Compatibility of maqasid al-Shari'a (Finalities and Purposes of the Islamic Law) with International Legislation on Refugees

by
Dr Ahmed Khamlichi

translated by
Fatima Laaouina

Publications of the Islamic Educational, Scientific and Cultural Organization
(ISESCO) 1436A.H./2014

Legal deposit: 2012 MO 0195
ISBN: 9981-26-541-7

Photocomposition, typesetting and printing: ISESCO
Rabat - Kingdom of Morocco

First edition
1436 A.H./2014

Content

Foreword

There exists no aspect of life that the Islamic Shari'a did not outline and regulate. The goal of the magnanimous Shari'a, which is revealed in the Qur'an and explained by the Prophet's venerable tradition, consists in three objectives: the necessities; the needs; the improvements; and the complements of each of these. Among the issues tackled by the peaceful religion of Islam is the question of asylum. It may be that the first event accompanying the emergence of the true religion of Islam is the call addressed by Mohammed (PBUH) to his followers among Quraich to emigrate to Abyssinia. This event, in fact, constitutes the first asylum event leading over eighty followers of the new faith to the land of Abyssinia fleeing persecution from their folk for the sake of protecting their faith.

Cases of covenant of protection, mentioned in the books of Sira, could be considered a type of asylum. A case in point is the situation of Mut'im ibn 'Udai offering protection to the Prophet (PBUH) after the passing away of his uncle. The Qur'an made reference to the covenant of protection as well in the Surat of *At-tawbah* (verse 6): [***And if anyone of the pagans seeks your protection then grant him protection so that he may hear the Word of Allah and then escort him to where he can be secure***]. The concept of covenant of protection meant, then, that the protector grants safety to the protected announcing publicly that the protected is under his care. However, one should be careful not to confuse the concept of covenant of protection and asylum at the level of both meaning and objective in the sense that the physical location of the *protected* is different from that of the "asylum seeker". The verse alludes to the protection of the disbeliever after the end of the pilgrimage period. Asylum, however, institutes this right on the principle of human dignity regardless of the faith and religion of the *asylum seeker*.

The third example on asylum will be drawn from the articles of second and third allegiance of the Aqaba and which stipulates: "I take pledge from you provided that you protect me of what you protect your women and your children from". Moreover, the pacts of reconciliation and safety can also be considered a type of conducting asylum.

These are examples illustrating the concern of the Islamic *Shari'a* towards the issue of asylum, bearing in mind the clear difference in both the goal and prescriptions of "protection" and "asylum". These examples constitute also major stops that mark the attention which Islam grants to this question.

As human societies evolved, and as man interacted with the developments of history and existence, there came to light a set of international legislations

which contributed to putting in place laws regulating the moments before, during and after wars are launched, including the consequences issuing therefrom. Among such cases is the emigration of refugees outside their home countries be it for human, economic or political reasons.

In keeping abreast with this historical evolution, and in response to the new requirements of *fiqh's* adaptation to the current reality, it seemes necessary to clarify the extent to which the finalities of the Islamic *Shari'a* concord with international legislation concerning refugees. Indeed, the Islamic world witnesses many cases of refugee seekers with large numbers of refugees fleeing, among other things, wars and persecution. Muslim migrants and refugees in the West are faced with numerous problems that need effective solutions. These solutions have to be considered in light of the Islamic law and international legislation, drawing on a modern Islamic *fiqh* approach which, brought closely in tune with the present-time requirements, has evolved into what we today refer to as "*fiqh al-aqaliyat*" (Minority Jurisprudence).

The objective of this study is to explain the concordance between the finalities of *Shari'a* and with no regard to its rulings, for the simple reason that the ruling is tied to cause and exists only by the latter's existence, as reports the famous *fiqh* rule. Should there be no need for legislative ruling in a specific time for a specific event, does not mean that the *Shari'a* ignored it. There is, thus, a need to connect rulings, issued with relation to happenings, with the finalities and objectives of the *Shari'a*, which concerns the human activity as developing from the five necessities to the needs, and ending with the complementing improvements.

This study came as a response to the lack felt by ISESCO with regard to the issue of asylum. The Organization developed a special interest in bringing this study to light in order to fill the gap and incite researchers and religious scholars to raise interest to this issue and give it the attention it deserves.

With the ambition to pave the way for the future and connect past to present, and out of concern to make available references on the issues of refugees and the concordance between international legislations and the *Shari'a* finalities, ISESCO is pleased to present this valuable study conducted by a distinguished scholar Dr. Ahmed Khamlichi in the field of Islamic *Shari'a* and law, hoping that Allah, in his glory and majesty, shall spread beneficence to everyone.

May Allah grant us success.

Dr Abdulaziz Othman Altwaijri

Director General of
the Islamic Educational, Scientific and
Cultural Organization (ISESCO)

Introductory Review

There is a tendentious suspicion in certain occidental circles, based on the allegation that Islam guidelines are inconsistent with international treaties in matters of human rights and respect of the freedom of individuals and communities. Some media organizations and political institutions do not hesitate to tarnish the reputation of Islam for violating human rights as part of their campaigns against Islam, its faith, culture and civilization.

Needless to say that Islam recognized human rights more than fourteen centuries ago, starting with the Islamic Shari`a acknowledgement of full equality between all human beings, to the affirmation of the unity of mankind's origin.

The main theme of this chapter calls for asking the following question: Don't we, Muslims, bear the biggest part of responsibility for the attacks that the Islamic Shari`a is subjected to.

We suppose that we bear in fact the largest part of responsibility in this matter, and the reasons for that are the two following facts:

- Absence of "updating" *fiqh* (the corpus of the Islamic jurists' doctrines, or Islamic substantive law) that expounds "*ahkâm al-Shari`a*" (rulings, prescriptions and laws stemming from Islamic law); and
- Lack of precision in specifying the authority entitled to formulate these rulings "*ahkâm al-Shari`a*".

I. Absence of "Updating" *fiqh*

The scopes of organizing society, whether in terms of relationships between its own members or its relations with other societies, have largely extended and developed. A major part of these organizing rules involve "human rights" which Islam is accused of trangressing, including the rights of refugees.

Going back to the content of Islamic teachings within which the Islamic rulings are taught, one finds out that:

- A part of the aforementioned rights is presented according to the perception of our forefathers in line with the social and cultural situation prevailing at the time and governing their reality. Examples include the "rights" of slaves, *ahl al-dhimma* (the people of the *dhimma*, covenant or pact of protection), prisoners, political and social rights of citizens....etc.

- Does not deal at all with the other part of rights resulting from the extension of the cognitive sphere, the evolution of social philosophy and coexistence between human beings which includes political and civil rights which were not tackled at the time.

To evidence what has been said above, I refer to the Cairo Declaration on "Human Rights in Islam"[1]. The latter, on the one hand, encompasses some rulings on which *fiqh* still retains the inherited *ijtihad* (jurisprudence) related thereto.

Article 3, for instance, stipulates the rights of prisoners. While everybody knows the five options that *fiqh* grants to the *imam* with regard to prisoners, this jurisprudence, in fact, is contradictory to the verse that limits the ruling to *al-mann* (grace) and *al-fida* (ransom) (replaced today by war compensations); educational institutions still teach it under *ahkam al-Shari`a*.

Article 9 specifies that education is the duty of society and the State. The latter shall ensure the ways and means to provide education and shall guarantee its diversity. However, what is taught to students in *usul al fiqh* (the foundations of Islamic jurisprudence) is that the learning of all branches of knowledge is part of *Fard kifâya* (collective obligation); once a part of the community acquires it and fulfils it, the others are relieved thereof. But if the whole community fails to fulfil it, the community as a whole is considered to have perpetrated a sin and all its members deserve punishment in the hereafter. There exists no mention in *usul al fiqh* about the obligation of the State towards education, let alone ensuring the ways and means to carry it out.

Likewise, Articles 13 and 17 stipulate that the State ensures the rights of workers to all social guarantees, as well as medical and social coverage for individuals and their dependents, including food, clothing, housing, education, medical care and all other basic needs.

However, *fiqh* leaves the employment contract, consisting in negotiating salary, the working hours, and the terms of the contract and its termination, to the care of the two concerned parties. With regard to meeting individual needs, what *fiqh* says is that the content of *Bayt Al Mal* (treasury of the Muslims where income is gathered for re-distribution) should be re-distributed to meet the needs of the poor. The remainder may be re-distributed to the rich as well. However, the resources of *Bayt Al Mal* are limited to the booty taken from the *kuffar* (the infidel) during war or outside war (booty and spoils). The Muslim has no obligation to pay

(1) Issued by the Ninth Islamic Conference of Foreign Ministers - Cairo, August 5th, 1990.

anything to *Bayt Al Mal*. According to *al-Shari`a*, only *al-zakat* (the wealth tax and one of the indispensable pillars of Islam) is imposed to the Muslims. It is redistributed to those who deserve it as specified in the Holy Qur'an. *Az-Zakat* is not part of the resources of *Bayt Al Mal* which is managed by the ruler in accordance with what he considers as meeting the Muslims needs(1). This fatal flaw; i.e., a State without resources (after the booty and spoils are consumed), was the cause that prevented both political thought and system(2) from developing, leading, thus, to the failure of synergy between society and political authority(3).

Fikh was not only unable to discuss the resources of *Bayt Al Mal* and financing social infrastructures and needs at the end of loot and spoils, but also has resisted initiatives emanating from the political authority.

On the other hand, the Cairo Declaration stipulates certain rights following the formulation of the *fiqh* corpus. As a result, some of these rights appear to be short of the way they are applied at present time. I will present only two examples:

First example: Article 3 stipulates that "killing non-belligerents such as elderly, women and children" is not permissible.

Prohibition is limited here to the act of killing, not including physical abuse, humiliating acts and the killing of those unable to fight such as the elderly, women, children and the like. *Fiqh* stipulated so for the following reasons:

---

(1) We read many a *fatwa* authorizing the Ruler, in the event the *Bayt Al-Mal* is empty, to take from the rich "supplies" or a "fine" for *Bayt Al-Mal*. Such *fatwas* are nevertheless immediate and confined to financing *Jihad* or preparing for it. Never have we read a *fatwa* which introduces the idea of obliging Muslim individuals to contribute, on a constant basis, money or any such resources to the treasury for public works (building educational institutions, hospitals, roads and other facilities) as well as towards basic requirements for the progress and stability of society.

(2) This confirms that the development of the political thought and system of other cultures emerged from the idea of obliging citizens to pay the tax, associated with the concept: those who pay can oversee.

(3) The lack of resources incited rulers to disorderly impose payments, which was the vehicle for many evils: corruption, intermediation, abuse of power, treachery, breach of faith, violations of moral values and freedoms and even, in many cases, torture and killings….

All this added suspicion and lack of trust to the relations between and «those who are responsible» and their «subjects» … We are still living some of the consequences of this situation, mainly: paying taxes is separated from the religious and national duty. It is rather considered as a «penalty» imposed by law out of injustice and as a consequence, tax avoidance is not a violation of religious and patriotic values.

- Since killing women not participating in fighting and young children was considered as reprehensible, their "human treatment" has never been discussed. Ethics of war made them slaves, or spoils to be distributed to the winners, in accordance with the distribution methods stipulated in that matter; and
- Because men, except the very old of them, were not considered as "non-fighters" according to the ancient nature and traditions of war.

At present, many concepts on the subject have changed. Article 3 of the Geneva Convention on the Protection of Civilian Persons in Time of War adopted on August 12, 1949, for instance imposes on parties taking part in an armed conflict that «persons taking non active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely»; and that «acts of violence to life and person and outrage upon personal dignity, in particular, humiliating and degrading treatment are and shall remain prohibited at any time and in any place whatsoever».

Second example: Article 8 states that "Every human being has the right to enjoy a legitimate capacity in terms of obligation and liability", which confines capacity to concluding contracts and legal acts, while the concept of capacity today includes the right to exert all civil and political rights, namely participation in choosing the political authority through practicing the rights of vote, nominating candidates and opposition instead of limiting them in the provision of article 23 saying that "Authority is a trust; and abuse or malicious exploitation thereof is explicitly prohibited". *Wilaya* or authority in all its forms has extended the moral scope and the values of self-consciousness to be one of the first fields controlled by law for the benefit of individuals and within the organization of their obligations.

The two aforementioned examples provide enough evidence demonstrating the urgent need to update the *fiqh* exegetic interpretation of revealed texts in order to deduce *Shari'a* legal rulings which the Cairo Declaration refers to in its articles 24 and 25.

