

Right to Self-Determination, Democracy and the *Shari'ah*: An Expository Study

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Abstract: The self-determination right, which is a so-called third generation right, and which gained prominence in international law as *jus cogens* and *erga omnes* - as it has been recognized by a large number of international legal instruments and a good number of courts - was broadly used for decolonization and establishment of a number of sovereign states. In the contemporary world also, it is of great importance for establishing and working of democratic regimes and guaranteeing the practice of constitutionalism. But this right cannot be invoked to support secessionist movements, except for genuine cases like Palestine and Kashmir. The *Shari'ah* principles pertaining to establishment and governance of states based on a constitution made in line with it, i.e. the sovereignty has to be with Allah (s.w.t.), citizens, including non-Muslim citizens, will command various rights and duties, as determined in light of the Qur'an and *Sunnah* and commanded from time to time by the *Khalifa* in conformity with them, and there has to be a participatory democracy based on the concept of a *Khalifa* and a *Majlis al-Mushawarah*. According to Islam, a regime must uphold the law of Allah (s.w.t.) and must work for the interest of general public (*maslahah mursalah*). On the contrary, it will not have right to remain in power against the will of Allah. If the government is arbitrary, working against the Islamic tenets, or obliterating the interests of its people, people have the right to revolt against the regime and establish a government of their own choice. In fact, the basic principles pertaining to the right of self-determination in international law and the *Shari'ah* are co-extensive. But its *modus operandi* may differ under the two paradigms. It is for this reason that a democratic set up in Muslim states may be different from that of their Western counterparts.

Key words: Right to self-determination, democracy, the *Shari'ah*

INTRODUCTION

The right to self-determination, which is a so-called third generation right (right to solidarity), has been viewed at many fora as an established political right of the people in certain situations (for instance, the Frankfurt Declaration of 25 January 1992; Abuja I Peace Talks in May 1992; the Washington Declaration on 23 October 1993). Based on this right, decolonisation across the world could be possible. But this right now has been a subject matter of serious debate among international law connoisseurs. This is more so when granting it is considered as a threat to territorial integrity of states. Many see the clamour for self-determination as causing a series of conflicts today in a number of sovereign states. The position, however, seems to be that, refusal to accede to peoples' genuine demand of the right to self-determination in certain states may threaten peace of that region or by implication the peace and serenity of the world. The latter possibility becomes eminent when the world is polarized. Many internal protests, revolutions and civil wars have been the result of refusing the legitimate right of peoples to self-determination. The effective way of preventing these conflicts seems to be honouring this right in genuine cases. The best example of such recognition is the creation of East Timor and South Sudan. Establishment of democracy in Egypt and Libya are also good examples of manifestation of the self-determination right. The other examples, which are still demanding recognition of such right, are Palestine, Kashmir and Syria.

Regrettably, the invocation of the right to self-determination has been very difficult even where it was legitimately clamoured, as granting or rejecting this right squarely suffers from world politics. Occupation of the Palestinian territories is illegitimate and based on surmises, yet the right to self-determination of the Palestinian people is not recognized because the United States provides political, although illegitimate, protection to Israel. The international community seems not to have done enough in this regard; this is in contrast to the solidarity that the world community demonstrated in establishing democracy in Egypt and Libya. This right has been sometimes neglected for political reasons. One should expect that even if people of a country feel more comfortable as being politically independent than remaining part of the country consisting of members of the same ethnic traits, they have to be persuaded to remain as one country rather than demanding a separate state under the guise of right to self-determination. Otherwise, such kind of demand will unnecessarily crop up in many sovereign states. It has to be very clear that this right cannot be used to support a secessionist attitude of a section of people within a sovereign state. However, the problem seems to arise where in genuine cases, people's

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political fate is determined against their will coupled with a form of oppression inflicted on them. This may lead them to outcry for their rights to self-determination. An attempt to trivialize the rightful claims of the people based on certain genuine reasons might also be counterproductive.

Thus, democratic tenets carry with them several freedoms and the prominent among them is that people will have right to choose a government of their choice. This often leads to the assertion of their rights to self-determination in a wrong way, as they mistakenly think that since democracy represents the government of the people by the people and for the people, they can on this basis form a new separate state from the central state. There are a number of secessionist movements around the world, which cannot be justified on the basis of right to self-determination, except for the genuine ones stated above. As a result of this mistaken belief, many people and governments do not seem to understand the real objective of the right of their people to self-determination. However, where an unpopular regime is causing atrocities and persecuting its own people, the people have the right to invoke self-determination and establish democratic governments, e.g. establishment of democratic governments in Egypt and Libya. In view of these problems, this paper undertakes an expository study of the right to self-determination, democracy and the *Shari'ah* perspectives. In doing so, it presents an in-depth study of its concept and international legal framework in order to demonstrate its various dimensions. Also, since a number of efforts have been made in the area of self-determination (Balzer, 1991; Walworth, 1954; Ernest, 1948; Birdsall, 1941; Patricia, 1997; Antonio, 1995; Paul, 1967; Clyde, 1953; Rupert, 1964; Gerson, 1964; Morton, *et al*, 1992; Philip, 1957; Harold, 1967), the *Shari'ah* perspective in this paper will be of valuable contribution. This is more so that peoples of many states, who clamour for the right to self-determination and democracy, are mainly Muslim states.

