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The cultural dimension in international law
"the case of the Arab world"

a theoretical essay in the sociology of international law

By
Ahmed Kheroua

Submitted for a PhD degree
to Glasgow university

May, 1994



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Acknowledgement

I wish to express my heartfelt gratitude to Dr. Carty, my thesis supervisor and friend for his keen interest, constant encouragement and wise counsel, without which this work would never have been completed. To H. Salim I express my gratitude and thank for his help in the typing. Last but not least, I am particularly indebted to the Algerian people who paid for my studies and made this work a possible project.

Abbreviations

- A.A.N** : Annuaire Afrique du nord.
A.F.D.I : Annuaire Francais de droit interational.
A.J.I.L : American journal of international law.
ASIL : American society of international law.
C.L.S : Critical legal studies.
D.I.D : Droit international de developpement.
N.I.E.O : New international economic order.
R.G.D.I.P : Revue g~~le~~ de droit international public.
R.A.R.E : Revue Algerienne des relations exterieures.
R.A.S.J.E.P : Revue Algerienne des sciences juridiques
economiques et politiques.
R.C,A.D.I : Recueil de cours Academie de dr inter.
R.E.S.P : Revue Francaise des sciences politiques.
U.N.G.A.R : United Nations general assembly resolutions.
R.S.D : The right to self determination.
R.P.S.D : The right to political self-determination.
R.E.S.D : The right to economical self-determination.
R.C.S.D : The right to cultural self-determination.

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FOREWORD

This essay is an attempt to rescue that agonizing North/South dialogue which for a while, has succeeded to attract the international audience . The dialogue is a continuous one though it is pursued more in a ~~Clauser~~^{Clauser}~~zwigian~~ way i.e. through military intervention, aggression and use of force rather than through peaceful means by way of talks and negotiations .

I believe in peaceful dialogue and in "man's reasonableness." That is why, I intend to contribute to that dialogue by exposing the hopes, aspirations and willingness of my community toward such ideals as peaceful co-existence, humanitarian brotherhood, world peace and International cooperation.

I may need to alert my colleagues that my argument, quite often, is going to take a "metajuridical" sense. Hence, instead of using concepts such as "nations-states" treaties, etc... as my colleagues would expect me to . I will be using terms and concepts such as " Arabo- islamic community - cultural self determination ", etc ... which a certain orthodoxy deems as "non-legal".

The point is, being an Arabo-Islamic lawyer, requires me to take, the term now being in vogue, a slightly unorthodox approach to the study of International Law. Let us say, I tend to be critical vis-a-vis the discipline. I do not see how things could be otherwise.

The Arabo-islamic world's interpellation of the contemporary

International Order has been a growing trend since its establishment back during the fourteenth^{Century}. It is now more and more taking violent forms as the Gulf war would attest. The outlook seems even darker if one is to "lend an ear" to the frightening growls which islamic- fundamentalism is raising here and there .

The North South debate has concentrated mainly on the economical dimension urging for the elaboration of a new international economic order. Many have argued that the weakness of this frame resides in its being oblivious of the cultural dimension which is determinant in such a civilizational debate. In the early seventies, a french colleague expressed a hope saying : **"After political decolonization, we have come to what is economical Sovereignty, after juridical equality. We have grown conscious of the necessity to achieve equality of opportunity in regard to development. There remains a third dimension which we are begining to foresee and this consists in something which touches deeply into the substance of people. Some have talked about a cultural resourcefulness, of the right of every state to recover its personality. A fruitful dialogue passes through this dimension if the third world states continue to send back to the northern hemisphere only a distorted image of itself, there would be but an illusion of dialogue and the result will be further disputes ."(1)**

Hence , it is our aim to answer that hope by providing the missing dimension. We believe as does Flory, that such a dimension is necessary in order to enhance our knowledge of each other as a first step : toward mutual understanding and comprehension.

Philosophical dictionaries tell us that the term "Culture" has a

double meaning, (one of them is too) narrow; confined to the definition of the creative expression in the field of arts, literature, painting and so on..., the other (is too wide) and open to include the creative expressions of man in all fields of human behavior. In our study, without neglecting either of these senses, we will focus on the later. There are important methodological issues which need to be examined before going any further

The Mean : Globalism versus Fragmentation

As we all know, there is a certain dichotomy perceptible in every aspect of man's nature: individual versus society, objective versus subjective, theory versus practice or the "homosapien vs homofaber", etc... One can infinitely draw parallelisms of this sort at all levels of human knowledge and activity.

An important dichotomy is that which opposes globality or holism to fragmentation. This is relevant to our study because it is reflected nowadays at the international level by the opposition between third world advocacy of a global negotiation of international problems, to the case-by-case policy supported by the industrialized nations. Both approaches (views, methods) could well be said to have qualities and weaknesses (advantages and disadvantages).

A global view of any "Phenomenon" gives you certainly a better understanding of the nature, cause, and the dynamics of interaction between the different parts or fragments of that phenomenon as a whole. Hence, it allows you to draw a general synthesis, that is for the qualities. As to the weaknesses, a global approach does not allow you a clear understanding of the role each small fragment or "unit" per-se, plays within the whole. Thus, it hinders your detailed analysis and makes your global vision of the

phenomenon in question too vague and weak at the level of "generalisability". The same applies to the fragmented approach. It allows you a better understanding of each fragment taken apart but hinders your global vision. Hence, the best way to avoid the weaknesses of both "methods" is to try a combination of the qualities of both. An assembling of fragmented precision and global outlook is the best of all. Yet, you may argue that in running "two rabbits at once", one may lose them both and end up empty handed. That is true, and that is a risk which you have to take in order to avoid the arrogance of fragmentation as well as the vagueness of globalism.

The combination of both is known as the method of the mean. A middle-way between two extremes, that is, in legal thought, what M. Bos. would call "Analytical Conceptualism"⁽²⁾; the notion of the mean, one could also call it "the balance", is an old/aged human synthesis. Aristotle has called it "Moral Virtue" in his Nichomachean ethic (Book II). Religions have advocated it. Islam has made it a central theme. In contemporary philosophy and social science, it is the cherished method through which, modern critical thought strives for a reconciliation between theory and praxis, subjectivism and objectivism, etc...

I therefore, entirely agree with those who call for a knowledge beyond objectivism and subjectivism, I furthermore, agree with those who believe that truth lies beyond prejudice, somewhere in the human linguistic community. For all these reasons, I have strived to broaden my horizon as much as possible so that I succeed in "transcending" myself and my prejudices to the utmost possible limit, as well as, the prejudices of the "other" and search beyond that for a common and shared value and that is our "humanity". I believe understanding at that level is possible

The level of Discourse : realism versus utopianism

Man is a political animal. That is what the most knowledgeable of our species have been repeating since earliest times. Man is a combination of a multitude of animal instincts with a natural gift distinguishing him from the rest of animals and that is "reason". Man endowed with "Reason", is man entrusted with a mission to do good (virtue) and forbid bad (evil). Reason allows man to distinguish between good and bad. Therefore, it is a tool, an instrument, a means. Man's conception of his own reason is twofold, he either uses it as a tool and in that case he is able to discern between good and bad, or he sees it as an end and in that case, Reason Mirrors to man his gift and talent i.e. his distinctive faculty of being a thinking animal, a knowing intellect, a self conscious "I". This discovery increases man's self love and egoism and turns him to a mortal god.

Through out history man has been shifting from one conception to another. Religions were revealed and Messengers came to preach "virtue" but in vain. "Virtue being a bite requiring for the taste of man." Reason was turned to an end. Man conquered it and has since lost it as a means. Today, man is either all spirit or all matter, two extremes and a perpetual conflict source of all the trouble in the world.

International Law : between Realism and Utopia

In the legal sphere, this dichotomy is reflected in the

opposition between morality and law (understood in a positive sense). In other terms, it is the all very known paradox between what "is" and what "ought to be", i.e. between realism and utopia, between present and future.

International Public Law, we are told by classical as well as contemporary lawyers, is the sum of juridical rules (norms) regulating the complexes relations between sovereign states. Classical writers used to call it the "Law of War and Peace" (Grotius).

Nowadays, ~~since~~ conflicts, violations and use of force, have become "Monnaie-Courante" in the mainstream of international activity. Many have imputed this "instability" to the "ineffectiveness" of international law, which is supposed to ensure stability and provides for order and peace. Hence, international law has become the target of severe criticism both from outside and from within.