The objective of a new interpretation of these texts is not to keep abreast with the concept and applications of "human rights" in detail as considered by others, for this would be contrary to belief in the divine message that guides us to the right path. The idea is to link interpretation and the lived reality. In other words, it means abiding by the principle of *usul al fiqh* urging for the

consideration of the consequences of law application on peoples' lives. Many partial rulings recorded in the Islamic *fiqh* corpus were influenced by the context and culture prevailing at the time of their promulgation[1]. In addition to the aforementioned examples, we will consider others related to the refugees context, governed at that time by the values of chivalry, tribal and community tradition and religious faith; all of which vanished today; the issue of refugees being governed today by what is termed "human principles" in light of political interests of States and their balance of power.

II. Lack of precision in the reference or authority entitled to formulate "*Ahkâm Al-Shari`a*"

This is a more serious gap than the earlier, which is why it is urgent to deal with especially in light of what is read and heard in terms of contradictory or extremist *fatwas* delivered in the name of Islam, quoting verses of the Holy Qur'an or Hadith of His prophet (PBUH).

It is beyond any discussion that the organization of the Muslim society and of relationships between its individuals, on the one hand, and between Muslims and others, on the other hand, were:

i) Partially governed by *Shari'a* through general or specific texts. The latter in general may be interpreted in various ways. Some of these texts are as numerous as the contexts which led to their revelation (relations with non Muslims for example). The validity of some of them is not subject of unanimity (isolated narrations);

ii) The other part, (and the most important one today in peoples lives), refers to *Shari'a* universal values and principles such as ensuring justice, warding off injustice, seeking benefit and avoiding evil.

In all these cases, it is obvious that individual explanations diverge. Our forefathers have opted for abiding by the doctrine and by what was preponderant or most generally accepted in case of divergence within a given doctrine. This solution was perhaps satisfactory within an environment characterized by its

---

(1) Such as the following opinion on our subject matter saying :

- When a non believer (non Muslim) enters the land of Islam without obtaining a pledge of safety, his blood is shed and he is considered as a spoils for Muslims if entering unwillingly as when for example his ship is wrecked….
- That stealing the money of a non-Muslim is part of spoils that is defined as: «what is taken in case of victory is like what is taken through stealing and embezzlement». We have read and seen fatwas like this openly published.

semi-isolation in which communication relationships were limited. Besides, *fiqh* was constrained to organizing relationships between individuals leaving the organization of society and public affairs outside the sphere of its intellectual interests and theories.

At present, the Islamic world is living a real crisis consisting in the following:

- The proliferation of *muftis* and *fatwas* to the point of contradiction with each *mufti* objecting to the legality of others' *fatwas* and sometimes even the latter's origin. The abundance of opinions recorded from our forefathers contributed to such a situation.
- The crisis also appears in the delivery of *fatwas* in the name of religion and in considering all legislation emanating from the State authorities as "positive law", alien to and violating *Shari`a* rulings. Some even consider it as the *tagout* (idol, tempter to error) that the Qur'an ordered to disavow.

Some Islamic countries appoint one of the *ulema* (scholars) as the "*mufti*" of the republic or the kingdom. There are also councils and official bodies to deliver *fatwas* such as the Islamic Fiqh Academy affiliated to the Organization of the Islamic Cooperation. Nonetheless, such measures did not bring any change to the situation: "independent" *fatwas* have increased in number and contradiction and, the official *fatwas* (be they individual or institutional) are by no means abiding, beside the fact that they deal only with limited and isolated issues while the contradictions of the positive law to *Shari'a* rulings and texts is increasingly notorious.

None denies that the aggressive and sarcastic writings against Islam have a historical, cultural and religious background, as well as political and economic motivations leading to biased decisions and standpoints vis-à-vis some Islamic countries and the Islamic world in general.

Nonetheless, we should be aware of the fact that this aggressive campaign is encouraged by the dissemination of *fatwas* through media, allowing the stealing of unbelievers' money, treating them roughly and suspiciously and avoiding their proximity: "I disavow any Muslim living amongst idolaters. The fires (dwellings) of a believer and a non believer should be at a distance that they do not see one another", "Earth is divided into two abodes: the abode of Islam (*dar al-Islam*) and the abode of war (*dar al-harb*), all non-Muslims living in the abode of Islam are "*dhimmi*", "the blood of all non-Muslims who enter the abode of Islam without a previous pact of protection is shed with complete impunity. The duty

of Muslims is to fight a holy war (*jihad*) against the infidels and establish an Islamic State that encompasses all continents and peoples on earth".... etc[1].

Such *fatwas* and other similar ones delivering conflicting rulings[2] on ordinary issues necessitate a moment of deep contemplation to reconsider the principle of issuing individual fatwas in the name of religion. One should distinguish between, on the one hand, the individual effort of exercising jurisprudence as personal opinion in expounding a text of the Islamic law and, on the other hand, a *Shari`a* ruling that is binding for society in terms of its self-regulation and relationships between individuals.

We, therefore, need to shift from a culture of decision-making based on *Shari`a* rulings issued through individual jurisprudence to a new culture where such decisions are institutionally taken.

- Shifting from a culture of individual jurisprudence to a system of institutional decision-making

The new system neither supersedes individual jurisprudence nore refutes it. On the contrary, the institutional decision-making would be based on individual jurisprudence rulings favoring opinions that are closest to truth and reason.

Institutional decision-making would spare the Muslim society the chaos of *fatwas*, manifested in contradiction and obstination in opinions. Likewise, it would shield the Ummah against the negative impact of the argument considering *Shari`a* "rulings" as contradictory to "positive law".

The identification and the organization of this institution (or institutions) to be entrusted with this task would take into consideration the situation of each Muslim country. Yet, the representation and participation of citizens in the choice of those who represent them seem to be unavoidable given the position of individuals within contemporary political and social systems.

---

(1) It is true that these are some of the eccentric ideas existing among Muslims as among others. Some people launched calls to shell mekkah with nuclear arms. There are also those who spend billions all over the world to make people change religion in order to establish « the Kingdom of the Messiah». But we should rather seek to correct our mistakes and not blame everything on the others.

The *fatwas* we have mentioned do not express the opinion of Islam neither that of the Muslim on the subject we are dealing with. They only represent the «chaos» of *fatwas* delivered in the name of Islam by some people usurping the quality of those who are qualified to deliver *fatwas* (scholars) due to the fact that they are easily accepted by followers and supporters. Our reality is the best witness for this.

(2) The problem does not lie in the existence of contradictory opinions on one event. It becomes an issue when a mufti opinion is delivered as a «God judgement» or «*Shari`a* judgement». This is what really calls for consideration.

The shift I have suggested here is not an easy task considering the culture prevailing over both individual and collective memories, yet, it is not impossible. Such a shift is imperative and cannot be discarded for the following reasons:

1. The knowledge of *Shari`a* rulings and their application pertains to the principle of personal *taklif* (responsibility, obligation for the individual to obey the law). Almighty Allah says: [***And We have fastened every man's deeds to his neck, and on the Day of Resurrection, We shall bring out for him a book which he will find wide open: "Read your book. You yourself are sufficient as reckoner against you this Day." Whoever goes right, then he goes right only for the benefit of his ownself. And whoever goes astray, then he goes astray to his own loss. No one laden with burdens can bear another's burden. And We never punish until We have sent a Messenger.***]"(1)

2. Conferring the value of a "legal ruling" on the opinion of an individual which has not been confirmed by any binding legal text. There exists no text obliging the Ummah to abide by a jurisprudence opinion delivered by any individual. What is certain is that Islam calls for joined efforts in the understanding of its texts and seeking the assistance of those who are more familiar with them and whom we nowadays call "specialists". Whereas the actual organization of the matter is to be entrusted to the Muslim community depending on circumstances of time and place.

3. Abiding by individual or collective interpretation of a religious text pertains to common agreement and custom. This is what the Christian church did. It determined the way to deliver formal opinions or making decisions in the name of religion. As a consequence, a Christian priest, in his quality of man of religion who knows the precepts of the latter, would not dare to deliver an opinion eliciting or prohibiting an act or a deed in the name of Christianity and even if he does; no one would consider his opinion as a binding, formal legal opinion.

- Why is it necessary to shift from a culture of individual jurisprudence to an institutional decision making system?

In the fields of worship and ethics, individual *fatwas* do not give rise to any social problem, except in specific cases since abiding by these *fatwas* is at the discretion of the receiver who takes what he deems right among the conflicting *fatwas* and applies it to his personal behaviour which is itself separate from the others' behavior.

---

(1) Surat *Al Issra'*, verses 13-15.

The problem rises when it is question of organizing society and relationships between its individuals, which is usually regulated by "law" in modern societies, and where it is impossible to apply multiple solutions to a single case.

When it is a question of "religious ruling, the multiplicity of solutions goes beyond the difficulty of applying the latter to create an exchange of allegations of misleading and digression. Emotional impulse might even lead to violence against holders of a different opinion; the reality we are living today attests to that.

Delivering religious rulings to organize social relationships in light of personal interpretative opinions inevitably gives rise to the multiplicity of these rulings, which results in conflicting opinions in terms of their application and consequently leads to breaking up social cohesion and ruining religious unity. For that reason, it is necessary to go beyond this option and adopt decision making through an institution that protects the *Ummah* from all these causes of corruption and evil and ensures its interests through stability and cohesion. The ultimate objective of *Shari`a* is to bring beneficence and ward off evil.

Some would consider this introduction out of subject. Others would see the call for upgrading the Islamic *fiqh* as a rejection of our identity and an agressive act against our heritage. They may consider relinquishing delivery of *Shari'a* rulings to a position behind individual jurisprudential effort as a denial of a unanimously agreed upon practice and which is dating back to the revelation of the divine message.

To sum up, the answer is as follows:

- Updating *fiqh* is imperative due to the existence of a wide range of jurisprudence rulings that can no longer be applied given the development of the philosophy of community-building and the principles organizing human coexistence. To be more specific, I will give some examples pertaining to political asylum.

On the other hand, updating *fiqh* does not mean completely discarding the inherited *fiqh* corpus and building up a new one. An important part of its rulings is still applicable. Besides, the multiplicity of opinions and interpretative judgements allow for a wider choice in order to select the most appropriate one, even if only few uphold it[1].

---

(1) For instance, the common opinion in *fiqh* saying that since Islam was revealed for mankind as a whole, Muslims are obliged to practice *da'wa* (call to Islam) on all non believers, giving them the choice of either converting to Islam, giving in and paying the *jizia*, or, in case they refuse, fighting them through *jihad*, a main duty on Muslims.

Yet, along with this opinion, there is another one saying that *jihad* as a duty, to fight non believers to force them convert to Islam, stopped to be so with the conquest of Makkah, for after this conquest *da'wa* was by fair means: «Invite (mankind) to the Way of your Lord with wisdom and fair preaching, and argue with them in a way that is better». Al Faqih Abdullah ibn Al Hassan (*Bidayat Al Mujtahid* by Ibn Rochd -368/1) and Al Faqih Sahnoun (*Al qawanin Al fiqhia* by Ibn Jizy, p.106) are among the scholars who support this opinion.

Evoking the fact that there has been *ijma'* (unanimity) on leaving the decision on *Shari`a* rulings to individual and independent *ijtihad* seems groundless. It is known that a significant group of *fuqaha*, since the recording of *fiqh* until today, has denied individual *taqlid* (imitation), let alone collective *taqlid* given its consequences such as *tahjir* (restriction) on the Ummah and ruling out the religious principle of *taklif* (responsibility).

A serious discussion, in my opinion, necessitates bearing in mind that the conditions having generated individual *ijtihad* and bestowed opinions the value of a religious ruling are different from the conditions under which we are living today. These undoubtedly demonstrate the impossibility to entrust individuals with the task of delivering binding rulings.

Can one imagine for instance that the society and the State should abide by rulings delivered by a *faqih Mujtahid* (jurisprudent) in matters of refugees? The answer is a definitely negative and for many reasons I do not need to dwell on, knowing that many individuals who deliver their jurisprudence opinions diverge at least on a part of these. So what would be the solution in this case?

The answer is beyond the subject we are dealing with and I will only mention it briefly in the third chapter.

After this introductory review, a question that comes to mind is why does the title of this study refers to the compatibility between Islamic law finalities and the international legislation on refugees instead of compatibility between this legislation and the *fiqh* rulings on the matter?

The answer lies in the two following facts:

Firstly: the question of refugees today is different in many key elements from the way it was perceived by our forefathers, which makes a number of *fiqh* rulings issued centuries ago no longer applicable today.

Secondly: conditions pertaining to refugees incessantly change, which necessitates linking them to *Shari`a* finalities since the latter are not influenced by time and place. While the concomitants demands and the conditions surrounding its particularities or its ruling on any given aspect change, the lofty meaning of its finalities remain unalterable as long as life exists on earth.

For that reason, I will deal with the subject in three chapters:

- Refugees between past and present
- The renewal nature of rulings related to refugees
- Comparison and observation

Chapter One
Refugees between Past and Present

There exists no clear time indication as to when old concept “refugee” changed to a contemporary one. What is indisputable, though, is that its significance today is fundamentally different from the one known ten or fifteen centuries ago. It is an inevitable result of the evolution mentioned before which affected the concept, the basis, the role of religion, and the competence granting the status of refugee.