Nature and Scope of the Right to Self-determination:

Umzorike, (1972) defines the right of self-determination as: "the right of all peoples to determine their political future and freely to pursue their economic, social and cultural development. Politically this is manifested through independence as well as self-government, local autonomy, merger, association or some other forms of participation in government. It operates both externally and internally to ensure democratic government and the absence of internal or external domination". This definition is in line with the one of the basic principles pertaining to the role of the United Nations and one of the basic rights stipulated by the International Covenant of Civil and Political Rights (ICCPR) and the International Covenant of Economic, Social and Cultural Rights (ICESCR). Article 1 part 2 of the UN Charter reads: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of people and to take other appropriate measures to strengthen universal peace." According to this Article, the right requires that the government in a state must be a popular government and states will work for establishing a peaceful world, for which states will have to abstain from expansionism and subjugating other states. Article 1 of both ICCPR and ICESCR reads: "All people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." This article is in line with Article 1 of the UN Charter.

The right, which has gained the status of *jus cogens* (highest rules of international law which has to be respected and internalized by all states) and *erga omnes* (subscribed by all; towards all), has an external dimension: people can choose to remain independent or merge with another state, or to remain with another state with some autonomy with it. These can be decided by a plebiscite. It also has an internal element: people can choose the form of government they desire. For example, the people of Kashmir have opted to be an independent state and the people of Egypt and Libya opted for a democratic government. Further, it is pertinent to distinguish between 'internal' and 'external' rights of self-determination (Coon-Come, 1992). Many scholarly debates seem to surround this distinction because the distinction is significant for policy makers who tend to forget the distinction and simply lump any assertion to external sovereignty or self-determination. This will also aid the understanding of people who assert the right. The internal rights of self-determination essentially enable a 'people' to have control over natural resources, a full voice within the legal system of the overall nation state, the proper ways of preserving and protecting their culture and way of life and to be able to become a visible partner or participant with strong powers within the overall national polity. External self-determination arises when a people finds that this internal concept is not being accepted and the right to full sovereignty, including the right to international recognition of that people, comes into play.

For some, the right of self-determination is restricted to a people of a country of a particular territory, whether in a district or a town, to declare by a free and fair plebiscite that they no longer wish to remain united to the country to which they are members at the time, but desire either to form an independent country or to join themselves to some other state. It is not a right vested in nations. In other words, it does not connote the right of self-determination of a delimited national unit. Rather, it is the right of the inhabitants of a territory large enough to form an independent administrative unit to make a decision on the country to which they wish to fit in or where they wish to belong. It should not be taken to mean that a nation state has the right to detach and incorporate into itself against the will of the inhabitant parts of the nation that belong to the territory of another

state. This is more so that it is impossible to grant the right of self-determination to every individual person constituting collectively a distinct group for the above stated purpose(s). This is because some undeniable technical considerations make it necessary that a region be governed as a single administrative unit and that the right of self-determination be restricted to the will of the majority of the inhabitants of areas that are large enough to be counted among territorial units in the administration of the country. It has to be clear that territorial integrity has precedence over self-determination unless there is a genuine reason for it. It means that on the basis of the right of self-determination a secessionist movement will not succeed unless there are some historical or other genuine reasons for it. There are a number of examples of this internationally accepted notion. In India for example, the secessionist movement of Sikhs in Punjab province for establishing a separate state of Sikhistan, similar movement in Andhra Pradesh province for establishing Telangana and Bodoseparatist movement in Assam province were not allowed to succeed. East Timor was separated from Indonesia for historical reasons, and South Sudan has been separated from Sudan for ending civil war and enthronement of peace in that country.

It is a different thing that due to globalization the notion of self-determination is being loosely followed. It can be imagined that if the world becomes borderless, the right to self-determination will lose its importance. In fact, we are moving from realism (strict adherence to sovereignty of the state) to liberalism (freedom of cross-border movement, strengthening regional cooperation and fostering free trade), and ultimately to total liberalism (a borderless world where the right of self-determination will have no value (Idowu, 2008).

In short, the right to self-determination is an essential principle of human rights law (Universal Declaration of Human Rights, G.A. Res. 217A (III)(1948), Art. 21; ICCPR 1976, 999 U.N.T.S. 171, Art.1; ICESCR, 1976, 999 U.N.T.S. 3, Art. 1.). It generally represents an individual's collective right to 'freely determine their political status and to freely pursue their social, economic, and cultural development' (ICCPR, Art.1; ICESCR, Art. 1; Parker, *et al.*). The right of self-determination was in general brought into being for decolonization, which existed in many parts of the world, and to establish sovereign states with all internally recognised rights (Parker, 2000). In order to provide strength to this notion, the U. N. Charter obliged in Article 1 part 2 to respect the principle of self-determination. The people of a state rather than a government hold the right (*Western Sahara Case*, 1975 I.C.J. 12, 31.). Two main studies of the United Nations on the right to self-determination have enumerated factors of the people that give rise to possession of right to self-determination: a history of independence or self-rule in an identifiable territory, a distinct culture, and a will and capability to regain self-governance (Gros Espiell, 1980). As stated above, the right to self-determination is unquestionably a rule of *jus cogens* (Brownlie, 1979; Gros Espiell, Parker, *et. al*, 2003). Both the International Court of Justice and the Inter-American Commission on Human Rights of the Organization of American States have equivocally stated that it also has the legal status of *erga omnes* (*Barcelona Traction, Light and Power Co. (Belg. v. Spain)* 1970 International Court of Justice 3, 32; *The Nicaragua Case (Nicar. v. United States)* 1986 ICJ 14).