From outside, it is the politicians (theoreticians and practitioners) who are the most vociferous in criticizing International Law. What mainly arouse their criticism is what they perceive as the pretentiousness, the utopianism of International Law. Its lack of realism and its irrelevant aspiration. Of course, politicians also are sometimes "idealists". Yet, they are only a minority and very often, mainly because of that, they do not succeed in politics. Politics throughout human history has relegated law to a lower rank in the social sphere. Today even more than before and it will probably continue to do so for ever.

From within, International Law is criticized by lawyers theoreticians and practitioners alike. Among the later, as among

their political pairs. there are utopians and realists. The first refuse to consider law as only a technical tool denied of all aspirations. they always seek to reach "virtue" and convert it into legal rules. Yet, they often if not always fail in their task. The Realists, on the other hand, use law as a technical tool, mainly to ensure political stability, very often they do so at the cost of justice and equity. Unlike the former, the realists neglect minor problems when they emerge and as long as the whole juridical machinery is functioning they worry little if not at all about what one may call "Les accidents de Parcours". While the former are initiators, imaginative and perfectionists, the later are conservatives, specialists or "professionals" and pragmatists. Both, of course, are extremists in their validity claims. The best way to avoid the drawbacks of both is to aim at a synthesis.. From what precedes then, follows the fact that our discourse will move constantly and dialectically from one extreme to another emphasizing always the possibilities for synthesis and compromises. It is our belief that beyond extremes lies the ^{salvation} of the species. It is also our belief that beyond prejudices, there is room for reason. Yet, unless "Divine inspiration" intervenes in a way or another, reason will not be able to cross the Edge of prejudice. Therefore, it is high time for man to give up his relentless pursuit of the illusion of thought, that is not the aim of reason. Reason's aim is man's education and emancipation. Reason would not achieve that by revealing to man the mysteries of the universe but rather by teaching him how to avoid false premises and extremists assumptions.

Bibliographical References & The Work's Outline

To prepare this essay, I have read widely textbooks and

articles from all disciplines of social sciences available in Arabic, French and English. I have combined data from various fields of social sciences to reach this synthesis.

There has been much talk in legal circles about professional humility. The saying goes that a successful lawyer should not make as his own, the task of explaining rules. Juristic humility requires him to content himself with the endeavour of interpreting rules within the boundaries set to them by the discipline. The extra legal aspects of the rule are of no concern to him. As Polanyi would put it : " this is no humility but rather an arrogant and arbitrary division of labour.(3)

The aim of this essay, is to provide an Arabo-Islamic reading of contemporary International Law and elaborate on the Arabo-Islamic understanding of what the contemporary International Legal order is about. Concerned as every student of International affairs is, with the level of military escalation, the use of force and violence reached in every sphere and on every occasion of our life, national as well international. I undertake this theoretical project with the hope of succeeding in introducing the Arabo-Islamic society to the international community; facilitating thus, its integration and contributing by such an effort to the appeasement of the tension reached so far. It is probably impossible to avoid polemics altogether in a theoretical essay like ours. Yet, I will do my best to keep argumentation within an acceptable tone.

I will begin with an introductory chapter, in which I think it is necessary to provide a historical survey of the concept " sovereignty" and traces its historical evolution taking the opportunity to outline the Islamic theory of the state, once this is

done, I will move on to the hard core of the study . i .e , the notion of the right of people (states) to self-determination in contemporary International Law.

Following our methodology we will dissect the right to self-determination into three sub-rights :

- 1) the Right to Political Self-Determination.
- 2) the Right to Economical Self-Determination.
- 3) the Right to Cultural Self-Determination.

Each of these sub-rights involves a key concept. R.P.S.D involves sovereignty and requires research and investigations on how to keep sovereignty within the law? R.E.S.D involves development and requires an analysis of the different developmental paradigms as well as their interaction. R.C.S.D involves question of identity and poses the challenge of modernity and univeⁿalism.

In concluding my essay, I will recover the global perspective and from there on draw a final panorama on the world scene, exposing theoretical schemes which I believe enhance dialogue and reenforce the rule of law. How, in other terms, International Law could contribute to the promotion of the right to self-determination as well as how self-determined entities could reciprocate

Notes

- (1) M.Flory, "Souveraineté Des Etats et Cooperation Pour le Développement", R.C.A.D.I 1974 I, Vol. 41, (p. 326).
- (2) M. Bos, a methodology of international law N. Holland. 1984, (p.35).
- (3) Polanyi.M, "Science, Faith and Society". University Chicago press, 1964 (p.14).

An Introductory Chapter

A. Historical Survey of the Concept of Sovereignty

Section one: Sovereignty in the western tradition :

I. The Medieval Scholastic :

Most writers on International Law and politics consider the concept of sovereignty as a relatively recent intellectual acquisition which has emerged from enlightenment. Yet, some scholars have sought to establish deeper historical roots to the concept of sovereignty and have linked it with the "Greeco-Roman" heritage. Phillipson, for instance, tells us that **"the division of Greece into dependent states rendered possible the evolution of the law governing relations among them in their capacity of sovereign powers".(1)**

Kleffens links the Concept of Sovereignty with the first century definition of PROCULUS: **" liber populus externus is qui nullius alterius populi potestati est subjectus"**. An independent foreign power is that which is subject to the power of none.**(2)** It is nevertheless, generally admitted that sovereignty is a recent notion which has burst along with the positivistic trend that has been dominating the European Arena since the 16th century. Sovereignty hence, is a secular concept purified from all metaphysical correlations. It is the attribute of supreme legal authority. This synthesis has evolved as a result of a long historical rivalry between spiritual power (church) and temporal (King).

At the beginning, the Christian scriptures had set a balance between the two: "Render unto Caesar the things that are Caesar's".⁽³⁾ St. Augustine, has emphasized the need for a balanced relationship between spiritual and temporal powers. "Grace and Free will, he said, are complementary and both necessary in order to succeed in life". Invoking prophet Jeremiah's Malediction "Cursed is the man who has hope in man and maketh strong the flesh of his arm and whose heart departeth from the Lord"⁽⁴⁾, he strongly advocated a mid-way in between. This is very important and we shall later on compare it to the position of medieval Muslim Doctors. In the fifth century, Pope Gelasius, in a letter to the Emperor Anastasius (494 AD) is reported to develop what since, has become known as the theory of the two swords. There are, he says, two systems under which chiefly this world is governed, the sacred authority of the priests and the royal power. Of these, the greater weight is with the priests; is so far as he will answer to the Lord even for Kings in the last judgement.⁽⁵⁾

This balance of power, was first shaken during the medieval era which confronted the problem of interpretation of the Supreme Law. The main controversy was provoked by the historical struggle between Pope Gregory VII and the Emperor Henry IV, at the end of eleventh century, over the rival claims of both spiritual and temporal powers as to supremacy. Through the Pope, as the head of the church and guardian of religion, spiritual power claimed not only the right of investiture of bishops but also supremacy over the emperor. The latter, on the other hand, claimed the right of hereditary succession and the right to appoint the clergy, as uncontested aspects of imperial power.

St. Thomas Aquinas came and attempted to solve the conflict by restoring the old Augustinian balance. He argued **"that the human will can by common consent, attribute juridical value to anything which is not in itself contrary to natural (divine) justice and this is positive Law, but if a thing is in itself contrary to natural justice, it cannot be made just by human volition"**(6). What St. Thomas attempted is a re-conciliation of Greek Rationalism with the spirit of Christianity. As Prof Dunning has observed : **"What St.Thomas did, was an attempt to reconcile Aristotelis with Christ_ianity"**. (7) It is worth mentioning in here, that Greek philosophy was then transmitted to Europe by Arabo-Muslim philosophers such as "Avicenna - Ibn-Tufail - el Farabi and Averroes". We will see later on how the later particularly has influenced St. Thomas.

Right now, let us come back to Europe where the struggle for power was renewed under Pope Boniface VIII and King Phillip the fair of France (1296-1303). The following is extracted from Prof. Dunning's book (8).

Pope Boniface:" We wish you to understand that you are subject to us in spiritual and temporal matters" .

King Phillip : " Let your most distinguished fatuousness be assured that in temporals we are subject to no one" .

