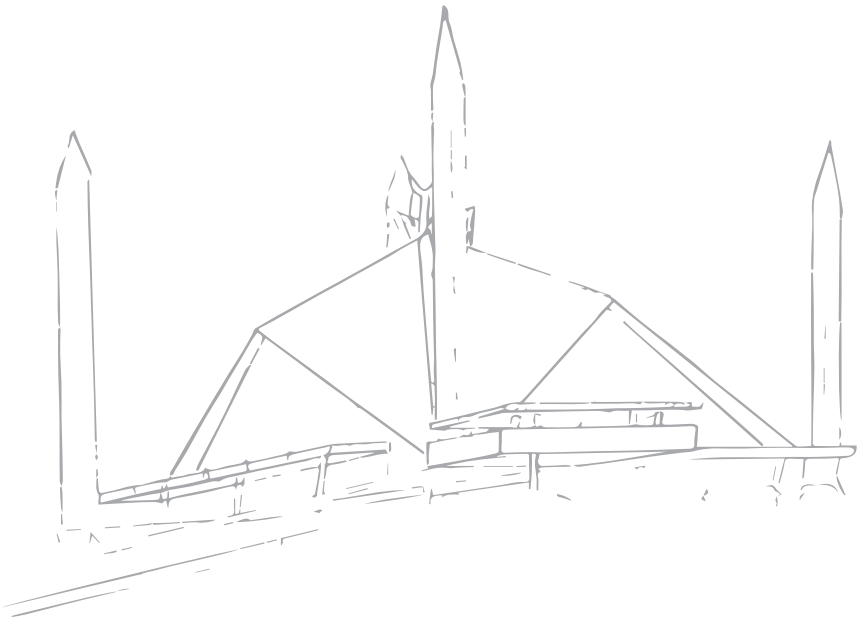

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SOME REFLECTIONS ON THE STORY OF BANU QURAYZAH: A RE-EVALUATION OF IBN ISHAQ'S ACCOUNT

Muhammad Munir[*]

ABSTRACT

One of the universally accepted stories in Islamic jus in Bello is that the Prophet Peace be Upon Him ordered the killing of all the combatants of Banu Qurayzah (Qurayza) for their treachery. It seems that this story is blindly accepted by Muslims themselves without knowing that this is perhaps the greatest fabrication in Islamic jus in Bello. This article attempts to elaborate the inner contradictions in the Banu Qurayza episode. It is concluded that the killing of all the combatants of Banu Qurayza never took place.

Key words: Banu Qurayzah, Jews, Islamic law, Islamic jus in Bello.

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INTRODUCTION

One story that is reported as a Gospel truth in our history is the killing of the combatants of the Jewish tribe of Banu Qurayza when they committed treachery against the Muslims during the battle of Khandaq (trenches) in 627 CE. Historians have relied on Muhammad Ibn Ishaq Ibn Yathar (d. 153 AH/770 CE) for this story without questioning the authenticity of his accounts. This article attempts to discuss that Ibn Ishaq's account of the Banu Qurayza episode is full of contradictions and he seems to have fabricated the story but has presented it in such a way as to make it a Gospel truth. Finally, this work also analyses the article of M.J. Kister who has strongly defended Ibn Ishaq and considered the Banu Qurayzah episode as a 'massacre'.

IBN ISHAQ'S ACCOUNT OF THE STORY OF BANU QURAYZA: A RE-EVALUATION

According to Ibn Ishaq, the Banu Qurayzah committed treachery during the battle of Khandaq (trench) also known as *ahzab*, betrayed the Muslims during the battle of *ahzab*, breached the treaty between the two sides (Muslims and Banu Qurayzah), and supported the large anti-Muslim coalition (*ahzab*) headed by the infidels of Makka. This was against the treaty they had with the Muslims which stated that

both sides shall defend the city together against any external attack. Once the battle was over, the Muslim army besieged the forts of Banu Qurayzah who eventually surrendered and were taken captives by the Muslim army and their fate was referred to an arbitrator – Saʿd b. Muʿad who was their former ally and the head of Aws tribe. It is reported that he decided that "their combatants should be executed, their women and children enslaved, and their properties be divided".[1] According to Ibn Ishaq, some 600-900 combatants were executed in the market place in Madinah in special trenches dug for them; that all of the Banu Quraydah were put into one house – Dar bint al-Harith in Madina; that trenches were dug; and that all of them (combatants) were executed by just two persons – 'Ali b. Abi Talib and Zubair b. al-'Awwam.

It is pertinent to note that S'ad's ruling but not the whole story is also reported by the compilers of *ahadith* with some conflicts in reports.[2] The words of *Sahih* Bukhari and Sahih Muslim are identical. The wording of Tirmizi is a bit different. It is reported that S'ad

[1] Ibn Ishaq has given the story in minute detail. See, Muhammad b. Ishaq, *The Life of Muhammad*, trans. A. Guillaume (Oxford: Clarendon Press, 1955), 461-467.

[2] See, Bukhari, *Sahih*, *hadith* no. 2878 available at <http://www.sunnipath.com/library/Hadith/H0002P0061.aspx> (last accessed 01 May, 2014); Muslim b. al-Hajjaj al-Nisapuri, *Sahih Muslim*, *hadith* no. 1769. Also see, Muhammad b. Eisa al-Tirmizi, *Sunan*, *Hadith* no. 1582.

ordered the killing of their 'men' (and not their combatants) and enslavement of their 'women' (children are not mentioned) so that they could assist Muslims. Tirmizi's report puts their number at 400.[3] The report in *Musannaf* is identical to the one in Bukhari and Muslim.[4] The episode is also mentioned in al-Juzjani's work on hadith.[5] Ahmad b. Hanbal has also mentioned the S'ad ruling.[6] The words of the first report are similar to that of Tirmizi with the only difference that the later mentions the enslavement of children as well. Ahmad also puts their number to be 400. Some commentators of *ahadith* have completely relied on Ibn Ishaq regarding the incident of Banu Quradha, such as Badruddin al-'Iini who mentions that according to Ibn Ishaq, they were either 600 or 900 (*wa qila*).[7] According to another commentator of *hadith*, they were between 600 to 800 in number. He states that they were imprisoned in one house called Dar bint al-Harith in Madina; trenches were dug; and that all of them (combatants) were executed by just two persons – ' Ali b. Abi Talib and Zubair b. al

[3] See, Muhammad b. Eisa al-Tirmizi, *Sunan*, *hadith* no. 1582.
[4] Abu Bakr 'Abdur Razzaq al-Yamani, *Al-Musannaf*, *hadith* no. 9737.
[5] Sa'id b. Mansur al-Juzjani, *Sunan*, hadith no. 2962; Also see, Ishaq b. Ibrahim (Ibn Rahwiya), *Musnad ibn Rahwiya*, *hadith* no. 1126.
[6] Ahmad b. Hanbl, *Musnad*, *hadith* 14773, 24295, and 25097.
[7] *'Umdat al-Qari Sharhsahih al-Bukhari*, *hadith* no. 158.

'Awwam.[8] The author does not cite any source but it is known that this detail is available in Ibn Ishaq's *Sira*.

Ibn Ishaq's details of the story have also influenced Muslim jurists (the pro-execution jurists) who advance the alleged execution of the combatants of Banu Qurayzah as an *example* to support their argument and argue that prisoner of war be executed[9] without evaluating the details and the inner contradictions in it. For formulating the rules of Islamic law of war one has to be extremely careful not to base them in an episode which is not reliable.

Inner Contradictions in Ibn Ishaq's Account of the Story of Banu Qurayiza

It is true that Ibn Ishaq has influenced the formulation of the doctrines of Islamic law regarding the Islamic *jus in bello* but there are many questions regarding his trustworthiness. Two modern authors, i.e., Barakat Ahmad[10] and W. N. Arafat[11] have categorically rejected the mass execution story of Banu Qurayzah. They have pointed out inner

[8] Hamza Muhammad Qasam, *Manar al-Qari Sharh Muktasar sahih al-Bukhari*, hadith no. 996, ed., Bashir Muhammad 'Uyoon (Damascus: Maktaba Dar al-bayan, 1990, 4: 354-357.
[9] Ibn Ishaq, *The Life of Muhammad*, 464.
[10] Ahmad, *Muhammad and the Jews*, 10-24, 67-94.
[11] W. N. Arafat, "New Light on the Story of Banu Qurayza and the Jews of Medina", *Journal of the Royal Asiatic Society of Great Britain and Ireland*, no. 2 (1976), 100-107.

contradictions in Ibn Ishaq's account. Their arguments may be summarized as follows:

First, both authors question the speech of Ka'b b. Asad – the head of Banu Qurayzah who is reported to have given three alternatives to his people: first, that since Muhammad Peace be Upon Him was a Prophet of God therefore they should follow him but they rejected this option; secondly, he told them that they should kill their wives and children and fight the Muslims. This plan was also rejected by the Qurayzah; and finally, the last alternative given by Ka'b was to fight the Muslims on the night of *Sabbath*. The Qurayzah also rejected this.[12] The story of Banu Qurayzah as reported by Ibn Ishaq has too many inner contradictions which makes it very difficult to accept with all the details. However, the credibility of the mass execution of all the combatants as reported by Ibn Ishaq has been seriously questioned. A full account of criticism of the story of executions is beyond the scope of this work but some of the important points are summarized here.

1) It is very difficult to believe that the Qurayzah knowingly rejected the Prophet Peace be Upon Him and that 600 to 900 men were going to fight an army of 3000 soldiers, who had returned victorious

[12] See the full story in Ibn Ishaq, *The Life of Muhammad*, 461-62.

from the Battle of *ahzab*.[13] 2) Ahmad argues that since the Maccabean revolt (175-135 B.C.) a rule has been promulgated that the preservation of life overrides the observance of the *Sabbath*. 3) He asserts that the speech of Ka‘b was either imaginary or distorted by later tradition.[14] 4) He mentions that the episode of the Qurayzah requesting to consult Abu Lubabah b. Mundhir who pointed his hand towards his throat signifying slaughter is not true either because it would mean that the fate of Qurayzah was already decided by the Apostle and Abu Lubababah already knew it. 5) In addition, when Aws were asked by the Apostle to decide the fate of Qurayzah and they choose Sa‘d b. Muadh who had earlier been deputed by the Apostle to go to Banu Qurayzah and remind them about the treaty and when the Jews told him that they had no agreement or understanding with the Prophet Peace be Upon Him reviled them and they reviled him. Ahmad opines that by the time S‘ad arrived to rule, the news of his intention to sentence them to death had spread and yet he went through the formalities of asking the Banu Qurayzah if they would accept his judgment and these very people who had asked for kind treatment for the Qurayzah said “Yes”. Afterwards he asked the

[13] Ahmad, *Muhammad and the Jews*, 74.
[14] Ibid., at 76.

Prophet Peace be Upon Him the same question although his opinion was known to Abu Lubabah who had already communicated it to Banu Qurayzah. Nevertheless the Prophet said "Yes". Consequently, S'ad's judgment was prearranged which is impossible.[15] 6) Moreover, the contents of the speech of Ka'b are identical to the contents of the speech of the leader of the Jews at the fort of Masada.[16] 7) Arafat argues that the number of those killed at Masada were 960 in total, that the number of *sicarii* who were killed numbered 600, and that at the time of despair they were addressed by their leader Eleazar precisely the way Ka'b addressed his people. 8) According to Arafat, the descendants of Jews who fled south to Arabia after the Jewish wars preserved the story and "superimposed details of the siege of Masada on the story of the siege of Banu Qurayza".[17] Ahmad disagrees with Arafat although Ibn Ishaq narrated reports from the children of Jewish converts it did not make much difference in the shaping of the story. He argues that 'Atiyah al-Qurazi is the only Jewish convert from whom Ibn Ishaq has narrated a report on this story. 9) In addition, the actual sentencing raises many questions as there is no unanimity in

[15] Ibid., at 79, 80.
[16] Arafat, "New Light on the Story of Banu Qurayza and the Jews of Medina", 106.
[17] Ibid., at 106, 107.

reports. As explained above, one report says that "the men should be killed"; another report mentions that "combatants should be killed". This would exclude sick, infirm, old, and other adult male population. Another version says that "the Apostle has ordered that every adult of theirs should be killed"; yet another report says that "those should be killed over whom the razor had passed." The last report is from 'Atiyah al-Qurazi who was from Banu Qurydha and who says that since the razor had not passed him he was not killed.[18] 10) How could such a large number of captives (600-900) men, their women and children[19] be taken to Madinah without any resistance and incarcerated in one house – Dar Bint al-Harith?[20] 11) Ahmad argues as to why were the captives taken to Madinah as they could have been executed in their own forts and why were new trenches dug for them when trenches were already dug by Muslims to defend Madinah against *ahzab*?[21] 12) The two executioners, 'Ali b. Abi Talib and Zubair b. al-'Awwam who have never been reported to share their experiences with

[18] See, Abu Dawud Suliman b. al-Ash'ath, *Sunan*, hadith no. 4404.
[19] In a small family of those days if every family had four children the total number would be 3,600.
[20] The forts of Banu Qurayzah were at a distance of about 5-6 hours from the centre of Madinah. See, Ahmad, *Muhammad and the Jews*, 82. The question is that were there such large houses in Madina at that time?
[21] Ibid., at 83.

anyone afterwards makes the story more doubtful.[22] 13) A massacre in the middle of the town where people lived must have created health hazards but Ibn Ishaq or any other reporter has not reported anything of this sort.[23] 14) The whole tribe could not be given the punishment for the wrong of their leaders. 15) Finally, how could the pagans and the *munafiqun* remain muted about this episode? Ahmad concludes that Ibn Ishaq's account of the mass execution of the punishment of the Banu Qurayzah "is a plethora of self-contradictory statements."[24]

Is Ibn Ishaq Trustworthy and a Credible Source for Citing in Formulating of the Rules of Islamic *jus in bello*?

Great scholars of Islam have leveled serious allegations against Ibn Ishaq. First, Imam Malik b. Anas called Ibn Ishaq a "*dajjal* (charlatan) who belongs to the *dajajilah*"[25] ('*dajjal min al- dajajilah*');[26]

[22] Ibid.
[23] Ibid., at 105.
[24] Ibid., at 89. For more details of accusations against Ibn Ishaq, see, Abu Yusuf Ya'qub b. Sufyan, *Al-Ma'rifa wa al-Tarikh*, ed., Akram Zia al-'Umari (Beruit: Mu'assat al-Risala, 1981), 3: 32. See, Al-Khatib al-Baghdadi, *Tarikh Baghdad* (Cairo: 1931), I:224.
[25] See, Ibn Sayyid al-Nas, *'Uyun al-athaar*, I: 12, 16.
[26] See Abu Yusuf Yaqub b. Sufyan, *Al-Ma'rifa wa al-Tarikh*, ed., Akram Zia al-Umari, Beruit: Mu'assat al-Risala, 1981, vol. 3, p. 32. See, Al-Khatib al-Baghdadi, *Tarikh Baghdad*, Cairo 1931, vol. I, 224; al-Dhahabi, *Tadhkirat al-huffaz*, Hyderabad, 1955, I, 173.

Secondly, Ibn Hajar considers this story as "odd tales"[27]; thirdly, Ibn Ishaq generally gives *isnad* but on the crucial matters concerning the Banu Qurayzah he does not give *isnad*[28]*;* fourthly, the execution of Banu Qurayzah is not reported in Jewish sources, such as Samuel Usque's book *A Consolation for the Tribulations of Israel – Third Dialogue* which is a classic of Jewish martyrology.[29] One wonders how such an important episode could be missing in this work. Fifthly, he was also accused of *shi'i* leanings, *qadari* beliefs and transmission of *sifat* traditions.[30] Sixthly, he is also accused of playing with cocks[31], *tadlis* in transmission,[32] and transmission of unreliable traditions. Seventhly, Dhahabi also mentions that Ibn Ishaq is accused of *shi'i* leanings, *qadari* beliefs, *tadlis* in transmission, of playing with cocks, transmission of unreliable traditions, and transmission of *sifat*

[27] *Tahdhib al-tahdhib*, IX, 45.
[28] See, Barakat Ahmad, *Muhammad and the Jews: A Re-Examination* (Delhi: Vikas Publishing House, 1979), 13. The author argues that several reliable reporters like al-Zuhri and Qatadah appear during the narrative but they report only "minor details, not the major events." At p. 13.
[29] See, Samuel Usque, *A Consolation for the Tribulations of Israel – Third Dialogue*, trans. Gershon I. Gelbart (New York: Gershon I. Gelbart Memorial Fund, 1964).
[30] See al-Bayhaqi, al-Asma' wa-a-sifat, ed. Muhamad Zahid al-Kauthari, Cairo, 1358, pp. 397-398; al-Dhabi, *Siyar a'lam al-nubala*, ed. Salah al-Din al-Munajjid, Cairo, n.d. Vol. I, 205, 206, 212-215.
[31] See, al-Dhabi, *Tadhkirat al-huffaz*, vol. I, 173.
[32] See Ibn Abi Hatim, *al-Jarh*, vol. VII, p. 194.

traditions.[33] The above allegations against Ibn Ishaq make his reports extremely doubtful that cannot be accepted otherwise it will put Islamic *jus in Bello* upside down.

M. J. Kister has put a scornful attack on the view of Arafat and Ahmad, especially the later[34], however, there are so many problems with this work. Kister discusses the rivalry between Malik and Ibn Ishaq and degrades Malik[35] which is very unfair. He mentions many Muslim jurists, such as Shafi'i', Abu 'Ubayad, Ibn Hazm, Shaybani, and Al-Mawardi to prove that they have generalized the outcome of Qurayzah's episode.[36] The author treats the treaty between the Prophet Peace be Upon Him and the Qurayzah not as a real treaty.[37] He attempts to prove that it was a "precarious, crude, incomplete agreement."[38] He mentions that the Prophet Peace be Upon Him

[33] See, Muhammad b. Uthman al-Dhahabi, *Tadhkirat al-huffaz,* ed., Zakariyya Amirat, (Beirut: Dar al-kutub al-'Ilmiyah, 1998), 1: 130. See, Abu Bakr al-Baihaqi, *Al-Asma' wa-a-sifat*, ed. 'Abdullah b. Muhammad al-Hashidi, (Jeddah: Maktaba al-Siwadi, n.d. ist edn.), 2: 319-320; al-Dhabi, *Siyar 'alam al-nubala'*, ed. Shu'aib al-Arnawut, (Beirut: Mua'sasat al-risala, n.d.) 13: 44, 67. See also, 'Abdur Rahman b. Abi Hatim, *al-Jarh wa al-t'adil* (Beirut: Dar Ehya al-turath al-Arabi, 1952), 7: 191-94.

[34] M. J. Kister, "The Massacre of Banu Qurayza: A Reconsideration of a Tradition," *Jerusalem Studies in Arabic and Islam*, 8 (1986), 68, pp. 61-96, especially at 64-81.

[35] Kister, at 75-80.

[36] Ibid., at pp. 66-74.

[37] Ibid., at 82, 83.