As noted above, the right of self-determination was mainly applied around the world in the process of decolonization of colonized states. This is because indigenous people during the colonial period were not in control of their respective territories; usually, the colonial masters were in control. Sovereignty, therefore, resided in an illegitimate government. De-colonization, thus, mainly addressed the legal need to chase out the illegitimate government and establish an independent sovereign state. Accordingly, due to the decolonization mandate, two types of situations emerged: the situations can be described as full decolonization and partial decolonization.

In a full decolonization process, the colonial people leave power and full sovereignty to the people in the territory is granted. In these circumstances, the people have their own state and command external sovereignty and internal sovereignty. The state then becomes entitled to get a seat allocated in the General Assembly of the United Nations and participates like other members.

Partial decolonization occurs when people who have legitimate right to self-determination are not restored with full power of governance. There are many examples of partial decolonization. One instance is where colonial powers, having conquered separate states, amalgamated them together as a 'unitary' state. This is usually a type of coerced marriage between the two or more previously distinct states. The people of these states more often than not have diverse ethnicities, languages, religions or cultures. At the time of decolonization, the colonial power may simply hand over power to one of the groups and leave the other group(s) basically trapped into the newly decolonized state. This group may refuse to go along with this, and may try to restore its pre-colonial sovereignty. In another instance, these diverse groups may decide to go on with the unitary state as they were left by the colonial power. However, this is done through an agreement (generally through national constitution or the instrument of decolonization) which suggests that if it does not work out, then the component parts could go back to their pre-colonial status of independent units. But, when a component part seeks to opt out, the dominant power may refuse. In another example, one state may compulsorily take control of a former colonial people, but the affected people, the international community or both do not recognize this as a legal annexation. The international community may have even mandated certain procedures, as yet unrealized, by which the affected people are to indicate their choice regarding self-termination rights. The last situation occurs where a small component part of a colonially created 'unitary' state agreed to continue the unitary state but with

no particular 'opt-out' agreements signed. Rather, what existed verbal or written agreements about how the rights of the smaller group would be protected in the component state. However, the smaller or weaker group then suffers strict restriction of their rights over a long period of time by the dominant group and may lose the capacity to defend its rights by peaceful means.

Legal Framework on Right to self-determination:

In line with the objectives of the Charter of the United Nations, Article 1 of the International Covenant on Civil and Political Rights, as noted above, states that all peoples have the right of self-determination. This is necessary in view of the fact that ensuring it is an essential condition for the guarantee and strict adherence to basic human rights guaranteed to citizens. It also promotes and strengthens the position of fundamental human rights. It is against this background that states put in place the right of self-determination and placed this provision as Article 1 apart from, and before all, the other rights in the two Covenants (ICCPR General Comment 12 on right to self-determination, 21st Session, 1984). As stated above, Article 1 enshrines an inalienable right of all peoples as described in its paragraphs 1 and 2. By virtue of that right, people have the right to freely 'determine their political status and freely pursue their economic, social and cultural development' (As above). It imposes corresponding obligation on all State Parties. This right and the corresponding obligations pertaining to its implementation are interrelated with other provisions of the Covenant and rules of international law. With regard to paragraph 1 of Article 1, State Parties are obliged to make the constitutional and political processes, which practically allow the exercise of this right. Paragraph 2 affirms a particular aspect of the economic content of the right of self-determination, i.e. the right of peoples, for their own ends, freely to "dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence"(as above). Paragraph 3 imposes specific obligations on State Parties, not only in relation to their own peoples but also all peoples, which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination. The general nature of this paragraph is confirmed by the history of its drafting. It states that: "The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations." The obligations exist irrespective of the fact whether a people who are entitled to self-determination depend on a State party to the Covenant or not. It follows that all State Parties to the Covenants should take positive action to facilitate realization of and respect for the right of peoples to self-determination. Such positive action must be consistent with the states' obligations under the Charter of the United Nations and under international law: in particular, states must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination.

We have noted above that the principle of self-determination has ultimately been embodied in Article I of the Charter of the United Nations. Initially, the principle was incorporated in the 1941 Atlantic Charter and the Dumbarton Oaks proposals, which culminated into the United Nations Charter. Its inclusion in the UN Charter marks the universal recognition of the principle as fundamental to the maintenance of friendly relations and peace among states. It got further strength when it was recognized as a right of all peoples in the first article common to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights which both entered into force in 1976 (UN GA Res. 1514 (XV) of 1960). As stated above, Paragraph 1 of this Article 1 provides: All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. Apart from Article 1, there are other international and regional legal instruments, which also protect the right of all peoples to self-determination (UN General Assembly Resolution 2625 (XXV) of 1970). These include: the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States adopted by the UN General Assembly in 1970 (United Nations, GA Res. 2625 (XXV)); the Helsinki Final Act adopted by the Conference on Security and Co-operation in Europe (CSCE) in 1975; the African Charter of Human and Peoples' Rights of 1981; the CSCE Charter of Paris for a New Europe adopted in 1990; and the Vienna Declaration and Program of Action of 1993.