I- The Concept

The concept of refugees following the provisions of the convention on refugees (1951) is to grant asylum and a home to a person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it” (Article 1).

“Every refugee has duties to the country in which he finds himself, which requires in particular that he conforms to its laws and regulations as well as to measures taken for the maintenance of public order” (Article 2). “The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals or to foreigners according to the rights detailed in the Convention”.

Main features characterizing the refugee concept in the 1951 Convention

- The “persecution” that the refugee fears to face originates in the country of residence, be it his native country or not, provided that the likely persecution is motivated by one of the reasons pointed out in Article 1 of the Convention.

- The State alone is entitled to grant asylum.

- Granting the status of refugee merely consists of providing “shelter/asylum” or a temporary stability to the refugee and does not attain “commitment” with the perpetrator of ill treatment or absolution of the refugee's misdeeds or errors.

Nevertheless, former writers on refugees, particularly refugees in Islam, point out several cases related to granting protection to persons against the dangers they would fear for their life, freedom or other fundamental rights.

Examples of refugee cases or antecedents:

- Immigration of a number of the first Muslims to Abyssinia (Habasha / Ethiopia), fleeing the persecution of the people of Quraish who mis-treated them for their religious beliefs. This event may be considered as a case of refugees according to the contemporary meaning of the term, since it comprises all its essential elements, except some insignificant formal aspects.

- A number of cases of *ijara* (granting asylum and protection) when Mut'im Ibn ‘Udai accorded protection to the prophet (PBUH) after the death of the latter's uncle, Abu Talib and when Ibn Daghna granted protection to Abi Bakr Seddiq May God bless him.

- The second and third allegiances (*bei'a*) of al-`Aqaba" wherein the prophet (PBUH) said “I take pledge from you provided that you protect me of what you protect your women and your children from”.

Ijara or granting protection, even if the seeker of asylum uses it to ward off a danger to his life or freedom, is totally different from granting the refugee status.

Ijara is the commitment of the grantor of protection and his public declaration that the seeker is under his protection. Any harm affecting the latter constitutes a direct aggression on the protector personally, his honour and provokes the latter's anger and retaliation[1].

---

(1) In *al Aqd al Farid* by Abdu Rabbih, the tale reported by Al-Nuamane ibn AlMundhir: “If a man of them learns that someone has requested his protection and that man were hurt during his absence, he would not be satisfied until he obliterated that tribe (the aggressor) or his own tribe is wiped out because of the violation of the protection he granted. They would protect even a criminal they do not know and whom they have never seen and his money better than they would protect themselves and their money if he came to them for protection”. Ch.2 p. 7.

While the material power of the person who grants protection plays an important role, sometimes his moral power is influential with the person from whom protection is requested. An example of this is the story related by the writer of Al Aghani about Al kamit who was accused of backing up the Hachimite. The Ommeyade caliphe Hicham ibn Abdelmalik wrote to his governor in Iraq asking him to send him the head of Al Kamit. One of the relatives of Hisham gave Al kamit a piece of advice to save him: “Hisham has lost lately his son. He was deeply grieving for him. During the night, go and put the flap of your tent on his tomb. I will then send his sons to be with you. So when Hisham sends his people to bring you, ask the children to attach their clothes to yours and say: he sought

Granting the status of refugee is far from this notion and is limited to according the refugee the right to temporary shelter within the territory of the State granting asylum. Protection from aggression is governed by the commitment of the State to ensure safety and security for all those living within its territory and does not emanate from the decision of granting asylum.

On the other hand, *ijara* occurs when the seeker of protection fears aggression in the location of effective residence, whether it is permanent or not, while the refugee status is granted out of fear of persecution in the country of original residence that asylum seekers have fled. The place they find themselves in is in fact "safe", hence choosing it as a refuge on a temporary basis.

Very often the verse [***And if anyone of the pagans seeks your protection then grant him protection so that he may hear the Word of Allah and then escort him to where he can be secure***][(1)] is evoked as evidence that the right of refugee exists in Islamic *Shari`a*. In fact, this inference is not grounded. The verse concerns granting protection to non-believers who are enemies of the Muslims. Their entry to the Muslim land would expose them to killing or aggression, as Muslims would face the same danger if they ventured to enter the land of non-believers. Non believers seek protection from the danger they face in the place of their temporary residence which is the land of the grantor of protection, while their original land or home, the land of non believers remains safe for them. This is clearly demonstrated when the verse orders to send back the protection seeker to "where he can be secure". Refugees today are threatened in their own country and seek protection and security in their temporary asylum that is the land of the asylum granter. The verse thus pertains to *ijara* and has nothing to do with the refugee concept as it is currently used today.

There are cases of "*amane*" (safety) that took various forms. Among them, I can refer to:

---

protection with the tomb of our father. We are entitled to grant him protection. The following morning he asked: who is this? He was told: may be someone seeking protection with the tomb. He said: "whoever, but not al Kamit. He deserves no protection. "But this is al kamit. He said: bring him to me in the harshest way. Al kamit then attached the clothes of the children to his. When Hisham saw this, his eyes fell with tears. He had pity when he heard his grandchildren say: Ö amir al mounminin. He sought protection with the tomb of our father. So allow us to do him this favour and avoid us this dishonour". He cried until he started sobbing and granted pardon to Al kamit. *Al Aghani* by Abi Faraj Al Asbahani - 17/13.

(1) Verse 6, Surat *At-Tawbah*.

Safety granted to fighters after their defeat or besiege. The treaty of granting safety which is also called the "treaty of Covenant" often hinges on certain conditions for the benefactor of safety. Here are some examples of this type of treaty:

The treaty of covenant granted by Khalifa Omar ibn al Khatab to the people of Bait al Maqdis stipulating the following:

"In the name of Allah the Merciful.

"Here is what the servant of God Omar, commander of the faithful, has granted to the people of Eilya [Jerusalem]:

He has granted them safety for their person, their money, their churches, their crosses, and the people of Eilya, the sick, and the innocent. Their churches shall not be dwelled in, demolished or diminished, nor their compounds or any of their properties. They shall not be forced to change their religion and no one of them shall be harmed. Nobody of the Jews shall live in Eilya.

The people of Eilya shall pay a tribute (*jizya*) as the people of Al-Madaine do. They shall keep out of town the Romans and the thieves. All those who choose to leave fear nothing for their person or their money until they reach a secure place. Those who wish to stay are granted security. They shall pay a tribute as the people of Eilya do. Those among the people of Eilya who want to take their money, merchandise and crosses and leave along with the Romans, shall be safe until they reach a secure place of their choice.

Whatever is written herein is under the covenant of God and the responsibility of His Messenger, of the Caliphs and of the believers…."[(1)]

The treaty of covenant granted by Amru bnu al 'as to the people of Egypt:

"In the name of Allah the Merciful.

Amer ibn al 'as has granted safety to the people of Egypt, their properties, their churches and crosses, their coreligionists, their land and their shores. The Nubians shall not live with them.

The people of Egypt shall pay a tribute of fifty thousand thousands if they agree on this covenant and if their river is filled. They shall be responsible of the deeds of their bandits. If one of them refuses to pay the tribute, the latter will be

---

(1) Political and Administrative Documents in the Era of the Prophet and the *al-Khulafa' ar-Rashidun* (Righteously Guided *Caliphs*) - Mohammed Hamidullah, p. 488.

levied according thereto. If their river is diminished, the tribute shall be levied according thereto. Those of the Romans and the Nubians who conclude a covenant with them shall be treated like them. Those who refuse and desire to leave shall be safe until they reach a secure place.

Whatever is written herein is under the covenant of God and the responsibility of His Messenger, of the Caliphs and of the believers".(1)

Granting safety to an individual or a group of individuals coming from an enemy land to the land of Islam

Ibn Jazy reports that "There are three types of safety: the two first ones concern the masses and only the sultan can grant them. These are the treaty of Covenant and the treaty of *dhimma*. The third type concerns one non-believer or a group of non-believers. Any competent Muslim is entitled to grand such type of security.(2)

Al Qalqashandi reports in *Sobh Al A'cha*: "the pillars of the pact of security are as follows:

- The granter of the safety pact: any responsible (*mukallaf*) Muslim can grant it.
- The benefactor of the pact: it can be granted to one or several male or female non-believers".
- The wording of the pact: it can be any word that means safety implicitly or explicitly.

Its conditions are: that it entails no harm to Muslims because of the benefactor of the safety and that its duration does not exceed one year."(3)

This type of safety is different from the other kind granted to one non-muslim individual or a group of individuals. The *Imam* or his substitute or any Muslim can grant it as well. It is also different from *ijara* / protection since it is conceded in the name of the Ummah, while in *ijara* only the grantor of protection commits to it vis-à-vis the seeker.

An example of this type of safety covenant is what King Nasser Mohammed ibn Qalawun wrote to the king of the Serb, Stefan Uros who wished to visit al Quds with his wife. The letter runs as follows: "As his honourable excellency

(1) Idem, p. 502.
(2) *Fiqh Laws* by Ibn Jazy, p. 113.
(3) *Sobh Al-A'cha* by Abi Abbas Al-Qalqashandi - 322/13.

Stefan Uros, head of the Christian community, pride of the nation of the Cross, pillar of the baptism, friend of kings and sultans, leader of Serbs, may God grant him longevity - as he has received our usual acceptance, and reached through our beneficence which prevents evil from reaching his people and fulfils the promise - our honorable wisdom led us to decide to enlighten his path, and provide him with major generosity, as we did with other kings, and that he be able to come along with his wife and their company to visit the revered Jerusalem, thus accepting them, generously taking care of them, and giving them with safe passage, to them and their money until their return to their country, and have them be treated according to our instructions, in generosity and care, until they return safe and sound. I hereby order that everyone follows my instructions in treating them as recommended and not prevent any good from reaching them, while passing by or settling down, and protect them from any wrong deed wherever they go. May Allah grant everyone entering our doors the bounty of safety, and that He fortifies our will by the everlasting Mohammadan victory until everyone submits to the true faith. The sign above is proof of the originality of this document. Good shall prevail by the will of Allah"[1].

Granting safety of movement for trade:

Truce treaties concluded between Muslim rulers and other rulers[2] are numerous. Sometimes safety is accorded separately without being linked to a truce or a peace treaty. This is illustrated by the decree of Sultan Qalawun wherein he invited people to enter Egypt: by any of its doors as they wished: from Iraq, Persia, Hejaz, the Byzantines, India, china - anyone among the honourable rulers, highly ranked merchants, magnates of these regions that have been cited and the ones that have not been mentioned, and everyone wishing to enter our kingdoms be it for residency or simple passage - into our extended welcoming land and umbrageous places, is called upon to come into our land and visit a country

(1) *Sobh Al-A'cha* by Al-Qalqashandi - 327/13.

(2) This kind of treaty may be concluded between two Muslim rulers, such as the treaty concluded between Sultan Dhahiri Faraj ibn Barquq and the Timor Kurkan, the ruler of Transoxiana in Jumada I 805H, after he has attacked As-Sham and conquered Damascus. The treaty stipulates that «each one shall respect the borders of the other's kingdom, shall not assail his dominions, citadels, fortresses, shores, ports and the like, shall not hurt his subjects of all faiths and races, nor anything known to belong to his kingdom, either in urban or rural areas and shall not harm people living in his country such as merchants and travellers, be they individuals or groups», *Sobh al A'cha* 103/14 - 107.

where neither provisions nor supply is needed… anyone reading this decree among the merchants living in Yemen, India, China, Sind and else, is called to make the trip and come to our land to witness the veracity of our promises… and enjoy the pleasant stay in a good land with the clemency of a forgiving god… with the safety of self, money and a happiness that distracts from worries and enliven the hopes… and keep their money in their purse… and anyone bringing merchandize consisting of spices and various types of merchandize known to merchants shall not be accountable for it, and shall not be imposed what they cannot bear, for justice shall ensure their rights…"[1].

Granting safety to opposers and persons in fear of the tyranny of a ruler:

This type is particular to the Muslims, for safety granted to non-Muslims falls under the known *dhimmi* pact.

That is why, Qalqashandi said: "I know that this type is a branch annexed by writers to the former type (treaty of safety for non believers). For the Muslims are safe by virtue of the Holy Law of Islam the moment they become Muslims. Evidence of that is the saying of the prophet (PBUH): "*I received the order to fight people until they express the profession of faith that there is no God but Allah. As soon as they pronounce it, their life and property are safe*". Yet, kings had a tradition of granting safety to those who feared their power or tyranny, particularly those whose disobedience was feared to be a source of disorder. This tradition was so widespread that safety pledges constituted the majority of the writings of their *diwan* (cabinet)"[2].