[38] Ibid., at 82.

forced the Banu Qurayzah to conclude an agreement.[39] He opines that it was not an agreement of peaceful co-existence.[40] He calls the episode of Qurayzah's sending supplies to the *ahzab* that eventually ended up in the Muslim camp as a help to the Muslims.[41] This is against the maxim, 'the facts speak for themselves'. This means that the learned author has twisted facts. The episode of sending supplies to the *ahzab* by the Qurayza does not need any re-interpretation. He does mention that the Qurayzah invited *munafiqin* from Madinah and gave them refuge in their stronghold.[42] However, on the one hand Kister relies on Ibn Ishaq and Waqidi to support the view that the mass execution took place but on the other hand he has made new allegations that cannot be supported even by the two authors. Kister treats Ibn Ishaq's account as authentic but Ibn Ishaq mentions that the combatants were executed as a result of arbitration whereas Kister's title suggests that he treats the execution of Banu Qurayza as a '*massacre'* and not the result of an arbitration.

Should the whole story of execution be considered authentic the ruling seems to be in accordance with the Jewish law. According to

[39] Ibid., at 83.
[40] Ibid., 83.
[41] Ibid., at 86-7.
[42] Ibid., at 88.

King James Version, "When thy Lord hath delivered it unto thy hands, thou shalt smite every male therein with the edge of the sword. But the women, and the little ones, and the cattle, and all that is in the city, even all the spoil thereof, shalt thou make unto thyself."[43] Although they were punished for their treachery but this is how the people of a besieged city are treated when captured by Jews. Leaving aside the heinous deed of treachery of which they were guilty, it is clear that if they had triumphed over the Muslims they would have dealt with them exactly in the same manner. Arguendo, should the whole story as reported by Ibn Ishaq be true (which we have submitted it is not), then can the decision of an arbitrator chosen by the Banu Qurayzah to decide the dispute between them and the Muslims be an example of executing POWs; can a single incident be treated as a *general* rule; and can the ruling of an arbitrator be accepted as the general and established *conduct* of the Prophet (PBUH) and his successors? Our answer is in negative. This ruling of the arbitrator cannot be raised to the status of a general rule because this was the outcome of arbitration. The Banu Qurayzah received the punishment of their treachery

[43] See, King James Version, *Denterouomy* (New York: Gideons International, 1987), 20: 10-14, 230; see also, *The Holy Scriptures According to the Mosoretic Text* (Philadelphia: The Jewish publication Society, 1953), 237; and *Good News Bible (today's English Version)* (Glasgow: Harper Collins, 1976), 191.

according to their own law. The Prophet (PBUH) never opted for arbitration regarding the enemy's POWs on all other occasions. This is why this arbitration, if true, has no precedential value in Islamic law.

Kister uses very bad language for the Prophet Muhammad (Peace be upon Him) that it cannot be reproduced by a Muslim. He cites Western authors who have severally criticized the (Prophet Peace be Upon Him) and S'ad.[44] The author contradicts himself. He says in one place at page 62 that the combatants of Qurayza were taken to a house adjacent to a market in Madina and the decision was given subsequently but in two other places (p. 62 and 93) he mentions that the decision of S'ad was given before they were put in the house near the market in Madina. The learned author considers the much-talked about punishment of Qurayza, i.e. execution, a very harsh one and cruel[45] but does not mention that this punishment is exactly based on Denteroumy.[46] The author has generalized exceptional opinions of Muslim authors to prove his point of view. This means that the learned author is disingenuous. Has deliberately ignored to mention that Sa'd's

[44] Kister, f. n. 2.
[45] Ibid., at p. 94-5
[46] See, King James Version, *Denterouomy* (New York: Gideons International, 1987), 20: 10-14, 230; see also, *The Holy Scriptures According to the Mosoretic Text* (Philadelphia: The Jewish publication Society, 1953), 237; and *Good News Bible (today's English Version)* (Glasgow: Harper Collins, 1976), 191.

judgment was in accordance with the Jewish law and that they had accepted the verdict before it was given. Finally, even if some Muslim jurists consider the Qurayza episode to have precedential value is it necessary to agree with them? Is it not possible to disagree with Muslim *fuqaha*?

CREDIBILITY OF AL- WAQIDI AND IBN JARIR AL-TABARI

On the other hand Abu 'Abdullah Muhammad b. 'Umar al-Waqidi (207/822) is regarded by the Sunni *'Ulama al-Rijal* (scholars of *Hadith* reporters) and the *Muhaddithin* (scholars of *Hadith*) as unreliable. Scholars in the West accept Al-Waqidi as a reliable and valuable source for the life of the Prophet (PBUH) and for the period immediately following the death of the Prophet (PBUH), whereas Muslim scholars, by and large, consider him as a story-teller.[47] Nadawi mentions that Al-Waqidi has very few supporters but the list of those who reject him is very long and include Imam al-Shafi'i, Ahmad b. Hanbal, Yahya b. Ma'in (d. 233/847).[48] Arafat argues that Ibn Ishaq

[47] See, Syed Salman Nadawi, "Muhammad ibn 'Umar al-Waqidi (130-207/747-822) between two Opposing Views", conference paper presented in *International Seminar on Modern Trends in Sirah* Writing, arranged by IRD & IRI, Islamabad, 26-28 March 2011, p. 3.

[48] Nadawi, "Muhammad ibn 'Umar al-Waqidi (130-207/747-822) between two Opposing Views", p. 3. Also see, W. N. Arafat, "New Light on the Story of Banu

has fabricated stories in his *Sirah*.[49] He is also called as *Kazzab* (lier), who is not considered trustworthy; is a Shi'a; is known for fabricating *ahadith* and distorting historical facts and so on.[50] There is unanimity among the Sunni scholars of *hadith* that Al-waqidi had fabricated *ahadith*.[51] There are many Western scholars who defend Al-Waqidi.[52] However, there are many accusations against Ibn Ishaq.[53]

Qurayza and the Jews of Medina", *Journal of the Royal Asiatic Society of Great Britain and Ireland*, No. 2 (1976), pp. 100-107.

[49] Arafat, "New Light on the Story of Banu Qurayza and the Jews of Medina", at p. 101.

[50] Also see, 'Abdur Rahman b. Abi Hatham Al-Razi, *Kitab al-jarh wa al-ta'dil*, (Beirut: Dar Ihya al-Turath al-'Arabi, 1953), 4: 20-21; Muhammad b. Habban al-Basiti, *Kitab al-Majruhiin min al-Muhadithsiin wa al-Du'afa' wa al-Matrukiin*, ed., Mahmood Ibrahim Zaid, (Halab: Dar al-Wa'i, n. d.), 2:290.

[51] See, Shamsuddin al-Zahabi, *Siyar A'alam al-Nubala*, ed., Shu'ayb al-Arnawut, (Beirut: Mu'asas al-Risala, 1990), 7th edn., 4:454-467; Muhammad b. Ahmad al-Zahabi, *Mizan al-'Itidal fi Naqd al-Rijal*, ed., 'Ali Muhammad al-Bajawi, (Sangla Hill: al-Maktaba al-Athariya: n. d.), 663-666. For further accusation against Waqidi see, 'Ali b. al-Husayn b. 'Asakir, *Tarikh Madinah Dimishq*, ed. 'Umar b. Gharama al-'Umrawi (Beirut: Dar al-Fikr, 1997), 54: 434; Ahmad b. 'Ali al-Khatib al-Baghdadi, *Tarikh Baghdad* (Beirut: Dar al-Fikr, n.d.), 3: 16; Yusuf b. Ibrahim al-Mazi, *Tahzib al-Kamal fi Asma'a al-Rijal*, ed., Bashr Ghawad Ma'ruf (Beirut: Mua'sasa al-Risala, 1992), 26: 182; Muhammad Ahmad b. 'Usman al-Zahabi, *Siyar A'alam al-Nubala'* (Beirut: Mua'sasa al-Risala, 1982), 9: 455; Ahmad b. Shu'ayb al-Nas'i, *Al-Dhua'afa' wa al-Matrukin*, ed., Boran al-Dhanawi & Kamal Yusuf al-Hut (Beirut: Mu'asas al-Kutub al-Saqafiya, 1987), 217; Muhammad b. 'Amr b. Musa b. Hammad al-'Uqaili, *Al-Dhu'afa' al-Kabir*, ed., 'Abdul Mu'ti Amin Qila'ji (Beirut: Dar al-Kutub al-'Ilmiya, n.d.), 4: 107-108. See also, Rizwi S. Faizer, "The Issue of Authenticity regarding Traditions of al-Waqidi as Established in His Kitab al-Maghazi," *Journal of Near Eastern Studies*, 58:2 (April 1999), 97-106.

[52] These include, J. Wellhausen, *Muhammad in Medina*, (Berlin: 1882), pp. 11-28, Joseph Horvitz, "The Earliest Biographies of the Prophet and the Authors", *Islamic Culture*, 2 (1928), pp. 495-526, Marsden Jones, Al-Waqidi, *Kitab al-Maghazi*, ed., Marsden Jones (Clarendon Press: Oxford University Press, 1966), pp. 29-34, M. J. Kister, "The Massacre of the Banu Qurayza: A re-examination of a tradition", *Jerusalem Studies in Arabic and Islam*, 8 (1986), 68, pp. 61-96, and Rizwi S. Faizer, "Muhammad and Medinan Jews: A Comparison of the Text of Ibn Ishaq's Kitab

In addition,, Ibn Jarir al-Tabari relies heavily on Al-waqidi but what is the reason for this? According to authentic sources, Tabari himself was inclined towards the Shi‘a doctrine. The Hanbalis do not consider him trustworthy at all[54] but even Muhammad b. Ahmad al-Zahabi (d.749/1348) – agrees that Tabari was inclined towards the Shi‘a [doctrine].[55] ‘Allama Tamanna ‘Imadi has documented Tabari’s Shi‘a links in his many articles.[56] Nadawi argues that Ibn Jarir was

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Sirat Rasul Allah with Al-Waqidi’s Kitab al-Maghazi”, *International Journal of the Middle Eastern Studies*, 28:4 (Nov., 1996), pp. 463-489.

[53] For more details of accusations against Ibn Ishaq, see, Abu Yusuf Ya‘qub b. Sufyan, *Al-Ma‘rifa wa al-Tarikh*, ed., Akram Zia al-‘Umari (Beruit: Mu’assat al-Risala, 1981), 3: 32. See, Al-Khatib al-Baghdadi, *Tarikh Baghdad* (Cairo: 1931), I:224; He is also accused of *shi‘i* leanings, *qadari* beliefs, *tadlis* in transmission, of playing with cocks, transmission of unreliable traditions, and transmission of *sifat* traditions. See, Muhammad b. Uthman al-Dhahabi, *Tadhkirat al-huffaz,* ed., Zakariyya Amirat, (Beirut: Dar al-kutub al-‘Ilmiyah, 1998), 1: 130. See, Abu Bakr al-Baihaqi, *Al-Asma’ wa-a-sifat*, ed. ‘Abdullah b. Muhammad al-Hashidi, (Jeddah: Maktaba al-Siwadi, n.d. ist edn.), 2: 319-320; al-Dhabi, *Siyar ‘alam al-nubala’*, ed. Shu‘aib al-Arnawut, (Beirut: Mua’sasat al-risala, n.d.) 13: 44, 67. See also, ‘Abdur Rahman b. Abi Hatim, *al-Jarh wa al-t‘adil* (Beirut: Dar Ehya al-turath al-Arabi, 1952), 7: 191-94).

[54] Shibli N‘umani, & Syed Suleman Nadawi, *Sirat-un-Nabbi* (urdu), (Lahore: al-Faisal Nashiran wa Tajiran-e-Kutub, n. d.), 1: 25.

[55] Zahabi, *Mizan*, 499.

[56] Tamanna ‘Imadi argues that Ibn Jarir was a Shi‘a but used to hide his real identity. See, ‘Allama Tamanna ‘Imadi, “Sub se Pehle awr sub se bare Mufasir – Abu Ja‘far Muhammad ibn Jarir al-Tabari”, *Tulu‘-e-Islam* 7th May (1955), 11-13. Tamanna mentions that most of the teachers as well as students of Ibn Jarir were Shi‘a. See, his “Sub se Pehle awr sub se bare Mufasir – Abu Ja‘far Muhammad ibn Jarir al-Tabari”, *Tulu‘-e-Islam* 21st May (1955), 11-13. Tamanna asserts that there was only one Abu Ja‘far ibn Jarir al-Tabari and not two as propagated by many historians. See, Tamanna, “Sub se Pehle awr sub se bare Mufasir – Abu Ja‘far Muhammad ibn Jarir al-Tabari”, *Tuloo‘-e-Islam* 24th May (1955), 11-14. The papers of ‘Allama Tamanna ‘Imadi are now put together in a publication. See, Tamanna ‘Imadi, “*Imam Zuhri wa Imam Tabari: Tasweer ka Doosra Rukh* (*Imam Zuhri and Imam Tabari: The Other Side of the Picture*) (Karachi: Al-Rahman Publishing Trust, n.d.). Syed Ridhwan ‘Ali Nadawi has defended Ibn Jarir against any accusation of being a Shi‘a.

accused only by Hanbali scholars to be a Shi'a.[57] The fact of the matter is that some Hanbali scholars did not accuse Ibn Jarir to be a Shi'a and relied on him. For example, Hafiz 'Imaduddin Isma'il b. Kathir (d.774 A.H./ 1372) – a well-known Hanbali, has relied in his *Tafsir* as well as history on Ibn Jarir.[58] The approach of scholars who denounce *hadith* of the Prophet (Peace be Upon Him) as untrustworthy but who accept every story of the biographers (collectors of *sirat* – biography) as the very gospel truth, so long as it is damaging to the (Prophet Peace be Upon Him) and Islam does not need any explanation. They seem to follow a rule (if it is right to call it one) that what is unfavorable to the Prophet (Peace be Upon Him) must be true. Persons who are not trustworthy because of their exaggeration of early Muslim history cannot be trusted when they formulate rules of Islamic *jus in Bello*.

Conclusions

Ibn Ishaq is the origin of the oft-quoted Banu Quraydah episode, that is, their combatants were executed and their women and children were

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See, Syed Ridhwan 'Ali Nadawi, "Tabarii per Shi'yyat ka Buhtan: Tajziya awr Tardid" *Al-Bayaan*, (August, 1990), 29-50.

[57] Nadawi, At 36-38.

[58] See, 'Imaduddin Isma'il b. Kathir, *Tafsir al-Qur'an al-'Azim* (Beirut: Dar al-Ma'rifa, n.d.). Similarly, Ibn Kathir depended on Ibn Jarir in his *Al-Bidaya wa al-Nihaya*. See, 'Imaduddin Isma'il b. Kathir, *Al-Bidaya wa Al-Nihaya* (Beirut: Maktaba al-Ma'rif, 2nd edn., 1974).

enslaved for their treachery in the battle of *ahzab*. However, there are many inner contradictions in Ibn Ishaq's report that puts many questions on Ibn Ishaq's account. First, the speech of Ka'b b. Asad – the head of Banu Qurayzah puts the whole episode into question because the contents of his speech are identical to the contents of the speech of the leader of the Jews at the fort of Masada. Secondly, the episode of the Qurayzah requesting to consult Abu Lubabah b. Mundhir who pointed his hand towards his throat signifying slaughter is not true either because it would mean that the fate of Qurayzah was already decided by the Apostle and Abu Lubababah already knew it. Thirdly, how could Sa'd b. Muadh, had been earlier deputed by the Apostly to go to Banu Qurayzah and remind them about the treaty and when the Jews told him that they had no agreement with the Prophet (Peace be Upon Him) he reviled them and they reviled him, be chosen to decide the fate of Banu Qurayzah. Fourthly, how could S'ad ask the Apostle if he could accept his judgment and then ask the Banu Qurayzah the same question. As Abu Lubabah had already told the Banu Quraydah about their punishment. It means that the judgment was prearranged which is impossible. Fifthly, there are conflicting reports about S'ad's ruling. Some say only 'combatants' be executed;

other say only men should be executed; still other say that adult should be killed. Sixthly, how could such a large number of captives (600-900) men, their women and children be taken to Madinah without any resistance and incarcerated in one house – Dar Bint al-Harith?[59] Seventhly, the whole tribe could not be given the punishment for the wrong of their leaders. Finally, how could the pagans and the *munafiqun* remain muted about this episode? In addition, Ibn Ishaq, the originator of this whole episode is accused of serious allegations. Imam Malik calls him '*dajjal min al- dajajilah*'. He was also accused of *shi'i* leanings, *qadari* beliefs, transmission of *sifat* traditions. He is also accused of playing with cocks, *tadlis* in transmission. In addition, other scholars who are quoted for the Banu Quraydah are Al-waqidi and Ibn Jarir al-Tabari. Both are not trustworthy according to authentic Sunni sources. Kister has strongly defended Ibn Ishaq and the Banu Qurayzah episode but his story has too many problems and cannot be accepted. Kister considers the treaty between the Muslims and the Quraydah to be a "precarious, crude, incomplete agreement." He argues that the Prophet (PBUH) forced the Banu Qurayzah to conclude an agreement. He calls the episode of Qurayzah's sending supplies to

[59] The forts of Banu Qurayzah were at a distance of about 5-6 hours from the centre of Madinah. See, Ahmad, *Muhammad and the Jews*, 82.

the *ahzab* that eventually ended up in the Muslim camp as a help to the Muslims. However, on the one hand Kister relies on Ibn Ishaq and Al-waqidi to support the view that the mass execution took place but on the other hand he has made new allegations that cannot be supported even by the two authors. Kister treats Ibn Ishaq's account as authentic but Ibn Ishaq mentions that the combatants were executed as a result of arbitration whereas Kister's title suggests that he treats the execution of Banu Qurayza as a '*massacre'* and not the result of an arbitration. Should the mass execution story be accepted then it was accordingly to the Jewish law. However, because of the inner contradictions and the fact that Ibn Ishaq, Waqidi and Tabari are not reliable the mass execution story is never true with the details given by Ibn Ishaq.

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ISLAMIC LEGAL DISCOURSE ON REBELLION

Saadia Tabassum*

ABSTRACT

For Muslim jurists, the right to rule the Muslim community was not just a constitutional issue but also it was deeply rooted in the worldview derived from the faith of the Muslim community. Several verses of the Qur'an and traditions of the Prophet (peace be on him) prohibit mischief and disorder and make it obligatory on Muslims to enjoin good and forbid evil. These verses are used both by government forces and rebels to justify their position. As Muslim history records several events of rebellion and civil wars in the every early stage and the Companions of the Prophet differently conducted themselves during these conflicts– such as obedience to authority, passive non-compliance with the unlawful commands of the rulers, pacific efforts to bring positive change in the system and forceful removal of the unjust ruler or replacing the unjust system – the Muslim heritage shows a rich variety of approaches towards the issue of resistance and revolt against an unjust ruler. This renders the monolithic approach of Orientalists untenable as they preached that Muslim jurists generally adopted the approach of passive obedience to usurpers.

INTRODUCTION

Islamic international law – or *Siyar* – has been proving to deal with the issue of rebellion, civil wars and internal conflicts in quite detail. Every manual of *fiqh* has a chapter on *Siyar* that contains a section on rebellion (*khuruj*/*baghy*).[1] Some manuals of *fiqh* have separate chapters on rebellion.[2] The Qur'an, the primary source of Islamic law, provides fundamental principles not only to regulate warfare in general but also to deal with rebellion and civil wars.[3] The *Sunnah* of the Prophet (peace be

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[1] Thus, *Kitab al-Siyar* in *Kitab al-Asl* of Muhammad b. al-Hasan al-Shaybani contains a section (*Bab*) on *khuruj*. (Majid Khaduri, *The Islamic Law of Nations: Shaybani's Siyar* (Baltimore: John Hopkins Press, 1966), 230-54). The same is true of other manuals of the Hanafi School.