In the same vein, the significant nature of this right has been given judicial flavour in a number of cases. For instance, the International Court of Justice in the *Namibia case* (1971 ICJ 16), the *Western Sahara case* (1975 ICJ 12) and the *East Timor case* (1995 ICJ 102), has confirmed its *erga omnes* character. Besides these, the scope and content of the right to self-determination was elucidated by many leading international bodies, including the UN Human Rights Committee (1984. UN doc. HRI/GEN/1/Rev.3.), and the Committee on the Elimination of Racial Discrimination (1996 UN doc. CERD/C/49/CRP.2/Add.7).

Similarly, the International Meeting of Experts also approved the right to self-determination, being a hard law, for the Elucidation of the Concepts of Rights of Peoples joined by UNESCO from 1985 to 1991. It concluded *inter alia* that hard law includes the right to self-determination and the right to existence in line with

the Genocide Convention. The Barcelona Conference also came to the conclusion that the principle of right to self-determination of all peoples is well established in international law. Also, the insertion of the right to self-determination in the International Covenants on Human Rights and in the Vienna Declaration and Program of Action is a testimony to the fact that self-determination is an essential part of human rights law, which can be applied universally. In the same token, observance of the right of self-determination is a condition precedent to the enjoyment of other human rights and fundamental freedoms, whether they are cultural, economic, political, social or civil.

Self-determination and the Shari'ah:

It is well understood that the contemporary Islam is a religion of peace and amity with followers of other religions, grants right of self-determination to all people and does not subscribe to expansionism, as one of its basic principles is that there is no compulsion in religion (*la iqrā'afiddin*); it is a religion of propagating its virtues (*marufat*) among followers of other religions and to invite them to embrace it, which cannot be considered as expansionism. Islam is at peace with other religions and recognizes sovereign rights of other states. This is the reason why one of the objectives of the Organization of Islamic Conference (OIC) is to respect the right of self-determination and non-interference in the domestic affairs and to respect sovereignty, independence and territorial integrity of each Member State (preamble to Organization of Islamic Cooperation Charter and Article 1 (3) of the Charter). The 1994 Arab Charter on Human Rights composed by the Council of League of Arab States in its Part I, Article 1 (a) states: "...all people have right of self-determination." Likewise, the First International Arab Human Rights Movement called for: "the due respect of human rights, most importantly the right to self-determination." The 1990 Cairo Declaration of Human Rights in Islam treats self-determination right as an Islamic Rights idea in its Article 11 (b). The objective flows from the teachings of the Qur'an and the *Sunnah* of the Prophet (s.a.w.). The Prophet (s.a.w.) during his lifetime recognised the right to self-determination and non-interference in the domestic affairs and to respect sovereignty, independence and territorial integrity of other nations. This is evident from a number of treaties concluded with people of other nations during his period and periods of four rightly guided Caliphs (*Khulafa' ual-Rashidun*).

Islamic history reveals as to how the Prophet (s.a.w.) united many tribes and nations, concluded treaties with them while giving them their rights to self-rule, especially in their mundane affairs. For instance, the pact with the people of Yathrib is worth examining. It was revealed that the people came to perform the pilgrimage (*Hajj*) from Yathrib, a city more than two hundred miles away, now known as Medina. Yathrib was fortunate in its location in a pleasant oasis, famous even to this day for the excellence of its dates, but unfortunate in many other ways. The oasis had been the scene of almost unceasing tribal strife. Jews fought Jews and Arabs fought Arabs; Arabs allied themselves with Jews and fought other Arabs who allied with a different Jewish community. While Mecca prospered, Yathrib lived in wretchedness. It was in need of a leader capable of uniting its people. At Yathrib, there were Jewish tribes with learned rabbis who had often spoken to Prophet soon to come among the Jews, with whom, when he came, the Jews would destroy the Arabs as the tribes of 'Aad and Thamud had been destroyed of old for their idolatry. The Prophet (s.a.w.), at that stage in his call was secretly visiting different tribes in the outskirts of Mecca to convey to them the message of Islam. It is well known that once, he overheard a group of men at Aqaba, a place outside Mecca, and he asked to sit with them to which they gladly welcomed. When the men from the tribe of Khazraj from Yathrib heard what the Prophet (s.a.w.) had to say, they recognized him as the Prophet whom the Jews had described to them, and all six men accepted Islam. They also hoped that Muhammad, through this new religion, could be the man who would unite them with their brother tribe, the Aws, a tribe in Yathrib with whom they shared common ancestry, but distraught with years of war and animosity. They were determined to return to Yathrib and spread the religion of Islam. As a result, vast majority of the people of Yathrib embraced Islam, and during the next season of pilgrimage, in the year 621, a huge delegation purposely came from Yathrib to meet the Prophet (s.a.w.). (Ibn Kathir).