This conflict developed on theoretical grounds in the works of scholars and theologians. The most important theoretical work written in the support of the church's claim was **" De Ecclesiatico Potestate"** by Egiduis Colonna (1302), who maintained that from the intrinsic moral superiority of the Pope follows the right of the church to judge all temporal authorities.

John De Paris(1302) defended the autonomy of the temporal power in his **"De Potestate Regia et Popali"** and argued strongly for a separation of the two powers. The synthesis so much advocated by St. Augustine was thus shaken apart and in the words of a scholar : **"One by one, the various spheres of life, successively managed to wrest themselves out from under the control of the church"**(9). It was Marsilius De Padua, who launched a decisive and almost final attack on the church's claim for temporal powers, in his **"Defensor Pacis"**. The defender of peace, Marsilius, denied to the church and the papacy any political competence and elevated the **"state"** to a position of supreme power to which everything else is subordinated. Hence, he argued : **"According to truth and Aristotle, the legislator is the people, or a majority of them commanding or determining that something be done or refrained from the field of social human action, under pain of some temporal punishment"**(10). Hence, the secular trend was already well under way. Giovanni Pico, (1463-1494) emphasized more deeply the notion of the free will in his : **"De hominis dignitate"** - Man's Dignity- **"Only man, he argued, is able to develop himself according to his own free will, he can rise to become 'God's equal' or fall to the level of beast"**(11).

All the enlightenment movement appears from then on, as a progressively growing secular trend in which man discovers his powers to control and design freely his own existence. The exclusion of the church from temporal power was consumed. Francisco De Vittoria (1485-1546) a Spanish theologian and Publicist, asserts in his **"Law of Nations"**, that civil power is not subject to the Pope because of any temporal sovereignty on his part, since as already proven, the Pope himself is not a secular sovereign, he cannot bestow secular sovereignty upon others and

consequently cannot make temporal kings or princes.(12)

By all means, it is Machievelli who gave the **"Coup De Grace"** to the old Augustinian synthesis. The author of the **"Prince"** is unanimously regarded as the founder of **"real politics"** and the notion of **"Raison D'etat"**. All means are justified for the purpose of upholding the state's supremacy **"Those or him who wants to perform the good no matter what the circumstances, will succumb in the midst of the many who are not good".(13)** Therefore, a ruler ought to maintain his position and must learn not to be good at times. In fact St. Augustine was well aware of this outcome, was it not him who wrote :**"The lust of sovereignty disturbs and consumes the human race with frightful ills"(14)**. Machievelli paved the road for the modern and secular notion of the nation-state. We will examine his influence later on when comparing him to Ibn Khaldun and his theory of State-Power. After Machievelli, it was left to Grotius, Hobbes and later on German idealists to raise the nation-state notion to its highest extremes.

Jean Bodin : (1530-1576) Bodin is considered by the majority of scholars as the father of the concept **"Sovereignty"**. In his **"Les Six Livres De La République"**, he reserved a whole chapter of his book I, to the analysis of sovereignty. With him is also linked the theory of state absolutism. Bodin was deeply concerned by what was going then in his country. A France of turmoil, threatened by dissolution from within and attacks from *outside*; The historical backdrop of Bodin's work is the development of France into a unified nation under powerful monarchs such as : Charles VII or Louis XI. Bodin introduces in an early work **"The Methodus ad facilem historiarum**

cognitionem". Method for an easy comprehension of history - 1566- the Principle of sovereignty but not in its absolute version. It is later on, in his major work (cited above) that he shifted to Absolutism which he derived from the political context of that times. His reasoning could be resumed as follow : Sovereign authority is absolute, the King of France is sovereign. Hence, the King has absolute power. The idea of absolute power was widely accepted by then. The language of the jurists and commentators of that time would seem today shockingly immoderate.(15)

In the opening chapter of book I, Bodin, informs us that sovereignty is that absolute power vested in a common wealth, which in Latin is termed "**Majestas**". Absolute power means exemption from all law and the distinguishing mark of sovereignty is that it cannot in any way be subject to the command of another, for it is he who makes Law (the sovereign) who at the same time abrogates and amends them. This is why in the Civil Law, it is laid down that the prince is above the law(16). For Bodin, then, sovereignty is absolute, inalienable, indivisible and perpetual, and is only limited by (divine law) natural law. All the princes of the earth are subject to divine and natural laws and cannot contravene them without treason and rebellion against god. Other than these laws, there are none to bind the supreme power of the prince. There was by Bodin's time, a well spread opinion that the king is bound by the popular command(17). Yet this opinion Bodin thinks must be disregarded because it furnishes seditious men with material for revolutionary plots with the consequence that there would arise disturbance in the commonwealth.

II .The Social Contract Theory And Sovereignty

The idea of the social contract is an old syncretism reached by early Greek philosophers. Plato, in the republic, has concluded : **"Therefore, when men act unjustly towards one another, and thus experience both the doing and suffering harm. Those among them who are well unable to compass the one and escape the other, come to this conclusion; that it is more profitable that they should mutually agree neither to inflict injustice, nor to suffer it. Hence, men began to establish Laws and covenants with one another and they called what the laws prescribed lawful and just".(18)**

During the late sixteenth and early seventeenth centuries, the social covenant theory was revived and used to legitimate the social order. Many scholars resorted to it. Grotius, Hobbes, Locke and Rousseau are among the most notable scholars who have elaborated on this idea. It is true, however, that everyone among them has given it a different interpretation. This is mainly because of the different political context in which every one lived.

Hugo Grotius: (1583-1645) Huig De Groot, who is much better known under his Latin name is unanimously regarded as the Father of International Law "Jus gentium". He applied the notion of the social covenant to explain that of sovereignty. If every individual may engage himself in private servitude as he pleases, why not a group of people? In order to gain protection, they could well transfer their sovereign rights to one or more persons without reserving any portion to themselves. Grotius defines then sovereign as the power whose actions are not subject to the

control of any other person, so as to be cancelled at the pleasure of any other human will.(19)

The state, he sees as the perfect body of the free men, united together in order to enjoy common rights and advantages. The law of nations he defines, as that extensive right deriving its authority from "**Pacta Sunt Servanda**", the consent of all nations or at least the majority of them. The sovereign, according to Grotius has the supreme power which cannot be superseded by any other will. Yet, it remains bound to Natural Law and the Law of Nations. The influence of St. Thomas is very apparent when he asserts: "**Positive Law can never enjoin what natural law forbids, nor forbid what Natural Law permits**"(20). However, Grotius seems to allow for a transgression of natural law when the general interest of the state is at stake. The Monarch then, determines alone the content of "**Utilitas Publica**" regardless of anything else. Grotius does recognize to the people the right to resist the power in some few cases.(21) For him Natural Law is a dictate of reason (right reason) which points out that an act according as it is or is not in conformity with rational nature has in it, a quality of moral baseness or moral necessity. This holds even if we are to concede that which cannot be conceded without the utmost wickedness, that there is no god; or that the affairs of men are of no concern to him(22). Grotius, thus appear to be the first to have admitted the alternative possibility of an atheist -secular and positive-foundation of the world Natural Law grounded on reason.(23)

Thomas Hobbes (1588-1679) : with Hobbes, Absolutism of the civil power is taken to its highest level. Unlike Bodin, Hobbes no longer considers the sovereign to be juridically bounds to Laws whether natural or others. His absolutist construction of the state

allows of no fundamental Legal Liberties proper to human beings. Hobbes starts with assumption that human beings in their natural state live in anarchy and are moved by desires and aversions which generate a state of perpetual restlessness. Human beings asserts, Hobbes, are profoundly self-interested, seeking always to maximize pleasure and fulfill their desires. The human being seeks power and because the power gained by one is lost by another, conflict of interests are inevitable. They are a fact of nature. The struggle for power defines the human condition and power can only be gained by war. So, Natural Society is a permanent state of war. It is the war of all men against men : bellum omnium in omnes.(24) Human beings are wolves to each others : homo-homini-lupus. So, those who are unable to resist the intensity of this anarchical state, reach the conclusion that it is more profitable for all to establish some kind of stable authority by surrendering their rights and transferring them to a powerful authority which can force them to keep their promises and covenants. Then, an effective and stable state can be formed. So men agree mutually on the establishment of a common power to which they all accept to be bound. Hence, they will be prevented from inflicting harm and injustice or suffering from it.