[2] This is the case with *al-Kitab al-Umm* of Muhammad b. Idris al-Shafi'i. This encyclopedic work of Shafi'i contains several chapters relating to *siyar*, and one of these chapters is *Kitab Qital Ahl al-Baghy wa Ahl al-Riddah*. (Muhammad b. Idris al-Shafi'i, *al-Kitab al-Umm*, ed. Ahmad Badr al-Din Hassun (Beirut: Dar Qutaybah, 2003), 5:179-242). The later Shafi'i jurists followed this practice. Thus, *al-Muhadhdhab* of Abu Ishaq Ibrahim b. 'Ali al-Shirazi also contains a separate chapter on *baghy* entitled *Kitab Qital Ahl al-Baghy*. (Abu Ishaq Ibrahim b. 'Ali al-Shirazi, *al-Muhadhdhab fi Fiqh al-Imam al-Shafi'i* (Beirut: Dar al-Ma'rifah, 2003), 3:400-423).

[3] Surat al-Hujurat gives directives for dealing with *baghy.* (49:9-10). Muslim jurists further discuss the issues relating to *baghy* while analyzing the implications of the religious duty of *al-amr bi 'l-ma'ruf wa al-nahy 'an al munkar* (enjoining right and forbidding wrong). See, for instance, Abu Bakr al-Jassas, *Ahkam al-Qur'an* (Karachi: Qadimi ╠utubkhana, n. d.), 1:99-101 and 2:50-51.

on him) elaborates these rules[4] and so do the conduct and statement of the pious Caliphs who succeeded the Prophet (peace be on him), these Caliphs especially ‘Ali (God be pleased with him), laid down the norms which were accepted by the Muslim jurists who in time developed detailed rules.[5] Islamic history records several instances of rebellion in its early period and that is why rebellion has always been an issue of concern for the jurists. Furthermore, the jurists were very conscious about the obligations of both factions during rebellion because Islamic law deems both warring factions as Muslims.[6] Significantly, rebellion from Muslim perspective is not only a question of law, but it also involves serious issues of faith as well as interpretation of historical events.

Hence, this paper first focuses on the Qur’anic verses about rebellion and how they are interpreted by the jurist, particularly those belonging to the Hanafi School. Then, it examines the Prophetic traditions about rebellion after which it shows how the divide on legal

[4] See, for instance, traditions in *Kitab al-Imarah* in *al-Sahih* of Muslim b. al-Hajjaj al-Qushayri.

[5] The illustrious Hanafi jurist Abu Bakr Muhammad b. Abi Sahl al-Sarakhsi in his analysis of the Islamic law of *baghy* asserts at many places that “‘Ali (May God be pleased with him) is the *imam* in this branch of law.” (Al-*Mabsut* (Bairut: Dar al-Kutub al-‘Ilmiyyah, 1997), 10:132.

[6] The Qur’an calls both the warring factions as “believers” (Qur’an, 49:9) and ‘Ali (God be pleased with him) is reported to have said regarding his opponents: “These are our brothers who rebelled against us.” From this, the jurists derive this fundamental rule of the Islamic law of *baghy*. (Abu Bakr Muhammad b. Ahmad b. Abi Sahl al-Sarakhsi, *al-Mabsut* (Beirut: Dar al-Kutub al-‘Ilmiyyah, 1997), 10: 136)

and constitutional issues developed into disagreement on issues of creed and faith resulting in creating various Muslim sects.

THE QUR'ANIC VERSES RELATING TO REBELLION

The Qur'an is the primary source of Islamic law and as such the jurists refer to several verses of the Qur'an while analyzing issues relating to rebellion. Khaled Abou El Fadl in his landmark study on the Islamic law of rebellion titled *Rebellion and Violence in Islamic Law* tried to explain "the doctrinal foundations of the laws of rebellion" by concentrating on four verses of the Qur'an, namely, the two "*baghy* verses" (Qur'an, 49:9-10)[7] and the two "*hirabah* verses" (Qur'an, 5:33-34).[8]

Surprisingly enough, he does not relate the issue of rebellion to the verses about the religious and legal duty of enjoining right and forbidding wrong (*al-amr bi 'l ma'ruf wa al-nahy 'an al-munkar*).[9] The fact remains that in Muslim history the discourse on rebellion, more often than not, revolved around this important duty and that is why the Hanafi jurists particularly discuss the issue of rebellion

[7] Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2001), 37-47.
[8] Ibid., 47-60.
[9] These verses include *inter alia*: Qur'an, 3:104, 110 and 114; 5:79; 9:67 and 112; and 22:41.

against unjust ruler under the doctrine of enjoining right and forbidding wrong.[10] Similarly, the juristic analysis of the issues relating to rebellion always revolve around the notion of mischief or corruption in land (*fasad fi 'l-ard*) and as such it becomes all the more necessary to examine the Qur'anic notion of *fasad*.

Hence, the analysis here focuses on these four categories of the Qur'anic verses, namely, the verses about *fasad*, *hirabah*, *baghy* and *al-amr bi 'l ma'ruf wa al-nahy 'an al-munkar*.

The Duty of Enjoining Right and Forbidding Wrong

According to the Qur'anic teachings, it is the duty of every Muslim[11] as well as of the Muslim community and the ruler[12] to enjoin right and forbid wrong. The Qur'an mentions it as a distinctive characteristic of Muslims that they command good and forbid evil while the hypocrites (*munafiqin*) enjoin wrong and forbid right.[13] Muslims are required,

[10]Jassas, *Ahkam al-Qur'an*, 1: 99-101. See also: Abu 'l-Fadl Shihab al-Din al-Sayyid Mahmud al-Alusi, *Ruh al-Ma'ani wa Tafsir al-Qur'an al-'A⊧im wa 'l-Sab' al-Mathani* (Beirut: Dar Ihya' al-Turath al-'Arabi, 1405), 4:22. Abou El Fadl himself acknowledges this fact. (*Rebellion and Violence*, 61). He also commented upon the traditions which emphasize the duty of enjoining right and forbidding wrong. (Ibid, 123). However, he proposes that "these verses and the reports surrounding them require a separate study." (Ibid., 61 fn. 120).

[11] Qur'an 41:33-36; 16:125.

[12] Ibid., 3:104; 22:41.

[13] Ibid., 9:67.

however, to perform this obligation with wisdom (*hikmah*)[14] and not to despair in face of difficulties during the performance of this obligation.[15] The Qur'an also warns Muslims that if they do not fulfill his obligation and resultantly the society gets corrupted, God's wrath will not only befall those specific persons who commit the evil acts but also those who do not prohibit them from committing these acts.[16] The Qur'an also mentions among the crimes of Bani Isra'il that they abandoned this important obligation due to which God's wrath befell them.[17] This Divine punishment and wrath need not always be in the form of a natural disaster or catastrophe. According to the Qur'an, mutual conflict in various sections of a society in which people kill each other is also a form of this Divine punishment.[18]

The famous Hanafi jurist of the fourth/tenth century Abu Bakr al-Jassas al-Razi (d. 370 AH/980 CE) has gone into great details of how Abu Hanifah, the founder of the Hanafi School, relies on the verses and traditions about the duty of enjoining right and forbidding wrong for justifying effort to forcefully remove an unjust ruler.[19]

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[14] Ibid., 16:125.
[15] Ibid., 31:18.
[16] Ibid., 8:25.
[17] Ibid., 5:79.
[18] Ibid., 6:65.
[19] See for details: Jassas, *Ahkam al-Qur'an*, 1:99-101.

The Qur'anic Notion of Mischief (*Fasad*)

Perhaps, the most elaborate discussion on the Qur'anic usage of the phrase *fasad fi 'l-ard* is found in *al-Jihad fi 'l-Islam* of Mawlana Abu 'l-A'la Mawdudi (d. 1979), a great Muslim reformer of the twentieth century. While explaining the details of the Islamic law of war, he divides jihad into two broad categories: defensive (*mudafi'anah*) and reformative (*muslihanah*).[20] He asserts that the reformative jihad is waged for the purpose of combating persecution (*fitnah*) and disorder (*fasad*).[21] Then, he explains the situations that fall either in *fitnah* or *fasad*.[22] He says that literally *fasad* denotes anything in excess and thus it signifies every unjust or evil act.[23] However, asserts Mawdudi, Qur'an generally applies this term on mischief and disorder at the community level.[24] In this regard, he identifies as many as eleven different instances of the Qur'anic usage of the term *fasad*.[25] It may,

[20]Abu 'l-A'la Mawdudi, *al-Jihad fi 'l-Islam* (Lahore: Idarah Tarjuman al-Quran, 1974), 53, 85.
[21] Ibid., 104-105.
[22] Ibid., 105-117.
[23] Ibid., 109.
[24] Ibid.
[25]These include policy of racism and "ethnic cleansing" adopted and enforced by Pharaoh against the Israelites, imperialistic policies of the ancient Arab tribe of 'Ad, indulgence in homosexuality and unnatural lust, corrupt trade practices, wanton destruction and putting hurdles in the way of Allah thereby making it difficult for people to accept the message of the Prophets. Ibid., 5:62-64.

however, be noted here that Mawdudi does not include in this list some other instances of *fasad* mentioned in the Qur'an. Most important of these usages are:

1. The offence of *hirabah* which the Qur'an has explicitly declared as *fasad*;[26]
2. *Fasad* as one of the causes for the death punishment;[27] and
3. Most importantly for our purpose, Mawdudi does not mention rebellion here.

Significantly, Mawdudi includes the law enforcing action against the criminals and the war against rebels within the scope of defensive jihad.[28] The net conclusion is that *fasad* is a generic term which includes every violation of the Divine law. For the sake of clarity, therefore, it is important to highlight the difference in the legal consequences of the different kinds of *fasad*.

[26] Ibid., 5:33-34.

[27] The other being the offence of intentional murder. See Qur'an 5:32. In this regard, one may also refer to a well-known tradition of the Prophet (peace be on him) which mentions three grounds for death punishment: intentional murder, unlawful sexual intercourse by a married person and apostasy.

[28] Mawdudi, *al-Jihad fi 'l-Islam*, 70-77. See for a detailed analysis of the views of Mawdudi and its comparison with those of Hamidullah and Wahbah al-Zuhayli: Muhammad Mushtaq Ahmad, "The Scope of Self-defence: A Comparative Study of Islamic and Modern International Law", *Islamic Studies* 49:2 (2010), 155-194.

In *Surat al-Ma'idah*, the Qur'an says that death punishment is permissible only for two offences, namely murder and *fasad*.[29] In the same *Surah*, however, the Qur'an mentions four different kinds of punishments for another category of *fasad* called *hirabah* by jurists.[30] Then, for curbing some categories of *fasad*, the Qur'an prescribes war.[31]

Now, the problem with the wider doctrine of *fasad* as expounded by Mawdudi is that it prescribes jihad, defensive or reformative, as the solution for all the various categories of *fasad*.[32] As opposed to this, the jurists, particularly the Hanafis, distinguished between these various categories of *fasad* and their legal consequences. Thus, they held that some of these categories would attract the law of war;[33] many of them might be regulated by the general criminal law of the land under the doctrine of *siyasah*;[34] while

[29] Qur'an 5:32.
[30] Ibid., 5:33-34.
[31] Ibid., 22:40 and 2:252.
[32] Amīn Ahsan Islahī (d. 1997), a renowned exegete of the twentieth century, went to other extreme of bringing all the various forms of *fasad* under the umbrella concept of *hirabah*. (*Tadabbur-i-Qur'an* (Lahore: Faran Foundation, 2001), 2:505-508). See for a detailed criticism of this view: Muhammad Mushtaq Ahmad, "The Crime of Rape and the Hanafi Doctrine of *Siyasah*", *Pakistan Journal of Criminology*, 6:1 (2014), 161-192.
[33] Rebellion attracts this rule. That is why the jurists devote specific sections to the rules about rebellion in the chapters regarding the law of war (*siyar*).
[34] The famous Hanafi jurist Ibn Nujaym defines *siyasah* as "the act of the ruler on the basis of *maslahah* (protection of the objectives of the law), even if no specific text

only a few of them would be covered by the special criminal law of the land – *qisas* and *hudud*.[35]

Hence, from the perspective of the Muslim jurists there are two doctrines of *fasad fi 'l-ard*: wider that covers all the various forms of *fasad* mentioned in the Qur'an and the *Sunnah* or covered by the general principles of law; and narrower doctrine of *fasad* which distinguishes between the various categories of *fasad* and their legal consequences. The jurists emphasize that the different kinds of *fasad* should be treated differently.

[of the Qur'an or the *Sunnah*] can be cited as the source of that act." (Zayn al-'Abidin b. Ibrahim Ibn Nujaym, *al-Bahr al-Ra'iq Sharh Kanz al-Daqa'iq* (Beirut: Dar al-Ma'rifah, n. d.), 5:11). The jurists validated various legislative and administrative measures of the ruler on the basis of this doctrine. For instance, the *faramin* of the Mughal Emperors or the *qawanin* of the Ottoman Sultans were covered by the doctrine of *siyasah*. This authority of the ruler, however, is not absolute. The jurists assert that if the ruler uses this authority within the constraints of the general principles of Islamic law, it is *siyasah 'adilah* and the directives issued by the ruler under this authority are binding on the subjects. However, if the ruler transgresses these constraints, it amounts to *siyasah* ┗*alimah* and such directives of the ruler are invalid. (Muhammad Amin b. 'Abidin al-Shami, *Radd al-Muhtar 'ala 'l-Durr al-Mukhtar Sharh Tanwir al-Absar*, ed. 'Adil Ahmad 'Abd al-Mawjud and 'Ali Muhammad Mu'awwad (Riyadh: Dar 'Alam al-Kutub, 2003), 6:20). See for details of the doctrine of *siyasah* the monumental work of the illustrious Imam Ahmad b. 'Abd al-Halim Ibn Taymiyyah: *al-Siyasah al-Shar'iyyah fi Islah al-Ra'i wa al-Ra'iyyah* (Jeddah: Majma' al-Fiqh al-Islami, n.d.).

[35] See for a detailed analysis of these various categories of crimes and their legal consequences: Imran Ahsan Khan Nyazee, *General Principles of Criminal Law* (Islamabad: Advanced Legal Studies Institute, 1998).

Hirabah (Robbery) as A Form of Mischief

In *Surat al-Ma'idah*, much of which was revealed in 6 AH/627 CE,[36] the Qur'an mentions a particular form of mischief and prescribes four different kinds of punishments for it:

> The only reward of those who make war upon Allah and His Messenger and strive to make mischief in the land is that they will be killed or crucified or have their hands and feet on alternate sides cut off or will be expelled out of the land. This is their disgrace in the world; and in the hereafter theirs will be an awful doom.[37]

Abou El Fadl has gone into great details of how this offence is related to rebellion.[38] However, for the jurists, particularly those belonging to the Hanafi School, this offence was confined highway robbery and they distinguished rebels from robbers and bandits.[39] This distinction

[36]Abu 'l-Hasan 'Ali b. Ahmad al-Wahidi, *Asbab Nuzul al-Qur'an* (Bairut: Dar al-Kutub al-'Ilmiyyah, 1411/1991), 191; Jalal al-Din 'Abd al-Rahman b. Abi Bakr al-Suyuti, *Lubab al-Nuqul fi Asbab al-Nuzul* (Bairut: Mu'assasat al-Kutub al-Thaqafiyyah, 1422/2002), 97.

[37]Qur'an, 5:33-34. The translation of all the verses in this paper is from the abridged version of *Tafhim al-Qur'an* of Sayyid Abu 'l A'la Mawdudi translated and edited by Zafar Ishaq Ansari. *Towards Understanding the Qur'an* (Leicester: The Islamic Foundation, 2006). Slight changes have been made on the basis of my understanding of the original.

[38] Abou El Fadl, *Rebellion and Violence*, 47-60.

[39] 'Ala' al-Din Abu Bakr b. Mas'ud al-Kasani, *Bada'i' Sana'i' fi Tartib al-Shara'i'*, ed. 'Adil 'Abd al-Mawjud and 'Ali al-Mu'awwad, (Beirut: Dar al-Kutub al-'Ilmiyyah, 1997), 9:360.

had significant political implications. For instance, this necessitated that rebels must not be treated like ordinary criminals and gangsters.[40] It further necessitated declaration of war and acknowledging a state of war between the rebel group and the government forces.[41]

Furthermore, although the verse uses the letter *aw* (or) between the four different kinds of punishments, the jurists held that it did not give discretion and option to the ruler or the judge to choose between the various punishments; on the contrary, they held that these four different punishments were prescribed for four different grades of highway robbery.[42] Thus, they held that death punishment could only be given to robbers if they committed murder during robbery.[43] They also declared that the offence of *hirabah* was a *hadd* offence which meant that it could be established only through a very strict standard of

[40] See for details about the distinction between th legal status of bandits and rebels and the legal consequences thereof: Sadia Tabassum, "Combatants not Bandits: The Status of Rebels in Islamic Law", *International Rewiev of the Red Cross*, 93:881 (2011), 121-139.

[41] This is what governments generally do not want to acknowledge. See for details: ICRC, "Improving Compliance with International Humanitarian Law: Background Paper for Informal High-level Expert Meeting on Current Challenges to International Humanitarian Law", available at: www.icrc.org/eng/assets/files/other/improving_compliance_with_international_humanitarian_law.pdf (Last accessed: 21-11-2014).

[42] Kasani, *Bada'i' Sana'i'*, 9:366-71

[43] Ibid., 369.

evidence.[44] Thus, by standardizing the parameters of this offence, the jurists blocked the way of arbitrary application of these strict punishments to political opponents.

Of late, some of the scholars have again been trying to widen the scope of the offence of *hirabah* by bringing within its fold all the various forms of *fasad*.[45] If accepted this change will not only demolish the whole edifice of Islamic criminal law as developed by centuries of juristic scholarship but also it will give devastating powers to the rulers for curbing political opposition and silencing criticism.

Rebellion between Mischief and Duty

The verses of *Surat al-Hujurat* directly address the issue of rebellion and civil war

> If two parties of the believers happen to fight, make peace between them. But then, if one of them transgresses against the other, fight the one that transgresses until it reverts to Allah's command. And if it does revert, make peace between them with justice, and be equitable for Allah loves the equitable. Surely, the believers are none but brothers unto

[44] Ibid., 366. See for details about the characteristic features of the *hudud* punishment: Ibid., 9:248-50.
[45] Islahi, *Tadabbur-e-Qur'an*, 3:505-508.

> one another, so set things right between your brothers, and have fear of Allah that you may be shown mercy.[46]

These verses make it clear that in case of mutual fighting between two Muslim groups, other Muslims should not remain indifferent. Rather, the verses impose a positive duty on other Muslims to try to resolve the conflict amicably.[47] Furthermore, if it is proved that one of the groups is committing aggression against the other, Muslims must support the group which is on the right side against the aggressor.[48]

It may be mentioned here that some of the scholars, particularly those belonging to the Hashwiyyah[49] and the Ahl al-

[46]Qur'an, 49:9-10.