The relationship of the Prophet (s.a.w.) with the people of Aqaba is also worth mentioning. The first and the second pacts of Aqaba reveal the fact that people need to be ruled based on their free submission to the sovereignty of a government, which is nothing but recognition of the self-determination right of other people. It was reported that a delegation composed of twelve men, five of those were from the previous year's meeting, and two members of the Aws met the Prophet (s.a.w.). They met with the Prophet (s.a.w.) again at Aqaba and pledged in their own names and in those of their wives, to associate no other creation with God (to become Muslim), neither to steal nor to commit adultery nor to kill their infants, even in dire poverty; and they undertook to obey this man in all things just. This is known as the First Pledge of Aqaba. When they returned to Yathrib, the Prophet (s.a.w.) sent with them his first ambassador, Mus'ab ibn 'Umayr, to teach the new converts the rudiments of the faith and further spread the religion to those who had not yet embraced Islam. Mus'ab preached the message of Islam until almost every family in Yathrib had a Muslim in their midst, and

before the pilgrimage (*Hajj*) of the following year, 622, Mus'ab returned to the Prophet (s.a.w.) and told him the good news of his mission, and of the goodness and strength of Yathrib and its people.

With regard to the second pact of Aqaba, in 622, pilgrims from Yathrib, seventy-five of them Muslims, with two women in them, came to perform the Hajj. During the later part of one night, while all were asleep, the Muslims from amongst the Yathribite pilgrims secretly crept into the place where they had arranged to meet the Prophet (s.a.w.), at the rocks at Aqaba, to vow allegiance to the Prophet (s.a.w.) and invite him to their city. At Aqaba, they met with the Prophet (s.a.w.). His uncle was also with him, who was still a pagan but who staunchly defended his nephew due to the familial bonds. He spoke and warned the Muslims about the dangers of their task, and against proving untrue to their commitment if they undertook it. Another person from the pilgrims, who was present the previous two years, also stood and warned against the danger of their commitment and their preparedness to uphold it. In their staunch determination and love to the Prophet, they swore, which is known as the Pledge of War, because it involved protecting the person of the Prophet (s.a.w.) by arms if necessary; and soon after the emigration to Yathrib, the Qur'anic verses permitting war in defense of the religion were revealed (Qur'an, 22 ayah 39-40).

Also, the Charter of Medina underscores the significance of consent and cooperation for governance. According to this compact, communities with different religious, cultural and political orientations enjoyed autonomy. The Charter of Medina firmly established a pluralistic state and a community of communities. The notions of equality, consensual governance, and pluralism were central to the charter of Medina. The *Sunnah* of the Prophet (s.a.w.) indicates how rule of self-determination should be observed in compliance with the rules of the administration of an Islamic state (*al-ahkam al-sultaniyyah*). This is because the first Islamic state was based on a social contract, and had a ruler who ruled with the explicit written consent of all the citizens of the state.

It is clear from the above paragraphs that right to self-determination, which respect sovereignty and independence of states, and establishment of a democratic form of government are among the Islamic teachings on establishing and running sovereign states. Islam subscribed from its inception to have a head of the state (*Khalifa*) and a consultative-cum-advisory committee (*Shura*, commonly known as *Majlis al-Mushawarah*) comprising a good number of representatives from among the people. In contemporary Muslim states, President, in the presidential form of government, and Prime Minister, in a Parliamentary form of government, is like *Khalifa* and Parliaments, comprising elected and nominated members (it can be known by any other suitable names) is like *Shura*. It does not allow any state to rule another state(s) without the will of the people of the state(s).

Application of the Right to Self-determination in the contemporary States With Special Reference to Kashmir:

It can be said that the implementation of the right to self-determination has been very much problematic in the modern day. It has been filled with more of politics than law. As a result, many conflicts and internal strifes are eminent in some regions in the world. It is submitted that the situation, which led to the independence of Pakistan from the clutches of dictators, is legally justifiable. The same applies to the situation in South Sudan and East Timor. There are valid applications of the rights to self-determination in Egypt and Libya. The movement of Syrian and Somali people can also be justified. It is clearly noted above that on the basis of the right of self-determination a state within a state unless there is a genuine and widely acceptable reason. However, the situation in Kashmir is different, as it suffers from an intricate political dispute between India and Pakistan. It is difficult, rather impossible, for people to exercise their right of self-determination and to establish an independent state, separate from Pakistan and India. The United Nations decided for conducting a plebiscite but it was never materialized. Not conducting a plebiscite may be considered as a violation of international law and the *Shari'ah*.