I will quote only two examples. The first is a safety granted to an individual and the second is a conditioned type of safety granted to a group. Both were accorded by Simsam ad-Dawla ibn Adud ad-Dawla ibn Bawayh Dailami. Abu Ishaq ibn Hilal Es-sabi drafted them in his name:

First Treaty:

"… You have expressed your desire to join our community, be under our protection, live under our shelter. You requested us to assure you security. We accepted that and granted you the safety of Allah, his prophet (PBUH) and that of Amir Al Muminin. We granted safety to your person, your kin and family, money and property. In exchange, you owe us loyalty. If you

(1) Idem - 339/13 - 342. Qalqashandi commented: «this document, even if it is not an express pledge of safety, it implies it, as Ibn Al-Mukarram said».

(2) *Sobh al A'cha* 329/1.

respect that without failure or revocation, our safety pledge shall be comprehensive, binding and not alterable for any reason.

If you come to us, we will treat you right, even better than what you expect from us. So feel safe. All those who see our letter among our *kharaj* agents, aids and administrators shall abide by it. Beware of violating this covenant."[1].

Second Treaty:

"… Mohammed ibn Mussayab made a request in your favour and expressed your desire to serve us and join our community. He requested safety for your person, your money, family and kin, provided that you behave with correctness and righteousness, that you cause no fear nor corruption, you do not disobey the sultan and walis and governors, become friend with his enemy or the enemy of a friend of his, protect anybody who disobeys him, betray him publicly or in secret, in your sayings or deeds. We have decided to accept this and to receive the request of Mohammed in your favour, and what is contained in the pact with regard to the protection granted to you and according to the conditions stipulated to you, namely sparing the community and the passers-by, avoiding attack of property and persons, the violation of a *dhimma* or a prohibited matter, or commit a sinful or wrong deed.

Thus, try to respect these conditions, by adhering to rightousness and straight path, controlling your action, and those immature among you, while enjoying the protection of Allah, his prophet Mohammed (PBUH), and that of the Commander of the faithful, and our protection as well on yourselves, your money and your surroundings. Protected as well are all those among you respecting these conditions including your family, tribe, followers and anyone in your circle.

Those among you who read this message among the governors responsible for *Kharaj* (land tax) and their assistants, those transportation administrators and others, are called upon to abide by its content, granted by their respective people are called to respect it as well, all by the will of Allah."[2]

In addition to these two types, there is the protection granted by a place. The oldest and most important place that affords protection is the haram of Makka. The *fiqh* doctrines (*madahib*) diverged on the degree of safety that this place can offer even to a perpetrator of a crime.

---

(1) *Sobh al A'cha* 337/13 - 107.

(2) *Sobh al A'cha* 338/13.

From what was noted above, it is clear that the concept of refugees is different from past to present. In the past, it used to mean granting shelter and protection to an individual or a group of individuals fearing an aggression or persecution, either in the form of *ijara* or *aman* in its various types or asylum in its strict meaning. The protector or provider of safety may be an ordinary person, a king, a ruler, a tribe or a sacred and respected place.

Today, the concept of refugee is very specific. To begin with, it is associated to the term of "political", in addition to all the provisions encapsulated in the 1951 Convention.

II. The Basis

Granting asylum in its broader meaning in the past times was motivated by many factors:

Chivalry and pride in rescuing others.

This factor was clear in *ijara* (protection) or *jiwar* (neighbouring) that was predominant in the tribal society where prevailed values such as courage, generosity, chivalry, taking pride in protecting the weak, and therefore acquiring the power that these values were meant to confer. People were competing in granting protection and rescue even if this would cost them high sacrifices avoiding thus what would bring them dishonour and weakness. To illustrate this aspect, I refer to some poetry verses by al-Hutay'a praising those who extend help and protection to persons seeking it and other satire verses by Al-Farazdaq lampooning people who fail to extend assistance to those who seek protection from danger.

Al Hutay'a praises Bani Adiy, describing them as the noblest youth of Busra(1). When someone calls for their help, they immediately provide it. They rescue the foreigner and the helpless and offer home for *murammalin* and *daradeq*(2).

Al-Farazdaq, on his part, wrote a satire against Bani Kulaib who failed to help Abbad bin Alqama called Akhdar.

In his poem, Al Farazdaq illustrates failure to help with Kulaib's attitude towards Akhdar when the latter was the target of arrows *shawajir*(3). Not a *najir*(4) came to rescue him that day. Only their absence was noticeable. They handed

(1) Busra is a place in as-sham, known of making swords.
(2) *Murammalin* mean those who have nothing to eat and *daradeq* means young children.
(3) *Shawajir*: various and intermingled.
(4) No one.

him to his enemy and, for that, they gained the attire of reprimand (*lama*)[1] that they will bear for the eternity".

This concept of protection became a practice of kings and rulers who granted it in their personal name. The State as a moral entity was inexistent in the minds and culture of people at that time[2].

Today, refugees' rights stem from human rights. The difference in motives between ancient times and today entails a distinction in determining those who are entitled to receive the status of refugee.

In the past, granting protection or help to those seeking aid depended on the power and desire of the grantor[3], regardless of the motives of the former. Reference was made earlier to Nu'mane ibn al Mundhir saying: "They would protect a criminal they did not know and protect his money better than they would protect themselves and their own money if he came to them for protection"[4].

Nowadays, the status of refugee is essentially linked to the reasons justifying it, namely the protection of human rights. This can be deduced from Article 1 of the 1951 Convention either in its paragraph "a" that specifies the reasons of fear from persecution justifying the request of asylum or paragraphs "c", "d", "e" and "h", relative to cases where the status of refugee is rejected.

Related to the cause justifying the status of refugee, the 1951 Convention specifies the rights that should be granted to the refugee, such as joining his family, freedom of movement, the right to practice an occupation or a profession,

---

(1) A blameable deed.

(2) For instance, what Sultan Barquq wrote to Timor Link about Al Qan Ahmad : «What you have done to Al Qan Ahmed was not as not enough for you and now you are asking us to hand him to you. Be it known to you that the Qan requested our protection, came to us and became our guest. God said in his Holy Book : [***And if anyone of the pagans seeks your protection then grant him protection so that he may hear the Word of Allah and then escort him to where he can be secure***], let alone Muslims who seek protection from Muslims… and even without that, our moral values and our sense of honour forbid us to hand our guest who sought our protection. Our traditions, customs and nature do not allow for this. If you do no believe me, ask those of our race and they will tell you. Our guest can never be hurt. He is kindly and generously treated», *Sobh Al-A'sha* - 308-319/7.

(3) Power and desire still motivate granting asylum today. This often happens between countries of the South in case their bilateral relations deteriorate and vice-versa when they are allies. People who deserve asylum are thus denied this right. They are even coercively sent back to the regime they have fled.

(4) *Al Aqd Al Farid* by Ibn Abdou Rabbih - 2/7.

religious faith, benefit from education… etc. All these aspects were not covered in what was called before *jiwar* or *khafr* (protection).

Yet, while granting protection was earlier motivated by pride and chivalry to promote the tribal social status, we may say that the reasons for granting asylum were not different nowadays. The best example of these is the right of asylum granted by king Annajachi of Abyssinia to Muslim immigrants who fled the persecution of the Quraish tribe against the believers in order to protect their faith.

III. The Role of Religion

Societies were based on religious bonds and unity of faith. Minorities that did not practice the religion of the majority lived isolated.

People belonging to the same creed consider themselves as brothers and members of one nation even if separated by borders imposed by the multiplicity of political systems.

The same thing applies to Muslims in this respect when another Muslim came from a foreign country, he was not considered as a "foreigner" who should seek asylum to be sheltered. Rather he became a member of the community, enjoying the same rights and having the same obligations as soon as he lived among the community whatever the reason that led him out of his country of origin. The principle followed was not to oblige him to go back or hand him to the authority of the country he left as long as there is no previous convention, as shall be mentioned later. Along with this principle, a number of remarks arise:

1. Non-permissibility to repatriate a Muslim even if newly converted to Islam

When a non Muslim, entering a land of Islam on a temporary basis for a given business, embraces Islam in the meantime and refuses to go back to his country, it is not permitted to send him back to the authorities of his country even at their request. This principle is particularly implemented is the case of *rahn* (hostage)[1] and the emissaries.

On hostages, Abu Al Hassan Shaibani says:

"If the asylum seeker after embracing Islam refuses to return to the country of origin despite the threats of the unbelievers to retaliate by killing or enslaving muslim hostages, the *Imam* should not send back the newly

(1) *Rahn* means persons handed by the authorities of their country to those of another country as a guarantee from the former to fulfill their obligations to the latter, a custom practised not a long time ago inside and outside the Islamic World.

converted asylum seeker even if he knew that the Muslim hostages would be killed, because the life of the asylum seeker was as sacred as that of the Muslim hostages.

Should the asylum seeker who embraced Islam request the return to the country of origin in order to recover the Muslim hostages in return, the *imam* or the decision maker believes that the asylum seeker would be killed upon return, he should not allow the return of the latter. The opinion of the asylum seeker in this case does not count if his life is put on the line, his life should be saved. In the event the asylum seekers request to be handed over and if we do not know what the outcome of their return would be, there is no harm in handing them back if so they wish, for they would not be requesting so unless they know themselves to be safe upon their return"[1].

Concerning the emissary who embraces Islam, the *fiqh* disagrees whether handing him back to the sending non Muslim state is permitted or not. Those who argue for permission take evidence in what the prophet (PBUH) did with Abi Jandal. Those who argue against it note that the handing back of Abi Jandal took place in response to the condition stipulated in the peace treaty of Al Hudaybiya. This was stated in the verse: [***If you fear treachery from any people, throw back (their covenant) to them (so as to be) on equal terms***][2]. The emissary who embraces Islam is not to be repatriated even if such a condition is stipulated in a previous treaty as Ibn Habib, a follower of the Malikite madhab, says[3].

2. Hosting a Muslim entering the land of Islam is not subject to the rulings on refugees

The general principle is that the entry of a Muslim seeking residency in in the land of Islam willingly or unwillingly does not require a refugee document or an "authorization".

In the few cases where a written document is mandatory -as in granting a collective asylum- the document states that the refugees shall enjoy the same rights of the native "citizens".

An example of this is the decree issued in Morocco by the Al Mohade calife, Rachid ibn Al Mamoun, in Chaaban 637AH relative to the settlement of immigrants from Andalusia. The decree runs as follows:

---

(1) *Sharh al-Siyar Al Kabir* by Shaibani 43/4.

(2) Verse 58, Surat *Al-Anfal*.

(3) c.f. *Al-Bayane wal-Tahsil* by Ibn Rochd-45/3.

"This is a sorveign decree ordered by Amir Al Mu'minin (Commander of the faithful), descendant of three generation of Amir Al Mu'minin - May Allah assist him with his victory and bestow his bounty on them all - addressed to host travellers from Valencia, Alcira (Asland of Shuqr), Játiva and those from all the eastern land, as requested by the august Sheikh Abu Ali Ibn Sheikh Abi Jaafar Ibn Khalass, after what befell them after the war… requesting a place for them and a location of residence. Upon this request, the Commander of the faithful granted them refuge in Rabat, making it their place of residence instead of their former one, in this land of bounty where commerce, agriculture, fishery and all land and sea trades thrive, thus, promising them welfare, making their strong stronger and kindly assisting their weak, cultivating the land, of which there is plenty, with all kinds of plants… as they did in their customs back in their country of origin, acquiring property to themselves, their children and their grand children. Whatever property they acquire, it all follows rulings… entirely and forever, and they will not be solicited thereupon except what is legally due by the law which Allah prescribed on the riches of the people of Islam. Their declaration on these properties shall be considered valid and their aspirations shall be respected as well as their people. The walis, governors - May Allah protect them - are instructed to protect them from all harm likely to reach them, or an obstacle likely to prevent them from reaching a goal, be it major or minor, and be generous towards them, seniors and notables, and grant them good neighbourhood in order to make them forget the plight they went through, and be hospitable towards them and the members of their group and family. Anyone among the community or governors -May Allah favour them- should follow the instructions of this decree. Allah is the one who assists; there is no god but Him. Recorded on the 21st of Chaaban of the year 637AH[1].

3. Religion may have no impact on repatriating refugees

Over centuries, political interests have dictated the necessity to make alliance treaties stipulating the commitment of each party to repatriate every applicant for asylum and refugee status, whether Muslim or not. These treaties could be concluded between Muslim rulers or between a Muslim and a non-Muslim ruler.

An example of the first type is the treaty concluded between Charaf al-Dawla wa zine al-Milla Abi Al Fawaris and his brother Simsam al-Dawla wa shems al-Millah abi kalijar, the two sons of Adud al-Dawla ibn Rukn al-Dawla ibn Buwayh in the middle of Safar 376 AH.