[47]Jassas, *Ahkam al-Qur'an*, 3: 595. In his commentary on Qur'an 49:9, the famous Anadalusian commentator of the Qur'an Abu 'Abdillah Muhammad b. Ahmad al-Qurtubi (d. 671 AH/1273 CE) says: "This verse establishes the obligation of fighting against those who are definitely known to have committed rebellion against a Muslim ruler or against any Muslim on unjust ground. It also proves that the opinion those people is wrong who disallow fighting against Muslims on the basis of tradition of the Prophet which equates fighting against Muslims with *kufr* (infidelity). Had fighting against such Muslims been *kufr*, it would imply that Allah commanded us to commit *kufr*. Allah is exalted!" (*Al-Jami' li Ahkam al-Qur'an* (Beirut: Mu'assasat al-Risalah, 1427), 16:316). Abu Bakr Ibn. al-'Arabi, the famous Maliki jurist, says: "This verse is the basic source for the validity of fighting against those Muslims who take up arms on the basis of a *ta'wil*. The Companions relied on this verse and the leading figures of Muslims referred to it [while fighting against such people]." (*Ahkam al-Qur'an* (Beirut: Dar al-Ma'rifah, n.d.), 4:1717).

[48] Qurtubi, *al-Jami' li Ahkam al-Qur'an*, 16:316-17.

[49] Hashwiyyah is another name of the fatalists (Jabriyyah). (Muhammad b. 'Abd al-Karim al-Shahristani, *al-Milal wa 'l-Nihal* (Beirut: Dar Maktabat al-Mutanabbi, 1992), 1:85).

Hadith[50], were of the opinion that in case of mutual conflict between two Muslim groups, other Muslims should remain impartial and should not participate in war.[51] They asserted that the word '*qatilu*' (fight) in these verses did not refer to war, but to the use of a little force, such as beating with sticks and shoes.[52] They pointed out that these verses were revealed when two Muslim groups used sticks and shoes against each other.[53] Similarly, they refer to the fundamental rule of Islamic law regarding the prohibition of the willful murder of Muslims and of waging war against them.[54] They also refer to many traditions of the Prophet (peace be on him) which prohibited support to

[50] Literally, the "people of Hadith". They were scholars who stuck to tradition and opposed rationalism in matters of faith as well as law. Thus, they appeared as a group distinct both from the Mu'tazilah, who subdued faith to reason, and the Ahl al-Ra'y (literally, the "people of reason"), who used to interpret the meaning of individual texts of the Qur'an and the *Sunnah* in the light of the general principles of law. See for a scholarly analysis of the difference in the approaches of the Ahl al-Hadith and the Ahl al-Ra'y: Imran Ahsan Khan Nyazee, *Theories of Islamic Law: The Methodology of Ijtihad* (Islamabad: Islamic Research Institute, 1994), 143-73.

[51] Jassas, *Ahkam al-Qur'an*, 3:595. See also: Qurtubi, *al-Jami' li Ahkam al-Qur'an*, 16:316-17; Alusi, *Ruh al-Ma'ani*, 26:172-73.

[52] Jassas, *Ahkam al-Qur'an*, 3:595. See also: Abu Ja'far Muhammad b. Jarir al-Tabari, *Jami' al-Bayan* (Cairo: Matba'at Mustafa al-Babi, 1954), 26:80.

[53] Abu 'Abdillah Muhammad b. Isma'il al-Bukhari, *al-Jami' al-Sahih*, Kitab al-Sulh, Bab Ma Ja' fi 'l Islah bayn al-Nas, Hadith No. 2494; Suyuti, *Lubab al-Nuqul*, 197-198. See also: Abu 'Abd al-Rahman Muqbil b. Hadi al-Wadi'i, *al-Sahih al-Musnad min Asbab al-Nuzul* (Cairo: Maktabah Ibn Taymiyyah, 1987), 198.

[54] Qur'an, 4:92-93; Bukhari, Kitab al-Fitan, Bab Qawl al-Nabi: Man Hamal 'alayna al-Silah fa-lays minna, Hadith No. 6543.

any group during such a conflict.[55] They also argued that during the conflicts in the early Muslim history, many of the prominent Companions of the Prophet (peace be on him) did not support any of the parties to the conflicts.[56]

In his analysis of this debate, Jassas elaborated some very important legal principles and explained the true purport of these verses. He says:

> The verses *prima facie* require that the group, which is committing transgression, must be fought until it agrees to resolve the conflict in accordance with the Divine law. This rule is general and includes every kind of fight. Hence, if that group [which has committed aggression] can be controlled by the use of minor force, such as beating with sticks and shoes, the use of excessive force will not be permissible. However, if it cannot be controlled by lesser force than sword, the verses *prima facie* require that they should be fought with sword. No one has the authority to limit the implications of the verses to beating with sticks and shoes when the aggressor group continues to commit

[55] Bukhari, Kitab al-Manaqib, Bab ‘Alamat al-Nubuwwah fi ’l-Islam. Hadith No. 3334; Muslim b. al-Hajjaj al-Qushayri, *al-Sahih*, Kitab al-Fitan wa Ashrat al-Sa‘ah, Bab Nuzul al-Fitan ka Mawaqi‘ al-Qatar, Hadith No. 5138.
[56] Jassas, *Ahkam al-Qur’an*, 3:595-596; Tabari, *Jami‘ al-Bayan*, 26:80

> transgression. This is one of the necessary corollaries of the duty of enjoining right and forbidding wrong.[57]

In other words, as one of the implications of the obligation of enjoining right and forbidding wrong is to fight an unjust ruler. Another implication of this obligation is wage war against those who rebel against a just ruler.

As far as the reports of *sabab al-nuzul* (occasion of revelation)[58] are concerned, explains Jassas, they cannot restrict the implications of the verses to a specific occasion.[59] Further, asserts Jassas, even on that occasion lethal weapons would have been used,

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[57] Ibid. See also: Alusi, *Ruh al-Ma'ani*, 26:172-73; Qurtubi, *al-Jami' li Ahkam al-Qur'an*, 16:316-17.

[58] The Qur'an was revealed to the Prophet (peace be on him) gradually in about twenty-three years. The knowledge of the historical context in which particular verses of the Qur'an were revealed to the Prophet (peace be on him) is called the Science of *Asbab al-Nuzul* (literally, causes of revelation). For ascertaining this historical context, the scholars not only look at the specific traditions of this particular genus, but also to the *Sirah* literature and, more importantly, to the internal evidence of the Qur'anic verses and chapters. Sometimes, a problem arises as to how to reconcile between the internal evidence of the verses and the external reports of *asbab al-nuzul*. For instance, the internal evidence may place the verses in the Makkan period and the *asbab al-nuzul* traditions may place these in the Madinan period, and vice versa. Similarly, more traditions than one are sometimes reported for one set of verses. Each of these cannot be a "cause" of revelation. Scholars of the Qur'anic Sciences have, therefore, always asserted that the *asbab al-nuzul* traditions should not be interpreted literally. Rather, some of these may well explain the "application" of the verses to concrete historical facts instead of explaining the "actual causes" of revelation. Furthermore, they also assert that the general rules mentioned in the verses cannot be restricted to the specific situations mentioned in the tradition, except where the internal evidence or other stronger arguments specify the rule to a particular space-time context. See for details: Badr al-Din al-Zarkashi, *al-Burhan fi 'Ulum al-Qur'an* (Beirut: Dar al-Fikr, 1988), 1:45-60.

[59] Jassas, *Ahkam al-Qur'an*,3: 596.

had the fighters also used such weapons. However, as they only used sticks and shoes, only sticks and shoes were used against them in response.[60] Regarding the conduct of the Companions, Jassas says:

> ‘Ali (God be pleased with him) accompanied by some prominent Companions, including those who participated in the Battle of Badr[61], fought rebels with sword. And in his wars, ‘Ali was on the right side. Further, none opposed him on this issue, except those who rebelled against him and those who followed these rebels.[62]

For those Companions who did not participate in the wars against rebels, Jassas points out that they did not consider these wars as unlawful. “Perhaps, they did not fight because they thought that the ruler and his forces could overwhelm the rebels and that they did not need their support.”[63]

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[60] Ibid. See also: Tabari, *Jami‘ al-Bayan*, 26:80.

[61] Among the Companions of the Prophet (peace be on him) those who participated in the famous Battle of Badr have a distinct and prominent position. They are deemed the torchbearers of justice, righteousness and truth.

[62] Jassas, *Ahkam al-Qur’an*, 3:595-96.

[63] Ibid., 3:597. Sarakhsi mentions another possibility as well: “It is said that Ibn ‘Umar and other companions (God be pleased with them) remained in their homes [and did not participate in war against rebels]. Perhaps, they considered themselves exempted from the obligation because of illness or some other lawful excuse, and the obligation of participation in war is imposed only on those who have the capability of participation.” (*Al-Mabsut*, 10:136)

The Prophetic traditions which prohibit taking sides in civil wars of Muslims, will be discussed below along with other traditions, which make it obligatory on Muslims to fight against the aggressors.

THE PROPHETIC TRADITIONS ON REBELLION

The *Sunnah* of the Prophet (peace be on him) further elaborates these Qur'anic commandments. In this Section, first the traditions about the 'grades' of the duty of enjoining right and forbidding wrong will be examined. After this, the traditions dealing with obedience to unjust rulers will be analyzed.

Three Grades of the Struggle to Change the Evil

An important question regarding the duty of enjoining right and forbidding wrong is whether every Muslim has the authority to use force while performing this obligation. A famous tradition of the Prophet (peace be on him) mentions three 'grades' of this obligation:

> If someone among you [Muslims] observes an evil, he should change it by force. If he does not have the capability for this, he should change it by raising voice against it. If he

> cannot do even that, he should have the determination in heart [to change it], and this is the least category of faith.[64]

Here, the first grade is to 'change'[65] the evil forcefully; the second grade is to change it by raising voice against it; and the third grade is that even if one remains silent, he should have the determination to change the evil. The third grade of the duty is, no doubt, the least demand of the faith of every Muslim. As far as the second grade is concerned, the *fuqaha'* mention that there is a *rukhsah* (exemption) for a Muslim to remain silent if he is sure that the person committing evil will cause him harm.[66] However, the text of this as well as other traditions proves that *'azimah* (original rule) in such a situation is to raise voice against the evil and face the consequences with patience. Thus, the *fuqaha'* assert that if this person is murdered, he will get the reward of *shahadah* (martyrdom).[67]

The first grade of the duty of changing evil, mentioned in this tradition, is to change it by the use of force. The most important

[64] Muslim, Kitab al-Iman, Bab Bayan Kawn al-Nahy 'an al-Munkar min Iman. Hadith No. 70

[65] The word used in the tradition is *falyughayyirhu*, which not only means that Muslims should 'forbid' evil but also that they should change it and replace it with good.

[66] Abu Bakr Muhammad b. Abi Sahl al-Sarakhsi, *Sharh Kitab al-Siyar al-Kabir*, ed. Isma'il Hasan al-Shafi'i (Beirut: Dar al-Kutub al-'Ilmiyyah, 1997), 1:116.

[67] Ibid.

principle in this regard is that a person can use force for this purpose only against those people over whom he has the *wilayah* (legal authority).[68] Thus, if a person regards something as evil, he can call it evil and can raise voice to mold public opinion against it. However, he does not have the authority to stop it forcefully.[69] He can use force only against those over whom he has the legal authority and in that case, too, the use of force has to remain within the legal limits.[70] For stop others forcefully, he has to ask those having the *wilayah* over them.[71]

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[68] See for a detailed analysis of the doctrine of *wilayah*: Abu 'l-'Abbas Ahmad b. Idris al-Qarafi, *al-Ihkam fi Tamyiz al-Fatawa 'an al-Ahkam wa Tasarrufat al-Qadi wa al-Imam* (Beirut: Dar al-Basha'ir al-Islamiyyah, 1416 AH), 121.

[69] Thus, if a Muslim causes damage to the musical instrument of another Muslim, he is under an obligation to pay damages (*daman*). (Abu Bakr Burhan al-Din al-Marghinani, *al-Hidayah Sharh Bidayat al-Mubtadi* (Beirut: Dar al-Fikr, n.d.), 3:307) However, he shall pay damages only for the value of the raw material not of the manufactured instrument because the use of musical instrument is prohibited under Islamic law. (Ibid.)

[70] The illustrious jurist-cum-philosopher Abu Hamid Muhammad b. Muhammad al-Ghazali (d. 505 AH/ 1111 CE) in his monumental treatise on Islamic Jurisprudence *al-Mustasfa* says: "As far as the prerogative of enforcing commands is concerned, it is available only to the One Who has the creation (*al-khalq*) and the authority (*al-amr*). This is because only the commands of the owner (*al-malik*) are enforced on the owned (*al-mamluk*). As there is no owner but the Creator, only He has the authority to issue binding commands. When the Prophet (peace be on him), the ruler, the master [of a slave], the father and the husband issue a command and make an act obligatory, that act does not become obligatory by virtue of their command, but because Allah has made their obedience obligatory." (*Al-Mustasfa min 'Ilm al-Usul* (al-Madinah al-Munawwarah: Islamic University, n.d.), 1:275-76)

[71] "To use force for enjoining right is the authority of the rulers because they have the capacity to enforce the decisions. Others can enjoin right only by raising their voice." Marghinani, *al-Hidayah*, 3:307.

Yusuf al-Qaradawi (b. 1926), a renowned contemporary scholar of Islamic law, in his recent study of the Islamic law of war titled *Fiqh al-Jihad: Dirasah Muqarinah li-Ahkamih wa Falsafatih fi Daw' al-Qur'an wa 'l-Sunnah*enumerates four conditions for using force for the purpose of changing the evil with force:

1. That there is a consensus on the act being evil; hence, if scholars disagree on the legality of an act, it cannot be changed with force;
2. That the evil act is committed openly; as such it is not permissible to enter into private premises for the purpose of changing the evil with force;
3. That force must be used only at the time of the commission of the evil act, not before or after the commission of the act; and
4. That the use of force does not result in causing greater evil.[72]

Qaradawi gives details of each of these conditions citing the Qur'anic verses, the Prophetic traditions and the juristic opinions.[73]

[72] Qaradawi, *Fiqh al-Jihad: Dirasah Muqarinah li-Ahkamih wa Falsafatih fi Daw' al-Qur'an wa 'l-Sunnah* (Doha: Qatar Foundation, 2008), 2:1040-41.
[73] Ibid., 1041-53.

This is a very important contribution of Qaradawi in understanding the true purport of the doctrine of enjoining right and forbidding wrong. However, it may be pointed out here that he does not mention the condition of *wilayah* in this regard and asserts that use of force for this purpose by individuals in their private capacity is not allowed by the contemporary laws. The fact is that this condition is prescribed by Islamic law also and the jurists discuss the implications of such acts of private individuals under the doctrine of *iftiyat 'ala haqq al-imam* (encroaching on the right of the ruler).[74]

Thus, for instance, the Hanafi jurists hold that if an enemy combatant deserved death punishment after he was captured and he was killed by a Muslim soldier, the act will not attract the law of *qisas*;[75] however, no one shall execute the prisoner unless he is specifically authorized by the ruler for this purpose;[76] if an unauthorized person executes the prisoner, the ruler may award him reasonable punishment for committing *iftiyat*.[77]

When a private person for the purpose of changing the evil takes the law into his own hands, other legal consequences may also

[74] See for details the entry on "*iftiyat*" in *al-Mawsu'ah al-Fiqhiyyah* (Kuwait: Wizarat al-Awqaf wa al-Shu'un al-Islamiyyah, 1986), 5:280-81.
[75] Sarakhsi, *Sharh Kitab al-Siyar al-Kabir*, 3:124-126.
[76] Ibid., 2:197.
[77] Ibid., 3:126.

follow. For instance, if a Muslim causes damage to the musical instrument of another Muslim, he is under an obligation to pay damages (*daman*) even if the use of musical instrument is prohibited for a Muslim.[78]

Obedience to an Unjust Ruler: Two Modes of Behavior

On the issue of obedience to an unjust ruler, there are two sets of traditions, which stress two apparently conflicting modes of behavior.[79] The first set of traditions requires of Muslims to stay with the *jama'ah* (Muslim community) and forbids them from dividing it.[80] Some traditions condemn separation from the *jama'ah* in most severe terms.[81] In this category, we may also place those traditions in which Muslims are prohibited from taking up arms against other Muslims,[82] or which prohibit Muslims from taking the oath of allegiance to a new claimant of the governmental authority in the presence of an already

[78]Marghinani, *al-Hidayah*, 3: 307. However, he shall pay damages only for the value of the raw material not of the manufactured instrument. (Ibid.)

[79] Abou El Fadl calls these traditions of "obedience and counter-obedience". (*Rebellion and Violence*, 118).

[80] Bukhari, Kitab al-Fitan, Bab Kayf al-Amr Idha lam Takun Jama'ah, Hadith No. 6557

[81] Ibid., Bab Qawl al-NabiSallallah 'alayh wa Sallam:Satarawn ba'di Umuran Tunkirunaha,Hadith No. 6531.

[82] Musnad Ahmad, Baqi Musnad al-Mukthirin, Baqi al-Musnad al-Sabiq, Hadith No. 8009.

existing ruler.[83] In some traditions, Muslims are prohibited from revolt against their ruler even if he is unjust.[84] The traditions, which prohibit Muslims from supporting any group in civil war, also fall in this category.[85]

In the second set of traditions, Muslims are prohibited from obeying those commands of the ruler which are explicitly against the norms of the Shari‘ah.[86] Similarly, Muslims are encouraged to raise their voice against the unlawful commands of the ruler and it has been termed as “the best form of jihad” (*afdal al-jihad*).[87] This rule, as elaborated earlier, is linked with the wider concept of enjoining right and forbidding wrong. Hence, Muslims are under an obligation to support the just ruler against the unjust rebels. The true purport of the tradition which prohibits Muslims from supporting any warring faction is explained by Jassas in these words:

[83] Muslim, Kitab al-Imarah, Bab Idha Buyi‘ li-Khalifatayn, Hadith No. 3444.
[84] Ibid., Bab Khiyar al-A’immah wa Shirarihim, Hadith No. 3447.
[85] Bukhari, Kitab al-Manaqib, Bab ‘Alamat al-Nubuwwah fi ’l-Islam. Hadith No. 3334; Muslim, Kitab al-Fitan wa Ashrat al-Sa‘ah, Bab Nuzul al-Fitan ka Mawaqi‘ al-Qatar, Hadith No. 5138.
[86] Muslim, Kitab al-Imarah, Bab Wujub Ṭa‘at al-Umara’ fi Ghayr Ma‘siyah wa Tahrimiha fi Ma‘siyah, Hadith No. 3423.
[87] Abu Dawud Sulayman b. al-Ash‘ath al-Sijistani, *al-Sunan*, Kitab al-Malahim, Bab al-Amr wa al-Nahy, Hadith No. 3781.

> In these traditions *fitnah* means a war in which various groups fight for worldly gains or on ethnic and parochial grounds and none of them fights under the command of a just ruler whose obedience is obligatory. As opposed to this, when it is established that one of the groups is a transgressor (*baghiyah*) and the other is on the right side (*'adilah*) under the command of the ruler, it is obligatory on every Muslim to support the ruler and his forces against the transgressors and to deem it an act that will surely bring reward for him.[88]

Sarakhsi begins his commentary on *Bab al-Khawarij* in these words: "Know that when *fitnah* occurs between Muslims, it is obligatory on every Muslim to remain aloof (*ya'tazil*) from the *fitnah* and to stay at home."[89] After this, however, he explains that Muslims must support the ruler if it is established that those who took up arms against him are on the wrong side.