The commonwealth is thus achieved and in every city that man to whose will, each particular man hath subjected his will is said to have the supreme power or chief command or dominion.(25) Hobbes further makes it clear that the will of who has the supreme power given to him is the will of all. Therefore, it contains the will of all citizens and as a result, the ruler is not bound to them nor to the Civil Law, because if that is so, then the ruler would be bound to himself. Therefore, Hobbes' ruler is the supreme monarch superior to everyone and to all and nobody could

be compared to him since he is a mortal god. As in the presence of the Master, the servants are equal and without any honor of all, so are the subjects in the presence of the sovereign and though they shine some more, some less, when they are out of his sight. In his presence they shine no more than the stars in the presence of the sun(26). In Hobbes' opinion, sovereignty is perpetual, undivided and ultimately absolute. It is conferred by the people and their consent but only because they were defeated in the first place by the biggest wolf of all. Reflecting the political atmosphere of his own times, Hobbes commonwealth aims at the abolition of anarchy. The only alternative for that is to rely on a powerful authority which is able of imposing order and assuring social safety. The Hobbishan political structure is of much relevance to our dictatorial military regimes based on naked brutal force. As Professor Friedman once noted :**"From Hobbes' political and legal theory emerges modern men, self centered, individualistic, materialistic, irreligious, in pursuit of organized power.(27)**

John Locke (1632 - 1704) : with Locke, the concept of sovereignty is going to change hands and goes from the monarch to the people. Sovereignty is no more the mark of the sovereign. Absolutism is inconsistent with civil society and the only sovereign is the people, the sole legislator. All power in the society are derived from the people's will, the commonwealth is made by the consent of every individual and the power of the community to act as one body enhanced by the will and determination of the majority.(28) Locke's treatise of civil government is often looked upon as a defense of the 1688 revolution and a justification of the "Whig" principles which dominated ,English politics during the eighteenth century. In any

case, it is a strong reaction to the Hobbishan Absolutism, the argument of Locke is directed against the arbitrariness of individual power. Locke starts from the assumption that the state of nature is a state of peace and good will.(29) It is worth recalling in here the ambivalent evolution of thought and its jumping from one extreme to another. Hence, from the state of war, described by Hobbes, we move to the opposite with Locke. The Wolf becomes suddenly a Lamb. If the nature of man is all good, why then do we need a commonwealth ? Locke answers: because of the fact that in nature, every man has the executive power, self-love, which despite the good nature, sometimes prevails in man's will carrying him far in punishing others. Hence, nothing but confusion and disorder will follow. The remedy to this therefore, is the establishment of a civil government. Wherever any number of men unite into one society as to quit everyone his power of the law of nature and to resign it to the public. There and there only is a civil society and this put men out of the state of nature and into that of commonwealth.(30) Unlike Hobbes, Locke does not urge for a complete and unconditional surrender of individual rights, at the opposite, he makes it clear that the transfer of right from the citizen to the commonwealth is conditioned upon the state's adhesion to its essential function and that is : the protection of the citizens lives, liberties and estates. All of which, Locke includes under the label of property.

J.J. Rousseau (1712 - 1788) : Sovereignty with Rousseau becomes "**volonte generale**". General will as expressed by the majority. If the state or the city is only a moral person whose life consists in the union of its members. If the most vital function is self-preservation, it must have a compulsive force to move and control each part in the way most suitable to the whole. As nature gives each man absolute power over its limbs, the social covenant

gives the political body absolute power over all its members. This power directed by the general will bear the name sovereignty⁽³¹⁾. Each man in giving himself to all gives himself to nobody because in the Civil Society, no man is subject to other man. The sovereign is the general will. Hence, it can never have interest contrary to those of its members. Sovereignty, that of the general will, is absolute, inviolable and integral. **"Man is born free but every where he is in chains".**⁽³²⁾ This stirring cry is the key note to the social covenant. Rousseau strives through his work to free man from his chains. The best way being that of giving the people the right to be their own masters. This explains the tremendous influence of Rousseau and the impact of his thought on the political life of Europe and the French revolution. Rousseau rejects at first hand the Grotian construction which denies to the people their freedom. Sovereignty, he asserts, cannot be represented for the same reason that it cannot be alienated. The people deputies are not and could not be its representatives. They are merely its agents and they cannot decide anything. Any law which the people has not ratified is void and not law at all⁽³³⁾. Further, Rousseau observes that liberty consists less in acting according to one's pleasure than in not being subject to the will and pleasure of others. Whom ever is the master over the others is not himself free, for to reign is to obey⁽³⁴⁾.

In trying to explain why sovereignty or "**volonté générale**" is indivisible, Rousseau uses a humoristic metaphor, "**our publicists, he says, being unable to divide sovereignty in its principle, divide it in its object**". They divide it into force and will, into legislative power and executive power. Into rights of taxation, justice and war. Into internal administration and power treating with

foreigners. Sometimes confounding all these departments and sometimes separating them. They make the sovereign a fantastic being formed of connected parts. It is as if they compose a man of several bodies, one with eyes, another with arms, another with feet and nothing else. The Japanese conjurers, it is said, cut up a child before the eyes of the spectators. Then, throwing all its parts into the air, they make the child come down alive and whole. Such almost are the juggle tricks of our publicists, after dismembering the social body by a deception worthy of the fair, they recombine its parts nobody knows how(35).

Rousseau is the real extreme opposite to Hobbes. Locke seems to be a middle-way between both. Hence, if Hobbes could be said to argue for a despotic type of monarchism, Locke for an enlightened parliamentary monarchy. Rousseau would then be the one arguing for a democratic republic with direct access to political decision. This insistence on self managed individuals through "**volonte De tous**" renders his "social contrat" almost utopian.

III. German idealism and the theory of the state.

German idealism is that current of thought which swept through Germany during the eighteenth century up to world war II and which attributes an autonomous existence to ideals in the society and ascribes a central role to the human intellect in achieving these ideals.

* E.Kant (1724 - 1804) adopts Rousseau's theory of the general will and proclaims that the will of the legislator is the joint will of all citizens. As such the general will cannot do wrong."When

the sovereign limits himself to his power task of maintaining the state as an institution of the administration of justice and interferes with the welfare and well being of the citizens only so far as necessary to secure this end. When on the other hand, the citizen is allowed freely to criticise acts of government but never seeks to resist it then, we have this union of the spirit of freedom with obedience to law"(36).

Kant believed International Coexistence possible between states. A universal and ongoing institution of peace is not simply a part, but ^a final purpose of legal theory within the limit of pure reason; for the state of peace is only the situation of "mine" and "thine" secured under law.

F.Hegel: (1770 -1831). With Hegel, idealism is taken to the extreme. History and the evolution of the human society through Dialectic, aims at the achievement of freedom. The state is the actuality of concrete freedom.(37) It is a substantial essence to the spirit of being. The individual tells us, Hegel, is his own end in the civil society. Nothing else matters to him. But since he cannot attain the "self-realization" aim, except among others, then his particular end assume the form of universality in the society. The welfare state, Hegel, dismisses as accidental in History because it is not the achievement of the first needs (animal) and the satisfaction of the biological instincts which constitute freedom. It is rather work. Man is a matter, he makes things and through them makes himself. Self-realization is the end of work. In the state, the personal individuality and its particular interests not only achieve their complete development and gain explicit recognition for their rights but they also pass over of their

own into the interest of the universal. Hence, the Principle of the modern-state has prodigious strength and depth because it allows the principle of subjectivity to progress to its culmination in the extreme of self subsistent personal particularity and yet at the same time brings it back to the substantive unity and so maintains this unity in the principle of subjectivity itself.(38)

IV. The Absolute Theory and the Abuse of Sovereignty.

Later German writers in order to justify and attenuate somehow the unlimited power of the state have developed what has been called the voluntarist theory or the theory of "**Auto-Limitation**" of the state. Among those who have contributed to the elaboration of this theory are scholars such as Treitschke, Thiering and Jellinek in Germany, Bosanquet and Austin in England, Willoughby in the U.S.A and Carre' De Malberg in France.

Treitschke, tells us that the test of sovereignty is the right to determine itself independently. The international agreement which limits the power of the state is an act of voluntary self-restriction(39).

Jellinek interprets the treaty as a characteristic of the state sovereignty "If the rights and duties of individuals receive their potency and authority from grounds set forth in objective law, the state finds the ground for its own rights and duties in itself"(40).