---

(1) *The Era of Al-Moravides* by Mohamed Abdullah Inane 732/2 and 738.

Stipulated the following:

They agreed "to unite against the enemies of the State, keep ready for them, bond to deter any of them who comes in sight, oppress any opponent, compel any tyrant to lean, humiliate any insolent and disrespectful party until all their friends and allies attain victory and their enemies become the target of all parts. And no enemy would be able to rally any of their allies, seeking protection or help. No one would accept a protection seeker coming from a friend, soldier, governor, scribe, friend or administrator in any manner, and none shall host a fugitive or protect a hider."[1].

Examples of the second type:

a- The truce treaty concluded between king Al-Zaher Bebars and his son king Al Malik Said with "Frère Hugues de Revel" Grand Master of the house of Hospitallers of Saint-Jean, on the coastal land and all the Hospitaller brothers in 669AH.

> "… should a Muslim whatever his social class, owned or free, or freed; move from whichever land to seek refuge in another (*tasahaba*)[2]; be he a child or not, he should be returned with whatever he owns, be it little or much. Even if the asylum seeker enters a church and stays in there, he is to be extradited to our representatives, with all his property, be it horses or clothing, money, gold or what people use as currency, all shall be handed over to our representatives as explained earlier. If someone from the Christian land seeks refuge in our land, or came through one of our representatives, he should be caught and handed back with whatever he owns of horses or clothing and all his property, be it little or much, and be caught by our representatives and handed over to the representative of the resident master and record the handing over in writing along with the seized property."[3]

---

(1) *Sobh Al-A'sha* by Al-Qalqashandi - 92/14 - 95.

(2) *Tasahhaba* means to refuse obedience of the king by leaving the latter's kingdom to the ennemy's.

(3) *Sobh Al A'sha* by Al-Qalqashandi - Handing back a refugee may be sometimes mandatory, but after he is accorded safety, as stated in the treaty concluded in 682AH between Sultan Al Malik Al Mansour Qalawun, the ruler of Egypt and Syria and his son Al Malik Al-Salih on the one hand and the Frank rulers in Akka and the coastal lands of Syria on the other hand. The treaty runs as follows: «When someone, whoever he might be, runs away from the land of the Sultan and his son to Akka and the coastal land specified in this treaty, intends to embrace Christianity and does so willingly, he shall be dispossessed of all the belongings he will have brought with him and remain naked. Who he intends to embrace Christianity and does not do it, shall be brought back to the land's high gates with all his

b- The letter sent by Sultan Mohammed IV, king of Grenade, on Jumada II 726AH to King of Aragon Don Jaime, in reply to the latter's proposal to extend the duration of the truce concluded with the father of Mohammed IV:

The letter runs as follows: "*Do not assist an enemy against Muslims or Christians, in land or sea in whatever form and the good faith of dealing with you would stipulate (the terms of agreement) that if a person escapes our land, avoiding our authority, shall not be hosted in yours, neither receive food or anything from you, and shall not assist anyone against us, and the same deal shall be put forward from our side*."(35)

Religion, thus, had a manifest role in granting asylum and expulsing refugees. Muslims did not need to seek asylum to enter "*dar al Islam*". *Fiqh* scholars are unanimous on the fact that Muslims are requested by virtue of their religion, to flee "*dar al kufr*" when feeling pressure or difficulty in living according to what the Muslim faith commands. Some scholars strongly considered immigration a duty even if the Muslim does not face such pressure or difficulty.

In practice, the settling down in "*dar al Islam*" of a Muslim immigrating from "*dar al kufr*" did not depend on granting the status of refugee. He immediately acquired all "citizenship" rights as soon as he entered the land of his brethern.

It is true that in some isolated cases, the reality and the political interest of the moment dictated the necessity to conclude treaties whereby a Muslim ruler committed to send back any Muslim, seeking asylum under his authority, to his original country whether this country was Islamic or non-Islamic.

---

belongings and shall be put in a good word after he is accorded safety. Likewise, when someone comes from Akka and the coastal lands specified in this treaty, intends to embrace Islam and does so willingly, he shall be dispossessed of all his belongings and remain naked. If he intends to embrace Islam and does not do it, he shall be handed back to his rulers and foremen of Akka with all his belongings and shall be put in a good word after he is accorded safety». Idem, pp. 51 and 56.

This treaty included an unusual provision: citizens who have settled down in the other country are sent back home, regardless of their religion. The treaty says: «… a town crier shall annonce in Muslim and Christian lands specified in this treaty that all farmers from Muslim lands, be they Muslims or Christians, lands shall go back to these lands. The same applies to farmers from Christian lands. Those who do go back after the anouncement are expulsed by the two parties».

(35) *Political and Administrative Documents in Andalusia and North Africa* - Dr. Mohammed Maher Hamada - pp. 465 and 466.

4. Competence in granting the refugee status

Fiqh sources have all agreed that protection (*jiwar*) can be granted either by the State or by individuals and have explored the conditions required for the individual to be granted the status of refugee.

Nonetheless, according to the contemporary custom and following the 1951 Convention, only a totally sovereign State has the competence to grant the status of refugee. This is obvious, since the protection granted by individuals before was imposed by a reality where the State did not exert the function of ensuring public order and security; individuals, their supporters and the tribe were responsible of ensuring their own security and protection.

In other words, some societies have witnessed at a point of their history the phenomenon of granting protection by individuals. Islam did not prescribe it, but it cohabited with it as something inherent to the society following the general principle of "adopting magnanimity and ruling according to custom".

The notions of individual protection (*Jiwar* and *khafr*) might still exist in some societies that have not yet outdone the tribal system within its traditions and customs; yet it is no longer a common practice. These conditions will surely disappear given the powerful role of the State that monopolizes sovereignty and the regulation of the person's security, freedoms and social relationships.

The difference is thus clear between past and present in terms of granting the status of refugee. It is no longer acceptable to argue for individuals' right to grant this status within or without the frame of Islamic law, since it conflicts with the political principles regulating the society. One thus might wonder why some contemporary writers claim that Islam gives individuals the right to grant the status of refugee as does the State and that Islam is superior to contemporary international law in that matter.

The events recorded in the beginning of the Islamic history were in line with the customs that suited at that time the community and the tribal reality in terms of security and social life. I think, it is absurd to say that Islam grants individuals the right to grant asylum and protection in the light of the political system of the State within which people live today, including Muslim States.

Islam is superior in the implementation of contemporary international law when real Islamic values are applied in matters of political asylum, for these values are based on moral ethics and do not seek to disguise acts and deeds in a superficial legal cover and phoney legitimacy that characterize an important part of the decisions granting or rejecting the refugee status today.

To evoke this superiority to entrust individuals with the competence of granting the status of refugee to whom they wish in the 21st century seems implausible with respect to the logical analysis of historical facts and the concept of the State and its institutions.

This chapter demonstrates how the concept of "refugee" has evolved as a social practice and a legal institution governed by inherited customs and traditions. At the same time, the concept has known continuous change influenced by the surrounding circumstances and by the culture shaping individual and collective activities.

The concept of "refugee" has known evolution and change, as well as its ethical basis, its relation with religious faith and the party entitled to grant it.

Chapter Two

The Changing Nature of Rulings Relative to Refugees

The concept of refugee is linked to a set of relationships constituting cohabitation within which each community has chosen to lead its collective life including relations with regard to faith, race, class as well as the manner in exerting power.

Human societies, since its beginning, lived a series of evolutions in their relations with respect to religion, race and class. The most important change they have known concerned the practice of political power (political entity), communication and cohabitation with other entities.

This fact led to a continuous change and evolution of the rules pertaining to the right of refugees, which the former chapter has clearly illustrated. We have seen how the concept of *jiwar* and *khafr*, exerted by individuals according to the customs of their tribe shifted to an institution organized by all States under the auspices of the United Nations.

From the tribal system sprang the concept of "*jiwar*" in line with the characteristics of individual courage, chivalry and power representing haughtiness conferring supremacy over the others and the power to impose one's point of view even when the latter is not right. That is why "*jiwar*" could be granted sometimes to perpetrators of injustice. A tribe could risk annihilation in defending it or taking revenge when it was threatened, or else face dishonour and bitter satire[1].

The customs related to refugees at that time adapted to the era of feudalism and despotic rule. Granting or refusing the right of refugee obeyed, then, to the whims of rulers following the extent of military power or the nature of concluded political, ideological or even family treaties.

In the twentieth century, the system of refugees knew a radical change in terms of concept and application.

In terms of concept, it shifted from granting a secure shelter, relief and some temporary solutions to legal protection in favour of refugees and granting them certain rights equal to the native citizens and some others equal to those granted to foreigners in the said country as confirmed by the 1951 Convention.

As for the responsibility of implementation, further to the fact that every state handles refugee issues separately, there appears the feeling of international collective responsibility. This feeling started by the creation of the League of

(1) C.f. Al hutay'a and Al Farazdaq poems mentioned earlier.

Nations High Commissioner for Russian Refugees in 1921, followed by the creation of regional and international entities devoted to specific categories of refugees. Later on, on December 1949, United Nations High Commissioner on Refugees was created making the refugee issue an international one that concerns the entire world community. The United Nations has been declared in charge of all matters pertaining to refugees. At that same time was created the High Commissioner for Refugees, with its statute setting it as an affiliate of the United Nations entrusting it with the issue of refugees regardless of their ethnicity, religion or geographical belonging.

After the 1951 Convention and the 1967 Protocol, new problems arose. The international community is still expected to lay down appropriate legal regulations. Among these problems, there is one which concerns refugees forced out of their country due to an external war, a civil or ethnic war, where the notion of refugee, as stipulated in the 1951 convention, cannot be applied, and where the number of refugees is beyond the traditional numbers of refugees, and who are surviving dramatic human and health conditions due to closing down the frontiers or assembling them in camps where the conditions specified for prisoners of public right are not met.

These facts confirm that the inevitable evolution of the conditions governing cohabitation among communities within one nation and at the international level bring rules governing the rights of refugees to change continuously.

This occurs at the level of the international sphere to which the Islamic World belongs. If we consider the question within the Islamic World and in the light of its divine law, we find a manifold of factors that urge us as well to continuously review the rules that govern the rights of political refugees. Among these factors are:

1. The absence of definite (*muhkam*) texts on the subject

There seems beyond any doubt that there exist no specific and decisive texts in the Holy book and Sunna regulating the rights of political refugees. This is understandable for obvious reasons:

What has been mentioned earlier on the nature of rulings governing the rights of refugees, i.e., the continuous change they know because of changing customs and traditions and the evolution of concepts and ideas in the field of international relations, human rights and political conditions. Setting specific and unchanging rules uninfluenced by time and place proves to be impossible.

- The Muslim, by way of fulfilment of the duty of *taklif* (responsibility) and faithfulness to the principle of *khilafa* (substitution) aiming at ensuring prosperity, has to adapt to life in reflection and practice and endeavour to influence and lead it to a better status. This can be achieved only by an incessant quest for solutions in line with the changing reality of life. If the revealed text had fixed rules for every detail, the intellectual capacity of humans would have frozen while life and mankind would deteriorate to the worst: "***Verily! the worst of (moving) living creatures with Allah are the deaf and the dumb, who understand not***].[(1)]

2. Necessity of Renewed Exegesis

The revealed texts are immutable and have known no change since the death of the prophet (PBUH). Texts concerning the building of relationships and cohabitation between people were revealed in two forms: partial detailed rulings and general values and principles.

The first type came in its majority in a form that can be interpreted in many ways. The application of the second type, given its nature, could be influenced by the culture of people and their ideas producing ideals and values. Culture and ideas change with the change of time and place. What was yesterday considered a lofty value representing good could be seen as something reprehensible and vice-versa. Here are some of examples pertaining to the refugees' question:

- Attacking a weak tribe and enslaving their men, women and children was considered as a sign of courage, and even part of the social rights of individuals[(2)].
- The refugee or seeker of protection was returned by force to his "owner", since he was a slave. The threat awaiting him back home or the reasons that pushed him to flee were not taken into consideration.

---

(1) Surat *Al Anfal*, Verse 22.

(2) Qortobi, in his interpretation of the verse : [***There is a share for men and a share for women from what is left by parents and those nearest related, whether the property be small or large - a legal share***]:

The verse was revealed relating to Aous Ibn al-Ansari. He died and left a spouse called Oum Kaja and three daughters. His two cousins, Suwaid and Ajrafa, took his money and gave nothing to his wife and daughters. In the jahiliya, women and children, even male children, were not entitled to inherit. It was said at that time that only those who fight on horses, use arrows, hold swords and bring booty could inherit. Oum Kaja briefed the prophet (PBUH) who called the two cousins. They said : «Ö Messenger of Allah, her son does not ride a horse, nor does fight an ennemy…God revealed this verse to disprove their sayings and deed…». *al-Jami' li Ahkam al-Qur'an* - 46/5.