Interests of the United Nations in the affairs of the State of Kashmir started between 1947 and 1948 (Parker, 1996). This was the period of the de-colonization process of the British rule in south Asia. The people in charge of what is today known as India and Pakistan agreed with the British that the citizens of Kashmir should decide their fate. The first Indian Prime Minister Jawahar Lal Nehru publicly declared this (Parker, 2003). Because of the high level of tension and chaos in the area, as well as a full-grown rebellion in Kashmir against the Maharajah (the king) imposed by the British, the United Nations started its efforts on Kashmir in 1948. At this point in time, the Security Council created the United Nations Commission on India and Pakistan. Besides, the Security Council resolved that the final disposition of Kashmir would be by a plebiscite conducted by the United Nations (Security Council resolutions 39 (1948), 47 (1948), 80 (1950), 91 (1951) and 96 (1951)). This appeared to enjoy support from the Indian and Pakistani governments. This was affirmed by Security Council resolutions, which indicated that United Nations action to resolve the Kashmir issue got the support of both parties in line with resolutions of the United Nations Commission for India and Pakistan (Resolution of the United Nations Commission for India and Pakistan, adopted on 5 January 1949, reprinted in UN Doc. S/1196 of 10 January 1949).

However, it has been alleged that prior to such a plebiscite, the armed forces of India forcefully controlled much of Kashmir under the guise of aiding the British-Maharajah who wanted Kashmir to be with India. The

Maharajah allegedly got the help of India's military as barter for an Instrument of Accession granting Kashmir to India ("Instrument of Accession to India missing from state archives", PTI News (New Delhi), 1 September 1995). Since then, India controls the Indian part of Kashmir. The elections, which took place in the Indian Kashmir, was seen by India as the will of the Kashmiri people. This was the reason why the United Nations Security Council has frequently stated that such unilateral acts of India do not represent the exercise of the free will of the people of Kashmir, as this can only be done by a plebiscite conducted by the United Nations (Security Council resolution 122 of 24 January 1957). It is notable here that the other part of Kashmir is with Pakistan. Kashmiri people in Pakistan are also not happy, as it is the most neglected part of that country. All the Kashmiri people want one Kashmir based on both the territories. The future of Kashmir seems to be uncertain, as even after more than six decades there is no sign of an independent Kashmir. The people of Kashmir are fighting for their independence, which is facing resistance from India. If they succeed, it will be actually an achievement of right of self-determination. But it seems to be difficult. There have been rounds of negotiations between Pakistan and India, but they have not yielded any amicable solution. The authors are of the opinion that the right of self-determination of the Kashmiri people should get due recognition. In all future negotiations, legitimate Kashmiri groups should also be invited, as there cannot be any amicable solution without involving them. There can be a solution that the status quo is maintained and the disputed border is considered as international border. But for this also, the Kashmiri people should make the decision. The Kashmir, for a long period of time, had a clearly defined territory. Kashmiri people generally speak Kashmiri and Urdu, while in rest of India there are fourteen officially recognised languages, which are different than Kashmiri language. The Kashmiri culture is different from that of other cultures in rest of India in many respects. But attire, traditions, and food, language, religion and culture cannot be grounds to support any secessionist movement unless there is any legal background. For example, the Palestinian movement against Israeli occupation of their territories has a legal basis. It is for this reason that it has got support from a sizable number of countries, except for the United States and its cronies. Since there is no legal basis for the Telangana movement in Andhra Pradesh's demand for a Sikhistan in Punjab province, the Indian government suppressed them. So was the case of secessionist movement of Tamil Tigers in Sri Lanka.

Democracy and the Shari'ah:

There is a slender minority of scholars who are of the opinion that Islam and democracy are not compatible. But vast majority of them hold the unpartisan view that the Islamic teaching encourages public participation in the formation and running of the government as it guarantees a number of rights to citizens with prominence of freedom of speech and expression and to choose a government of their choice (Ansari, et. al, 2011). Islam does not support autocratic or authoritarian rulers. Louay Safi of the Centre for Study of Islam and Democracy is supportive of this view. He rightly says,

"I think that Islam as a set of norms and ideals that emphasizes the equality of people, the accountability of leaders to community, and the respect of diversity and other faiths, is fully compatible with democracy. I don't see how it could be compatible with a government that would take away those values."

A historian of the Muslim world named Richard Bulliet of the Columbia University has expressed similar view. He is of the opinion that:

"Some of the people who say that democracy has no place in Islam, what they really express is a sense that the word 'democracy' as presented in international discourse appears to be wholly owned by the West. The word itself has, for some, a connotation of cultural imperialism. If you talk about representative government without the baggage of these institutions in the U.S., but on more idealistic grounds, then it makes perfectly good sense to a lot of Muslims. The idea of citizenry participating in government is, particularly within Sunni Islam, sort of a bedrock theory" (Handwek, 2003).

