

## Siyāsah Shar'īyah or the Policies of Islamic Government

*Mohamad Hashim Kamali*

### Introduction

*Siyāsah shar'īyah* is a broad doctrine of Islamic law which authorizes the ruler to determine the manner in which the Shari'ah should be administered. The ruler may accordingly take discretionary measures, enact rules and initiate policies as he deems are in the interest of good government, provided that no substantive principle of the Shari'ah is violated thereby. The discretionary powers of the ruler under *siyāsah shar'īyah* are particularly extensive in the field of criminal law. The head of state and those who are in charge of public affairs, the *ulū al amr*, may thus decide on rules and procedures as they deem appropriate in order to discover truth and to determine guilt. With regard to the substantive law of crimes, too, the *ulū al amr* have powers to determine what behavior constitutes an offense and what punishment is to be applied in each case.

Many observers have expressed concern over the wide discretionary powers that rulers and judges enjoy under *siyāsah shar'īyah*. It is suggested that *siyāsah*, as such, defies effective control, and it is open to abuse, which would ultimately undermine the ideals of justice under the rule of law. One observer has thus considered *siyāsah* as "direct negation of what may be regarded as the second essential implication of the idea of the rule of law in a secular system—namely, the principle that the sovereign must not possess any arbitrary power over the subject."<sup>1</sup>

According to another critic, *siyāsah* has enabled the Islamic ruler to enact

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Dr. Mohammad Hashim Kamali is an Associate Professor in the Faculty of Law at the International Islamic University, Selangor, Malaysia.

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<sup>1</sup>Noel J. Coulson, "The State and Individual in Islamic Law", *International and Comparative Law Quarterly* 6, 1956, p. 52.

legislation, especially in the field of criminal law, under the guise of "administrative regulations." But in effect, the ruler enacted independent legislation in such areas as taxation, police matters, and the administration of justice, in general, which often interfered with, or severely circumscribed, the Shari'ah.<sup>2</sup>

Penalties imposed at the discretion of the ruler or the judge are known as *ta'zīrāt*. As a branch of *siyāsah*, *ta'zīr* (lit. deterrence) must differ according to the nature of the offense and the particular circumstances of the offender. The judge may thus determine the punishment of *ta'zīr* in each case according to his own observations and personal *ijtihād*. It has been suggested that the individual in such a system is exposed to official abuse against which he has no effective means of protecting himself.<sup>3</sup>

It is the purpose of this essay to delineate the arbitrary and legitimate uses of power in Islamic Law. My inquiry suggests that *siyāsah shar'īyah* is incompatible with the arbitrary and abusive exercise of power in any form. Furthermore, unlike the suggestion made by many authors, *siyāsah shar'īyah* does not preclude the possibility of the regulation and control of discretionary power through the medium of statutory legislation. On the contrary, it is contended that *siyāsah shar'īyah* encourages diligence and initiative on the part of the *'ulū al amr* to take all necessary measures that contribute to the ideal of government under the rule of law. Although the realization of an aware and God-fearing conscience on the part of the *'ulū al amr* is a cardinal principle of all Islamic teachings, it would seem patently unjustified to rely on the pious hope that God-fearing judges are immune to error.

## I

The 'ulama have used the term *siyāsah shar'īyah* for different purposes. Literally, it means a Shari'ah-oriented policy, or government in accordance with the Shari'ah. This is the widest meaning of *siyāsah shar'īyah* in the sense that it is free of the technicality that has developed around this expres-

<sup>2</sup>Joseph Schacht. "The Law," in G. Von Grunebaum (ed), *Unity and Variety in Muslim Civilization* (University of Chicago Press), 1955, p. 75. In this connection, it will be noted that prior to the introduction of modern legislative assemblies, government laws in many Islamic countries were entitled in such a way as to indicate their lower status vis-a-vis the Shari'ah. In the case of Afghanistan (and Iran), statutes were referred to as "*nizāmnāmah*" (code of regulations) or "*uṣūlnāmah*" (code of principles). "Qānūn," the modern equivalent of these terms, signifies that statutory law holds a higher status. A brief history of the development of such terms in Afghanistan is to be found in my book, *Law in Afghanistan: A study of the Constitutions, Matrimonial Law and the Judiciary* (Leiden: Brill), 1985, pp. 35 ff.

<sup>3</sup>In Joseph Schacht's assessment, *siyāsah shar'īyah* is an instrument of "ambiguity" and "arbitrariness" that enables the Islamic ruler to exercise his power "as he thinks fit." See his *An Introduction to Islamic Law*, (Oxford: Clarendon Press), 1964, reprint 1969, p. 54.

sion in the works of the *fuqahā'*. In its literal sense, *siyāsah shar'īyah* applies to all government policies, be it in areas where the Shari'ah provides explicit guidance or otherwise.

But in the usage of the *fuqahā'*, *siyāsah shar'īyah* implies decisions and policy measures taken by the imam and the *ulū al amr* on matters for which no specific ruling could be found in the Shari'ah. In this sense, *siyāsah shar'īyah*, as Khallaf observes, is tantamount to acting on *maṣlahah*, or public interest which the Lawgiver has neither upheld nor overruled.<sup>4</sup> *Siyāsah shar'īyah*, in other words, "denotes administration of public affairs in an Islamic polity with the aim of realizing the interests of, and preventing harm to, the community in harmony with the general principles of the Shari'ah even if it disagrees with the particular rulings of the *mujtahidūn*."<sup>5</sup> *Siyāsah*, in this sense, may entail adopting policies and enacting laws in all spheres of government, be it in the area of domestic or foreign relations, constitutional, fiscal, administrative or judicial affairs. All measures taken to ensure an efficient management of public affairs fall within the purview of *siyāsah shar'īyah*.<sup>6</sup> The only restriction in all this is that *siyāsah shar'īyah* must not contravene the Shari'ah itself.

According to Ibn Qayyim, *siyāsah shar'īyah* does not necessarily mean conforming to the explicit rules of the Shari'ah. In Ibn Qayyim's words, "any measure which actually brings the people closest to beneficence (*ṣalāh*) and furthest away from corruption (*fasād*) partakes in just *siyāsah* even if it has not been approved by the Prophet (ṢAAS) nor regulated by Divine revelation. Any one who says that there is no *siyāsah shar'īyah* where the Shari'ah itself is silent is wrong and has misunderstood the companions (*saḥābah*) . . ."<sup>7</sup>

*Siyāsah shar'īyah* is thus characterized by its essential harmony with the spirit and objectives of the Shari'ah, sometimes even at the risk of abandoning its letter. An illustration of this is the decision of 'Umar ibn al Khattab concerning the *mu'allafah al qulūb*, persons of influence whose friendship and cooperation were regarded beneficial for Islam. The Qur'an (al Tawbah 9:60) had assigned a share for them in charities which Caliph 'Umar discontinued, because, in 'Umar's widely quoted words, "Allah has exalted Islam and it is no longer in need of their favor." 'Umar thus departed from the letter of the Qur'an in favor of its general purpose, and "his ruling is con-

<sup>4</sup>Abd al Wahhāb Khallāf, *Al Siyāsah al Shar'īyah*, (Cairo: al Maktabah al Salafīyah, 1350/1931), p. 3.

<sup>5</sup>Ibid, p. 14.

<sup>6</sup>Ibid, p. 15.