> When Muslims are united under the command of one ruler whom they trust, and there is peace in the society, then if a group of Muslims rebel against the ruler, it is obligatory on

[88]Jassas, *Ahkam al-Qur'an*, 3:597.
[89]Sarakhsi, *al-Mabsut*, 10:132.

> everyone capable of fighting to fight under the command of the Muslim ruler against these rebels.[90]

Hence, a holistic view of these various sets of traditions leads to the conclusion that's Islamic law requires of Muslims to raise their voice against the unjust commands of the ruler and to disobey such commands, but at the same time it stresses upon the unity of Muslims and prohibits mischief. As such, forceful removal of an unjust rulercannot be permitted unless the expected mischief in the attempt to do so is lesser than the mischiefcoming from the unjust ruler.[91]

CREED, HISTORY AND LAW

Abou El Fadl rightly points out:

> In the field of rebellion, Muslim jurists also responded to theological demands, e.g. how does one declare rebellion to be a crime without suggesting that some of the most esteemed Companions of the Prophet were criminal?

[90] Ibid.
[91] Muhammad Mushtaq Ahmad, *Jihad, Muzahamat aur Baghawat Islami Shari'at aur Bayn al-Aqwami Qanun ki Roshni mayn* [*Jihad, Resistance and Rebellion in the Light of Islamic Law and International Law*], (Gujranwala: al-Sharia Academy, 2008), 21.

> Significantly, however, they also worked within an inherited legal culture that imposed its own logic and language.[92]

This political divide among Muslims was expressed in religious language[93] and, thus, with the passage of time these various political groups converted into religious sects each having its own set of beliefs as well as its own concept of the legitimate political authority. In time, three major groups were to emerge among Muslims; *the Ahl al-Sunnah wa al-Jama'ah*, the Shi'ah and the Khawarij.

The Right to Rule the Muslim Community

The Shi'ah believe that Muslim community cannot live in accordance with the norms of Islam unless it is led by a rightful successor of the Prophet (peace be on him). In their opinion, it was so important an issue that it could not be left for people to decide. Hence, they assert that succession to the Prophet (peace be on him) was to be declared by him through an explicit text (*nass*).[94] While various Shi'ah sub-groups

[92] Abou El Fadl, *Rebellion and Violence*, 21.
[93] Muhammad Abu Zahrah, *Ta'rikh al-Madhahib al-Islamiyyah fi 'l-Siyasah wa 'l-'Aqa'id wa Ta'rikh al-Madhahib al-Fiqhiyyah* (Cairo: Dar al-Fikr al-'Arabi, n.d.), 21-24.
[94] This is known as the doctrine of *Imamah*. (Shahristani, *al-Milal wa 'l-Nihal*, 1:146) Among the Shi'ah, the Zaydiyyah hold that the Prophet (peace be on him) did not name his successor, but mentioned his characteristics. (Ibid., 1:153). The Shi'ah

disagree on the question of the legitimate authority, they all agree on one point: that the successor of the Prophet (peace be on him) is to be from among the descendants of ‘Ali (God be pleased with him). The Khawarij, on the other hand, were anarchists in essence[95] and some of them took the extreme position of asserting that political setup (*imamah*) was not at all necessary.[96]

The Ahl al-Sunnah, or the Sunnis, were of the opinion a political setup is necessary for enforcing various provisions of Islamic law.[97] For this reason, they put several conditions for the eligibility of a person to become the ruler of the community. However, unlike the Shi‘ah, they did not deem it necessary that the Prophet explicitly declared the name of his political successor. Rather they were of the opinion that political leadership was dependent upon the support of the

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Imamiyyah, on the other hand, believe that the Prophet mentioned his successor by name and the same is done by each Imam in his turn. (Ibid., 1:162)

[95] Shihab al-Din Ahmad Ibn Hajr al-Haytami (d. 973 AH/1566 CE), the famous sunni jurist of the tenth/sixteenth century, summarizes the arguments of the Khawarij in these words: “Establishing governmental setup brings harm as it makes the commands of the ruler binding on the subjects even though both are equal and as such it results in mischief (*fitnah*). Moreover, the ruler is not infallible (*ma‘sum*) from infidelity and sins. If he is not removed, he inflicts harm on people and overthrowing him is not possible without bloodshed.” Ibn Hajr al-Haytami, *al-Sawa‘iq al-Muhriqah ‘ala Ahl al-Rafd wa ’l-Dalal wa ’l-Zandaqah* (Cairo: al-Matba‘ah al-Maymaniyyah, 1312 AH.), 1:26).

[96] The Najdat, the followers of Najdah b. ‘Uwaymir, were of the opinion that establishment of political setup was not a requirement of the shari‘ah but a dictate of the practical needs. (Abu Zahrah, *Al-Madhahib al-Islamiyyah*, 122).

[97] Haytami, *Al-Sawa‘iq al-Muhriqah*, 1:25.

Muslim community. In other words, only that person was entitled to caliphate who would command the confidence of the community.[98]

Divergent Views on the Legal Status of the Usurper

Sunnis, Shi'ah and Khawarij also disagree on the legal status of a ruler who does not fulfill the required conditions or who later on becomes disqualified due to violation of fundamental conditions.

The Khawarij took the position that a Muslim who commits a major sin (*kabirah*) becomes infidel.[99] Thus, in their opinion, a usurper (*ghasib*) is not a legitimate ruler and he must be removed from his office by the use of force, if necessary.[100] Similarly, a legitimate ruler who later becomes unjust (za*lim*) or sinner (*fasiq*), is not qualified and

[98] Notwithstanding this, the Ahl al-Sunnah generally asserted that the caliph should be from the tribe of the Quraysh. (Ibid., 132-135) In fact, this has been explicitly mentioned in various traditions of the Prophet (peace be on him). (Bukhari, Kitab al-Ahkam, Bab al-Umara' min Quraysh, Hadith no. 6606; Ahmad b. Hanbal al-Shaybani, *al-Musnad*, Baqi Musnad al-Mukthirin, Musnad Anas b. Malik, Hadith No. 16249). In the tenth/sixteenth century when the Ottoman Turks established their caliphate, many Sunni jurists felt compelled to re-examine their position. See, for instance, Abu 'l-Kalam Azad, *Mas'ala-e-Khilafat* (Lahore: Maktaba-i-Jamal, 2006). This issue bothered many Muslims thinkers in the fourteenth/twentieth century. See, for instance, Sayyid Abu 'l-A'la Mawdudi, *Tafhimat* (Lahore: Islamic Publications, 1978), 129-152; Amin Ahsan Islahi, *Islami Riyasat* (Lahore: *Dar al-Tadhkir*, 2002).
[99] Ibn Hazm, *Al-Milal wa 'l-Nihal*, 1:113
[100] Ibid.

must be removed.[101] Rebellion (*khuruj*) against unjust rulers and usurpers is, thus, obligatory according to the Khawarij.[102]

The Shi‘ah also had strong reservations regarding the legitimacy of the usurpers and unjust rulers.[103] However, they disagreed on the legitimacy or obligation of *khuruj* against such rulers. While some of the leading figures among the various Shi‘ah groups revolted against the Umayyads and the Abbasids, such as Muhammad b. al-Hanafiyyah, Zayd b. ‘Ali and Muhammad Dhu ’l-Nafs al-Zakiyyah, the imams of the Twelver Shi‘ah never revolted against any ruler.[104] This was either because they could not express their beliefs regarding rebellion[105], or because they were of the opinion that

[101] Ibid.
[102] Ibid.
[103] Ibid., 1:147ff.
[104] For the Sunni perspective of the struggle of Husayn b. ‘Ali (God be pleased with them both) against the Umayyad Caliph Yazid. Azad, *Mas’ala-e-Khilafat*, 99. Azad is of the opinion that there were two stages in the struggle of Husayn (God be pleased with him). When he went out of Madinah, the caliphate of Yazid had not established and many important cities had not yet taken the oath of allegiance to him. However, when Husayn (God be pleased with him) reached near Kufah, it became apparent to him that the people thereof had bowed to the rule of Yazid. At that point, he decided to return to Madinah, but the government forces encircled him and forced him to fight till he was martyred. “At the battlefield of Karbala’, Husayn was not an aspirant of *khilafah* and he was not fighting for this purpose. Rather, his position was position was that of saintly and innocent person whom the government forces wanted to arrest without a legal ground. He resisted his arrest and wanted to set an example of the patience and forbearance of the truth in front of the powerful and forces of tyranny.”
[105] This is known as the Shi‘ah doctrine of *taqiyyah*, a dispensation allowing believers to conceal their faith when under threat, persecution or compulsion. (Ibn Hazm, *Al-Milal wa ’l-Nihal*, 1:145).

rebellion would result in a greater evil than the evil of the continued existence of an unjust ruler.[106] If it was this latter consideration, their view was not different from that of the great Sunni jurist Abu Hanifah al-Nu'man b. Thabit (d. 150/767).

The Sunni jurists accepted the rule of usurpers firstly because in their opinion a Muslim remains Muslim even if he commits *kabirah*, and secondly because they concluded that rebellion results in bloodshed and anarchy, which is a greater evil. Some of them went to the extreme of asserting that any attempt to remove an unjust ruler is *fitnah* (mischief). Thus, they preached passive obedience to tyrants.[107] As opposed to them, Abu Hanifah strongly advocated the right of the community to remove an unjust ruler.[108]

[106] This is how the Sunni scholars interpret the conduct of these Imams.

[107] The famous Hanafi jurist Abu Bakr al-Jassas severely criticizes passive obedience to the tyrants and points out its bad effects on Muslim society. (*Ahkam al-Qur'an*, 2:50-51). This attitude led people to accept the rule of tyrants as their fate. See for details of the doctrines of Jabriyyah (fatalists): *al-Milal wa 'l-Nihal*, 1: 84-90.

[108] The position of Abu Hanifah on these issues has been examined in detail in another article: Sadia Tabassum, "Recognition of the Right to Rebellion in Islamic Law with Special Reference to the Hanafi Jurisprudence", *Hamdard Islamicus*, 34:4 (2011), 55-91.

In view of this variety of approaches of the Muslim jurists, it is surprising to see modern scholars generally denying the existence of "the right to rebellion" in the Islamic legal discourses.[109]

CONCLUSIONS

Rebellion has always remained an issue of concern for Muslim jurists because the Qur'an and the Prophetic *Sunnah*, the primary sources of Islamic law, prohibit mischief and disorder and make it obligatory on Muslims to strive for bringing peace and order to society and for establishing a just legal and political system. Thus, rebellion not only involves issues of law and politics but also those of creed and faith.

The Qur'anic verses dealing with rebellion can be divided into four categories: (a) those enjoining the duty of commanding good and forbidding wrong; (b) those prohibiting mischief and disorder in society; (c) those prescribing punishment for bandits; and (d) those dealing specifically with rebellion and civil war. The first two sets of verses are variously interpreted by government forces and rebels to allege that the other party is committing mischief which it is under a

[109]We have explained this in another place. See for details: Sadia Tabassum, "Modern Discourse on the Islamic Law of Rebellion", *Islamabad Law Rewiev* (Forthcoming).

legal obligation to curb. The third and the fourth sets of verses led the jurist to distinguish between bandits and rebels and develop different sets of rules for them. These verses have been elaborated with the help of the Prophetic traditions which, on the one hand, explain the grades and stages of the duty of enjoining good and forbidding wrong and, on the other, prescribes various modes of behavior for dealing with various forms of mischief, disorder and tyranny.

Muslim history records events of rebellion and civil war from very early on. The conduct of the Companions in these conflicts became one of the major sources for the jurists who were working on developing detailed law of rebellion and civil wars. These issues influenced not only law and politics but also creed and faith and that is why many of these issues are discussed in greater detail in the books of creed than in the books of law.

ABOLITION OF THE DOCTRINES OF CHAMPERTY AND MAINTENANCE IN PAKISTAN

Warda Yasin*

ABSTRACT

The doctrines of champerty and maintenance, along with the related concepts of conditional and contingent fee are still treated as sins in Pakistan and India, because, those who administer the law and manage the legal system consider themselves heirs of the ancient British empire. The doctrines are today working against the interests of the common man. These doctrines stand in the way of lawyers willing to support those persons who neither have the fee nor the awareness to stand up for the violation of their rights. The lawyers can help such people for a share of the damages to be awarded. To facilitate such support, these doctrines were first abolished in the United States followed by many other jurisdictions. More recently, the United Kingdom has also abolished these doctrines and has permitted lawyers to share damages in return for services rendered. In a country like Pakistan where the poor people silently and passively suffer injuries, the abolition of these doctrines can bring about a revolution in the law of torts and the protection of the rights of

those subjected to injuries. Lawyers and judges, however, act like silent spectators in this case, although they are the ones who stand to gain the most besides the poor and downtrodden people of Pakistan. This paper argues for the abolition of these ancient doctrines for removing the shackles from the legal system of Pakistan.

Key Words: Champerty, maintenance, conditional fee, contingent fee, financing litigation, British India Pakistan, Independence Act, justice, equity, common law, civil wrongs, codification, torts, crimes, offences, defamation, libel, slander, damages, public figures, false light

INTRODUCTION

The law of torts is the most important means for securing the rights of the people in most common law countries.[1] It will not be wrong to say that the words "sue" and "be sued" conjure up images of this branch of the law. This is also true for Europe where a comprehensive programme for securing rights through tort law is underway since the

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[1] The United Kingdom, the United States of America, Canada, Australia and New Zealand are the most important among the common law countries.

end of World War II.[2] Strange as it may sound, many professionals working in senior positions within the legal system of Pakistan can be heard saying that the law of torts does not exist in Pakistan. Is this true? Is Pakistan not a common law country? Does the common law have nothing to do with Pakistan anymore? Before these questions are answered it may be stated at the outset that incredibly the law of torts has a very limited role to play in Pakistan. As a result of this, the rights of many people are trampled upon with impunity and the legal machinery is unable to secure these rights. The rich may obtain relief through some mechanism, but it is the poor people who are the main losers and have nowhere to go. The situation calls for immediate redressal and rejuvenation of the law of torts. There are many causes of the neglect of the law of torts in Pakistan, but one of the major reasons for this neglect are the doctrines of champerty and maintenance, which need to be abolished forthwith in order to revive interest in this vital field and to secure the rights of the poor.

[2] "The European Group on Tort Law (formerly also called 'Tilburg Group') is a group of scholars in the area of tort law established in 1992. The group meets regularly to discuss fundamental issues of tort law liability as well as recent developments and the future directions of the law of tort. The Group has drafted a collection of Principles of European Tort Law (PETL) similar to the Principles of European Contract Law drafted by the European Contract Law Commission ("Lando Commission")." http://www.egtl.org/ (accessed 15.12.2014). The Group and its various centres have produced yearbooks on tort and insurance law. See, e.g., *Tort and Insurance Law Yearbook—European Tort Law 2007*, Helmut Koziol and Barbara C. Steininger eds. (Vienna: Springer-Verlag/Wien, 2008).

This paper is being written with the purpose of initiating tort law reform in Pakistan. The underlying idea of the paper is that the legal system cannot secure the rights of the common man just by criminalizing a few intentional torts against the person and property.[3] A comprehensive plan must be made and the serious civil wrongs identified must be presented in the form of a code so that it can be followed conveniently by the people. The present paper is, therefore, a small beginning. It argues that one of the major causes of the neglect of tort law in this country are the common law doctrines of champerty and maintenance. These doctrines have been abolished in many jurisdictions all over the common law world. The paper also shows that the benefits of these doctrines have been minimal as compared to the loss they have caused in terms of the development of the legal system.

The paper will begin with a historical overview of the law of torts in Pakistan, to show how it works in a country where common law and Islamic law reside side by side. The causes due to which the law of torts has failed to develop in Pakistan will then be identified. The major jurisdictions in the common law world that have abolished these

[3] See, in particular, the sections dealing with assault, trespass, and defamation in the Pakistan Penal Code, 1860.

doctrines will then be identified and the reasons for the abolition will be explained. The case for abolishing the doctrines of champerty and maintenance in Pakistan will be built up and the benefits to be attained will be identified and explained. The conclusion will build on the findings of the paper and make concrete proposals in terms of the practical steps that are to be taken for initiating a comprehensive tort law reform program.

THE LAW OF TORTS AS APPLIED IN PAKISTAN

Justice, Equity and Good Conscience

The application of English common law in India started in earnest in 1726, through the Parliamentary Charter of George I. Mayor's courts were established in Madras, Bombay and Calcutta. These courts were required to apply the English common law with "justice and right." The power and influence of the British increased gradually till a Supreme Court of Judicature was established in the Presidency towns, with the authority of King's Bench in England, applying the law of torts, among other laws, through "justice, equity and good conscience" with adjustments according to local conditions. A variety of courts existed till the Indian High Courts Act, 1861 was passed. The

jurisdiction of British courts and hence the application of the law of torts increased till the partition of India.

§ 18(3) of the Indian Independence Act, 1947[4] read as follows:

> (3) Save as otherwise expressly provided in this Act, the law of British India and of the several parts thereof existing immediately before the appointed day shall, as far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions and the several parts thereof until other provision is made by laws of the Legislature of the Dominion in question or by any other Legislature or other authority having power in that behalf.

This section was adopted in the series of constitutions of Pakistan: 1956,[5] 1962,[6] 1972[7] (interim). Article 268 if the 1973 Constitution[8] now reads as follows: "268(1) Except as provided by this Article, all existing laws shall, subject to the Constitution, continue in force, so far

[4] Indian Independence Act, 1947. 10 & 11 Geo. 6. CH. 30.
[5] The Constitution of the Islamic Republic of Pakistan, 1956.
[6] The Constitution of the Islamic Republic of Pakistan, 1962.
[7] The Interim Constitution of the Islamic Republic of Pakistan, 1972.
[8] The Constitution of the Islamic Republic of Pakistan, 1973.

as applicable and with the necessary adaptations, until altered, repealed or amended by the appropriate Legislature."

The English common law thus applies directly in the Islamic Republic of Pakistan through the law of torts. The broad policy for applying this law is "justice, equity and good conscience," which really means "judicial discretion" according to the Positivists like Austin. The law of torts was not codified, except the effort by Fredrick Pollock noted below.

In some areas, the law has been codified. These are either torts or related systems of compensation. The Defamation Ordinance, 2002 is a good example. Defamation is a crime too under the Pakistan Penal Code. When codification takes place in some are, as in the case of defamation, the common law may be said to shrink to the extent of the provisions of such codified law, but the common law continues to apply to fill the gaps left in the law. The law of defamation has been codified in the United Kingdom (Defamation Act, 1996),[9] Australia (Queensland Defamation Act, 2005)[10] and New South Wales (Defamation Act, 2005)[11] as well as in Canada. The Australian

[9] Defamation Act, 1996.
[10] Defamation Act No. 55 of 2005.
[11] Defamation Act, 2005 No. 77.

codified law, for example, does not attempt to define defamation. This means that the definition of defamation in the common law will apply. The same method applies to Pakistan, that is, if the codified provisions have not altered a common law rule, it will continue to apply.