The historic Islam was more democratic than the postcolonial Muslim states. It is notable that after the demise of the first *Khalifa*, the second *Khalifa* was chosen on the basis of consultation (*shura*); even women were consulted (Ansari, 2008). This has been quite unfortunate to the Muslim world. It is for this reason that Muslim states, Islamic and secular, were ruled by autocrats who did not subscribe to human rights, including right to self-determination and preferred to practice dynasty rule, e.g. Husni Mubarak of Egypt wanted to bring his son as the next president, Muammar Gadhafi wanted to put his son in his place, Hafiz al-Asad gave his regime to his son, all kings appointed their sons as their successors. There has been an unfortunate story in Pakistan and Iraq that they had dictators for quite sometime. These top-down practices were against the Islamic tenets of law and state as they undermined their own peoples, and never took their mandates for appointing next rulers and worked for their own might. There was a need to bring about some kind of cultural revolution and political uprising from within these states in order to mount pressure to root out unpopular governments with or without outside help. Such revolutions have already succeeded in some countries and people of some other countries are still struggling. It is notable here that ensuring Islamic human rights and peoples' participation in the state is a necessary element. It is not warranted that Muslim countries should establish Western type of

democracy and grant human rights enshrined in the popular international human rights instruments; they can be acceptable only when they are in conformity with the Qur'an and *Sunnah*. Even in secular Muslim States, e.g. Turkey and Bangladesh, governments, in order to be popular, cannot go against these.

Peoples of some Muslim countries are still struggling for enforcing democratic values to be respected in their countries. The reason for this appears not only religious but is more of political, cultural and historical. As noted above, although a minority of scholars around the world considers democracy to be against Islam, a good number of them argue that the principle of *Shura* (consultation) is the foundation of modern democratic governments. In contemporary states, Parliament or any other legislative body comprising elected and nominated members may be known as *Majlis al-Shura* or consultative decision-making body which is a noticeable democratic value in Islam, as ordained by Allah (s.w.t.) (Qur'an, 3: *ayah* 160; Qur'an, 42: *ayah* 39) and accentuated and practiced by the Prophet (s.a.w.) (Hadrat Aisha (r.a.); *Tafsir Al-Kabir*, Qur'an, 3: 160, pp. 445-446, footnote 442.), and *Khalifa* (Hadrat Umar (r.a.); *Tafsir Al-Kabir*, Qur'an, 3: 160, pp. 445-446, footnote, 442) (plural of *Khalifa*) after his demise. It can thus be contended that the modern concept of democracy is actually the idea borrowed from the Islamic concept of *Shura*. Thus, one clearly understands that Islamic democracy needs to have a *majlis al-shura*, which is the manifestation of the fact that Islam subscribes to a democratic government; it rejects any other form of government, e.g. a kingship, an aristocracy or a dictatorship, which rejects this idea.

It is observed that many Muslim writers have advocated for *Shura*, i.e. the practice whereby the ruler consults the senior and experienced members of the community in reaching a viable decision in matters relating to the state (Abd al-Qadir Auda, 1980; Rida, 1947; El-Awa,). This is because Allah (s.w.t.) enjoins the Prophet (s.a.w.) to deal gently and kindly with the believers and consult them in state affairs, but if he were resolute on certain matters, he would execute his decision or rely on revelation (*wahih*) from Allah (s.w.t.) (Qur'an, 3: *ayah* 159.). This does not mean that the Prophet (s.a.w.) was under an obligation to consult the companions at all occasions (Sambo, et. al 2012). Indeed, he consulted them in some affairs and at the other times he did not (El-Awa, Ibid). But on important state matters, he quite often consulted his senior and experienced companions (Ibid). This is because having regard to the position of the Prophet (s.a.w.) as a Messenger of Allah receiving revelation, the fact he did not speak the mind of his own except what was revealed to him, his religious role and nature of the relationship with his followers, it would be unexpected that he should consult them in all affairs.

Similarly, Allah (s.w.t.) describes the believers as a community who decide their affairs by making consultations among themselves (Qur'an, 42: *ayah* 38). This does not mean however that majority view must prevail (Al-Tabari, 1954). Abu Bakr (r.a.), the first Caliph, while during his rule maintained freedom whether to consult his community and act on a given advice. There has even been an instance where the Caliph acted against what was supposed to be the view of the majority of the companions. He decided to fight Arab tribesmen who rebelled after the death of the Prophet (s.a.w.) (An-Naim, 1990). Similarly, Umar (r.a.), the second Caliph, also on few occasions acted against the majority of his companions with respect to distribution of lands taken in Southern Iraq as spoils of war (El-Awa, Ibid). This shows that majority may not necessarily be followed, as it cannot always be right for the people and/or state.

The Islamic concept of *Shura* today does require the ruler to consult and be bound by the advice so given by the members of the legislative body (*majlis al-shura*) if the advice is in the interest of the people and the state (public interest – *maslahah mursalah*). Reliance has been placed on many verses of the Qur'an, which ordain the believers as commanding what is good (*marufat*) and prohibiting what is evil (*munkarat*) (Qur'an, 3: *ayah* 110, Qur'an, 3: *ayah* 112 and Qur'an, 22: *ayah* 41.). This supports the power of the government to command what is good and prohibit what is evil.