<sup>7</sup>al Jawzīyah, Ibn Qayyim, *al Turuq al ukmīyah fī al Siyāsah al Shar'īyah*, (Cairo: al Mu'assisah al 'Arabīyah li al Tibā'ah, 1380/1961), p. 16.

sidered to be in harmony with the spirit of the Qur'an."<sup>8</sup> The original ruling of the Qur'an was considered to be no longer applicable because of the change of circumstances.

In a similar vein, Caliph 'Umar validated a triple *ṭalāq*, pronounced in a single utterance, to take place as three repudiations. 'Umar ruled this despite his knowledge of the Qur'an that "*ṭalāq* is only twice" (al Baqarah: 229), and of the fact that during the time of the Prophet (ṢAAS) and Abu Bakr, a triple repudiation uttered in a single pronouncement incurred only one *ṭalāq*. But since 'Umar saw that triple *ṭalāq* had become a wide practice among people, he introduced a ruling that held them responsible for the consequences of what they were doing.<sup>9</sup> As Ibn Taymīyah points out, 'Umar's *siyāsah* on this matter was designed to punish and deter those who paid little attention to the gravity of their deeds.<sup>10</sup> In validating triple *ṭalāq* as such, Caliph 'Umar departed from the letter of the Qur'an in favor of its general purpose and made a decision that was justified owing to the change of circumstances.

While discussing the different usages of *siyāsah shar'īyah*, it will be further noted that the *fuqahā'* have used this term in the sense of implying flexibility (*tawsi'ah*) for rulers and judges in their decisions. In this way, *siyāsah shar'īyah* is used to denote discretionary powers. When a decision is said to have been taken as part of the *siyāsah* of a ruler or a judge, it is tantamount to saying that it was a discretionary decision, provided, of course, it did not contravene the Shari'ah principles.<sup>11</sup>

The jurists of the later ages, (*al muta'akhhirūn*) however, have used the term *siyāsah shar'īyah* in a more restricted sense, that is, the administration of penalties meted out by rulers and judges in order to combat criminality and evil.<sup>12</sup> Rulers have thus ordered the killing of criminals who robbed the people's houses at times when calamities, such as fire, earthquake, and war, caused the occupants to escape danger, or when kidnappers terrorized people and inflicted suffering on the parents and relatives of the victim. But to confine *siyāsah* to the administration of penalties is not totally justified, for *siyāsah* has a much wider scope as it can equally apply in other areas of government. "Uthman, the fourth Caliph, for example, collected the text

<sup>8</sup>Abd al Rahmān Tāj, *al-Siyāsah al Shar'īyah wa al Fiqh al Islāmī* (Cairo: Maṭba'ah Dar al Talīf, 1373/1953).

<sup>9</sup>See Khallāf, *al Siyāsah*, pp. 8-9.

<sup>10</sup>Taqī al Dīn Ibn Taymīyah, *al Siyāsah al Shar'īyah fī Islāh al Rā'ī wa al Ra'īyah*, 2nd ed., (Cairo: Dar al Kitāb al 'Arabī, 1951), p. 52. (There is also an English translation of this work by Omar A. Farrukh bearing the title *Ibn Taymīyah on Public and Private Law in Islam*, Beirut: Khayat, 1966).

<sup>11</sup>Tāj, *al Siyāsah*, p. 28; Kallaf, *al Siyāsah*, p. 3.

<sup>12</sup>Khallāf *al Siyāsah*, p. 3.

of the Qur'an in one volume and ordered the burning of all other copies which had existed in miscellaneous forms so as to prevent interference with, and controversy over, the authentic text of the Qur'an.<sup>13</sup>

And finally, the 'ulama have used the term *siyāṣah shar'īyah* for a particular branch of Islamic learning. Several books have been written bearing the title *al siyāṣah al shar'īyah*, and they discuss topics that fall under the broad heading of government administration in all of its branches.<sup>14</sup> *Siyāṣah shar'īyah* in this sense bears close similarity to the two other expressions the 'ulama have commonly used, namely, *al aḥkām al sultānīyah*,<sup>15</sup> and *nizām al ḥukm*, both of which may be translated as "principles of government." Some of the earliest writings on this subject bear the title *al aḥkām al sultānīyah*.<sup>16</sup> It may be added further that a comparison of al Mawardī's *al Aḥkām al Sultānīyah*, with Ibn Taymīyah's *al Siyāṣah al Shar'īyah*, tends to indicate a shift in emphasis from a somewhat power-oriented system of government to a more Shari'ah-oriented polity, a tendency that is characteristic of Hanbalī jurisprudence in general. *Nizām al ḥukm*, on the other hand, is the more modern title for the literature in the field, and there are several reputable works of recent origin that appear under this title.<sup>17</sup>

## II

The Qur'anic authority of *siyāṣah* can be found in a number of its injunctions, especially those enjoining the believers to the promotion of good and the prevention of evil.<sup>18</sup> *Siyāṣah shar'īyah* is thus an instrument, in the hands of the *'ulū al amr*, with which to discharge this duty. But more specifically, the Qur'anic command, addressed to the believers to "obey God, obey the Messenger and those who are in charge of authority from among you" (al Nisā': 58) provides the necessary authority for *siyāṣah*. Obedience to

<sup>13</sup>Tāj, *al Siyāṣah*, p. 28.

<sup>14</sup>The Hanbalī jurists are particularly noted for their contribution to this field. Two of the most widely acclaimed works on the subject have both been written by Hanbalī 'ulama, namely *Taq al Dn Ibn Taymīyah* and *Ibn Qayyim al Tawzīyah*. Both have been frequently quoted in this essay.

<sup>15</sup>For a variant translation of the term, note Khalid Ishaque's article "Al-Ahkam al-Sultaniyyah," *Islamic Studies* 4 (1965), p. 273, where the term is somewhat awkwardly translated as "the laws of the authority."

<sup>16</sup>Note, for example, the Shāfi'ī Abū'al Hasan al Mawardī's (d.450/1058) classic, *Kitāb al aḥkām al-sultānīyah*, and Abū Ya'la al Farrā's book bearing the identical title.

<sup>17</sup>Note, for example, Mutawallī, *Mabādi' Nizām al Ḥukm fī al Islam* (quoted) below at reference no. 42; Zāfir'al Qāsimī, *Nizām al-Ḥukm fī al Shar'īah wa al Tārīkh*, (Beirut: Dar al Nafā'is, 1979).