Court-fee and the British

The British were interested in preserving their revenue that they collected from India. This required minimum litigation. Accordingly, heavy court-fee was imposed. This discouraged tort claims, and made the protection of the law of torts unreachable for the poor masses. It is only in the last decade that this fee has been reduced to Rs. 25000 and less in Islamabad. The expensive process of litigation still prevents the poor from seeking relief under the law of torts.

No Codification

Sir Fredrick Pollock prepared a draft and presented it as a proposal to the Indian government for codification. This proposal was not accepted. The Bill is found as an appendix to his book: "A Bill to define and amend certain parts of the Law of Civil Wrongs." It consists of 9 chapters and 73 sections. Chapter VII deals with the tort

of nuisance, that is, damage arising out of public nuisance and the tort of private nuisance.[12] It was an excellent effort and worth reading. Perhaps, it can still be used to codify the law of tort.

THE MEANING OF CHAMPERTY AND MAINTENANCE

Maintenance, in the context of torts and litigation in general, means the "stirring up of litigation by giving aid to one party to bring a claim without just cause or excuse."[13] The target of this doctrine, *inter alia*, is the lawyer. The purpose is to discourage frivolous litigation. It means that lawyers should not aid and encourage people to file cases where genuine causes of action do not exist. In Pakistan, there is abundant frivolous litigation despite the application of this doctrine, but the cause may not be lawyers; it is usually the litigants who seek personal satisfaction or are motivated by a desire to seek revenge.

"[C]hamperty is the particular form of maintenance which exists when the person maintaining the litigation is to be rewarded out of its proceeds."[14] This doctrine means that if a lawyer helps a person with

[12] Sir Frederick Pollock, *The Law of Torts: A Treatise on the Principles of Obligations arising from Civil Wrongs in the Common Law,* 4th ed. (London: Stevens and Sons, 1895), 527–83.
[13] W.V.H. Rogers, *Winfield and Jolowicz: Tort* (London: Sweet & Maxwell, 2006), 876.
[14] Ibid.

the understanding with his client that the damages awarded to the client will be shared by them, then this is unlawful.

The Ontario Court of Appeal in *McIntyre Estate v. Ontario (Attorney General)*,[15] described maintenance and champerty as follows:

> Maintenance is directed against those who, for an improper motive, often described as wanton or officious intermeddling, become involved with disputes (litigation) of others in which the maintainer has no interest whatsoever and where the assistance he or she renders to one or the other parties is without justification or excuse. Champerty is an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation.[16]

These doctrines arose in medieval England, at a time when there was a general disregard for litigation and an understanding that lawsuits were an evil to be avoided whenever possible.[17] At common law, maintenance and champerty were both crimes and torts, as was

[15] [2002] 61 O.R. (3d) 257 (C.A.).
[16] Ibid. 265-266.
[17] Max Radin, "Maintenance by Champerty," *CALIF. L. REV.* 24 (1935): 48-78, 68 as cited in Jason Lyon, "Revolution in Progress: Third Party Funding of American Litigation," *UCLA L. Rev.* 58 (2010): 571-609, 575.

barratry.[18] But, since the passing of Criminal Law Act 1967 in the United Kingdom, these doctrines are no more considered as crimes and torts.[19]

Abolition of Champerty and Maintenance in the USA

In modern times these two doctrines were resisted. The defences advanced were so numerous and "imposing liability for" these acts "so outdated that the law ceased to serve any useful purpose."[20]

The principal practical importance of champerty has been "to invade contingency fee arrangements."[21]Contingency fee agreement should not be confused with conditional fee. Conditional fee means that the client can pay later, on completion of the court proceedings. There is no problem with this; the main problem is with "contingent fee," which is "an arrangement between a solicitor and client for the payment of fee only if the client wins the case." This is still considered against public policy in some jurisdictions including Pakistan.

[18] Barratry is bringing of vexatious litigation or litigation for the purpose of harassment or profit.

[19] Sections 13(1)(a) and 14(1) of the Criminal Law Act, 1967 as cited in W.V.H. Rogers, *Winfield and Jolowicz: Tort* (London: Sweet & Maxwell, 2006), 876.

[20] W.V.H. Rogers, *Winfield and Jolowicz: Tort* (London: Sweet & Maxwell, 2006), 876.

[21] Also called as 'Damages-based agreements' (DBAs). DBAs are a type of 'no win, no fee' agreement under which a lawyer can recover an agreed percentage of a client's damages if the case is won, but will receive nothing if the case is lost.

Maintenance and champerty[22] were introduced into American legal system through the common law, but debates about their continuing validity have existed nearly as long as the U.S. legal system itself.[23] Courts began to question the utility and effectiveness of these doctrines as early as the middle of the nineteenth century.[24] Scholars like Max Radin, who objected the doctrines of maintenance and champerty in his study in 1935, argued that these doctrines were almost dead in practice and absolutely out of step with American thinking regarding litigation at that time.[25]

In the United States, or in most states, the doctrines of maintenance and champerty stand abolished and even contingent fee is allowed. Contingency fees are permitted by all the courts in the USA to facilitate the plaintiffs without any financial means providing them with an opportunity to file a lawsuit.[26] Contingency fees have been permitted on the principle that allowing a plaintiff with a successful

[22] It includes legal financing, also known as litigation financing, third party funding, legal or litigation funding.
[23] Jason Lyon, "Revolution in Progress," 581.
[24] Ibid.
[25] Max Radin, "Maintenance by Champerty," 48.
[26] Susan Lorde Martin, "The Litigation Financing Industry: The Wild West of Finance Should Be Tamed, Not Outlawed," *FORDHAM J. CORP. & FIN. L.*10 (2004): 55-77, 55- 57 ; See also Paul H. Rubin, "Third Party Financing of Litigation," *Northern Kentucky Law Review* 38 (2011): 673-685, as cited in Nicolas Dietsch, "Litigation Financing in the U.S., the U.K., and Australia: How the Industry has Evolved in Three Countries." *Northern Kentucky Law Review* 38 (2011): 687-711, 689.

claim to pursue justice is more important than preventing champerty, which can effectively be eliminated through the supervision of the court.[27] In 1997, the Massachusetts Supreme Court in *Saladini v. Righellis*[28] ruled that the doctrines of maintenance and champerty "no longer shall be recognized in Massachusetts." The court reasoned that: "The champerty doctrine is [no longer] needed to protect against the evils once feared: speculation in lawsuits, the bringing of frivolous lawsuits, or financial overreaching by a party of superior bargaining position." The court explained that new tools such as fee regulations, sanctions rules and the doctrines of unconscionability, duress and good faith provide sufficient safeguards to protect against the "evils" the common law doctrines were originally intended to address.[29] The Supreme Court of South Carolina adopted the *Saladini* analysis in *Osprey v. Cabana Limited Partnership*[30] in 2000.

During the course of twentieth century, litigation has been viewed as "a noble tool that can lead to transformative social change."[31] And therefore, third party funding has become increasingly available to US

[27] Susan Lorde Martin, "The Litigation Financing Industry," 55 as cited in Nicolas Dietsch, "Litigation Financing in the U.S., the U.K., and Australia," 689.
[28] 687 N.E.2d 1224 (Mass. 1997).
[29] See, also *Bates v. State Bar of Ariz.*, 433 U.S. 350, 376 n.32 (1977). The Supreme court abandoned the notion that litigation should be "viewed as an evil in itself."
[30] 532 S.E.2d 269 (S.C. 2000).
[31] Jason Lyon, "Revolution in Progress," 588.

litigants in recent years.[32] At least three states –Maine, Ohio and Nebraska have enacted legislation to regulate third party legal funding, and these statutes primarily apply to loans in personal injury suits rather than commercial suits.[33]

Abolition of Champerty and Maintenance in Jurisdictions other than the UK

The common law principles of champerty and maintenance have been rejected by many legislatures throughout the world during the 1970's and 80's. Efforts were made in Canada, for example, to follow the United States in this field.[34] Courts of Ontario,[35] Alberta[36] and Nova Scotia[37] have not considered any such arrangements contrary to public policy and viewed them as being capable of promoting access to

[32] UK, Review of Civil Litigation Costs: Preliminary Report, Volume 2 by Lord Justice Rupert Jackson (London: Her Majesty's Stationery Office, 2010).
[33] Jason Lyon, "Revolution in Progress," 575. The statutes are: Maine Consumer Credit Code Legal Funding Practice, Me. Rev. Stat. tit. 9-A, §12 (2009); Nebraska Nonrecourse Civil Litigation Act, Neb. Stat. Ann., § 25-3303 (West 2010); and Non-Recourse Civil Litigation Advances, Ohio Rev. Code Ann. Tit. 13, § 1349.55 (West 2008).
[34] See, for example, Walter C. Williston, *Contingent Fee in Canada*, 6 *Alta. L. Rev.* 184 (1968).
[35] *Metzler Investment GMBH* v. *Gildan Activewear Inc.*, [2009] O.J. No. 3315.
[36] *Hobsbawn* v. *Atco Gas and Pipelines Ltd.*, (May 14, 2009) Calgary 0101-04999 (QB).
[37] *MacQueen* v. *Sydney Steel Corporation*, (October 19, 2010), Halifax 218010 (SC).

justice.[38] It has been maintained that today, contingent fees are now allowed in Australia, Brazil, Canada, the Dominican Republic, France, Greece, Ireland, Japan, New Zealand, the United Kingdom and the United States.[39]

In *Arkin v. Borchard Lines Ltd*,[40] the trial judge commented that, "[i]t is indeed highly desirable that impecunious claimants who have reasonably sustainable claims should be enabled to bring them to trial by means of non-party funding" and further that it is "highly desirable in the interests of providing access for such claimants to the courts that non-party funders … should be encouraged to provide funding, subject always to their being unable to interfere in the due administration of justice…"[41]. The court of Appeal while recognising the beneficial role of these arrangements drew a distiction between the litigation agreements made before court and the arrangements that give effective control in litigation to the funders, thus diminishing the purpose of abolishing champerty.[42]

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[38] Steve Tenai, Nicholas Saint-Martin, "Third Party Funding Of Class Actions," This paper was prepared for the 8th National Symposium on Class Actions, (Osgoode Hall: April 28-29, 2011), 10.
[39] Herbert M. Kritzer, *Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States* (Stanford: Stanford University Press, 2004), 258-259.
[40] [2005] EWCA Civ 655.
[41] Ibid. at para. 16.
[42] Ibid. at paras 38-40.

The High Court of Australia has gone a step further and held in *Campbells Cash and Carry Pty Ltd. v. Fostif Pty Ltd.*[43] that it is not contrary to public policy for a commercial or non-party funder to not only finance but, also to control the litigation.[44] Similary, the Supreme Court of Appeal of South Africa decided in *Price Waterhouse Coopers Inc and Others v. National Potato Co-operative Ltd*,[45] that "an agreement in terms of which a person provides a litigant with funds to prosecute an action in return for a share of the proceeds of the action is not contrary to public policy or void."[46]

Abolition of Champerty and Maintenance in the United Kingdom

Abolition of maintenance and champerty in the United Kingdom has already been discussed in the previous paragraphs, in different contexts. Here we may mention some of the important provisions once again to recall what has been said above. Both as crimes and torts "maintenance and champerty" have been abolished in the United

[43] [2006] HCA 41.
[44] Steve Tenai, Nicholas Saint-Martin, "Third Party Funding Of Class Actions," This paper was prepared for the 8th National Symposium on Class Actions, (Osgoode Hall: April 28-29, 2011), 7.
[45] [2004] ZASCA 64.
[46] Ibid., at para. 52.

Kingdom.[47] Conditional fee is also allowed in the United Kingdom and § 58 of the UK Courts and Legal Services Act 1990 recognizes such an arrangement. However, contingency fee agreements were considered against public policy. But, since April 2013, under the Damages-Based Agreements Regulation of 2013,[48] contingency fee agreements are now permitted in the United Kingdom. This implies that lawyers can legally conduct litigation as well as arbitration in return of a share of any damages. Previously it was only allowed for employment and other tribunal work. The U.K. relaxed its laws regarding champerty in recent decades to increase access to justice for less priviledged and to lessen taxpayer's expenditures on the state's legal aid system.[49] The abolition of the champerty and the introduction of the conditional fee agreements resulted in the expansion of litigation financing in the UK.[50] In this regard, *Arkin v. Borchard Lines, Ltd.*,[51] has worked as a vehicle for the development and growth of this

[47] Sections 13(1)(a) and 14(1) of the Criminal Law Act, 1967 as cited in W.V.H. Rogers, *Winfield and Jolowicz: Tort* (London: Sweet & Maxwell, 2006), 876.
[48] This regulation came into force on 1st April 2013. Section 45 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) amends section 58AA of the Courts and Legal Services Act 1990 to permit damages-based agreements (DBAs). Certain requirements that DBAs must meet in order to be enforceable are set out in the Damages-Based Agreements Regulation 2013.
[49] Susan Lorde Martin, "The Litigation Financing Industry," 73.
[50] Ibid.
[51] [2005] EWCA Civ 655.

industry in the UK.[52] In addition to *Arkin*, the Civil Justice Council, through its report on improving the access to justice in the UK, has supported litigation financing.[53] It has noted that courts in the UK recognise litigation financing as permissible means of funding lawsuits and, that plaintiff's right of access to justice should be given preference over the doctrines of champerty and maintenance.[54] The Civil Justice Council concluded that, subject to the rules in *Arkin*, legal funding should be encouraged.[55] And recommended the implementation of regulation to protect the claimants and attorney-client relationship.[56]

All this has been adopted to provide an adequate solution to access to justice problems for poor indiviuals and similar steps need to be taken in Pakistan as well.

The Discussions in India

As recorded in an Indian case (*Dr. V.A. Babu v. State of Kerala*),[57] the law of maintenance and champerty was applied in a different way in India:

[52] Susan Lorde Martin, "The Litigation Financing Industry," 73.
[53] Nicolas Dietsch, "Litigation Financing in the U.S., the U.K., and Australia," 700.
[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] 2010 (9) SCR 1039.

> Following the judgment of the Supreme Court in AIR 1954 S.C. 557 their Lordships held that if no Advocates are involved in the agreement, the agreement does not become illegal or enforceable in India for the only reason that the same is Champerty. The agreement which was considered by the Supreme Court in AIR 1954 S.C. 557 was an agreement between an Advocate and a litigating claimant under which it was agreed that the entire litigation will be financed and conducted by the Advocate without claiming any charges in advance but once the fruits of the litigation are realized, the Advocate will be given 50% of the same. The Supreme Court did not enforce the agreement noticing that an advocate was involved.

But the distinction between the law in England and the Indian law regarding Champerty agreements is that while in England Champerty agreements, whoever the parties to the same are, are per se illegal. [while] in India such agreements become per se illegal only if advocates are involved.

Contingency fee agreements are not permitted in India as well. The Indian Bar council prohibits lawyers from charging fees to their clients

contigent on the results of the litigation or claim a percentage or share in the damages awarded by the court.[58] In the landmark case of *Ganga Ram v. Devi Das*,[59] the court held such an agreement to be void and against public policy and also against professional ethics.

The law in Pakistan appears to be the same. Whatever the position in Pakistan, it is suggested that *contingent fee for a lawyer should be allowed in tort cases.* Failing this, the rights of the poor people, who do not have the resources to go to courts with their tort claims, will go waste. The law of torts will remain "the rich man's game." The power of the law must be unleashed for the sake of the poor and their rights. This will open the door for the development of tort law in Pakistan. So far, growth in this very important branch of the law stands arrested.

Litigation financing or third-party funding

In addition to conditional fee agreements and contigent fee arrangements, litigation financing industry also emerged during 1990s, first in the USA, then the UK followed by Australia.[60] These companies, through contractual arangements, provide money for

[58] Bar Council of India Rules, Part VI, Chapter II, Section II, Rule 20: "An advocate shall not stipulate for a fee contingent on the results of litigation or agree to share the proceeds thereof."
[59] 61 P.R. (1907).
[60] Nicolas Dietsch, "Litigation Financing in the U.S., the U.K., and Australia," 705.

different expenses including lawyer fees, court costs, expert witness fees, and plaintiff's living expenses while the litigation is pending.[61] In return, third party receives a percentage from the proceeds, if the litigant is successful. Litigation financing companies in the USA at present deal with all kinds of lawsuits including personal injury, patent litigation, copyright infringement, and employment discrimination.[62] In the UK, the abolition of champerty and maintenance and introduction of conditional fee agreements opened a way for third-party funding.[63] Consequently, contingent fee arrangements have also been allowed under the UK law.[64]

The litigation financing industry is still developing in the U.K.[65] However, in Australia, the funding industry has become widely accepted and more successful than the U.S. and the U.K. in incorporating financing agreements into the state's legal system.[66] Australia has been more receptive to litigation financing agreements

[61] Ibid., 688.
[62] Ibid., 693.
[63] Ibid., 699. See also *Arkin v. Borchard Lines Lt.* [2005] EWCA Civ 655.
[64] Damages-Based Agreements Regulation of 2013.
[65] Nicolas Dietsch, "Litigation Financing in the U.S., the U.K., and Australia," 702.
[66] See Standing Committee of Attorneys-General, Discussion Paper on Litigation Funding in Australia, 4 (May 2006) as cited in ibid.

than the U.S. or the U.K.[67] The Supreme Court of New South Wales in *Domson Pty. Ltd. v. Zhu,*[68] refused to terminate a financing agreement on the grounds that the financing firm had controlled too much of the litigation. The court argued that third-party funding agreements are not against publuc policy.[69] And even went so far as to point out the irony of suing a financing firm that has been hired to finance litigation, on the terms of the original agreement.[70]

The development of litigation finance industry in the U.S., the U.K. and Australia has provided access to justice to needy and poor plaintiffs. Pakistani legal system can also ensure better access to justice to impoverished by making rules and intiating legal financing industry in the country.

Abolishing the doctrines in pakistan

The purpose for which these doctrines were introduced has almost no practical importance and utility in the present times. The problems meant to be addressed by the doctrines can be more efficiently and

[67] Nicolas Dietsch, "Litigation Financing in the U.S., the U.K., and Australia," 703. See also, *Campbells Cash and Carry Pty Ltd. v. Fostif Pty Ltd.* [2006] HCA 41.

[68] [2005] N.S.W.S.C. 1070, 1070.

[69] Ibid., 1071.

[70] [2005] N.S.W.S.C. 1070, 1071. See also, *QPSX Commc'ns Pty. Ltd. v. Ericsson Austl. Pty. Ltd*., [2005] 219 A.L.R. 1.

effectively remedied by various modern rules of procedure.[71] Instead these doctrines have blocked the way of justice for the underprivileged. The doctrines of maintenance and champerty have long been given away by the United Kingdom, and by many other common law jurisdictions including the United States. And now contingency fee agreements have also been allowed in the United Kingdom. Pakistan is a common law country but still these doctrines have not been abolished from its legal system. This issue has not gained prominence in Pakistan and very rare case law is available on this point. The debate of litigation financing in the courts has revovled around section 23 of the Contract Act, 1872 which states that, "any consideration or object of an agreement is unlawful if it is opposed to public policy." The courts, relying upon the common law principles of champerty and maintenece, have declared third party funding agreements void under section 23 and thus considering them opposed to public policy.