It should also be said that a caliph was not a despotic and dictatorial leader as he was bound by the *Shari'ah*, just like any other Muslims. Although he was an ultimate authority on the *Shari'ah* because he exercised what is now categorized today as executive, legislative and judicial functions, this does not mean that his limitations set by the *Shari'ah* were not of high practical value. This also did not mean there were not ways of checks and balances. In fact, his checks and balances were stricter than what is today referred to as checks and balances. This is because first, the caliphs asked the people to follow them as long as they follow the injunctions of Allah (s.w.t.) and Prophet (s.a.w.). This was a potent check on the ultimate authorities of the caliphs to avoid oppression on land and abuse of power. Thus, the dangers of abuse of office commonly associated with the chief executive today could not arise as Allah (s.w.t.) saved and rightly guarded them from this. It is further observed that while sovereignty belongs to Allah (s.w.t.), it has been delegated to human being as vicegerents of Allah (s.w.t.) (Qur'an, 2: *ayah* 30.). The duty now is to contemplate on how this agency can be best applied in such a way as to conform with the objectives (*maqasid*) of the *Shari'ah* thereby translating to welfare and good governance to the people now and generations yet unborn. Allah (s.w.t.) who is just should not be used as an excuse for putting in place and legitimizing leaders that are not responsible to their people and responsive to their human needs.

In view of the above, one can rightly say that Islam is not at all opposed to democracy. It merely opposes some bad practices associated with democracy resulting from failure to implement it in the Islamic spirit. Issues

such as rigging and manipulation in elections are frowned at by Islam; even these issues are also strictly not based on the modern concept of democracy. The *Sunnah* of the Prophet (s.a.w.) shows how democratic theories and practices are attuned with the *Shari'ah*. This is evident from the Charter of Medina. After the migration of the Prophet (s.a.w.) from Mecca to Medina in 622 CE, he firmly established the first Islamic state. He ruled for about 10 years. Then, he was not only the political leader of the Muslim *Ummah* (community) in Arabia but also the political head of Medina. The appointment of ruler was not arbitrary. Rather, the indigenous Muslims of Medina, Muslim immigrants from Mecca, and, significantly, the Jews of Medina based it on the Tripartite Charter (known as the Medina Charter) that was signed. The Medina Charter can serve as a model and guiding principles for modern constitutions of Muslim countries.

The Charter of Medina clearly shows the proper relationship between divine revelation and a constitution (*dastur*). The Prophet (s.a.w.), could have simply declared that the Qur'an would serve as the constitution and forced it upon both the Muslim and non-Muslim residents of Medina. He never did that. He instead showed a democratic spirit quite unlike the authoritarian tendencies of some Muslim States who claim to follow his exemplary character today. The Prophet (s.a.w.) drew up a historically specific Charter based on the everlasting and inspirational principles revealed to him but also sought and had the consent of those who could have been affected by its implementation. Hence, the first Islamic state was constitutional in nature based on a social contract, and had a ruler who ruled with the clear written consent of all the citizens of the state. Today, Muslims need to follow the Prophet (s.a.w.) and draw up their own suitable constitutions.

The Charter of Medina underscores the significance of consent and cooperation for governance. The Charter equates Muslims and non-Muslims citizens of the Islamic state, with identical rights and duties. Societies with different religious orientations enjoyed religious autonomy. The compact of Medina firmly established a pluralistic state. The communities were ruled on the principles of consensual governance, equality, and pluralism. These were central to the Charter of Medina. The Prophet's (s.a.w.) interpretation of the Quran was so kindhearted, tolerant, and democratic. This is how democratic practice and theories are attuned with an Islamic state. As noted earlier, the first Islamic state was constitutional in nature since it was based on a social contract. The leaders had an obvious written consent of all the citizens of the state to rule.

Conclusion:

From the foregoing discussions, the principle and the right to self-determination is firmly rooted in international law, especially human rights law, and the *Shari'ah*. Both the laws are worth universal application. In the contemporary world, the implementation of the right to self-determination is necessary for honouring the tenets of participatory democracy and establishing a peaceful world order, provided there is no incitement from outside the country. Its proper application will resolve competing interests of existing states and peoples, including indigenous peoples, and minority communities in several countries. It is in this sense that understanding the right to self-determination is vital, as it cannot be allowed to justify secessionist movement, except for genuine cases, e.g. Palestine and East Timor. Broadly speaking, this right will ultimately guarantee some forms of self-governance, cultural security, economic self-reliance, land rights, effective participation at the international level, religious freedom, free speech and human dignity. It is on this basis that the paper has made an expository study of the right to self-determination from both international and the *Shari'ah* perspectives.

To achieve self-determination, participatory democratic principles need to be put in place. This is why the paper also discussed the concept of democracy from the *Shari'ah* concepts of the *Khalifa* and the *Shura*. Thus, the paper contends that the *Shari'ah* is compatible with a number of democratic principles enshrined in constitutions of modern democratic states. The process of self-determination is itself a democratic process. This is because of the importance of consent in governance both from international and the *Shari'ah* perspectives.

Thus, implementation of the right to self-determination has been uniform. While it was rightly applied in some instances, the same has proven very difficult in many other circumstances, notably in Palestine and Kashmir. In order to effectively prevent upheavals in states, there is a need to properly, peacefully, democratically and justifiably implement the rights of self-determination. To achieve this, the concept itself needs to be properly understood not only from the international law point of view but also from the Islamic perspective. It is because of this reason that some Muslim countries, notably Egypt and Libya, have experienced establishment of democratic government; and governments of some other countries are facing resistance from their people, e.g. Syria and Yemen. It is also because of both international law and the *Shari'ah* people of Palestine and Kashmir are pressing their demand of self-rule.

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