For the voluntarist, the supreme power of the state is not only that "**suprema potestate**" over which there is no other authority, but also what "**Plenitudo Potestatis**", full power which means

that the state possesses the competence of its own competence, **"Kompetenz' Kompetenz"**. In England, Bosanquet introduces the state **"Hegelian-wise"** and liberates it from all obligations in the field of foreign affairs.⁽⁴¹⁾ But it is J. Austin, with his analytical school of jurisprudence who will exercise much more influence. Austin though defending the absolute power of the state, conceives sovereignty as that of the British Parliament. He provides us with a substantial analysis of the concept of sovereignty.⁽⁴²⁾ It is, he says, an ambiguous and polemical concept. The student who invades that dread domain finds himself in a world where differences of opinion are numerous. One moment, he learns that sovereignty is absolute, the next, he learns that it is limited. Now, he is told that in the nature of things, sovereignty must be indivisible and inalienable then, he is confronted with definite illustrations of sovereignties. If he seeks to inquire what sovereignty is based on, he is told by some that it is based on force; by others, on will, and by still others on reason. If he is so rash as to ask, where sovereignty resides ? He is referred to person and bodies of all kinds.⁽⁴³⁾

Austin defines sovereignty as **"The habit of obedience or submission to a determinate human superior, who is not in a habit of obedience to a human superior"**⁽⁴⁴⁾. He also defines an independent political society that which is composed of sovereign and subjects as opposed to the subordinated society. Sovereign power, asserts Austin, is incapable of legal limitation, because supreme power limited by positive law is a flat contradiction in terms. We cannot speak of law set by a man to himself, a law of that kind amounts, at the most, to a rule of positive morality.⁽⁴⁵⁾ Sovereignty, notes Austin, is something well worth fighting for. It belongs, if not to the things which men

hold sacred, at least, to the things which they hold dear. It is a concept which is progressive and changes as communities grow, any account of it which affects to be universal is almost certain to be misleading. Sovereignty is at the end a multi-dimensional concept and everyone will conceive it as he wants.(46)

In France, Carre' De Malberg has developed the theory of auto-limitation in his "**Contribution a La Théorie Generale De L'état**"(47). He confirms that all laws emanate from the state and derive their binding force from it. The state has the power by which it can determine itself, that is why we consider justified and conform to the reality the sovereignty of the state. What has been the consequence of this theory of the state absolutism was left to the proponents of totalitarianism. Hence, extremist policies of power (Fascism and Nazism) were elaborated on the basis of state Absolutism with no regard for International obligations. The notion of the "**volkisher staat**" was raised as the ultimate of self-realization, heading the International Community to a dramatic war whose damage is still apparent today.

V. The Theory of Relative Sovereignty.

Augusts Compte in his course on positive philosophy, asserts that humanity had passed through three successive stages of knowledge:Metaphysical-Theological-Positivistic. Today according to Compte, we have reached the third stage and what characterises it, is the non-acceptance of abstract metaphysical or theological assumptions. We will see later on how this happened. In the field of legal philosophy, positivism was introduced with the aim of purifying the Science of Law. From all

such assumptions, two distinguished scholars among others, have strived to accomplish this task.(48)

L.Duguit: He is the elaborator of sociological positivism. Duguit denies the idea of sovereignty at first glance. It is, he affirms, a dangerous fiction which should be banished because it can only lead to despotism and the negation of public law.(49) History was going to prove ^{him} right on this point. Duguit believes that the rule of law is above the individual and the state, above the rulers and the ruled. A rule which is binding on both of them and we hold that if there is such a thing as sovereignty of the state, then it is juridically limited by this rule of Law(50). Sovereignty according to Duguit, should be replaced by the notion of "**Public Service**" which is the purpose of social life and the genuine expression of "**social solidarity**". Other scholars such as G. Scelle, N. Politis and Krabbe were to follow Duguit and elaborate on this teachings. Yet juridical positivism was to culminate to its paroxysm with H. Kelsen and the Vienna School.

H. Kelsen : Kelsen rejects "**Sovereignty**" as a judgement of value and a pure assumption. Only the "**ground norm**" which is the basis of the whole legal pyramidal system could be said to be sovereign(51). To admit sovereignty is to deny the existence of International Law(52). Kelsen elaborates a twofold approach to the study of International Law;" subjective versus objective or monistic versus dualistic' approaches. The science of law, according to Kelsen, describes both approaches but does not side with either one because that is beyond its scope(53). In any case, tells us Kelsen, sovereignty remains a dogma which cannot be contradicted scientifically(54).

Other scholars have emphasized the need for a relative

conception of sovereignty. World War II demonstrated unequivocally the fictitious dimension of Absolute Sovereignty. Ch De Visser for instance, argues that doctrine has long tried to come to terms with the idea of sovereignty⁽⁵⁵⁾. It has attempted to domesticate it, to bend it towards a conception of prerogatives that could submit to imperative of law. The vague and equivocal terms "**Limited or Relative**" sovereignty, he asserts, are indicative of these efforts. Yet, the relation of sovereignty to law depends on the degree in which the political power has been historically integrated in the legal order. The further this integration goes, the more does sovereignty, losing its character of domination and becoming a legal authority.⁽⁵⁶⁾

VI. The Marxist School and Sovereignty.

For Marx and F. Engels, the state is a "**bourgeois**" creation set by the capitalists in order to protect their privileges. It is by no means the aim of the workers who have got rid of the narrow mentality of humble subjects to set the state free. Freedom consists in converting the state from an organ superimposed upon the society into one completely subordinated to it. Between the capitalist and communist societies lies the period of revolutionary transformation of the one into the other. During that period, the state can be nothing but the revolutionary dictatorship of the Proletariat⁽⁵⁷⁾. Engels in his "**Anti-Dühring**" tells us that the proletariat seizes political power and turns the means of production in the first instance into state property. In doing this, it abolishes itself as a directorate of the Proletariat and at the same time it abolishes all class distinctions and the state as such. The first act by virtue^{of which} the state constitutes itself as the representative of the whole society; the taking possession of the means of production, is at the same time its last independent act

as a state. The government of the persons is replaced by the administration of things and by the conduct of the process of production. The state is not abolished, it withers away⁽⁵⁸⁾.

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In Marxist theory, the state is seen as an "apparatus" which permits the class that owns the means of production, the transformation of its economical power into a political one, that is, the state is the superstructure determined by the economical infrastructure. Yet, since the state, even in socialist and Marxist countries instead of withering away has been constantly growing in stature and dimension, Marxist theoreticians have adopted the concept of sovereignty and they have given it to a new substance, that of self-determination⁽⁵⁹⁾. In marxist doctrine, the principle of the right- to self-determination means the right of the workers to protect the revolution and its achievement. Hence, Marxist Jurists reject the theory of relative sovereignty, because they see in it, an attempt of the capitalists to undermine the emerging new revolutionary states in the third world. In the field of political theory, also, Marxism has to adopt to the new context. Hence, the orthodox Marxist Dogmas were called into question in all European Communist currents and parties. We will see what will happen to the Marxist theory in Germany with the Frankfurt school later on. In Italy, Gramsci was to invert the dialectical relationship in his own version of the functioning of the Civil Society. Thus, according to Bobbio⁽⁶⁰⁾, Gramsci emphasized the primacy of the superstructure over the infrastructure. It is the former which is seen as the active and positive factor in the historical development of societies. Borrowing from Marx the concept of "**Hegemony**", Gramsci made it a central theme in the functioning of the Civil Society. He thus defines it as the attempt to construct a successful leadership by establishing a political

consensus where interests and needs of all social groups are met. The chief constructors of such a consensus should be the intellectuals.

In France, Althusser, though recognizing a certain (relative) autonomy to the state did not question the orthodox-Marxist Leninist version "DIAMAT". He describes ideology as a relation of a second degree based on the first degree relations "The relations of production"(61).

It is N. Poulantzas, who under the influence of Gramsci and Ingrao, has made notable efforts to elaborate on the notion of relative autonomy of the state. Poulantzas has sought first to define the Crisis of the State, as the crisis of structure.(62) However, in his last work(63), he has come to see the state as an autonomous political body which incorporates into its heart the class struggle and becomes as that "**Abnormal**" state of Marx, where no class has enough power to dominate the state, thus, according to Poulantzas; acts positively and attempts to isolate the workers from their class consciousness. How ? through a complex process which Poulantzas divides into four parts :

- 1)-Division between manual and intellectual labour force through the expertise device,
- 2)-Individualization of work through atomization and specialization,
- 3)- Law and the monopoly of legitimate violence,
- 4)- The international division of labour.