<sup>18</sup>Note, e.g., the Qur'an (Āl 'Imrān: 104 and 100; al Tawbah: 71 and 124).

the *ʿulū al amr* is thus a Qurʾanic duty of the Muslims, provided the *ʿulū al amr* themselves are obedient to God and to His Messenger. Every Muslim must, therefore, comply with the dictates of *siyāsah sharʿiyah* since it must consist of measures that serve the ideals of justice and *maṣlahah*.<sup>19</sup>

*Siyāsah*, in its widest sense, has five purposes: the protection of life, religion, mind, lineage, and property.<sup>20</sup> The ʿulama are unanimous that the protection of these values constitutes the ultimate objective of the Shariʿah, despite the fact that a specific reference to these can be found neither in the Qurʾan nor in the Sunnah.<sup>21</sup> The consensus on these values is based not on a particular provision of the Qurʾan or the Sunnah but on the overall contents of these and the numerous commands and prohibitions designed to protect these values. The same can be said of the Qurʾanic verses, which enjoin certain behavior by the community in the pursuit of good and the prevention of evil: The good and evil are nowhere listed in the Qurʾan or the Sunnah, but they can be known through a general investigation of these sources. But even so, as al Shāṭibī points out, rights and wrongs cannot be known in detail in advance without referring to particular acts and their surrounding circumstances.<sup>22</sup> Hence, the *ʿulū al amr* must have powers to uphold and protect the values and objectives of the Shariʿah and be able to order punishment for conduct that violates the sanctity of these values. It is on the strength of this argument that some jurists have added to these five values a sixth, namely, the "elimination of corruption" so as to enable the ruler to penalize conduct that amounts to corruption, even if it does not violate any of the five values in question, and even if no specific ruling could be found for it in the Shariʿah.<sup>23</sup>

### III

Ibn Qayyim divides *siyāsah* into two types: unjust *siyāsah* (*siyāsah ḡālimah*), which the Shariʿah forbids, and just *siyāsah* (*siyāsah ʿādilah*), which seeks to serve the cause of justice. Since justice is the principal goal of (*siyāsah ʿādilah*), it is an integral part of the Sharʿiah and always in harmony with it. "We merely call it *siyāsah* because of the linguistic usage,

<sup>19</sup>Cf. Mohammed S. El-Awa, *Punishment in Islamic Law* (Indianapolis: American Trust Publications, 1982), p. 116.

<sup>20</sup>Tāj, *al Siyāsah*, p. 10.

<sup>21</sup>Cf. Mohamed S. El-Awa, "Taʿzīr in the Islamic Penal System," *Journal of Islamic and Comparative Law* 6, (1976), pp. 56-57.

<sup>22</sup>Abū Ishāq Ibrāhīm al Shāṭibī, *al Muwāfaqāt Fī Usūl al Sharīʿah* (Cairo: Maktabah al Tijāriyah al Kubra), II, p. 7.

<sup>23</sup>Ibrāhīm bin ʿAlī Ibn Farhūm, *Tabsirah al Hukām fī Usūl al Aqḍiyah* (Cairo: al Maṭbaʿah al Bahiyah, 1302) II, p. 106.

but it is nothing other than the justice ordained by God and His Messenger."<sup>24</sup> God Almighty sent messengers and scriptures to mankind in order to establish justice among people. When there are signs that indicate the path to justice, it is in accord with the Law of God to aim toward it.<sup>25</sup> For it is not in consonance with Divine wisdom to show us the way of attaining justice and then to forbid us from attempting it. Hence, "any path that leads to justice and fairness is an integral part of the religion and never contrary to it."<sup>26</sup> The Prophet (ṢAAS) occasionally ordered flogging, or doubled the amount of compensation in mitigated cases of theft, and gave orders to smash the container in which wine was found. Ibn Qayyim maintains that whoever sets free the accused, after taking his oath, stating that there should be no punishment without the testimony of just witnesses, even though the accused has a reputation for corruption and robberies, verily speaks contrary to *siyāṣah shar'īyah*.<sup>27</sup> It is not just *siyāṣah* to reject claims that are not accompanied by upright witnesses.

Indeed, the judge is authorized to admit witnesses of lesser qualification (*ghayr udūl*) if this proves to be the only way to protect the rights and properties of the people.<sup>28</sup> In their efforts to protect the people against aggression, the most capable of rulers have exercised intuitive judgment (*farāṣah*) and took decisions on the basis of circumstantial evidence (*amārāt*).<sup>29</sup>

In the area of taxation, just *siyāṣah* requires fairness in the levying of taxes and consideration to the ability of the taxpayer. Furthermore, the non-Muslim citizens (*dhimmi*) must be fairly treated and they must not be burdened with oppressive taxes that subject them to poverty and degradation.<sup>30</sup>

Oppressive *siyāṣah* (*siyāṣah ḡālimah*) is one that is founded on self-interest and indulgent pursuit of pleasure and wealth by the rulers. It is employed in the service of a few but inflicts harm on the rest of the community, whose needs and benefits are totally ignored.<sup>31</sup>

No policy can properly be called *siyāṣah shar'īyah* unless it observes the limits of moderation, which errs neither toward severity nor to laxity, for both lead to injustice and the loss of rights.<sup>32</sup> A just *siyāṣah* requires that the judge should not set well-known and dangerous criminals free merely because of insufficient evidence, but should detain them until the truth

<sup>24</sup>Ibn Qayyim, *al Ṭuruq*, p. 5.

<sup>25</sup>Ibid., p. 17.

<sup>26</sup>Ibid., p. 16.

<sup>27</sup>Ibid., p. 28.

<sup>28</sup>Tāj, *al Siyāṣah*, p. 43.

<sup>29</sup>Ibn Qayyim, *al Ṭuruq*, p. 28.

<sup>30</sup>Tāj, *al Siyāṣah*, pp. 40-41.

<sup>31</sup>Ibid., p. 44.

<sup>32</sup>Tāj, *al Siyāṣah*, p. 34.

emerges. It would be patently tyrannical, on the other hand, to exercise the same degree of severity with every accused person, especially the first-time offenders who have no criminal record.<sup>33</sup>

#### IV

The requirements of a just *siyāsah*, with regard to the selection and appointment of officials, as Ibn Taymīyah explains, have been laid down in the Qur'an (al Nisā': 58) as follows: "Surely Allah commands you to make over trusts (*antu'addū al amānāt*) to those who are worthy of them, and when you judge between people, you judge with justice." Ibn Taymīyah's widely-acclaimed book, *al Siyāsah al Shar'īyah fī Iṣlāḥ al Ra'ī wa al Ra'īyah*, as he says it on the very first page, is a commentary on this *āyah*. "Selection of officials," Ibn Taymīyah states on the same page, is the "occasion of revelation" (*sha'n al nuzūl*) of this *āyah*. It is a trust that is fulfilled only when selection is based on ability and competence. The author goes on to say that the phrase *tu'addū al amānāt* in this *āyah* has been interpreted by the following hadith: "When a person is entrusted with authority over the affairs of the believers, and he, in turn, delegates this authority to another while he could find a more competent person for the task, he has betrayed Allah and His Messenger."<sup>34</sup> On the same page, the author quotes 'Umar Ibn al Khaṭṭāb to have said: "Whoever delegates a public office to another for the sake of friendship or personal favor indeed betrays Allah and His Messenger and the believers."

Selection of officials is, of course, not the only purport of the *āyah* under discussion. The fact that the Qur'an refers to *amānāt* in the plural indicates that all forms of trusts—be it the responsibility of public office, abiding by one's promises and contracts, responsibility to give a sincere counsel, and one's duties towards others—are all within the gambit of *amānāt*.<sup>35</sup>

Fulfillment of trusts in this *āyah* is intended to nurture loyalty and confidence (*thiqah*) among the believers, for it is through honest dealing and awareness of one's duty toward others that *thiqah* and sincerity can become a reality of social life.<sup>36</sup>

Elsewhere, the Qur'an singles out two qualities, namely, strength and loyalty, to be the most desirable qualities in the selection of employees: "Surely the best of those you can employ is the one who is strong and loyal (*amīn*)"

<sup>33</sup>Ibid., p. 42.

<sup>34</sup>Ibn Taymīyah, *al Siyāsah*, p. 6.

<sup>35</sup>Muḥammad Al Bāhī. *al Dīn wa al Dawlah min Tawfīhāt al Qur'an al Karīm*, (Beirut: Dar al Fikr, 1391/1971), p. 356.