- A foreigner[1] entering the borders without having a pledge of "*aman*" (safety) could be killed or enslaved at sight even if lost or shipwrecked due to a strong wind.
- Political cohesion of society was based on religious faith. It was not acceptable to send back a person of the same faith to his original country where people practised a different religion even if the refugee seeker was not victim of oppression or persecution with regard to his faith or other rights.

Today, there is no connection between religion and granting or refusing asylums. The entity of political community is based on "nationality". Granting asylum is related to the requirements of Article one stipulated by the 1951 Convention, which does not include the religious faith of the refugee.

- The nature of social life allowed individuals to grant asylum. But in the light of the contemporary political situation, there is no room for granting this right to individuals.

From these examples, the renewal of the exegetic activity in the field of refugees seems to be unavoidable, in order to face the continuously changing realities of individuals and communities, and which require solutions different from the ones our forefathers have accepted and applied.

3. The nature of *ijtihad* rulings requires continuous revision

The Mujtahid bases his rulings on the explanation of a particular text that allows for different interpretations, either by the use of the analogy principle upon a ruling commanded by this text, or on the basis of the Shari`a principles and its general values, mainly the principle of promoting beneficence and deterring evil, since Shari`a as a whole aims ultimately at ensuring good and avoiding evil.

Thus, the *Mujtahid* is influenced by the surrounding conditions and circumstances, as well as by intellectual and personal characteristics through which he discerns the best signs of a sound ruling. Al Ghazali, May God bless him says: "*he who considers fiqh matters in which there is no decisive clear cut text (qat'i) is aware of the absence of decisive evidence… should it bear an un-explicit proof through consensus, he who misses the un-explicit proof is wrong. We have said that conjectural signs cannot be evidences by themselves, for they change according to additions. Evidence might be conjectural for Zayd, but it might not*

(1) A foreigner is the one who is neither a member of the tribe which he entered, nor a follower of the religion of the State or Emirate to which he entered.

be so for Amr even if he is fully aware of it. Conjecture might be considered as such for one person with regard to one matter but not for another one. Besides, on a single matter, there might be two contradictory evidences, each of which could, if taken separately, imply a conjecture…. Signs are like a magnetic rock, it can exert a pull on a nature that suits it like the magnet draws iron to itself but not copper"[1].

The existence of a manifold of rulings most of which emanate from *Ijtihad* illustrates this fact.

On the other hand, the humans' endeavours never stop with regard to broadening their knowledge, which influences human relations with the world surrounding them and the organization of their personal and social life both at the national and international levels. This necessitates the adaptation of these relations and organization to the knowledge development and ideas stemming from them.

For these two reasons, many *ijtihad* rulings relative to human rights have become outdated by reality and are no longer applicable. We also notice that there is an absence of this type of rulings on new events that characterize the organization of State and international relations.

The idea of granting the right of asylum by individuals, for instance, is no longer applicable, as are opinions arguing that access of non Muslims to the land of Islam is forbidden unless they have a permission granting them *aman* (security), otherwise they would be either killed or enslaved; that those who detain this permission have the right to settle down for a duration from four months to one year, i.e., the period decided by the imam according to some opinions on the subject. After that, these non-Muslims are either expulsed or become subject to *dhimmi* law. Another example of outdated opinions is the one stating that a Muslim has the right to enter and settle down in any other Muslim country or territory, and that it is prohibited to refuse him access for any reason.

These opinions were justified at the historical period they were issued, which are no longer applicable in the light of the current reality.

Conversely, many newly adopted rulings included in the 1951 Convention regarding asylum do not exist in *ijtihad*, for the reality addressed by the latter never necessitated these rulings.

---

(1) *Al-Mustasfa* by Al-Ghazali - 365/2 and 366.

4. The lived reality

The lived reality consists of a number of components contributing to its making: common culture, relations and cohabitation with others, compassion, ideas related to human rights and freedoms, events leading people to flee their country to seek asylum elsewhere, their situation before and after being granted asylum, the positive and negative consequences of asylum, the other possible means to redress the situation of those who could face forced immigration to seek a secure shelter. There are also security and economic problems of states and their effective readiness to comply with the political refugees' rights.

These are the components of the reality which dictates rulings related to refugees, without being subjugated to its negative aspects, but rather adopt the positive aspects in view of their consolidation and improvement.

I believe that the briefly exposed facts showing the necessity to reconsider the rulings governing the matter of refugees provide enough evidence for the legitimacy and practical need of this revision.

It seems necessary to compare these rulings with some Qur'anic texts in the following chapter, since a number of *fiqh* opinions are no longer being applicable.

Nonetheless, let's not forget the ethical tendency that characterizes *fiqh* opinions:

These opinions, a pure product of *ijtihad*, are open to revision. However, it seems recommendable that we take inspiration from those opinions with ethical dimensions and try to transmit them in a modern legal formulation to the legislation on refugees, be they national or international.

The fact that fiqh rulings emanate from fundamental religious matters makes them more connected to moral values and closer to people's consciousness, for they are not limited to the formal nature characterizing the legal discourse.

If we look at the effective application of the 1951 Convention, we clearly notice the extent of prejudice that affected refugees in a number of cases despite the simulacrum of respect of the convention's provisions. I will quote only two examples in this respect:

First: the completion of the application procedures for requests of granting asylum. There are two distinct types but the result is the same, i.e., getting rid of refugees. The first type is expeditious. The applicant for asylum is asked to remain at the borders in a quasi state of detention. It often results in the decision to reject the request. If he does not find another country to host him or if his application for refugee status is rejected outright, he is obliged to return to his country whatever the danger awaiting him.

The second procedure runs slow. The applicant for asylum waits several months, even years, before his application is decided upon and the intention is to make him seek another shelter or return to his country, especially when conditions in the host country are difficult to bear.

The second example: It concerns expulsion or repatriation at the borders, which is, in theory, forbidden by Article 33 of the Convention.

In some cases, the legal decision of expulsion or repatriation is carried through a law of imposing visas on foreigners. All those who cannot get a visa are repatriated at the borders or expulsed when they succeed to cross them. The reasons leading them to leave the country of origin and seek asylum elsewhere, whether justified or not, are not taken into consideration.

Sometimes, the borders are definitely sealed, particularly for the persons who are forced to leave or flee their country because of an external, civil or racial war. This measure is sometimes extended to neutralizing refugee seekers outside the borders and forcing them to return home, as was the case with the United States when the US Navy forced Haitian and Cuban boats of asylum seekers to return to their countries. This act perpetrated by the United States was endorsed by the American Supreme Court. Further to this decision, the Tanzanian foreign minister commented on the event saying: "*It would be unacceptable to expect poor countries to respect human rights commitments, while powerful countries fail to do so when it comes to their national interest*."

This deplorable destiny in the application of certain fundamental principles of the Geneva Convention puts the responsibility on the Islamic countries in terms of abiding by moral values such as honesty, generosity, bounty and relief in applying the Convention while making a true and objective appreciation of asylum granting conditions and making sure that public order is not violated. They should, thereby, encourage the spirit of solidarity and generosity that are inherent to the Muslim character.

The member countries of the Organization of the Islamic Cooperation are thus called to apply the Geneva Convention in the light of the Islamic values, while endeavouring to prompt this spirit in future international treaties dealing with refugees. In this manner, they will have initiated a good deed and fulfilled their responsibility towards the Islamic *Shari`a*[1].

---

(1) We hope that this will happen, even if the signs make it seem difficult to achieve for the time being, as Muslim refugees represent 80% of the total number of refugees in the world.

Chapter Three

Comparison of the Major Principles and Provisions Relevant to Refugees

In this chapter, I will try to set a comparison between the most important principles and rulings included in the International legislation with those commanded by the Holy Qur'an concerning asylum or related thereto, concluding with useful outcomes to this comparison.

Both legislations, Islamic and international, encompass rulings avoiding the refugee phenomenon and others addressing the situation of refugees when it occurs.

1. The International legislation

a. Prevention from asylum

There are two types of prevention in the international domain:

The first one is embodied in international instruments related to human rights, such as: the Universal Declaration of Human Rights (1948), the International Covenant on Civil and political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973), the Declaration on the Elimination of all Forms of Discrimination based on Religion or Belief (1981) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

These instruments were issued in the name of protecting human rights and freedoms, but at the same time they lead to the prevention of the refugees' cases. The application by the signing countries of these treaties leads immediately and automatically to the non existence of persecution for reasons of race, religion, nationality, social class, political opinions, and as a way of consequence the prevention of the refugee phenomenon. Unfortunately, what really happened was the opposite. At the time of issuing and signing these treaties by most states, the rate of refugees increased and their plight worsened in an unprecedented way.

The second type of prevention that the United Nations attempted to implement in the wake of the Cold War was a set of successive measures over two stages: early detection to foresee the possibility of a flow of homeless people and refugees, and address of the reasons that may possibly lead such a flow through a number of measures taken in cooperation between the concerned countries and the international community. Nothing of this could be implemented. The number of refugees increased during the two recent decades more than ever. Cases in point are Rwanda, Bosnia-Herzegovina, Kosovo, the Sudan....

b. Addressing the situation of refugees

The main legislation on the matter is the 1951 Convention relative to the Status of Refugees and the 1967 Protocol annexed thereto. Among its main principles and provisions is the following:

- Human beings shall enjoy fundamental rights and freedoms without discrimination. (Preamble)
- The United Nations has recognized the international scope and nature of granting asylum cannot be achieved without international co-operation. (Preamble)
- The social and humanitarian nature of the problem of refugees. (Preamble)
- The reason justifying seeking asylum is a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. (Art. 1)
- The Convention shall not apply to those who committed one of the crimes pointed out in Article 1, p. (f).
- The Convention shall cease to apply to any person falling under the terms of Art. 1, p. (c) ;
- Every refugee has to conform to the host country's laws and regulations; (Art.2)
- The rights that refuges benefit from equally with nationals of the host country:
  * freedom to practise their religion and freedom as regards the religious education of their children.(Art. 4)
  * Elementary education (Art. 22, p. 1)
  * Public relief and assistance (Art. 23)
  * Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme). (Art.24)
  * The Contracting States shall not impose upon refugees' duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.

- The rights that refuges benefit from equally with foreigners living in the host country:
  * The acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.(Art. 13)
  * Setting and belonging to non-political and non-profit-making associations and trade unions. (Art. 15)
  * The right to engage in wage-earning employment. (Art. 17)
  * The right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies. (Art. 18)
  * Education other than elementary education and remission of fees and charges and the award of scholarships. (Art.22/2)
  * The right to choose their place of residence and to move freely within the host country. (Art. 26)

2- The Islamic legislation

The Islamic legislation also provides for measures to prevent the refugee phenomenon and others dealing with refugees. But before tackling these two aspects, it is worth mentioning that this analysis aims at distinguishing between the jurisprudence explaining the revealed texts and the interpretation(s) that can be applied to these texts even if not emanating from our forefathers. This approach is to avoid the superficial discourse that limits itself to enumerating principles in the fields of governance, equality, human rights, solidarity and the like, confirming that Islam did recognize them without any deep discussion of the application resulting from interpretation. An important faction of those speaking in the name of Islam and who obviously influencing the constructs of ideas and culture among people still widely use this interpretation. There is no room for exposing in detail this trend but it is necessary to make note thereof. Back to our subject now.

a- Preventing the refugee phenomenon

Prevention of the phenomenon is achieved by addressing the reasons and events leading to it. According to Article 1 of the 1951 Convention, the actual or expected persecution motivating the request for asylum is related to race, religion, nationality, and membership of a particular social group or political opinion.

Race, nationality and social class are related to racial and class discrimination. In *Fiqh*, there are opinions on a limited number of cases connected to race, social

category such as the ability to contract marriage, *diya* (compensation) for having killed or injured a person, rulings on slaves and those who can or cannot be enslaved.

Nonetheless, these opinions translate the perception and are conditioned by the circumstances under which they were issued, as well as the culture and traditions of the society for which they were relevant. Not a single verse in the Holy Qur'an, on the other hand, encourages any kind of discrimination based on community or class. On the contrary, it firmly disavows any call to discrimination or behaviour encouraging it. I will just quote the first verses of the Surah of "*Abs*" and his Sayings Subhanahu in Surah of "*Al Hujurat*":

> [***O you who believe! Let not a group scoff at another group, it may be that the latter are better than the former. Nor let (some) women scoff at other women, it may be that the latter are better than the former. Nor defame one another, nor insult one another by nicknames. How bad is it to insult one's brother after having Faith. And whosoever does not repent, then such are indeed unjust.***][(1)], [***O mankind! We have created you from a male and a female, and made you into nations and tribes, that you know one another. Verily, the most honourable of you with Allah is that (believer) who has piety. Verily, Allah is All-Knowing, All-Aware***][(2)]

Religious persecution against non-Muslims in the Islamic world may have happened in some limited situations. History did not keep record of any such events of wide collective persecution as was the case against Muslims in Al-Andalus and Sicily for instance.