Poulantzas concludes by stating that the state is not a monolithic unit, rather, it is a strategic battle field of class struggle where only representative democracy based on Mass movement could lead to freedom and real democracy.(64)

Much time passed since and today with the coming into power of Gorbachev, a new policy seems to sprang out under the name of Glasnost. It consists in a restructuring "Perestroika" of the whole Soviet policy. In the field of International law, Tunkin has recently observed that the new thinking has softened the positivism of the Soviet approach to international law and represents another step in the international accommodation and "detente".(65)

Notes

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- (11)-Eikema Hommes, opcit,p.69
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- (13)-Machiavelli.N,"The Prince", Chp.15.
- (14)-St.Augustine,"De Civitate Dei",Chp.III,Part XIV
- (15)-See,in that respect,J.H.Franklin,"Jean Bodin and Absolute theory. Cambridge Uni.Press 1973,p.68.
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- (17)-Bodin, opcit. p.29
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- (19)-Grotius.H,"De Jure BELLI AC PACIS",Book I,Chp VII.trans. Campbell, Washington-1901.

- (20)-Grotius, opcit,Book I, Chp.I X.
- (21)-Opcit,Book I,Chp.IV, X
- (22)-Opcit,Book I,Chp.I.X5
- (23)-This seems to be the reason why H. Morgenthau has accused him blasphemy. *See Section three - supra*.
- (24)-Hobbes.T,"De Cive",Chp.V,part XI
- (25)-Opcit,Chp.V,part XI
- (26)-Opcit,Chp.V,part XIII
- (27)-Hobbes.T,"The Leviathan", Chp. XVIII, part II.
- (28)-Friedman.W,"Legal Theory",5th ed,London,1967p.122
- (29)-Locke.J,"A Treatise of Civil Government",ed:J.W. Cough Chp.III,p.95,Oxford, 1946.
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- (35)-Opcit,Book III.Chp. XV.
- (36)-Opcit,Book II.Chp.II.
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Section Two: Sovereignty in the Islamic Tradition.

Literally speaking, the term sovereignty in its meaning of absolute power is in Arabic a divine attribute or more precisely, a name of God. The strong "**El-Kawi**", the Merciless "**El-Djabar**", the dominant "**El-Muhaimin**", the invincible "**El-Kahar**", and the powerful "**El-Kadir**", are all god's names which bear the meaning of sovereignty. God is the only sovereign, tells us the Koran : "**Knowest thou, that it is God unto whom belongeth the sovereignty of heavens and earth**" ?(1) "**Say Oh God, Lord of sovereignty , thou givest sovereignty to whom thou pleasest and takest away from whom thou pleasest**".(2)

We have shown earlier that sovereignty is a pure western concept. Hence, we are not going to find the same concept in the Islamic tradition. But, we certainly are going to find many terms which are its equivalents. Thus "**Essiyada**" which means "**supreme authority**" is a term used in modern manuals of international law and could be said the closest term to the western concept of sovereignty. We have also, "**Esolta el-Amma**", public authority "**el-Mulk**" Kingship or political power, "**Al-Imama Al-Kubra**" or "**El-Khilafa**" is a more technical term, which is derived from "**Istikhlaf**", the action of designating a political successor, refers to the highest political authority in the Islamic society. The term is derived from the Koranic verse : "**Where God says to the angels : I am placing on earth a Khalifat**"(3). When the Prophet (Peace Be Upon Him) died, Abu Bakr was elected Khalif to replace him as the head of the community. Al-Imama, means in Arabic, leadership and is usually used to designate the men who lead the congregational prayers. It is also used, particularly among the "**Shi'it**" to designate the

political head of the community. In Islamic political theory however, the term **"Imam"** has been used interchangeably with that of **"Caliph"**.

The Prophet (Peace Be Upon Him) revealed Islam to the Arabs of Koraish in Mecca. At first, he faced a strong opposition from his fellow tribesmen, he nevertheless succeeded in propagating his message and ressembled around him the first nucleus of what later on was to develop into an Islamic society. Many authors have pointed out that the covenant concluded between Mohammed (Peace be Upon Him) and his followers is the first constitution of the Islamic commonwealth. It is known as the oath **"El-Bay'a"** of Akaba. The compact was written in Ana's house, in the first year of the exile of Mohammed (Peace Be Upon Him). It opens as follow :**"In the name of God the Merciful. This is a text by Mohammed, between the faithful Muslims of Koraish and Yatrib and those who follow them and fight with them. They all form one community "Umma" in distinction of all other people..."**(4).

The text is considered as the first written constitution. It sets up a state in its modern sense, based on people, territory and political authority.(5) What interest us here, is political authority in the Islamic community. Who holds it ? and how is it attributed ? and exercised ? This, we intend to go through the examination of the basis of political authority in Islam as derived from the authentic sources of law **"Usul-Eddine"** : The Koran, the Hadith "Sunna" and the Ijma "consensus" of the Islamic community as well as through the analysis of the classical Islamic theory of **"Al-Khilafa"** as elaborated by Al-Mawerdi, Al Ghazali, Ibn Taymiya and Ibn Khaldun.

Before that however, it is necessary to sketch a brief preliminary outline of what are the basic sources of law **"Sharia"**. Islamic jurisprudence **"Fikh"** is a combined doctrine on religious and legal thought. To Moslems, the "Sharia" or "Echar'e" is the sum of religious rules which God has promulgated through his prophet (Peace Be Upon Him). Thus, the Koran says : **"He Hath ordained for you, that religion which he commended unto "Noah" and that which we inspire in thee (Mohammed) and that which we commended unto "Abraham" and "Moses" and "Jesus". For each, we have appointed a divine law and traced a way"**(6). Hence, Islamic Law is divine. The legal system as a whole is divided into two parts : Al-Ibadat, religious observances in regard to the affairs of the hereafter, such as, beliefs, prayers and fasting and El-Muamalat, the affairs of this world, social life etc... .

The Koran is admitted by all Muslims as the word of God and is therefore the basis of all laws. The second legal source is the **"Sunna"** the Hadith which comprises what the Prophet (Peace Be Upon Him) did, said or approved. The compilation of the Hadith was done during the Abbasid era and the most trusted compilations of Hadith are those of El-Bokhari and Muslim, called the **"Sahihain"** authentic. The Sunna explains the Koran and interprets its general provisions. Adherence to it, is obligatory for all Muslims by authority of the Koranic verse : **"And whatsoever the prophet giveth you, take it and whatsoever he forbideth, abstain from it"**(7). Because of its importance, Muslim scholars began to study the Hadith critically according to a method known as **"El Jarh wa Ta'adil"** ; the researcher in this field was the expert who declares the Hadith valid or invalid, according to the degree of their authenticity. The **"Ahl-Essuna"** or Sunnis are the majority

of Islamic community. Four schools of jurisprudence have flourished among them, these are : The Malekit, the Hanafit, the Shafiit and the Hanbalit. Next to the Sunnite, are the Shiites or "Shia" called so because of the support they manifested to the Caliph Ali Ibn Abi Talib in his struggle against Muawiya. The Shiites are divided to many sub-branches, Ismaelits, Twelvers, etc... .

The third source of Islamic Law is the "**Ijma**"consensus. It is defined as the unanimous agreement of Muslim jurisconsults in any particular age on a juridical case not already covered by a holly enactment, This agreement may be explicit or tacit, i.e by acquiescence and silence.⁽⁸⁾ Ijma has been derived from the prophet saying : "**My community will never agree upon an error**". Much has been said about this Hadith and Ijma,⁽⁹⁾ and we will deal with that later on. Let us just mention that a good example of "Ijma" has been the establishment of the Institution of "**El-Khilafat**".