<sup>36</sup>Ibid., p. 357.

(al Qaṣaṣ:26). Strength in every *wilāyah* (delegation of power) is to be sought in the best of its relevant qualities. The strength of an army commander, for example, refers to his knowledge of warfare, and that of a judge to his knowledge of the Shari'ah. Loyalty, in turn, refers to three qualities: fear of Allah, refusal to neglect His commands for a small price, and lack of fear of men. As the Qur'an tells us: "So fear not people and fear Me and take not a small price for My messages." (Al Mā'idah:44).<sup>37</sup>

It is obligatory on the imam to depose an official who has failed to exert his utmost to prevent an evil (*mafsadah*) from the community. He must also remove from office a person of lesser ability in favor of a more competent one. There is disagreement, however, on the dismissal of one of the two equally capable persons in favor of the other. The preferred view discourages this as there is no benefit in it for the community, and it harms the person who is to be dismissed.<sup>38</sup>

No candidate for a public office must be given priority over others merely because he has requested it or because he is eager to obtain it. On the contrary, self-canvassing is prohibited in Islam. The Prophet is reported to have discouraged one of his companions, 'Abd al Raḥmān b. Sāmurah, who made such a request. The hadith is as follows:

"Do not solicit an office of authority O 'Abd al Raḥmān, for if it is given to you at your request, you will be left therein to your own resources. But if it is given to you after asking, you will be aided therein (by Allah)."<sup>39</sup>

On another occasion, when a group of people approached the Prophet (ṢAAS) with a request for a certain appointment, he answered emphatically: "By God we do not appoint to such work anyone who asks for it nor anyone who covets it."<sup>40</sup>

According to one observer, at present, anyone possessing local influence or wealth is free, regardless of his worth, to secure election to a legislative assembly. But under the foregoing enactments, only a person enjoying well-deserved and unsolicited esteem would have a genuine chance of success.<sup>41</sup> According to another observer, however, the *aḥādīth* under discussion con-

<sup>37</sup>Cf. Ibn Taymīyah, *al Siyāsah*, pp. 12-13.

<sup>38</sup>Shihāb al Dīn al Qarīfī, *Kitāb al Furūq*, (Cairo: Dar Iḥyā' al Kutub al 'Arabīyah, 1346), IV, p. 39.

<sup>39</sup>*Sahīh al Bukhārī*, Eng. trans. Muhammad Muhsin Khan, (Lahore: Kazi Publications, 1979), IX, p. 194.

<sup>40</sup>Ibid., IX, 196.

<sup>41</sup>Muhammad Asad, *The Principles of State and Government in Islam* (Berkeley and Los Angeles: University of California press, 1961), p. 47.

stitute *tashrī 'zamanī*, or temporary legislation, which was appropriate at the time but which may not be suitable, or even feasible, under modern conditions. Bearing in mind such factors as the complexity of modern life, densely populated cities, etc., it is a distinct possibility that government authorities may have no knowledge as to where to find the best candidate for a particular position. It would also be unfair to the general public to confine the range of selection only to those whom the authorities happen to know. It is thus concluded that the open method of seeking voluntary applications from potential candidates is more suitable to modern conditions.<sup>42</sup>

If a public official takes bribes or unjustly devours the property of the citizen, it is the duty of the ruler to return the assets to its true owner and to punish the offender accordingly. Public officials must honor the dignity of the citizen. 'Umar Ibn al Khaṭṭāb is reported to have said to an audience:

By God, I do not send my officials in order to slap you on your faces or to devour your property. Whoever transgresses the limits of his duty, report him to me and I shall effect just retaliation. 'Amr b. 'Aṣ rose and asked, 'O Commander of the Faithful! If a man is in charge of the affairs of Muslims and he disciplines someone in his custody, will you then retaliate?' 'Umar replied, Indeed I will. How can I not retaliate while you saw the Messenger of God who would retaliate upon himself.<sup>43</sup>

According to a hadīth from Ibn 'Abbās, the Prophet (ṢAAS) is reported to have said: "Gifts given to [government] employees partake in misappropriation (*khiyānah*)."<sup>44</sup> Ibn Taymīyah concludes from this hadīth that it is the duty of the ruler (*walī al amr*) to return to the owner any gift a government employee has taken because of the work he has done.<sup>44</sup> Ibn Taymīyah goes on to quote another hadīth of the Prophet who said that anyone who intercedes on behalf of his brother, and then accepts a gift from him, has indeed participated in usury (*ribā*). According to yet another report, 'Abdullah Ibn Mas'ūd has said: "When a man removes hardship from another and then receives a gift from him, large or small, (he) has taken something which is *ḥarām* for him."<sup>45</sup>

<sup>42</sup>Abd al Hamīd Mutawallī, *Mabādi Nizām al Ḥukm fī al Islām*, 2nd ed., (Alexandria: Mansha'ah al Ma'ārif, 1974), p. 43. This author also quotes Abū al 'Alā Mawdūdī's view in support of his own.

<sup>43</sup>Ibn Taymīyah, *al Siyāsah*, p. 161.

<sup>44</sup>Ibid., p. 46.

<sup>45</sup>Ibid., p. 48.

## V

The prescribed *ḥadd* penalties must be enforced. There is little option for the judge if it is established that the *ḥadd* (literally limit) in question has, in fact, been transgressed. According to *aḥādīth* on the authority of 'Abdullah Ibn 'Umar, the Prophet (ṢAAS) is quoted to have said: "Pardon the *ḥudūd* among yourselves, for once a *ḥadd* is reported to me, then it becomes incumbent upon me to enforce the penalty."<sup>46</sup> While encouraging certainty and predictability in the enforcement of the *ḥudūd*, this hadīth simultaneously warns the Muslims against showing eagerness in the enforcement of *ḥudūd*. According to Abū Yūsuf, it is not permissible for the Imām to show leniency or accept intercession in the enforcement of a *ḥadd* unless the proof of *ḥadd* is afflicted with doubt. According to the majority of jurists, intercession is lawful before a *ḥadd* offense is reported to the Imām or his representative, but no intercession is allowed once the violation has been established through lawful evidence.<sup>47</sup>

There must be no doubt as to the proof of the *ḥudūd*. According to a hadīth from 'Ā'ishah, the Prophet (ṢAAS) has said: "Drop the *ḥadd* penalties, insofar as you are able, in all cases of doubt. When you find a way to release a Muslim from a *ḥadd* then you must do so. It is better for the Imam to err on the side of leniency than to err on the side of harshness."<sup>48</sup>

*Ta'zīr* is applicable to violations for which the Shari'ah has not specified a punishment,<sup>49</sup> or that a punishment has been assigned but the conditions for its enforcement remain unfulfilled. Thus, when adultery (*zinā'*) is not testified to by four witnesses, or when there is a doubt in the proof of *zinā'*, murder, theft, and, in all cases, attempted crimes, the judge may impose a punishment in accordance with the conditions of the offender and the nature of the offense.<sup>50</sup>

There is no minimum for *ta'zīr*; it may consist of any measure that inflicts suffering, be it a verbal reprimand or measures that entail social degrada-

<sup>46</sup>See Ibn Taymīyah, *al Sisāyah*, p. 72.

<sup>47</sup>Abū Yūsuf Ya'qūb b. Ibrāhīm, *Kitāb al Kharāj*, 2nd ed., (Cairo: al Maṭba'ah al Salafīyah, 1352), p. 152.