Yes! Hundreds of cases of persecution against atheism or deviation were established, regardless of whether this accusation was justified or not. Some were humiliated, others were tortured and imprisoned, and others executed. Some of the persecuted succeeded in running away, avoiding the worst of fates by resorting to rulers.

These are periods that all religious societies witnessed over their history.[(3)]

---

(1) Surat *Al Hujurate*, verse 11.

(2) Surat Al *Hujurate*, verse 13.

(3) Historical events attest that Muslims in general were less oppressive and harsh in dealing with individuals accused of dissolusion, deviation from the doctrine and apostasy than other religions. A case in point is the order issued on July 1559 in France by Henry II, where he commands judges to sentence to death all protestants refusing to reurn to Catholicism. Later on, Francis II renewed this order adding to it the demolition of all buildings where are held Protestant meetings, and the execution of individuals and relatives hosting a heretic who has been sentenced or those failing to report the sentenced individuals. Over the last five months of 1559, he burned alive 18 persons accused of entertaining heresy, and because they refused the presence of priests and refused to eat the Catholic sacrifice… *The Story of Civilization* - 29/175.

In referring to the Qur'anic texts, we find out that these confirm the freedom of humans to practice freely their faith: [***There is no compulsion in religion***][1], [***Will you then compel mankind, until they become believers?***][2], [***And say: "The truth is from your Lord". Then whosoever wills, let him believe; and whosoever wills, let him disbelieve.***][3]

By virtue of these verses, nothing justifies any persecution of people practicing other religious faiths.

Concerning divergent opinions within religion on particular subjects related to behavior, intellectual or metaphysical issues, Islam has never granted to an individual or a community the authority to impose their opinions as the ultimate truth on those upholding a different point of view. Yes! Persecution based on the difference of opinion occurred leading to charges of dissolution and disbelief. This is the result, I believe, of ignoring the institutionalization need to manage the difference, which is inherent to human nature.

Within the principle commanding "and their rule is to take counsel among themselves,", it was necessary to provide for regulated measures to manage differences that the principle of "*shura*" consultation unavoidably entails, particularly in the realms of promoting good and forbidding evil that the Qur'an commanded in more than one verse. The lack of institutional measures to which everybody refers to in describing a deed or an opinion as good or evil allowed everybody to consider his own opinions as right and the others' as an expression of dissolution, atheism and infidelity to Allah. This culture was encouraged by individual legal opinions permitting or forbiding in the name of *Shari`a* and deciding on people's faith with uncertainties in conduct or opinion that may relate to the invisible realm whose truth can in no way be perceived nor imagined by the human mind...

Political opinions are another reason for persecution leading people to seek refuge. It is also the most important factor that caused harm to individuals and groups and led to major flows of forced immigrants.

This happened over centuries throughout the Islamic history and is still taking place. It was mentioned earlier that Muslims represent eighty per cent of the total number of world refugees.

While a number of societies succeeded in overcoming such a situation thanks to the establishment of a culture of institutions in terms of practices and conduct,

---

(1) Surat *Al Baqara*, verse 256.

(2) Surat *Yunus*, verse 99.

(3) Surat *Al Kahf*, verse 29.

Muslim societies, in general, are still endeavouring to ensure an institutionalized political life based on dialogue and consultation and rejecting favouritism and exclusion.

This is due in our opinion to many reasons:

First of all:

- The political thought that came to light in the Muslim society, even if it witnessed initiatives of institutional concepts such as *Khilafa*, *ahl al hall wal 'aqd* (influential people in power), justice, *hisba* (bookkeeping and control), *bayt al mal* (State treasury)...etc, it has; however, ignored the anchoring of such an organization in practice. The characteristics of institutions faded away as a result thereof and were substituted by individuals. They were, thus, confined in theoretical discussions without any attempt to translate them into practice as was the case with *ahl al hall wal 'aqd*.
- There still exists a powerful trend in Muslim societies replicating the aforementioned political thought as the system decided by Islam for the State. For that reason, the political discourse is characterized by harshness that often leads sometimes to persecution and even worse.
- The means of communication that facilitated familiarisation on a daily basis with external world and realities of life attracted some factions of society and transformed cohabitation from calm dialogue as a means to manage differences to confrontation, causing each faction trying to impose its opinions on the others.
- The spread of illiteracy as a consequence of a weak level of consciousness paving the way for superficial and emotional discourses resulting in incorrect outbreaks of anger adversely affecting the political life and peaceful cohabitation between citizens.

These are the most important reasons that increased the rate of refugees in Islamic countries. The latter are not much different in this from other countries that undergo the same phase of political and institutional creation and knowledge prospects. The matter has no connection with religious faith but with the level of individual and collective consciousness of one's mission in life and the extent to which one can benefit from religion orientations and human experience to fulfil it. That is why prevention of the refugee phenomenon, which causes prejudice to Islamic societies, necessitates first a consideration of the causes mentioned earlier. The first measure is to disseminate knowledge and raise consciousness, helping citizens become effective actors in the future and not negative irresponsible beings vis-à-vis the fate of the Ummah.

Going back to the *kulliyat* (the fundamental tenets of *Shari'a*), we find a variety of means to prevent persecution caused by difference in political views. Some of these are:

1. The principle of *taklif* (responsibility) applies to individuals not only with regard to personal taklif such as the relation between Muslim and Creator entailing faith rituals but encompasses also personal responsibilities and duties towards society by enjoining right and forbidding wrong whose concepts and means of application adapt to the nature of mechanisms the society has chosen to organize itself : [***And We have fastened every man's deeds to his neck, and on the Day of Resurrection, We shall bring out for him a book which he will find wide open: "Read your book. You yourself are sufficient as reckoner against you this Day." Whoever goes right, then he goes right only for the benefit of his ownself. And whoever goes astray, then he goes astray to his own loss. No one laden with burdens can bear another's burden.***][(1)].

   Hence, each individual is aware of responsibility and tries to learn in order to fulfil it in complementarity with other members of society.

2. The concept of consultation that places decision-making in general matters under the competence of every member of society. They can exercise it in the way they choose in accordance with changing circumstances.

3. The creation of institutions of "*Ulu al amr*" (those responsible for the Muslim community matters) regulated by constitution or law according to the competences of each, and whose decisions are to be binding for all[(2)].

The application of these principles would certainly prevent despotism in opinion without the need of political action outside the framework of the law.

In other words, the principles of *Shari`a* related to decisions-making on public matters safeguards society against deviation into practices violating the

---

(1) Surat Al *Isra'*, verses 13, 14 and 15

(2) *Fiqh* discussed the concept of "*uli al amr*" «those in charge» and their opinions diverged as to apply the term to "decision-makers" or scholars or princes. It seems that the term "*uli al amr*" is defined according to the organization of each society, and the institutions in charge of executive decisions. The president of a state, for exemple, the parliament, the judges, the executive authority, the constitutional court, the local councils and else all have to abide by what has been decided within the constitution and the framework of law; every disagreement is relayed to the specialized entity whose decision on the matter is applied to all.

law and the concept of political action leading to persecution and consequently making citizens flee their country seeking a safer shelter.

It is notworthy here to highlight a matter that has clearly influenced the evolution of political thought within Muslim societies, that is, the reading of the revealed texts in the light of reality and experience of human civilization. The readings of the first and second centuries following the prophet's immigration still prevail today. This is noticeable in the literature of the various Islamic groups and even among many contributors to the "Islamic revival". That is why some essential elements in the construction of the State were lacking or treated superficially, such as defining the competences of constitutional institutions in decision making, the financial resources for managing the State structures, the legal competent instance for issuing and regulating legal texts, supervising their amendment or modification. We still talk about the "*Mujtahid*" without paying any attention to his actual presence or absence, let alone expounding the way he should practice the issuing of binding texts with respect to all aspects and needs of society or to some of them in the event there are several legislative instances for a single society.

b. Treatment of refugees

I will not dwell too long on the treatment of refugees. I believe that the position of Islam on the matter does not need any extensive explanation or comment.

- First, there is the lofty ethical value in treating others as a whole. Not many people are capable of fulfilling this value: [***Repel (the evil) with one which is better, then verily he, between whom and you there was enmity, (will become) as though he was a close friend. But none is granted it (the above quality) except those who are patient - and none is granted it except the owner of the great portion in this world.***][(1)].

- The repeated call in about ten verses to care for *ibn sabil* (wayfarer, traveller), the closest to the concept of refugee. Both are forced to leave their country and wander looking for a safe shelter, either alone, with their family or along with thousands of people to avoid external, internal, or racial cleansing wars.

While *ibn sabil*, a person or a group, is easy to take care of by individuals, the situation is different today when the number of people forced to flee home is estimated at over fifty million persons. Their flow would be impossible to manage by a group of persons or a single State.[(2)]

---

(1) Surat *Fussilat,* Verses 34-35.

(2) For example during the year 1994 one million Rwandan crossed the frontiers into Zaire over four days - The Problematic of Refugees at the International and Arab levels / Abdelhamid Al Wali, p. 51.

All of this fact necessitates taking part in the international community efforts led by the UN in view of elaborating rules on refugees. This contribution should be conceived from the Islamic point of view, caring for *ibn sabil* especially in extending relief to millions of refugees.

- The multiple of verses praising the way *al ansar* welcomed Muslim immigrants who left their home, Makkah, fleeing the persecution due to embracing Islam.

While these verses concern the treatment of Muslim immigrants, the Qur'an has also commanded to treat people other than Muslims with kindness and justice as long as they are not fighters or initiators of aggression.

> ”***Allah does not forbid you to deal justly and kindly with those who fought not against you on account of religion nor drove you out of your homes. Verily, Allah loves those who deal with equity.***][(1)]

A refuge seeker is neither a fighter nor an aggressor.

The 1951 Convention stipulated several detailed provisions granting refugees the right to enjoy a number of privileges in the same way nationals or foreigners do.

The Qur'an of course does not provide for similar privileges formulated in the same way neither does *fiqh*, for the intervention of law in detailing these rights and the distinction it sets between “citizens” and “nationals of a foreign country” did occur only at a late stage of the political system after the concept of “State” and the organization of the society matured.

Nonetheless, part of principles on good treatment commanded by Islam can be adapted to the situation of refugees and the rights they should enjoy.

I will mention only one example related to the performance of good behavior. Tens of verses praise beneficent and charitable persons whom God loves and rewards for their deeds. It is clear that charity in its ultimate meaning is much wider than the provisions provided for by the 1951 Convention. This affirms, if need be, that Islam was revealed to «guide to that which is most upright» and lead Man to the highest rank in behaviour after a priod of time when nothing significant was declared.

This does not mean that there is no need for elaborating rules relative to refugees unless they are expressly taken from the Qur'an, Hadith or a specific principle; what is required is that such ruling does not conflict with an express and established text or with one of the *Shari`a* universals.

---

(1) Surat *Al-Mumtahana*, verse 8.

3. Main concluding remarks

The main conclusion that to drawn is the following:

a. Comparison should be carried out with the revealed texts

I have mentioned earlier that rulings governing the situation of refugees change quickly due to continuously changing realities giving rise to the phenomenon.(1)

That is why several jurisprudence opinions become obsolete after a short while and no longer fulfil the objectives for which they were issued; hence becoming unfit for the new reality.

The organization of the refugees' situation overlaps on the field of *mu'amalat* (relationships and dealings with others) whose rulings are based on the principle aiming at promoting good and warding off evil.

This applies to matters covered by specific texts in the Qur'an and Sunna, let alone the issue of refugees that such texts did not address. This matter is rather governed by *Shari`a* principles and universals that apply to all times and any places. The latter's implementation depends on the ethical values that they protect and ensure in relation to a specific happening.

This means in no way discarding old *fiqh* opinions. We should rather exploit them as a reference and source of inspiration. May be some of them are still applicable. What we need to do is go beyond just reporting, and study these opinions in the light of both text and reality and make decisions that really meet the purposes of *Shari`a* and its noble principles that came for the good of mankind.

It is worth mentioning that referring to *Shari`a* texts and to extracting rulings in line with the lived reality was called for more than a century ago. Yet, this call did not go beyond theory. Nothing has changed in the reported *fiqh*, which resulted in its separation from reality and to the appearance of movements that broke forth discordance. May God help us quell it.

Finding an accepted and effective means (institution) of *Ijtihad* constitutes the biggest obstacle for the Muslim society. If the latter succeeds in finding this means, it will pave the way towards integrating the march of human civilization and influencing its course.