The fourth source of Islamic Law is doctrinal interpretation "**El-Ijtihad**" or the action of deploying all the intellectual potential of one's mind in order to grasp the profound wisdom of the holly texture "**Koran and Sunna**" and derive from it applicable rules to concrete cases. The "**El-Mujtahid**" is the one who exercise "**Ijtihad**". Ijtihad is derived from the prophet (Peace Be Upon Him) ordinance to Muadh Ibn Jabal; when he sent him to Yemen as a judge, he asked him : how will you decide the cases which will be brought to you ? Muadh replied : I shall decide them according to the book of God. How if you find nothing in the book of God ? asked the Prophet (PBUH). I then shall decide them according to the Sunna of God's apostle. How if you find nothing in the Sunna ? Added the Prophet (PBUH). Then, replied Muadh, I shall exercise

my own judgement without hesitation. There upon, the prophet (PBUH) slapped him upon the chest and said : **"Praised be God who has guided the Messenger of God's messenger to what pleases God and his messenger".**(10)

El-Ijtihad may take many forms, the most known is **"Al-Qiyass"** analogy, which means the extension of the applicability of a certain legal rule prescribed for a given case to a new case on the ground of a common effective cause **"illat"** which is identical in both cases; example : the drinking of wine is prohibited on the ground of the intoxicating property of Alcohol. The rule is extended by analogy to all other drinks which have the same property. Other forms of Ijtihad are **"Massalih El Mursala"** public interest, Istilah and Istihsan, Preference etc... we will see elsewhere what are the necessary qualifications for El-Ijtihad. At a given historical age, Islamic political authority has judged El-Ijtihad to be threatening the Religion of Islam and has on the basis of the consensus of those in power **"Awli Al-Amr"** decided to close the gate of El-Ijtihad. The gate remained closed since(11).

I. The Basis of Government in Islam.

There are two key institutions in the political structure of the Islamic policy, these are:the Caliph and the advisory council.

The Caliph : when the prophet (PBUH) died in 632 A.D. the Islamic society found itself faced with the issue of political organization. So long as the prophet (PBUH) was alive, the Muslims whenever on disagreement reported to him and he decided. After his death, the Muslims gathered on the **"Banu Saïda's terrace"** and invoked the issue of succession, the meeting was reported to Abu Bakr, he summoned Omar and Abu Obeida and hurried to the meeting. There he made a speech and emphasized the need for unity and the preservation of the Islamic bound. He then proposed either

Omar or Abu Obeida to be elected Caliph. Omar promptly reacted, took the hand of Abu Bakr and made his pledge to him "**Baya**". He was followed by the rest of the Muslims and Abu Bakr was elected Caliph(12). Once this is done, people started calling him "**the Caliph of God**". He is reported as having replied "**I am not God's Caliph, I am only the Caliph of God's Messenger**"(13).

All the Islamic community owes obedience to the Caliph according to the Koranic verse : "**Oh you faithful, obey God and obey the apostle and those in command among you**"(14). The Hadith also orders: "**He who obeys me,obeys God, and he who disobeys me, disobeys God. And he who obeys the Emir, obeys me and he who disobeys the Emir,disobeys me**"(15). Obedience to the Caliph however, is due only in so far as he himself obeys God's commands. When Abu Bakr was elected Caliph, he pronounced the following : "**You have elected me "Khalif" but I claim no superiority over you, the strongest among you shall be the weakest with me until I get the right of others from him and the weakest among you shall be the strongest with me until I get all his right. Help me if I am correct and oppose me if I take a wrong course. Obey me as long as I obey God and his Messenger. In case I disobey God and his Messenger I have no right to obedience from you**"(16).

The advisory council : "**Majlis Esh'uraa**", sides the Caliph and assists him in his function, the council include those referred to as "**Ahl el Hall wa el Akd**" or the people of binding and loosing. The expression itself reflects strongly the power held by its members. We will examine later on the different definitions given by the Doctors to this expression. For now, we will content ourselves with what the holly texture says in this respect : "**Their**

communal business is to be transacted in consultation among themselves"(17), and also "Take council with them in all communal business and when you have decided on a course of action, place your trust in God"(18). This last verse was revealed to the prophet (PBUH) just before the battle of "Uhud" i.e. on an occasion when the prophet felt constrained against his own better judgement, to defer to the advice of the majority of his companions. The prophet is also reported to have said to Omar and Abu Bakr : "If you two agree on a council, I shall not dissent from you"(19).

II. Political Authority in Islamic Doctrine.

Al Mawerdi : Abu-el Hassen Ali Ibn Mohammed Ibn Habib (991-1031 A.D.) In his "El'Ahkam-Essoltania"(20) governmental ordinances, El mawerdi tells us that the "Imama" is established to replace prophecy in the defense of the Islamic faith and the administration of worldly life according to God's commandment. He then asks, whether El-Imama is a legal duty derived from the Sharia or a temporal matter reached by reasoning and opts in his answer for the first option.(21) El-Imama, tells us Al Mawerdi, is also required by consensus of the companions and is set up through a contract between the community and the Imam. The community is represented by a group of delegates called "The Ahl el-Hall wa el Akd" whose function is to select a candidate for the community's leadership.

The members of the advisory council should fulfill three conditions : First, they should be just and equitable in their choice. Second, they must be learned and possess the knowledge required about the qualifications necessary to the function involved, and

last, they must have the ability to judge and make independent decisions.(22) The candidate for the Imama should fulfill seven conditions,(23) these are : 1) equity and justice, 2) Knowledge and the ability to interpret the holy texture, 3) mental fitness, 4) physical fitness, 5) competence in administration, 6) courage and determination to protect the community, 7) a descendant of Korashit lineage. This seventh condition is added on the basis of a Hadith ordering that the Imams should be from Koraish (Mohammed's Tribe).

Next, Al Mawerdi tells us that there are two ways of concluding the Imama contract. The first one is through election first, that of "Ahl el Hall wa el Akd". Doctors have divergent opinions about the number required of "Ahl el Hall" in order to select an Imam. The standard number is five as in the case of "Othman" the third Caliph. The second way is by designation as has been done Abu Bakr with Omar. Once the choice of the candidate is made and once the candidate has accepted the charge, the Imama is set up and the whole Islamic community is required to give allegiance to the new Caliph, "Mubayaa". Once the Imam is chosen, he cannot be replaced even by more worthy than him. If the choice is stuck on two equal candidates, factors such as age and the political circumstances of the moment should be taken into consideration in the selection of the Imam; for example, if the community is in a state of war, it will certainly need a courageous Imam capable of organizing and winning the war. Thus, among the two candidates it has to pick up the most courageous. If on the contrary, the community is at peace, then it certainly needs a learned and competent Caliph and so on... Two Imams could not be appointed at once, which means that the "Imama" is indivisible. If the Imam is designated as in the case of Omar, the "Ulema" have divergent opinions, on whether the public "Bay'a" allegiance is

necessary to validate "Khilafat" or only formally required. Al Mawerdi is of the later opinion. He thinks that the designation of the precedent Caliph is sufficient in itself, the duties of the Imam are according to him ten, these are :**(24)**

- 1) The protection of the religion and its authentic sources.
- 2) The administration of justice and the settlement of disputes.
- 3) The application of religious ordinances.
- 4) The establishment of peace and social order.
- 5) The defense and protection of the community.
- 6) The El-Djihad.(Holly war).
- 7) The collection of taxes.(El-Zakat).
- 8) The administration of the public treasury.
- 9) The administration and nomination of qualified officials.
- 10) The direct exercising of control and inspections.

This last duty is derived from the Koranic verse :**"Oh Daoud, We have make thee Khalifa on earth, command justice among people and do not submit to pleasure for you will be deflected from God's path"**. Al Mawerdi then goes on to show the cases on which the Imama loses its validity because of physical and mental deficiencies.

El-Ghazali : Abu Hamed Mohammed Ibn Mohammed (Died 1111 A.D.) has elaborated the theory of Al Imama in his treatises on the sources of religion **"El Mustasfa Min ilm el-Ussul"**. And **"El Iqtissad Fi Al-itiqad"**. Like Mawerdi, he starts by clearly rejecting the idea that the Imama is an institution required by reason. This is the claim of the philosophers and their adepts. We know how Ghazali had refuted their assumptions in his **"the incoherence of philosophers"**.