<sup>48</sup>Ibid., p. 152. On the same page, Abū Yūsuf also quotes another version of this hadīth on the authority of 'Amash. The two reports are almost identical.

<sup>49</sup>Ibn Taymīyah has listed a number of such offenses, including fraud, cheating in measures and weights, bribery, perjury, misappropriation by officials of *waqf* and Public Treasury, and betrayal of trust by proxies and partners. See his *al Siyāsah*, pp. 119-120.

<sup>50</sup>Maḥmūd Shaltūt, *al Islām, Aqīdah wa Sharī'ah* (Cairo: Dār al Qalam, n.d.), p. 303; Ibn Taymīyah, *al Siyāsah*, p. 119.

tion,<sup>51</sup> dismissal from public office, financial loss, flogging, and imprisonment. The 'ulama have differed as to the maximum limits of *ta'zīr*. Ibn Taymīyah's account on this subject is, however, generally considered to be representative of the majority of the 'ulama,<sup>52</sup> which is as follows: It is said that *ta'zīr* must not exceed ten lashes, and a vast number of 'ulama have held that it must not reach the extent of the *ḥadd* penalty in any case. Then there are two views: one is that *ta'zīr* must not reach the minimum of the *ḥudūd*, or the lowest penalty in the range of the *ḥudūd*,<sup>53</sup> the other is that in ascertaining the maximum limit of *ta'zīr*, one must refer to the type of offense in the *ḥudūd* categories. In this way *ta'zīr* in property offenses (theft of unprotected property, for example) must not reach the *ḥadd* for theft even if it exceeds another *ḥadd*. Similarly, *ta'zīr* for sexual offense must not reach the *ḥadd* of *zinā'* even if it exceeds another *ḥadd*. This view refers to the precedent of 'Umar Ibn al Khaṭṭāb who punished the forger of his official seal with 300 lashes applied during three consecutive days. The Khulafā' Rāshidūn are also reported to have ordered 200 lashes for an unmarried couple who were found under the same blanket. But Imām Mālik and a number of other jurists have held that *ta'zīr* may amount to the death penalty in some cases such as a Muslim who commits espionage for the enemy. But Abū Ḥanīfah, Aḥmad Ibn Hanbal, Imām Shāfi'ī, and the Hanbalī Abū Ya'lā al Farrā have not approved of killing in this case, whereas Mālik and the Hanbalī Ibn 'Aqīl have.

Ibn Taymīyah continues: "As for the hadith of the Prophet (ṢAAS), reported in the *ṣaḥīḥayn*<sup>54</sup> that "No one may be flogged more than ten lashes except for transgressing any of the limits prescribed by Allah (*ḥadd min ḥudūd Allāh*)," some ulama have suggested that the term *ḥudūd Allāh* in this hadith refers, not to the prescribed offenses, but to the violation of the limits of God in general."<sup>55</sup>

The type and severity of punishment are to be determined with reference to the nature of the offense, the pain it has inflicted on the victim, and its implications for the community. Just punishment is neither too severe nor

<sup>51</sup>The Prophet (ṢAAS) is reported to have imposed seclusion (*i'tizāl*) as a punishment on three of his companions who did not participate in the battle of Tābūk. They were denied the courtesy of *salām* (greeting), and a social boycott was imposed on them until a revelation came in respect of the acceptance of their penance. For details see Ibn Taymīyah, *al Siyāsah*, p. 121.

<sup>52</sup>Cf. El-Awa, "Ta'zīr in the Islamic Penal System," p. 51.

<sup>53</sup>This would be 40 lashes, or 80 for a free man, depending on which one of these constitutes the *ḥadd* of *shurb* as there is some disagreement on this point.

<sup>54</sup>That is *Ṣaḥīḥ al Bukhārī*, and *Ṣaḥīḥ Muslim*, the first two of the six authoritative collections of hadith.

<sup>55</sup>Ibn Taymīyah, *al Siyāsah*, pp. 119-126.

too light, as the Qur'an addresses the believers (al Shūrā: 39): "And the recompense of an injury is an injury like it, but if a person forgives and amends, his reward is with Allah, and Allah loves not those who do wrong."

Commenting on this, Abdullah Yusuf Ali writes: "When you stand up for your rights, you may do so through processes of law and you must not seek a compensation greater than the injury suffered. The most you can do is to demand equal redress, that is, a harm equivalent to the harm done to you. The ideal mode is, however, not to pursue vengeance but to follow better ways leading to the reform of the offender and reconciliation."<sup>56</sup> The foregoing is reaffirmed in another Qur'anic injunction (al Nahl:126) where the believers are instructed: "And if you take your turn, then punish with the like of that with which you were afflicted. But if you show patience, then it is surely better for the patient."

It thus appears that the Qur'an discourages impulsive revenge and haste in any form of punishment. Patience (*ṣabr*), one of the virtues that is emphasized on numerous occasions in the Qur'an, can either mean pardon or abstaining from rash decisions so as to allow time for investigation, reflection, and the possibility of forgiveness. It is also significant to note that most of the references to punishment and just retaliation in the Qur'an are accompanied by an allusion to the virtues of tolerance and forgiveness. The lesson here must be that even in combating criminality, a society cannot resolve its problems by means of coercive measures alone, and it must try to find better ways to educate its people, promote moral virtues, and reform the wrongdoer. But the main purport of the foregoing *āyahs* that in all cases, be it the enactment of laws and regulations or issuance of judicial decisions, the ruler and the judge must enact punishments that are just and proportionate to the crime. If there is a margin of error, as would normally be expected to be the case, then an error committed on the side of patience and forgiveness is preferable to the one on the side of severity and harshness.

We are also reminded by two prominent 'ulama, Ibn Qayyim and Maḥmūd Shaltūt, of the emphasis that the Qur'an lays on the virtues of sincere repentance (*tawbah*) in granting pardon to offenders.<sup>57</sup> This aspect of Qur'anic teaching has not, in my view, been given proper recognition in our penal laws. *Tawbah* undoubtedly embodies the most significant element in the prospects of educating and reforming the offender, and in assessing the possibility of reconciliation and forgiveness, all of which must be the ultimate objective of a judicious penal policy.

<sup>56</sup>Abdullah Yusuf Ali, *The Holy Qur'an, Text Translation and Commentary* at note no. 4581.

<sup>57</sup>See Shaltūt, *al Islam*, p. 312, where the author quotes Ibn Qayyim's view in support of his own.