---

(1) The Geneva Convention itself is in need of updating and reform as amendment by the reports submitted by the High Commission for Refugees and dealt with situations which the initiators had no idea about. Examples are the forced refugee situation due to an external war (Afganistan for instance), civil war (the Sudan), ethnic (Rwanda, Bosnia and Herzegovina), and the closing down of frontiers through imposing a visa on all visitors, in addition to immigration in search for a better life.

On the other hand, by connecting rulings/ legislation on refugees to the revealed texts, does not mean a systematic link between a ruling and a particular text. It only means that the ruling should not be contradictory to a particular or general text of *Shari`a*.

There is no way to keep abreast of the changing nature of legislation on refugees unless we adopt the aforementioned concept of Islamic reference to this system.

Such orientation will allow the Member States of in the Organization of the Islamic Cooperation and ISESCO to:

- Use these distinct and changing events to determine the ones that come under to the concept of political refugees.
- Suggest every possible human solution as long as there is no contradiction with an established text of *Shari`a*, be it specific or general.
- Add as many ethical rulings as possible to the elaboration of binding rules to avoid the current fake and superficial application of the Convention's provision.

This only requires that these rulings do not contradict an express text of *Shari`a* or one of its decisive and conclusive rulings (*qat'i*) or one of its fundamental tenants. This leaves a vast room for *Ijtihad* and for the choice of rulings that ensure welfare and avoid prejudice against both refugees and host countries.

b. Making decisions relating to refugees

I have evoked this subject given its importance for the dually characterized reality and which has not been identified and discussed yet in order to reach an acceptable and logical solution.

Writings and discussions, as well as the training provided through Islamic *fiqh* and *Shari`a* sciences schools in general, confirm that the delivery of binding legal opinions; yet, organizing the Muslim society is under the competence of the "*Mujtahid*" alone. But this remains contained at the level theory and is far-off from the reality. The practical definition of a *Mujtahid* has never been discussed, at least in Sunnite doctrines, let alone his recognition by the Ummah as well as the method of implementing his *fatwas* and opinions.

That is the reason that caused the multifaceted discourse on the qualifications of a *Mujtahid* and types of *ijtihad* to be repetitive and vain.

Practically speaking, all Islamic countries, without exception, have institutions that practice issuing legal and organizational texts.

While the subject does not allow for an extensive discussion of this contradicting duality, it does not dispense us from presenting our point of view on decisions regulating the situation of refugees which respects the same laws governing all facts of society as is the case in contemporary political systems.

We have seen earlier that the rulings regulating the field of refugees relate in their Islamic reference to *Shari`a* universals and general principles. This means that they should be based on one of these universals and not in contradiction with them. The matter is, thus, limited to "*ijtihad*" in applying the *Shari`a* universals.

The interpretation of *Shari`a* universals, as general intellectual concepts such as justice, equality, non-violation of the fundamental human rights, does not necessitate the norms of *tafsir* (exegetic effort) provided for in *usul al fiqh* and applicable only in explaining specific texts. The explanation of universals and the way they should be applied on the realities of life can be accomplished by anyone with enough knowledge to understand the reality and present ideas to solve its problems. That is what Shatibi meant when he said:

> "*The conclusion from these facts is that universals can be considered by ordinary people and scholars alike, while specific and partial matters is the speciality of scholars only*".(1)

On the other hand, in addition to *Ijtihad* - extensively discussed by advocates of usul and scholars - the latter pointed briefly to "legal politics" which governs some rulings in the field of management of state institutions and handling general state policies. Generally, competency is granted to the *imam*, or the political ruler.

The distinctive differences between the two terms has not been defined, neither the concept nor the competent instance to exert it. This was impossible. Today, it is even more so to talk about several competent legislative instances to exercise it, since it is impossible to define and set a clear line between the fields where binding rulings are decided through *ijtihad* and those covered by a *Shari`a* policy. This is because all organisational aspects and needs of society are subject to some rulings taken from the specific *Shari`a* texts according to *fiqh* norms, while others are inspired from the *Shari`a* universals and principles promoting good and prohibiting evil if we interpret *Shari`a* policy through universals.

The idea of an individual issuing binding rulings and imposing his interpretation over others is not acceptable nor applicable. The reason being that the political institutional system, the concept of the state, the status of the individual and the protection of his rights within society, have all evolved. Similarly, the fields that

(1) *Al Mouwafaqat* by Shatibi 4/238.

need to be organized grew in complexity and so did the requirements of each special field of study.

It is true that there exist specialists whom we should refer to and whose opinions could be useful and a source of inspiration, without becoming off limits for discussion and amendment, if need be.

All of these reasons attest to the fact that rulings related to refugees in domestic legislation and the ratification of international conventions should be under the authority of one or several competent institutions, entitled to issue legal texts and regulations and ratify international conventions by virtue of the constitution.

c. Nature of decision-making

Should rulings issued within a domestic legislation or an international convention, be considered as final or rather amendable ?

When we refer to the *usul al fiqh* for an answer, we find two different if not contradictory stances.

On the one hand, *usuliyun* confirm that all opinions emanating from *ijtihad* are *Dhannî* (un-explicit). They are described as such because the texts extracted inductively or deductively bear either an un-explicit meaning or validation or both. They do not allow for a clear-cut, explicit and definite ruling (*qati`*). The *Mujtahid*, then, points out the ruling that seems most appropriate to him and which he thinks is implicit in the text, leaving room for conjecture as to its other implications and meanings. In many cases, other *Mujtahidun* choose the implication or implications that the first *Mujtahid* had discarded as improbable.

This agreed upon situation implies that, ruling emanating from *ijtihad*, even if its application is a duty[1], its un-explicit characteristic subjects it to discussion, amendment or even rejection for an opposite opinion.

Nonetheless, the *ijtihad* ruling was considered to be beyond annulment: those who do not fulfil conditions of *ijtihad* should apply its rulings without

---

(1) The application of an un-explicit *ijithad* requires that:

- The *Shari'a* be applied by the competent persons according to what they can understand from its texts;
- The significance and constancy (subject of *Ijtihad*) of un-explicit texts cannot but devise un-explicit rulings;
- The non-application of an un-explicit *ijtihad* ruling inevitably entails the latency of *Shari'a* and the freezing of its texts.

discussion; those who fulfil these conditions have the possibility of declaring a different opinion: a first, a second and then a third and so on. All these opinions have the characteristic of a "legal ruling" that should be applied. Afterwards, doctrines tradition was used to avoid the never-ending reproduction of *ijtihad* opinions and "absolute *ijtihad*" was over and done with. The *ijtihad* ruling became, thus, set and no longer able to keep up with new events, knowledge, ideas, facts and behaviors.

This result was due to the incapability of finding an agreed upon way to regulate the amendment of former legal opinions or their cancellation for multiple reasons. These can be summed up in the simple political system, i.e., the State, illiteracy, the limited awareness and knowledge scope, the isolation of individuals and patriarchal communities from other individuals and communities forming - theoretically- one society, the related lack of consciousness on the common interest and the need for a collective organization mode to serve this interest. The widely spread conception at that time is that individuals were accountable only for their personal actions, in isolation with the community and that there were not called to work collectively in order to meet the global vital needs of society.

To support what I have said, in *usul al fiqh*, it is the individual who has the responsibility of carrying out infrastructure works which fall within the sphere of public interest such as roads works, water resources, civil occupation such as justice, education in all its branches, learning crafts, commerce and even small businesses of butchers, barbers... all this falling under the duty of *kifaya*.

There is no room here to extensively evoke the adverse effects of "*furud kifaya*". It is enough to say that the focus on the latter hindered a real reflection on the "ummah duties", especially the understanding, the application of the God's *Shari`a* and scientific and practical planning likely to satisfy the public interests of the society, such as education and vital infrastructure.

The reality we are living shows that the management of any affair of the society is subject to continuous revision in order to keep up with new events and change circumstances surrounding the implementation. Considering that management is done through un-explicit *ijtihad* rulings, it becomes certain that the formulation of binding rulings should remain subject to amendment and cancellation at all times.

The general principle of refugees is no exception, since it evolves continuously as was pointed out in chapter I of this research.

CONCLUSION

I did not dwell too long on the comparison between international legislation on refugees and *Shari'a* finalities and principles through the exposition of an extensive list of rulings and trying to link each ruling to a *Shari'a* principle or a general text.

What is most important today is to determine the appropriate approach to adopt in dealing with *Shari'a* texts either in relation to refugees or any other aspect of society or its organization.

It is generally believed that dealing with the revealed texts is limited to a restricted group. The latter is, mostly, still prisoner to replicating and reproducing opinions of the past that suited a reality which is different from that of our forefathers.

The Office of the High Commissioner for Refugees has prepared on the Arab world refugees Document number 1, in cooperation with the Secretariat of the OIC and was presented to the ministerial conference of the OIC held on 28-30 November, 2005, and wherein it is stipulated:

3. Respect for migrants and those seeking refuge has been a permanent feature of the Islamic faith. Based on the Holy Qur'an and Islamic Shari'a, the institution of "*Aman*" (safety) guaranteed protection to those seeking refuge in "*Dar-al-Islam*" (the House of Islam). Once protection was granted, the foreigner became a "*Musta'min*" (a protected person) and it was the duty of the community to treat the "*Musta'min*" with dignity and respect throughout the period of his stay. The extradition of the "*Musta'min*" was prohibited even if it had been requested in exchange for the release of a Muslim. The Islamic tradition therefore recognizes in its own precepts the principle of *non-refoulement* which represents the cornerstone of modern-day international refugee law.

The Document confirms that a refugee is a *musta'min* whom *fiqh* describes as an infidel entering the house of Islam either to practice commerce, to visit or to flee any danger. Some schools of *fiqh* add to this category the emissary and the ambassador who enter on the basis of a protection granted by the *imam* or any Muslim who has come to age. The stay of the *musta'min* lasts between four months and one year. Beyond this period, he has the choice either between leaving the house of Islam, paying a *jizya* or integrating the *Ahl Dhimma*.

If this is the definition of a refugee in Islam, its comparison with the 1951 convention would be absurd…

For the previous reasons, this study stresses the following points:

1. Comparison should be set with the revealed texts that should be read in the light of reality;
2. Any one who feels himself competent should give his opinion as part of a debate and not in the way of *tabligh*;
3. Only an authorized constitutional institution may deliver abiding rulings, taking into consideration the various opinions emanating particulary from competent persons;
4. Rulings should be temporary. Rulings may be modified or annulled at any time, in the light of new events or according to developments occurring during the implementation of these rulings.

In my belief:

Firstly fulfilling the *taklif* responsibility of the Muslim, either as individuals or as a society;

Secondly, an insightful vision able to satisfy the rising question, be part of the human civilizational process and participate in its orientation and rationalization.

In other and clearer words:

Our forefathers left for us some terms expressing ideas that they adopted to organize the society. These terms and ideas naturally emanated from *ijtihad*. For instance:

In the field of understanding the *Shari'a* texts and deciding on its rulings: the *mujthid*, the *mukallid*, *al khassa*, *al amma*, *al ijma*, *al fatwa*…

In the realm of relations and dealings with others: *dar al Islam*, *dar al harb*, the *dimmi*, *musta'min*, *al muharib*, *al mujir*, *al khafr*.

Our reality now in the beginning of the mid-15th century of the hegira is extremely different in all aspects from the reality witnessed ten centuries or so before. This necessitates loking for adequate rulings. Yet, *ijtihad* related to rulings should be preceded by an *ijtihad* with regard to concepts and perceptions for which the aforementioned terms were elaboratd. Without this second type of *ijtihad*, *ijtihad* on regulating rulings related to refugees in the 21st century is out of the question.

May God guide us the right path.

Main references:

- *Bidayat al Mujtahid wal Muqtasid*; Ibn Rushd
- *Al Qawanin al fiqhiya*; Ibn Jazy
- *Al Aghani*; Abul Faraj Al Asbahani
- *Al 'Iqdu l-Farid*; Ibnu 'Abdi Rabbih
- *Political and Administrative Documents of the period of the Prophet and the Righlty Guided Califs*, Mohammed Hamid Allah
- *Sobh Al A'cha*; Abu l-Abbass Ahmed Al Qalqashandi
- *Sharhu's - Siyar Al Kabir*, Al-Shaibani
- *Al Bayan wa tahssil*; Ibn Rushd (the ancestor)
- *The Almoravides period*; Mohamed Abdullah Inan
- *Political and Administrative Documents of Andalusia and Northern Africa*; Mohammed Maher Hamada;
- *Al Jami' li-ahkam Al Qur'an*; Al Qurtubi
- *Al Muwafaqat*, Al Shatibi
- *Al Mustasfa fi 'Ilm al Usul*; Imam Ghazali
- *The Story of Civilization*; Will Durant - translated by Mohammed Badran
- *The Problematic of Refugees at the International and Arab Level*; Abdelhamid Al Wali
- Online publications of the UN High Commissioner for Refugees (UNHCR)