Whereas now in many states, litigation funding agreements are not *per se* considered to be contrary to public policy. And the courts of all such jurisdictions have held that legal funding arrangements, though

[71] *Saladini v. Righellis*, 687 N.E.2d 1224, 1226–27 (Mass. 1997).

champertous, may still be enforceable if these are not unconscionable and exorbitant. Such arrangements, however, need to be carefully scrutinised by the courts and if they are found to be for improper purpose, unconscionable, inequitable, oppressive or one leading to vexatious litigation, the courts would refuse to enforce them.

Contingent fee agreements are also not allowed in Pakistan. Under Rule 149 of the Canons of Professional Conduct and Etiquettes of Advocates,[72] approved and adopted by the Pakistan Bar Council, an advocate cannot "accept the whole or part of the property in respect of which he has been engaged to conduct the case, in lieu of his remuneration, or as a reward or bounty."[73] These Canons need a thorough reexamination in any case, so that archaic and ancient cumbersome requirements are removed.

The issue of third-party funding can also be examined under Order 1, Rule 10 of Code of Civil Procedure, 1908 where court may strike out or add parties. Order 1 Rule 10(2) states that,

> The Court may at any stage of the proceedings either upon or without the application of either party and on such terms as may

[72] Canons of Professional Conduct and Etiquettes of Advocates, B- Conduct with regard to Clients, Rule 149, Chapter XII, Pakistan Legal Practitioners & Bar Council Rules, 1976.
[73] Ibid.

> appear to the Court to be just, order that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely, to adjudicate upon and settle all the questions involved in the suit, be added.

The courts have decided in several cases that only necessary or proper parties can be added and not any other parties.[74] Elaborating necessary or proper party, courts argued that persons indirectly or remotely interested are not necessary or proper parties[75] and the persons who have no interest should not be added.[76] Further, a person who has a champertous interest in litigation should not be added.[77] Courts have heavily relied upon these precedents to apply the ancient and obsolete common law principles of maintenance and champerty. It is now time for the legislature, courts and advocates to take a new course for promoting access to justice for a common man. Australian legislation for abolishing maintenance, champerty and barratry is one

[74] A 1951 M 665, A 1934 N 228.
[75] 1996 SCMR 781, 1996 CLC 678, P 1972 L 169, A 1941 FC 16, A 1943 A 289, 20 IC 658, 1996 CLC 456, P 1996 K 467, A 1918 PC 49.
[76] PLJ 1975 SC 345, 2004 CLC 1567, 1994 MLD 1489, A 1937 M 200, A 1929 B 353.
[77] 2004 MLD 1395, 1996 CLC 678, 1996 SCMR 781.

of the simplest legislation, consisting of only 6 sections.[78] Pakistani legislature may follow this Australian model for making a draft and introducing it in the parliament.

[78] Maintenance, Champerty and Barratry Abolition Act, 1993.

CONCLUSIONS

In conclusion we may say that legislation be made to cure this chronic illness in our legal system. The law to be passed may appear something like the following:

Maintenance and Champerty Abolition Act, 2015

Preamble: Whereas it is expedient to abolish the ancient and now obsolete doctrines of maintenance and champerty, and to streamline and facilitate the charging of contingency fee and provision of third-party funding of litigation;

And Whereas it is crucial for supporting the deprived and underprivileged through litigation funding to protect themselves against injuries caused and to secure their rights;

Now, Therefore, it is enacted as follows:

1. **Name of Act.---**This Act may be called the Maintenance and Champerty Abolition Act, 2015.
2. **Commencement.---**It shall come into force at once.
3. **Champerty and Maintenance no longer civil wrongs or offences.---**Notwithstanding anything in the law for the time

being in force, champerty and maintenance are neither offences nor civil wrongs, and no contract will be declared void or unenforceable merely on grounds that it is champertous or involves an element of maintenance.

4. **Advocates, Lawyers and Third-Parties permitted to support and fund litigation.---**Any person may seek support from a lawyer, advocate, attorney or a third-person, private individual or company/corporation, to fund and finance his litigation and legal actions, whether this is in lieu of some kind of fee arrangement or the sharing of damages or cost awarded as a result of such litigation or legal action.

5. **Contracts based on funding and financing for litigation to be valid.**---All contracts concluded under section 4 shall be valid and enforceable.

THE PAST, PRESENT AND FUTURE POLITICAL RIGHTS OF MUSLIM WOMEN: A REFLECTION ON NIGERIA

Nimah Modupe Abdulraheem*

ABSTRACT

There has been low level of participation of Muslim women in politics in Nigeria as the largest proportion of women are perceived as members of supporters' club, clapping club and team of cheers in contrast to their male counterpart. This problem is not peculiar to Nigeria but pervasive, covering both Muslim and non-Muslim women alike. Peculiarities of Muslim women however, occupied a special spectrum across the nations due to various interpretations given to the Qur'an and Sunnah in matters concerning women. In the recent time, there has been a global cry for a greater participation of women in politics and decision making to reflect the democratic level of the nations across the globe, particularly as democracy is a vital tool for the attainment of sustainable development. This paper therefore argues that, although the primary role of women in Islam is that of being a mother and dutiful wives to their husbands, Islam as a religion, does not limit their roles to domestic and family matters. It

*permits them as members of the society to participate in other societal activities including politics, in so far as such would not affect their primary roles in life. The paper will at the end conclude that Muslim women have the capacity to contribute to the development of the society and therefore deserve more roles than what is currently obtained in the society***.**

Key words: Muslim women, Political rights, Reflection, Nigeria

INTRODUCTION

For some time past, there has been low level of Muslim women participation in politics in Nigeria. This problem is not limited to Nigeria but pervades Muslim countries across globe. The tide is however changing in some Muslim countries[1] as more and more women in many such countries like Algeria, Tunisia, Iran, Pakistan, Malaysia, Indonesia and Egypt have made tremendous progress in terms of their participation in politics and decision making over the years, especially after the fourth Beijing Conference.[2] In these and

[1] Women's Participation and the Political Process in Nigeria: Problems and Prospects. Http://www.academicjournal.com).
[2] Mapping of the situation of women in politics, Algeria, Morocco and Tunisia, http://www.womenpoliticalparticipation.org. Accessed on 11/1/2012 P. 7.

many other Islamic countries, Muslim women are now expressing their views on matters concerning politics in all spheres of life demonstrating that women have a vital role to play in the development of Islamic state. It can therefore be said that, there is an overwhelming increase in participation of women and Muslim women in particular in politics now than before. Although, involvement of women in politics in Nigeria is largely noticeable in voting and sometimes in supporting other fellow women and political parties of their choice, this participation has however not translated into women representation at the various levels of government. In the recent past, women, particularly, Muslim women have been making concerted efforts to raise their voice and prove to the world that their place is not restricted to the kitchen. They are capable of contributing to the development of the society, be it in the field of politics, governance, management, economy and commerce. They say it loud and clear that what men can do, women can equally do it if given equal opportunity. This paper therefore aims to examine the political rights of women in Islam with a view to determining the reality of Muslim women participation in politics. It also aims to put on the scale of Islam the agitation and the

claim of women of eligibility to lead without offending the principle of their faith.

POLITICAL RIGHT OF WOMEN UNDER VARIOUS LEGAL INSTRUMENTS

This segment of the work discusses the guarantee of the political right of women generally, .Muslim and non- Muslim alike under various legal instruments and other instruments which are peculiar to Muslim women specifically. It therefore means that the discussion under this segment is divided into two, namely, political right of women under various human rights instruments and political right of women under Islamic law.

Political Right of Women under various Human Rights Instruments

The Universal Declaration of Human Right (UDHR),[3] is the human right instrument proclaimed by a Universal International Organization. The General Assembly through the preamble to the instrument proclaims the instrument among other things to serve as the common

[3]Adopted 10 December 1948. G.A, Res. 217 A (iii), UN Doc. A/810 at 71 (1948).

standard of achievement for all people and all nations[4]. Similarly, the preamble contains the basic human rights by recognizing the inherent dignity, equality and inalienable rights of all members of the human family. Article 21 of the instrument specifically guarantees the right of everyone to equally participate in the government of a country either directly or through freely chosen representative. Although the instrument is not legally binding, it is universally acceptable by all states and thus become a common reference in human rights for all nations.

Similarly, the provisions of the International Covenant on Economic, Social and Cultural Rights[5] (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR)[6] elaborate and complement the basic human right contained in the Universal Declaration of Human Right. The two instruments were signed and ratified by Nigeria[7]. Article 1 of the two instruments respectively provides for the right of all persons to freely determine their political

[4] See the last Paragraph of the Preamble to the Universal Declaration of Human Rights (UDHR)

[5] Adopted and opened for signature, ratification and accession by the General Assembly Resolution 2200A(XXI) of 16th December 1966 entry into force on 3rd January 1976

[6] Adopted and opened for signature, ratification and accession by the General Assembly Resolution 2200A(XXI) of 16th December 1966 entry into force on 23rd March 1976

[7] Nigeria ratified the two Conventions on 29th July 1993

status among other things. Further to the above provisions, Article 3 of the ICCPR obliges state parties to ensure equal right of men and women to the enjoyment of all civil and political rights set forth in the instruments.

In the like manner, the Convention on Elimination of All Forms of Discrimination against Women (CEDAW), otherwise referred to as the Women's Convention[8] makes it mandatory for state parties to take appropriate measures to eliminate discrimination against women in political and public life of the country under its Article 7. It further mandates them to ensure that women are given equal right as their male gender to contest for all eligible posts[9] and to participate in formulation of government policy and the implementation thereof, and the right to hold public offices and perform all public functions at all levels of government.[10] Their right to participate in non-governmental organizations and associations concerned with the public and political life of the country is also guaranteed.[11] In the same vein, Article 8 provides for equal opportunity of both males and females to represent

[8] Adopted 18 Dec. 1979, entered into force 3 Sep. 1981, G.A Res. 34/180, 34 UN GAOR, supp. (No 46), UN Doc. A/34/46, at 193 (1979), reprinted in 19 ILM 33 (1980).
[9] Article 7 (9)
[10] Article 7(b)
[11] Article 7(c)

their government at the international level and to participate in the work of international organizations. The Convention is a major milestone in the realization of human rights of women[12] being the first international instrument to deal comprehensively with the condition of women. Nigeria signed and ratified the Convention.[13].

Other international human rights instruments that seek to protect the political right of women in Nigeria are the Convention on the Political Rights of Women[14] and the Beijing Declaration and Platform for Action Fourth Conference on Women.[15] Article 1 of the Convention entitles women to vote in all election on equal terms with men without any discrimination while Article 2 provides for the right of women to hold public office and to exercise all public functions established by national law on equal terms with men without any discrimination. Similarly, Paragraph 13 of the Beijing Declaration requires the empowerment and the full participation of women in all spheres of decision making on the basis of equality.

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[12] 0gwu J, "Women in Development: Options and Dilemmas in the Human Rights Equations." In Kalu A & O sinbanjo Y (eds) *Perspective on Human Rights,* Lagos, Vol. 12, Fed. Ministry of Justice, P.143.

[13] Nigeria signed in April 23 1984 and ratified in June 13 1985

[14] Adopted by the United Nations GA on 20th December 1952 and opened for signature on 31st March 1953 (U.N.T.S. 135). It entered into force July 1954.

[15] Beijing Declaration and Platform for Action Fourth Conference on Women, 15 September 1995, A/CONF.177/20(17October 1995) and A/CON,177/20/Add.1 (1995)

At the regional level, the African Charter on Human and People Rights[16] and its Protocol on Women's Rights, otherwise referred to as Maputo Protocol,[17] equally guarantee the political rights of women in Nigeria. Article 13 of the African Charter guarantees the right of every citizen to participate in the government of his country either directly or through the freely chosen representative in accordance with the law. Similarly, Article 9 of the Protocol to the Charter guarantees equal participation of women in political life of their countries through affirmative action, enabling national legislation and other measures.[18] It also guarantees the right of women to participate in all election without any discrimination[19], the right to be represented equally at all levels with men in all electoral processes[20] and be equal partners with men at all levels of development and implementation of state policies and development programs[21]

At the national level, Section 15 of the 1999 Constitution of the Federal Republic of Nigeria provides for the political objectives of the

[16] Adopted 27 June 1981, entered into force 21 Oct. 1986, O.A.U. Doc. CAB/LEG/67/3/Rev.5, reprinted in ILM 58 (1982); 7 HRLJ 403 (1986). Nigeria signed the document on 31st August, 1982 and ratified on 22nd July, 1983.
[17] Adopted by the Conference of Heads of State and Government Maputo-Mozambique 11 July 2003, came into force on 25 November, 2005. Nigeria signed the document on 16th December, 2003 but did not ratify same.
[18] Article 9(1)
[19] Article 9(1)(a)
[20] Article 9(1)(b)
[21] Article 9(1) (c)

state when it provides under section 15(2) that the national integration of Nigeria shall be encouraged and that discrimination on the grounds of sex, place of origin, religion, status, ethnic or linguistic association or ties is prohibited. This section should be read in conjunction with the provision of Section 14 of the Federal Republic of Nigeria, which provides that Nigeria state should be based on the principle of democracy and social justice. The section went further to provide that Sovereignty of Nigeria state belong to the people of Nigeria,[22] male and female alike. It is from the people that the government through the Constitution derives all its powers and authority to rule. In addition to the above, the provision went further to provide that the participation by the people in their government shall be ensured in accordance with the provisions of the Constitution[23]. In view of the phrase *'in accordance with the Constitution'* connotes men and women in Nigeria are entitled to participate in the government since the Constitution itself prohibits discrimination[24].

[22] Section 14(a) 1999 Constitution.
[23] Section 14(c) 1999 Constitution.
[24] See Section 42 of the 1999 Constitution of the Federal Republic of Nigeria.

POLITICAL RIGHT OF WOMEN IN ISLAM

There are divergent opinions among the Islamic scholars on the political right and participation of women in politics. This therefore generates a serious controversy as to whether a woman occupies the same position in the area of politics or not. The two sides quoted different verses to support their arguments. Although these arguments are not the focus of this work, the supporting verses are key to the discussion. The antagonists of women to hold political positions quote the following verse among others to support their argument: "Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means."[25]

This paper is of the view that the above Qur'anic verse does not in any way restrict Muslim women from participating in politics and decision making of the country, rather it explains the responsibility of a man towards his family. This responsibility as explained by the Qur'an falls within the family and cannot be interpreted and generalised to cover the whole affairs of the society. Hence, the man's obligation towards his family does not in any way

[25] Q4: 34

restrict the right of a woman to participate in politics and affairs of her community. The woman only needs to engage in a fruitful discussion with her partner in such a way that mutual consensus would be reached between them.

Apart from the above Verse, the antagonists also supported their position with the hadith of the Prophet which reads that: "A nation whose affairs are led by a woman shall not succeed."[26]

It is also the view of this paper that the hadith in question speaks of success but does not entirely prohibit participation in governance. However, the argument regarding the qualification of a ruler in the contemporary Islamic society has been a subject of discussion in another work[27]. It is therefore the view of this paper that the controversy generated by the scholars on the political status of a Muslim woman in Islam may probably be due to the narrow perception of the role of women, through narrow interpretation of Islamic injunctions dealing with women issues , such as the ones

[26] Sahih Bukhari (Muhsin han's trans). Vol 1 x. hadith 219
[27] See Abdulraheem N.M, "Women Governance in Nigeria. Religion and Politics as Challenges" in Nigerian Journal of Food, Health and Drug Law, Vol.3 No.1, 2010 Published by Faculty of Law, Kogi state University, Ayingba, Nigeria, Pp 39-48

quoted above.[28] Hence there is a serious argument as to what the specific roles of women are in the society. This paper does not in any way dispute the fact that women primary role is that of bearing and rearing of children and general management of the home.[29] This however does not mean that a woman should always be confined to the four walls of the home. Admittedly, the Qur'an says:

> And stay in your houses, and do not display yourselves like that of the times of ignorance, and perform As-Salat and give Zakaat and obey Allah and His Messenger. Allah wishes only to remove evil deeds and sins from you, O members of the family of the (Prophet) and to purify you with a thorough purification[30].

By no means does this verse prohibit women from going out to contribute to the development of the society. Muslim scholars have diverse opinions on role of Muslim women in Islam, while some

[28] Zeenath K, *Political Participation of women, Contemporary Perspectives of Gender Feminists and Islamic Revivalist* (1997) Noordeen Publisher, Kuala Lumpur P. 19.
[29] Iqbal S*, Women and Islamic Law* (1997), Adam Publisher Delhi, P. 10. See also understanding the Role of Muslim Women http://www.warwick.ac.uk accessed on 11/1/2012.
[30]Q33:33

believe that the role of women is basically at home, that is bearing, rearing of children and general management of the home, others believe that apart from their basic roles, they can still participate in outdoor activities including politics. Notwithstanding this however, the political right of women in Islam have been traced to be as old as Islam itself. A Muslim woman is permitted in Islam to engage in politics just like her male counterpart, provided such engagement will not be detrimental to her basic roles in life. As a member of the society, she is entitled to be a member of legislative or executive arm of the government by involving herself in the consultative council of the Head of State[31]. As regards judicial appointments, the consensus of all the jurists is that a woman cannot be a judge (*Qadin*)[32] following the principles that one cannot be a judge in a matter which one cannot be a witness, especially, criminal matters. *Abu Hanifah* held that a woman may become a judge in matters in which she is competent to serve as a witness, (this indicates all matters) except *hudud* and *Qisas* cases. On the other hand, *Ibn Jabir al – Tabari* and *Ibn Hazm* held that a woman may become a judge in all types of matter since

[31] Iqbal S, *Women and Islamic Law* P. 83.
[32] Nasir bn 'Aqeel bn Jaseer *Al Qadai Fi'ahdi 'Umar bn Khattab* (1994/1414) Maktabah At-Tawbah press, Riyad, Vol.1, 2nd ed. P.212

emphasis regarding qualification for the post of Judge is knowledge of *Shariah* and ability to make *ijtihad*[33]

Apart from the position of a judge mentioned above, the protagonists of women holding political post are of the view that both men and women in Islam are equally responsible for restructuring and reforming the society as both are regarded as vicegerent of Allah on earth[34] so far as it does not harm the structure of the family. The Qur'an says: "Believer men and women are protectors, one of another: they enjoin what is just and forbid what is evil."[35] In another verse, the Qur'an says: "Then the Lord accepted their prayer and answered them: Never will I suffer the work of any worker among you to be lost, whether male or female, the one of you being from the other."[36] Similarly, the Qur'an provides:

> Surely, those who submit (to God) men and women, those who believe, men and women, those who obey, men and women, those who are patient, men and women, those who are modest, men and women, those who fast, men and women, those who guard their modesty men and women and

[33] Ibid
[34] See Qur'an 2 :30
[35] Q 9: 71
[36] Q 3: 195.

> those who remember their creator, men and women God has prepared for them forgiveness and great reward.[37]

The above verses testify eloquently and are emphatic on the issue of equality of men and women in Islam, this is established beyond doubt. Although the Qur'an is silent on specific issues relating to human endeavours, it however places the two genders on the same pedestal in relation to any religious or mundane activities. Allah neither sleeps nor slumbers and was not mistaking in revealing the verses, nevertheless, the affairs of the Muslim community are left in the hands of generation after generation to decide according to the prevailing circumstances.