The ruler is advised to be gentle in implementing the Shari'ah, and to verge on the side of leniency when there is a choice between leniency and harshness. Removal of hardships from, and bringing ease to, the people are general principles of the Shari'ah derived from the Qur'an (al Baqarah: 185): "Allah intends every facility for you and He does not intend to put you in hardships." This has been reaffirmed in several other *āyats* also (e.g., al Hajj: 78). In support of this, Ibn Taymīyah quotes a hadith of the Prophet (ṢAAS) that "Gentleness does not fail to create beauty whereas harshness is most likely to lead to ugliness." The Prophet (ṢAAS) has also said: "Allah loves gentleness (*rifq*) and gives through gentleness what He gives not through oppression (*'unf*)."<sup>58</sup> The Prophet (ṢAAS) used to treat people kindly, and whenever someone asked him for something, he either satisfied his need or consoled him with kind words. According to another hadith, Abū Burdah reported that when the Messenger of Allah sent Mu'ādh b. Jabal and Abū Mūsa al Ash'arī to Yemen (they were each appointed to govern a part of Yemen), he told them: "Be gentle to people and not hard on them; bring them good tidings of mercy and scare them not, and do not incite them to aversion."<sup>59</sup>

Commenting on this hadith, Ibn Taymīyah observes: It is not benevolence (*ihsān*) to the citizens to leave them to do what they like doing or avoid doing what they dislike. The essence of *ihsān* is to ask them to do what is beneficial for them in this world and meritorious in the next, even if they happen to dislike it. However, when the ruler asks his subjects to do what they dislike, he must do so with gentleness, and avoid inciting people to aversion from the Shari'ah.<sup>60</sup>

## VI

In the legislative sphere, *siyāsah shar'īyah* must aim at "opening the doors of mercy and beneficence to the people, and selecting from the diversity of schools and interpretations advanced by the 'ulama that which is beneficial to relieve people from severity and hardship."<sup>61</sup> It was on this basis and in consideration of the *maṣlaḥah* of the people, Khallāf continues, that the Egyptian legislature enacted a law (in 1923) denying registration to a marriage in which the parties had not reached sixteen and eighteen years of age, respectively.<sup>62</sup>

<sup>58</sup>Both of these *aḥādīth* appear in Ibn Taymīyah, *al Siyāsah*, p. 145.

<sup>59</sup>Ibn Taymīyah, *al Siyāsah*, p. 145.

<sup>60</sup>Ibn Taymīyah, *al Siyāsah*, pp. 144-145.

<sup>61</sup>Khallāf, *al Siyāsah*, p. 14.

<sup>62</sup>Law No. 25, 1923 (Art. 1). This law consists of two articles only, both of which are concerned with the age of marriage.

In an earlier legislation in Egypt, the law denied admission to witnesses in some cases and confined the means of legal proof to documentary evidence only.<sup>63</sup> The purpose of this legislation was, as Khallāf puts it, "to prevent corruption and to facilitate benefit which were in accord with the principles of the Shari'ah even if it disagreed with the views of the *mujtahidūn* of the past."<sup>64</sup> The author then goes on to quote Shihāb al Dīn al Qarāfī, at some length, to the effect that nothing could be found in the Shari'ah against taking measures, in any area of government, that would eliminate corruption and facilitate benefit to the community.<sup>65</sup>

Legislation in Islamic countries must reflect the true spirit of *ijtihād* even if it does not correspond with the manner adopted by the *fuqahā'* of the past. *Ijtihād* essentially aims at constructing new legal rules from the existing principles through the exercise of independent reasoning often involving a reinterpretation of the original sources. "In the early Islam," as one observer has noted, "this would have almost been a matter of routine, for any competent jurist was held to have the right of *ijtihād*."<sup>66</sup> One restriction on *ijtihād* is, of course, that it is permitted only when no definite ruling can be found in the original sources on a particular problem. But even so, the scope of *ijtihād* is virtually unlimited, bearing in mind the diversity of the source materials and the ever accelerating process of social change. It is a dynamic concept, which cannot admit false limitations such as the commonly recurrent misconception referred to as the "closure of the gate of *ijtihād*." Even if it is accepted as a historical fact, it was conceptually erroneous and totally anomalous to the original teachings of Islam.<sup>67</sup>

Ibn Qayyim has referred to yet another misunderstanding concerning *ijtihād*: a certain finality which is ascribed to the *fatwā* and *ijtihād* of the *mujtahidūn* of the past. This is reflective of an attitude that ignores the rule that *fatwā* and *ijtihād* are changeable with the change of circumstances. In Ibn Qayyim's words:

<sup>63</sup>The Egyptian Code of Organization and Procedure for Shari'ah Courts 1897, (Art. 31) provided that no claim of marriage, divorce, or acknowledgment thereof may be heard after the death of either party unless it is supported by valid documents.

<sup>64</sup>Khallaf, *al Siyāṣah*, p. 14.

<sup>65</sup>*Ibid.*, pp. 15-16.

<sup>66</sup>J.N.D. Anderson, "Modern Trends in Islam: Legal Reform and Modernization in the Middle East," *International and Comparative Law Quarterly* 20, 1971, p. 12.

<sup>67</sup>It is almost taken for a fact that *ijtihād* came to a close around the beginning of the fourth century A.H. But there is some evidence to the contrary which maintains that *ijtihād* was never discontinued. See for example, Wael Hal-laq, "Was the Gate of Ijtihad Closed," *International Journal of Middle East Studies* 16, 1984, pp. 3-41.

This is a great aberration from the Shari'ah which is due to ignorance as it causes unwarranted rigidity and hardship to the people . . . To facilitate benefit to the people in this world and the next is in the essence of the Shari'ah. Anything which violates the *maṣlahah* and leads to corruption (*mafsadah*) has nothing to do with the Shari'ah even if it is made to appear as a part of it.<sup>68</sup>

One may refer, in support of this statement, to the precedent of Imam Shāfi'ī, who developed his juristic thought in two separate phases and changed some of his earlier *fatāwa* after his arrival in Egypt, because of the change of circumstances and the conditions of a different society.<sup>69</sup>

Another misunderstanding concerning *ijtihād* is reflected in the contention that modern legislation in Islamic countries, even if enacted in consideration of public interest, is anomalous and disagreeable with *ijtihād*. In response to this claim, a prominent professor of al Azhar, 'Abd al Raḥmān Tāj, has the following to say: "It is incorrect to say that laws and policies that are initiated for the realization of the public interest are opposed to the Shari'ah merely because of some apparent discrepancy (*mukhālafah zāhirah*) to one or the other proofs (*adillah*) of the Shari'ah." Tāj goes on to say that before passing such judgment one must "try to understand the purpose and spirit of the proof in question and try to distinguish between those of the Shari'ah rules that contemplated a particular situation (*mā warada 'ala sabab khāṣṣ*), and those that constitute general laws (*tashrī' 'āmm*). Only the latter are binding and must be observed in the formulation of *siyāsah shar'iyah*."<sup>70</sup>

The author also gives examples of some of the rules intended to be temporary as they were introduced in response to a particular situation. Thus, it would not be against the Shari'ah if we were to enact a law that would require soldiers to deliver to the public treasury the belongings of their victims in the battlefield. A law of this type may appear to be contrary to the hadith, which provided: "Whoever kills an enemy in the battle and can prove it, he may take his belongings." However, the contradiction would only be apparent, but not real, because the hadith in question is not a general law. It is a policy decision which is amendable to change in accordance with the *maṣāliḥ* of every age. Similarly, it is not necessary in our times to follow the same methods that were applied in early Islam in such areas as the allocation

<sup>68</sup>Muammad b. Abu Bakr Ibn Qayyim al Jawzīyah, *I'lām al Muwaqqi'īn 'an Rabb al 'Ālamīn* (Cairo: al Kulliyah al Azhariyah, 1388/1968), IV, p. 309.

<sup>69</sup>See, for a discussion, Sulaymān Muḥammad al Tamāwi, *al Sulaṭāt al Thalāth fī al Dastr al 'Arabīyah wa fī al fikr al siyāsī al Islāmī* (Cairo: Dār al Fikr al 'Arabī, 1973), p. 305 ff.