It is pertinent to note at this juncture that in Nigeria, there is cultural classification of gender roles into productive and reproductive functions with the former assigned to the male and the latter to the female. This belief was deeply rooted in the cultural beliefs and values of the society, as a result of which women generally and Muslim women in particular suffer undue discrimination, inequality and exclusion in the field of politics and decision making of the country. There is no evidence that Islam makes such water-tight compartment or division. Thus, political right of Muslim women in

[37] Q. 33: 35

Nigeria has been endangered by historical gender inequality.[38] To further buttress the position taking by this work, it is pertinent at this juncture to examine the political activities of Muslim women in the cradle of Islam.

POLITICAL ACTIVITIES OF WOMEN IN THE EARLY DAYS OF ISLAM

As earlier established, men and women are equally responsible for the reformation of the society whether in the area of social, political or educational development. This in essence, translates to the fact that Muslim women like their male counterparts possess equal rights to voice out their opinions on any matter that concerns the society. History speaks volume of political activities of women during the life time of the holy Prophet and the four rightly guided caliphs. It was sooner after this period that the women status and roles began to witness a decline in their identity, dignity and their rights as women generally as a result of failure to apply Islamic principles as taught by the Prophet. There are many examples to support this view both within and outside the family life of the Prophet. The following will suffice our purpose.

[38] Women's Participation and the Political Process in Nigeria: Problems and Prospects.

Firstly, *Khadijah*, the wife of the Prophet and the popular wealthy *Makkah* woman was a successful business woman. She was so reputed in business that she employed male and female members in her business firm which operated within and outside *Makkah*. She engaged the Prophet in business trip to Syria. She was known for her support for the Prophet. When the Prophet trembled by his first experience of receiving the message, she comforted him and that had its impact on the stability of the society.[39] She also supported Islam at its infancy with her wealth. Even though she died before the establishment of Islamic empire in *Madinah,* she is recognized and known for her regular supply of materials and political backing to Muslims at that time[40].

Secondly, Umm Salmah was one of the women who left *Madinah* for *Makkah* to perform hajj but they were prevented as a result of which there was the *Hudaibiyyah* truce between the believers and the non-believers after which Muslims returned to *Madinah* without performing Hajj. Many Muslims understandably were frustrated to the extent of disobeying the directive of the Prophet to perform the rites

[39] Ibn Kathir, *Abridgment of Prophet Muhammed Biography*, (2007),Egypt,Pp.26-29
[40]Sa'd Yusuf A. A,, *Rijaalu wa nisaahu hawla-r-Rasu*l,(2010) Daaru-l- fajr lith-thuraath, 2nd ed., P.439

due. The Prophet confided in her that the disobedience of his order was an invitation to disaster. She advised the Prophet to carry out the rites. As he did, the Muslims followed him in the observation of the rites.[41] She is therefore on record as having advised the Prophet on the treaty of hudaibiyyah in the manner that averted disobedience to him by the companions,[42] a situation which would have gone down the history forever[43] and impact negatively on the religion of Islam. Also it was Umm Salmah who demanded that nothing was heard in respect of the efforts of women in hijrah and Q3:194 was revealed.[44]

Thirdly, the contribution of *A'isha*, the wife of the holy Prophet and the Mother of faithful to the development of the administration both during and after the life of the Prophet cannot be over emphasized. Her distinct knowledge of interpretation of the *Qur'an* and Islamic law generally assisted the Muslim *Ummah* at large. Also, *A'isha* delivered *Qur'anic* lectures and instructions to men behind the

[41] Muhammad-al-Khadariy, *Nurul yekeen fi sirah sayyid limurisalin*, Dar fitr, Lebanon, P.191
[42] Ibn Kathir, Vol.7, P. 182
[43] Iqbal S, *Women and Islamic Law* P. 88. Kamali M.H, *Freedom, Equality and Justice*. P. 102.
[44] Ibn Kathir, *Tafsir li Qur'an al-Azim,* Vol. 1, Isa'h al babiy al halaby & co, Egypt, P.441. see also Ahmad As-Sawiy al- Malikiy, Hashiyattul-li 'allamah as-sawiy, Vol.1, P.263

curtain in the Prophet's home.[45] Her knowledge of *Qur'an* and *Hadith* created a special recognition for her, especially, during the pilgrimage considering the number of male and female who gathered round her for knowledge[46]. It was on record that her students later became *Immams* and leaders who molded the society at a later time.[47] Some of her students were *Abdullahi ibn Zubair*[48], *Abu Musa al Ash'ariy* and a good number of others. In fact *Abu Musa*, while commenting on *A'isha's* intelligence stated that, whenever any of the Companions of the Prophet sought for clarification on any problem or question relating to any field of Islamic law, *A'isha* readily and satisfactorily made provisions or answers to such question or problem put before her.[49] *A'isha's* political involvement during and after the life of the Prophet recorded a positive influence in the Islamic administration of the entire Ummah.

Fourtly, Umm Haniy, Caliph Ali's sister and the Prophet's cousin gave refuge to a non-believer in her house, when his brother, Ali got to

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[45].Q33:35
[46]See foot note 29
[47] Iqbal S*, Women and Islamic Law* P. 88. Chaundry M.S Women's Right in Islam P. 149. See also Kamali M.H, Freedom Equality and Justice P. 102.
[48] A'siha's nephew, that is the son of Asmau, bint Abubakr (A'isha's sister)
[49] Ibn Khathir, Vol.8,P.81. Additional information was received from personal interaction with Hon. Justice M.A Ambali, the retired Grand khadi, Sharia Court of Appeal, Ilorin, Kwara state Nigeria.

know of this, he insisted on killing the unbeliever. She took the matter to the Prophet and the Prophet replied: "We have given protection to whosoever you have protected". This incident demonstrated the confidence the Prophet reposed on women and preferring her stand to Ali, both of whom were cousins to the Prophet. The Prophet trusted her that she would never give refuge to someone with harmful character. This instance is another way by which Muslim women influence the political stance of the *Ummah vis-a-vis* the surrounding circumstances

The political voice of women was not only valuable during the life of the Prophet, they were also allowed to participate in discussions with the Prophet on public and family matters. At times, the Prophet himself sought the advice of women. He was always consulting *Ummu Waraqa bn Abdullah* on various matters.[50] Furthermore, the directive of Caliph Umar ibn Al-Khatab that soldiers should not stay in war front beyond four months was based on the counseling of Hafsah bint Umar[51]. It was on record that a slave woman argued with the Prophet when the Prophet advised her to return back to her husband. She said "O Prophet! Do you order me? He replied that: he was not

[50] Ibid. See also Iqbal S, *Women and Islamic Law* P. 88.
[51] Jalalud Din As-Suyuti, Tarikhul Khulafai,(1974/1494) Darul fikr, Lebanon, P.131

making an order, but was only making a recommendation. She replied, if this is a recommendation, I do not wish to go to him"[52].

Furthermore, the *Qur'anic* injunction in respect of *Zihar* was revealed as a result of a woman (khawlah bint Thalaba) protest against her being wrongly divorced in pagan manner of *Zihar* by her husband. She contested against the process of her separation, prayed to Allah and her prayer was accepted. Then, the Qur'an was revealed[53]. "Allah has indeed heard (and accepted) the pleads with thee concerning her husband and carries her complaint (in prayer) to Allah."[54]

In addition to the above evidences, an old woman rose to prevent *Umar,* the second Caliph of Islam during his life time, from attempting to fix an amount of *Mahr* since the Prophet did not do it. *Umar* realized this and dropped the idea. He announced publicly that he (*Umar*) was wrong[55]. *Umar* also allowed a woman *Ash-Shafwu bint Abdullahi al Adawiy* for her intelligence to voice her opinion publicly, involve her in consultation[56] and appointed her as a market superintendent. She was assigned the responsibility to supervise the

[52]Riyaadus-Saliheen, Maktaba li ' Ilm Hadith 252, P.122
[53]Tafseer Ibn khathir, (2005),Darul-Aafaq Al-Arabiyyah,Cairo, Vol.4 1st ed. P.448
[54] Q 58:1.
[55]Kamal Ibn Sayyid Salim, (2003) Saheeh Fiqh Sunnahmaktabatu-Taofiqiyyah, Cairo, 1st ed.
[56] Iqbal S, Women and Islamic law, P. 88

affairs of the market of *Madinah*. The woman was recognized for her intelligence, honesty and capacity to rule.

These instances in the early days of Islam evidenced the fact that men and women equally participated in political activities regardless of gender and that superiority is only based on piety and good character.[57] Hence Muslim women are eligible to hold political positions in the like manner as their male counterparts.

MUSLIM WOMEN AND POLITICS IN SOME CONTEMPORARY MUSLIM SOCIETIES

As previously discussed, the recent involvement of Muslim women in politics is not a new phenomenon, it has been in existence since the time of the Holy Prophet and his rightly guided Caliphs. Before now, some Muslim countries practiced questionable system of democracy as they left no space for women to participate in politics based on the faulty assumption that Muslim women were not capable of expressing themselves in the political platform.[58] For instance, some of the arguments usually raised against women are that: "Women are affectionate and emotional and have weaker nerves – men, however,

[57] Musnad Imam Ahmad Ibn Hanbali vol. 7. Dar li fikr lilta'at 1994 P. 127.

[58] Understanding Gender Roles http://www.waowickac.uk).

are wise and intellectual and have strong nerves, which make them more qualified to strive, struggle and campaign against the odds of everyday life".[59]

Today, some Muslim women in some popular Islamic countries have recorded impressive achievements in politics and leadership as discussed later in this paper. In Nigeria, Muslim Women are often prevented or discouraged from participating in politics and decision making of the country. This exclusion generally debar them from participating or contributing at the decision making level which may affect family or community at large. As such, they are prevented from taking active role in government cabinet where major decisions that affect the country are to be taken.[60] Many use religion to discourage them and the few of them who refused to be discouraged do not receive good names from the society. They are normally regarded as bad Muslims and of low morals that could not but

[59] Allamrah Muri, quoted in Shireen, *The position of women in Shia Iran: Views of the Ulama in Women and family in the Middle East: New Voices of Change* (Elizabeth Warnock Fernea, ed. 185: This is quoted from Eissa D, *Constructing the notion of male superiority over women in Islam. The influence of sex and gender stereotyping in the interpretation of the Qur'an and the implications for a modernist exegesis of rights* P. 18).

[60] Sada I.N. & Ors "Shariah and the Rights of Muslim Women in Northern Nigeria".P.52

compromise their religion[61]. The reflection of this can be seen in the number of Muslim women occupying elective or appointive positions in the country. In contrast some men find it difficult to have their wives hold a different opinion from theirs as they believe that such wives must toe their husbands' line of political thinking. In some instances, such approach has caused a break in matrimonial relationship or even greater consequences. For instance, Mrs. Lami Sadu was divorced in 1999 for having the audacity to vote for a particular party against her husband's wish. In the same vein, in January 2011, Hajia Halima Tijani was battered and her elbow broken for daring to contest for a political position.[62] Aside this, Women cannot afford the kind of money thrown around by their male counterparts during campaigns in the contemporary world.

The above assertion does not intend to totally dismiss the participation of Muslim women in politics and decision making of the country. Some of them have even been actively involved in politics to the extent that the country had at one time or another elected or appointed them as Ministers, Deputy Governors, and Senators among other positions. Nonetheless, the contention of this paper is that the

[61] Ibid P.53
[62] Women and 2011 Elections in Nigeria http://www.boelnigeria.org).

number of those who hold or have held political positions is negligible when compared with their numeric strength in the country. For instance, the political activities of Queen Amina of Zazzau in the Pre-colonial period cannot be overestimated. Also the activities of Hajia Gambo Sawaba, Hajia lateefat Okunnu and Sinat ojikutu, who held position of Deputy Governor in Ogun and Lagos states respectively, Architect Halimat Tayo Alao was a Minister for state for Environments in 2003/2007, and Prof. Rukayat Ahmed Rufai was a Minister for Education in 2011/2014. In addition Hajia Zainab Maina is the current Minister for Women Affairs. Recently, in the just concluded election in March 22, 2015, Lagos state has just elected a Muslim woman as the Deputy Governor for the state. She is expected to be sworn in on May 29, 2015. Also in the last concluded election, the country almost produced Barr. Jumai -al –Hassan as the first female and first female Muslim Governor from Taraba state. She unfortunately lost the position to her male opponent after her victory was erroneously proclaimed. She was said to lose the election on the basis of religion. At the Federal legislative house, there were Senator Rukayyah Gbemisola Saraki, Hon. Nimata Oba, and currently, Hon. Abike Dabiri and Hon. Mulikat Akande among few others. In the same

vein, the research carried out by Jemila Nasir supports the above position of this paper. According to her, in Shariah states of Northern Nigeria,[63] out of 36 space available at the Federal Senate across the Shariah states, only1 was occupied by female. In the House of Representatives, out of 137 space available to the states only 2 were occupied by female, while only 3 out of 12 was recorded for Federal Minister. Similarly, for the position of Governors and Deputy Governors, 0 was recorded against 24, while at the various Houses of Assembly, only 6 seats was occupied out of 360 available space. In summary, out of a total number of 569 positions available at various level, only 12[64] were occupied by female, a number which is pitiful according to Jemila Nasir.[65]

In reality however and as seen from the earlier quoted injunctions, it could be categorically stated that Islamic law does not prevent the female gender from participating in politics and decision making of a country. Evidence revealed that the Prophet used to seek

[63] The states are according to the research Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano,Katsina, Kebbi, Niger, Sokoto, Yobe and Zamfara.
[64] A number which a times may include non- Muslim women, especially in states like Bauchi, Borno, Gombe, Kaduna, Niger and Yobe where the inhabitants are inclusive of non- Muslims and are equally eligible to vie for the positions.
[65] See genrally, Nasir J.M, "Shariah Implementation and Female amuslims in Nigeria states in Ostien P, Shariah Implementation in Northern Nigeria, 1999-2006, Vol. III, Spectrum Books, P88

the opinions of the women during his life time and many of them made useful and relevant opinions. To this end, women under Islamic law are allowed to hold key positions in politics except for the post of President, a constraint which is brought about by the nature of creation. Even this has equally being a subject of controversy among Muslim scholars as many women in some Islamic countries have risen to become leaders of their respective countries, though Nigeria is yet to get to that level. It is on record that some of the popular Islamic countries at one time or another had women as their leaders while others actively engaged in politics. For instance, Indonesia elected Megawati Sukanmoputri as the President, Pakistan had Benazir Bhutto as their Prime Minister, and she was recorded as the first Muslim woman to lead a Muslim State. In fact, it was reported that the election was fixed on her expected date of delivery, she contested few days after delivery and recorded electoral victory. Bangladesh had Kheleda Zia and Sheikh Hasina as Prime Ministers. Also, Afghanistan since 2002 has the highest number of female politicians and Saudi women are currently allowed the right to vote. The Muslim majority region of Kosovo unanimously elected President Atifete Jahjaga on April 7, 2011 election. Similarly, 27.1percent of the Ministers in Iran are

women, while 3.4percent are in the parliament. In the same vein, nearly 1/3 of parliament members in Egypt[66] are women, to mention a few. Recently also, in October 2014, Sweden appointed Aida Hadzialic as minister for education. She is on record to be the first female Muslim to occupy the position of a minister in the state and therefore set a role model for other Muslim politician in that state. Although Sweden is not an Islamic state, Muslim in that state constitute 450,000 and 500,000 of the Sweden's 9 million people.

In furtherance of participation of Muslim women in politics, Hassan al Banna of Egypt established a Muslim Sisterhood and mobilized women for active participation in politics. The organisation supported fully the political involvement and activism of such women like Zaynab al - Ghazzali, who was imprisoned for 6 years and brutally tortured during the regime of Naseer. Zaynab was an Islamic activist and known for her great devotion for revival of Islam. Her sufferings are a testimony of her spiritual strength and example worthy of emulation for the contemporary Muslim women in politics.[67] The Islamic revivalist under the leadership of Hassan Turabi of Sudan did

[66] The 5th Populous Islamic Country.
[67] Zeenath K, *Political participation of women, contemporary perspectives of Gender Feminists* P. 24. See also Pp. 59 – 60

not only endorse in theory the full participation of women in politics but also made it empirically a reality[68].

In 1986, two women in persons of Suad al-Fatah and Hikmat Hasan Syed Ahmed, were members voted into the parliament under the auspices of the Islamic Natural Front (INF) an organisation headed by al-Turabi himself. Some years later, 10 percent of the Sudanese Parliament consisted of 3 women Ministers and one Judge at the Supreme Court. The government has further established quotas to increase the number of women participation in politics. In an interview conducted by Zennath Kausar, Al –Turabi, despite giving full support to women participation in politics, he however did not deny the fact that preference should be given to the family first before any other mundane matters outside the home.[69] In Tunisia, Rashid al Ghamudin of Islamic Movement opined that the number of women in politics has increased from what it used to be.[70]

In view of above instances, this work submits that the position of the Muslim women in Nigeria vis-a–vis their participation in politics and decision making of the country should be reconsidered,

[68] Ibid.
[69] Ibid. P. 25
[70] Ibid, P. 27.

after all, their political right was recognized during the early era of Islam and throughout the period of the rightly guided Caliphs who governed according to Islamic law, therefore, to insist on Islam as the basis to deprive women of political rights in Nigeria amounts to hypocrisy. Women therefore have roles to play in the society, be it legislative, security, law and order, health and so on. Depriving them of political participation and holding political posts may amount to a loss or shortage to the entire Muslim community as their other female counterparts from other religions are not disallowed. Equally, depriving them may be due largely to the ambitious Muslim male counterparts who may not be comfortable or could not withstand the competition from female gender and decided to black mail them using a verse of the Qur'an which focused mainly on maintenance.[71]

CONCLUSIONS

This paper discusses Muslim women and their rights to participate in politics. It confirms and supports that the major role of women in Islam is that of bearing and rearing of children to boost the population of the Muslim *ummah* in particular and generally, to fulfill the essence

[71] Q4:34

of creation and procreation as ordained by Q4:1 (regardless of their faith in the day of judgment). However, it was succinctly argued that the role of women is not restricted to the four walls of the home because women, like their male counterparts, have key roles to play in the affairs of the society. The paper further postulates that in Islam men and women enjoin equal rights. It also enunciates unequivocally, the women activists and their roles during the life time of the Prophet and the rightly guided caliphs. The paper blamed the low pace of participation of women in the development of the society on the parochial interpretation of the relevant verses of the Qur'an and a time on the selfish attitudes of the male which has indeed pose serious challenges to active participation of Muslim women in politics.

This work therefore submits that the *Qur'an* is of universal application and its interpretation should not be restricted to the period of revelation or the time of the Prophet and the righteous guided caliphs or any particular age. Its general principles should be applied elastically to all the circumstances in any given age and place. Its application must equally be extended to the contemporary needs of the Muslim societies.[72] Although some scholars opined that women have a

[72] Ibid

clear guideline to stay at home and take proper care of children and other house management, they nonetheless agreed to the fact that women are free to get education and serve the nation but ruled out their right to participate in politics. Going by this argument, the question is: where a woman is educated by virtue of which she is entitled to serve the nation, how would she be able to serve if restricted to the four walls of her home? After all, her service to the nation is quite different from her service to the home. Hence, to shut them out of politics is to short change the entire Muslim community of their quota in the nation's cabinet. It is for this reason that the paper prefers the argument that Muslim women's right in politics should be preserved and respected

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