<sup>70</sup>Tāj, *al Siyāsah*, p. 21.

of government funds, military strategies, and policies concerning the defense and protection of borders.<sup>71</sup>

In al Tamāwī's view, *ijtihād* by individuals in the manner practiced by the *fuqahā'* of the past is no longer suitable to modern conditions. In our times, education is a responsibility of the government and it should, therefore, be possible to make attainment to the rank of a *mujtahid* dependent on special qualifications. A council of qualified *mujtahidūn* may thus be set up to advise on the preparation and approval of laws and ensure their harmony with the Shari'ah.<sup>72</sup>

A subject that merits special note in this connection is the obstruction of means, or *sadd al dharā'ī'*. It is regarded as "one of the most important areas where *siyāṣah shar'īyah* can be utilized as a means of improving the conditions of the community."<sup>73</sup> Since the Shari'ah is concerned with the ultimate objectives of things, it empowers the ruler to obstruct the means that lead to corruption (*Sadd al dharā'ī'*). In other words, it can authorize "forbidding the permissibles (*mubāḥāt*) which are being used by the people as a means to criminality and evil."<sup>74</sup> When the *walī al amr* observes, for example, that the transaction of sale (which is otherwise lawful) is being used solely as a means to usury (*ribā*), or that *nikāḥ* is contracted for the sole purpose of *taḥlīl*,<sup>75</sup> he is authorized to obstruct the means which open the way to abuse, and to ensure that the *mubāḥ* in question is practiced for its legitimate purposes alone. It makes no difference whether the evil is obtained through deliberate abuse or through common practice in which the element of intentional abuse is not prominent. If, for example, due to the change in times and circumstances, something that was once lawful subsequently turned into a *mafsadah*, the ruler may exercise his discretion and make it unlawful in order to safeguard the public interest.<sup>76</sup>

Both Khallaf and Tāj hold the view that *siyāṣah shar'īyah* is changeable in accordance with changing circumstances. Indeed, *siyāṣah* is an instrument with which to accommodate the needs of social change with the Shari'ah. *Siyāṣah shar'īyah* thus enables the government to administer its domestic and foreign affairs by enacting laws and regulations that guarantee security

<sup>71</sup>Ibid., pp. 21-22.

<sup>72</sup>Al Tamāwī, *al Su'āt*, p. 307. This is not a new suggestion. In the 1930's, in his well-known *Reconstruction of Religious Thought in Islam*, Muhammad Iqbal advanced a similar proposal which he thought was the only way of institutionalizing *ijtihād* (which he refers to as the principle of movement) and *ijmā'* into the fabric of modern government.

<sup>73</sup>Tāj, *al Siyāṣah*, p. 76; al Qarāfī, *al Furūq*, III, 266.

<sup>74</sup>Ibid., p. 71.

<sup>75</sup>*Taḥlīl* is an intervening marriage that legalizes the marriage of a woman who has been divorced by triple *ṭalāq* to her former husband.

<sup>76</sup>Tāj, *al Siyāṣah*, pp. 71-72.

and justice to the citizens, materialize their interests, and pave the way for their prosperity.<sup>77</sup>

## VII

The availability of fairly wide discretionary powers to the *ʿulū al amr* may be partially explained by a reference to the Islamic theory of government. In Islam, government is a trust and the *ʿulū al amr* exercise political power in the capacity of trustees, or vicegerents of God. The basis of this principle is clearly laid down in the Qur'an (al Baqarah:30; al Nūr:55): "And when thy Lord said to the angels: 'I am going to appoint a vicegerent in the earth . . . ;'" and "Allah has promised those of you who believe and do good that He will surely make them vicegerents in the earth."

It is in the nature of the concept of trust that the trustees are given the opportunity to exercise discretion in order to fulfill their trust as best as they can. *Siyāsah shar'īyah* is an instrument of the trust that Allah (SWT) has placed on the shoulders of the community and their leaders. Just as the form and organization of government have not been articulated by Islamic law, so is the case with *siyāsah shar'īyah*. The Shari'ah prescribes no specific form of government but lays down a number of substantive principles which provide the rudiments of a political order. In the field of policy-making also, the Shari'ah provides general guidelines for a just policy and leaves the day-to-day formulation and implementation of such a policy to the discretion of the *ʿulū al amr*.

Educating the mind and conscience of the believer is the primary concern of Islam. A heightened sense of responsibility and a watchful conscience are the guides for the believer in the fulfillment of his duties. In his capacity as a trustee of God, the believer is instilled with the qualities of *amānah* (trustworthiness) and *taqwā* (piety). The word *amānah* (pl. *amānāt*) occurs in several places in the Qur'an. There is disagreement as to the precise meaning of the word, but it is fairly clear that responsibility and trust are the essential ingredients of *amānah*. We have already discussed the implications of *amānāt* in relation to the selection of government officials. In another place, the Qur'an refers to the magnitude of the *amānah* that man has undertaken: "We did indeed offer the trust (*amānah*) to the heavens, the earth and the mountains, but out of awe, they refused to undertake it, but man bore it. He was indeed unjust and foolish." (Al Aḥzāb: 72).

The *amānah* in this verse is said to be a reference to the vicegerency of man (*istikhlāf*) (Surah al Baqarah: 30-34),<sup>78</sup> which is an interpretation

<sup>77</sup>Khallāf, *al Siyāsah*, p. 19; Tāj, *al Siyāsah*, p. 30.

<sup>78</sup>Abdullah Yusuf Ali, *The Holy Qur'an, Text, Translation and Commentary*, at note no. 3782.

that links *amānah* and *istikhlāf* into a single concept of trust. An alternative interpretation is offered by Maḥmūd al 'Aqqād who discusses what the classical commentators have to say and then concludes that *amānah* in this verse refers to the heavy burden of responsibility (*taklīf*) man has undertaken.<sup>79</sup> In any case, the *āyah* we just quoted is at once a complement to the nobility and trustworthiness of man and a reminder of his propensity toward ignorance and injustice. Man is capable of bearing the trust, but he must at all times discipline his inclination toward injustice. The Qur'an tells us that those things that the nature, skies, and mountains were not capable of undertaking, man is. But despite his immense capacity for trust, man was too audacious and ignorant to undertake such a momentous burden, for he is also capable of betraying the trust. In another place, *amānah* occurs in the Qur'an in the manner of praise "to those of the believers who are observant of their trusts (*amānāt*) and promises,"<sup>80</sup> which is perhaps a reaffirmation of their capacity to trustworthiness.

And lastly, *amānah* occurs in the Qur'an in its material sense, that is, trust of deposited property, payment of debts, and other financial obligations that partake in the nature of trust. The principle is thus laid down in Surah al Baqarah (283), as follows: "And if one of you deposits something on trust with another, let the trustee faithfully discharge his trust and let him fear his Lord."

The trustee is thus enjoined to guard the interests of the person on whose behalf he holds the trust and to render back the property and accounts according to the terms of the trust.<sup>81</sup> Ibn Taymīyah comments that both the ruler and the ruled have both been enjoined in this *āyah* to pay their dues to one another.<sup>82</sup> The citizens must not expect from the government more than what they deserve, nor must they withhold any payment to which the government may be entitled. The Messenger of God (ṢAAS) has ordered the Muslims to "pay the ruling authorities what they are entitled to, for in their capacity as custodians, they are answerable to God in respect of what they have in their custody."<sup>83</sup> The ruling authorities must, in turn, deliver the wealth of the community to those of its deserving members, not according to their whims, nor in the manner of owners and proprietors, but in their

<sup>79</sup>Abbās Maḥmūd al 'Aqqād, *al Insān fī al Qur'an al Karīm*, (Cairo: Dr al Hilāl, n.d.) p. 39.

<sup>80</sup>The Qur'an (al Mu'minūn:8); "*amānāt*" which occurs elsewhere in Surah al Anfāl:27), also bears the same meaning of "trust."

<sup>81</sup>Abdullah Yusuf Ali, *The Holy Qur'an, Text, Translation and Commentary*, at note no. 335.

<sup>82</sup>Ibn Taymīyah, *al Siyāṣah*, p. 27.

<sup>83</sup>Ibid., p. 28.

capacity as trustees and delegates (*umanā' wa nuwwāb*).<sup>84</sup>

To this effect Ibn Taymīyah, on the same page, quotes a hadith narrated by Abu Ḥurayrah, in which the Prophet has said: "By God, I do not give anything to anyone nor do I withhold it from anyone (according to my personal choice), for I am merely a distributor (*qāsim*) and I deliver to people as I am commanded (by Allah)." The Messenger of God thus tells us, Ibn Taymīyah continues, that giving and withholding the communal property are not within his authority; he is merely a trustee who fulfills the terms of his trust. He attributes to himself neither the powers of a proprietor nor of a king who may dispose of the property as they please. If the Messenger of God says this, then the terms of this trust are even more emphatic with regard to the generality of Muslims and their rulers.<sup>85</sup> In yet another hadith, the Prophet forbids his followers from competing with one another in breaking trusts. The hadith reads: "Pay your *amānah* to whom it belongs, but do not betray (in return) the one who has betrayed you."<sup>86</sup>

### VIII

In concluding this essay, let us take a look at Ibn Taymīyah's description of some of the most desirable qualities of a ruler: Islam nurtures unselfishness, humility and ease at forgiving on the part of the rulers in their personal relations, and a vigilant and uncompromising attitude in all cases of contemptuous violation of the law. Ibn Taymīyah divides people into three types:

- Those who are provoked (*yaghḍibūn*) both for their own sake and for the sake of God;
- Those who do not care about either;
- Those who are provoked for the sake of God but not for their own sake.

It is reported in the *Saḥīhayn* that 'Ā'ishah (RAA) said: "The Messenger of God never hit anyone with his hand, no one at all, neither his servant, nor his wife, nor even an animal, unless it was in the way of God. He never took revenge for his own sake but for the sake of God."

While quoting this hadith, Ibn Taymīyah adds: Those who accumulate wealth for their own sake and not for the sake of Allah, and those who accumulate wealth but do not give to others, are the the worst of them all. No benefit can accrue from them either in this world or in the next. The

<sup>84</sup>Ibid., p. 29.

<sup>85</sup>Ibid., p. 29.

<sup>86</sup>Ibn Taymīyah, *al Siyāsah*, p. 26.

upright leaders who pursue a perfect *siyāsah* (*siyāsah kāmīlah*) are those who enforce the commands and prohibitions of God. They are the ones who give everyone their due. They take nothing except what is lawful to them; and when it comes to their own entitlements, they are forgiving. These are the qualities of the Prophet and are thus the best attributes of a virtuous *siyāsah*.<sup>87</sup>

## Conclusion

The availability of some discretionary powers to the rulers is accepted in principle in all theories of government. It is the scope and dimension of such powers that are the main causes of concern and the chief reasons behind the efforts at developing adequate checks and controls over their exercise. The need for the regulation of the use of discretionary powers is particularly urgent in the field of criminal law where the citizen is exposed to the use of coercive power. It is in this area that the principle of the rule of law acquires special significance.

The basic principle of the limitation of the power of the state finds full expression in Islamic constitutional theory. The authority of the temporal ruler, whose existence is necessary for the welfare of the community, is derived from, and defined by, law. To implement this law, the Shari'ah, is the *raison d'être* of government and a cardinal duty of the ruler. The Shari'ah is supreme, and it enjoys a status in the Islamic political order that cannot be challenged. I shall not repeat here what I have elsewhere tried to explain as to how Islam advocates a limited form of government, which is subject to the rule of law and must observe the rights and freedoms that the citizen enjoys under the Shari'ah. There are limits, for example, on the sovereignty of the Islamic state, on its powers regarding legislation, and on the executive powers of the *'ulū al amr*, to the extent that they must observe the dictates of the Shari'ah.<sup>88</sup>

The need for discretionary powers is perhaps more pronounced in an Islamic state, given the fact that the Shari'ah is derived from Divine sources and a set of permanently valid principles which the *'ulū al amr* cannot change beyond certain limits. Had it not been for discretionary principles, such as *siyāsah*, *maṣlaḥah*, and *ta'zīr*, the ruler would have been faced with an authority-oriented and all-encompassing system of law that was permanently fixed and inflexible.

<sup>87</sup>Ibid, pp. 63-65.

<sup>88</sup>See Mohammad H. Kamali, "The Citizen and State in Islamic Law," *Shari'ah Law Journal* 3, April, 1986, the International Islamic University, pp. 15-47, Selangor, Malaysia.

In a government under the rule of the Shari'ah, all measures that ensure proper administration of justice and the well-being of the people become an integral part of *siyāsah shar'īyah*, including those that ensure the judicious exercise of discretionary powers by state officials. There is no room for unlimited or unguided discretion in an Islamic polity. Given the increasing complexity of government in modern times, it would seem good *siyāsah* to define and restrict discretionary powers, especially regarding *ta'zīr*, within reasonable limits. With the unprecedented advance of education and learning in modern times, it is obvious that specialization and technical know-how have become essential to good management. The development of a judicious *siyāsah* must, therefore, to a large extent, depend on the availability of better and more refined methods. It is desirable, for example, to develop uniformity in judicial decisions as disparity in sentencing—which stems partly from wide discretionary powers—undermines the deterrent effect of punishment. These objectives could best be achieved through the introduction of uniform laws enacted with the benefit of expert advice aimed at regulating the exercise of discretionary powers through uniform procedures and controls against possible abuse. This is merely to explain a phenomenon all too familiar and an already established feature of modern government. In the present century, the bulk of the civil and criminal law in Islamic countries has either been codified or extensively regulated by statutory legislation. Parallel to this development, a deliberate effort has been made, almost everywhere, to regulate the exercise of *ta'zīr* by Shari'ah courts.<sup>89</sup> This is not to say that *ta'zīr* has been totally overruled, for there is a need for a measure of flexibility in sentencing where *ta'zīr* can still play a useful role. One such area is the enforcement of public morals, or the moral standards of Islam, where *ta'zīr* is considered to be indispensable.<sup>90</sup>

In a similar vein, as a result of the introduction of formal constitutions by most Islamic countries and attempts to define and regulate the powers of the various organs of state, the scope of *siyāsah* has been considerably restricted. However, *siyāsah* can still play a useful role, which is to encourage initiative in the direction of *maṣlaḥah*, to prevent rigidity in the application of the law, as well as enabling the government to formulate responses to unprecedented situations. The need for such flexibility is often felt when the legal text does not cover an isolated case, or when the strict and literal application of the text fails to serve the ideals of justice and public interest.

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<sup>89</sup>A description of such developments in the case of Afghanistan can be found in my book *Law in Afghanistan*, p. 46 ff.

<sup>90</sup>El Awa, *Punishment in Islamic Law*, p. 116.