The Imama, El Ghazali tells us is required by the Sharia for God

has created man and will take him back again, so this world is only a farm on which ground the harvest is made for the hereafter. Since man submit§by nature to his instincts and passions, he is in need of guidance and sociability which can be achieved only through power **"Essoltane"**. Power and Religion are twins. Religion is the foundation and power is a guardian; that which has no foundation is easily destroyed while that which has no guardian is easily lost(25). The El-Imama, is an indispensable institution of life required by the consensus of the community. It is necessary that good order and social harmony are assured so that the faithful could strive to gain access to God's Mercy and eternal blessing. Ghazali enumerates the qualifications of the candidate to el-Imama, they are the same as those listed by Mawerdi, yet, they are tempered by much more realism and designed to accommodate the political circumstances prevailing then. Courage and military competence are required if not as intrinsic qualifications of the Caliph, at least, as qualities derived from a powerful **"Soltane"** Army commander. The same applies to knowledge; the Caliph if lacking the required knowledge could rely on the Doctors **"The Fukahas"** to guide and advise him. Ghazali main goal seems the reinforcement of the Caliph position as the holder of the unity of the "Umma". Even his competence in administration and daily supervision of the community matters is entrusted to an able **"Vizir"**, minister. The chief criterion for El Ghazali in defining political authority is the public interest. "There are, he tells us, those who hold that the Imama is dead, lacking as it does the required qualifications, but no substitute can be found for it, what then ? are we going to give up obeying the law ? or shall we continue as we are recognizing that the Imama really exists and that acts of the administration are valid ? given the circumstances and the necessities of the moment, the concessions made by us are not spontaneous but necessity makes lawful what

is forbidden. We know it is not allowed to feed on a dead animal, still, it would be worse to die of hunger, of those who contend that the Imama is dead forever, we would like to ask : What is to be preferred ? anarchy because of the lack of properly constituted authority or acknowledgement of the existing power whatever it be ? Of these two alternatives, the jurist cannot but chose the later..(26) To compensate for this pragmatic interpretation, El Ghazali puts the emphasis on "El-Wara'e" piety, and the fear of God and urges the Imam not to forget that he is responsible before God of his people according to the Hadith : **"Verily each of you is a shepherd and each of you is responsible for his flock, the Imam is a shepherd and he is responsible for his flock"**(27).

Among the duties of the Caliph, El Ghazali mentions that of securing material welfare for the community at large and the satisfaction of the basic needs, El Ghazali believes that the right ordering of religion is only accomplished when the right ordering of the mundane world is ensured. By a right ordering of the mundane world, we mean the preservation of a healthy body, the satisfaction of the basic needs such as clothing, shelter and food and security. In truth says, El Ghazali, he who is secure in his heart, is sound in body, and has his daily bread, may as well have the whole world given to him... faith could not be firmly established without the attainment of security in these essential necessities. Elsewhere, Al Ghazali quotes a poet describing as astonishing people who strive for worldly life and neglect their religion but more astonishing are certainly those who abandon their religion to run after the worldly life and at the end miss both of them(28).

Ibn Taymiyya :Taqie Eddin Abu el Abbas Ahmad (1263-1328

A.D.), for Ibn Taymiyya, the Sharia is the supreme authority at once, the exclusive and unique guide of the **"Umma"**. With him, the centre of gravity is shifted from the Imam to the community. In his treatise **"legal policy"**(29), he recognizes the necessity of a temporal power but as his predecessors, he sees it only as a means to an end. The political power has the duty of preserving peace and assuring good order so that all the Muslims may worship the Creator and devote their attention to the praise of God the Almighty. It is the duty of the temporal power to improve the material conditions of the people. Politics and religion are one and the same thing and they cannot be dissociated. The essential principle of a just government is the ordering of good and the forbidding of wrong. The exercise of public authority **"El Imama"** is a religious function and a good work which brings closer to God. All legal matters are related to the Koran and the Sunna. Here, he invokes the Hadith: **"Obey God, his Messenger and those with authority among you"**.

With Ibn Taymiyya, religion is purified and sought as authentic **"Hanif"**. The doctors of law are the guardians and interpreters of the Sharia. The Muslims are the nation of the middle **"El-Wassat"**. Although showing much orthodoxy in his fight of innovations **"Bida'e"** and **"Taqlid"** sterile imitations, Ibn Taymiyya encourages reasoning and subtleness in the interpretation of the Sharia rules. The form of government does not matter much to him.(30) What matters is the Sharia. Whenever the Sharia rules are truthfully applied, we have an Islamic state. The ordering of good is the main duty of the Imam. It includes the organizing of congregational prayers and religious duties such as taxes and pilgrimage. Everyone should get his due, people should be loyal and respectful

towards each other, kind to their parents and neighbors and must fear God's wrath.

* Ibn Khaldun : Abderrahman Ibn Mohammed (1332-1406 A.D.). With Ibn Khaldun, the theory of the Khilafa receives its **"titles of Noblesse"**. In a rigorously elaborated analysis, ⁽³¹⁾ Ibn Khaldun combining Philosophy, History and sociology, provides us with a fascinating theory of power and state craft. He starts with the traditional assumption about human nature. Man, he tells us, is a social animal. In order to survive, he associates and thus forms societies. Mutual help is necessary to satisfy man's needs for food, clothing, shelter, etc... The provision of the necessities of life is followed by a desire for material comfort and so the stage of food gathering and cattle raising is supplemented by a stage of crafts and arts. This is the transition from rural to urban spheres of life. Urban life, Ibn Khaldun calls **"El-Umran"**, the action of fulfilling earth with life, a state of urban prosperity and civilization. El-Umran connotes the same narrative meaning that today is given to the concept of **"Development"**.

What is the engine of social life ? Ibn Khaldun replies : It is the cohesion of the social group, its solidarity and **"Esprit De Corp"**. He calls it **"El-Assabia"** a literally word meaning **"nerve"**. It is the **"Assabia"** which is the source of power. Whomever has it, has power. Social solidarity is what hold men together and make them strong. How does "El-assabia" develop? In the first place, the ties of blood and family lineage create a sense of solidarity and mutual responsibility, a common outlook which expresses itself in unified action. Then at the tribe level "El-assabia" becomes mature. The more solidary is the tribe, the more strong it is and the more likely it is to achieve power and rule over other tribes. ⁽³²⁾ Hence, the strong tribe becomes a strong

monarchy and then a strong and flourishing Dynasty ruling over the empire. After developing his theory of the El-Assabia, Ibn Khaldun, moves in a section entitled "**on the nature of power and its types**", to enumerate for us three types of power.⁽³³⁾ Natural sovereignty, temporal sovereignty and religious sovereignty. The first two are in the nature of man and his sociability, that is, in his instincts of (self-love and self-interest) "**Ettaghalub wa El Kahr**". When man seeks power in order to satisfy his own desires and achieve glory for him self by subjugating others to his rule, he becomes a despot and his rule is dictatorial. That, according to Ibn Khaldun, is the lowest form of power. The second natural type of power is "**rational power**", that is, power which aims at the satisfaction of all the society's needs. Not only those of the ruler but the needs of all the members of the society. This "rational power" is generally conducted according to rules established by the wise men in the society and its learned members. Religious power "sovereignty" is however, the best form of power among all. Essiyassa Eddiniya consists in ruling the society according to divine laws revealed by God to his people through prophets. Mankind is intended for religion. Divine laws have been issued to guide mankind in all circumstances, for devotion as well as transaction. Power resting on force is reprehensible in the eyes of God and power based on reason though better is also reprehensible. Since it is conceived other than by the light of God and "**whom ever God has not enlightened, what light has he**" ?.

Religious politics mean ruling man in accordance with the dictate of divine law, securing thereby both the interest of the hereafter and those of this world. It is by far, the best form of political grouping for it combines "Assabiya" with the religious motivation "**El wazie Eddinni**" and allows for its blossoming into a civilizational syncretism. It is true, notes Ibn Khaldun, that

religion attacks El Assabiya; tribal chauvinism and el-ghadab (34)
:the bad usage it is put to. El Assabiya is not deemed in itself
because without it there can be no promotion of religion. El
Assabiya for the cause of God is good.

Ibn Khaldun moves from then on, to enumerate the conditions
required for the function of the "Khalifa" and endorse almost the
same version of Al Mawerdi, which we have already reviewed.

Among the ruler's duties, Ibn Khaldun emphasizes the need for
him to be considerate of people's affairs. He advises him not to
harm the community by exaggerated severity because severity
harms and ruins the state. Arbitrariness and dictatorship are
indicators of the state's decline. Assabiya should be maintained by
an efficient administration of the community affairs. The
satisfaction of people's temporal needs is very important and
reinforces the ruler's authority. The reason being that the state
and the ruler constitute the largest market in the life of the
community. If therefore, the ruler keeps back the goods and
revenues and he abstain from spending them, The expenditure of
people will decrease, the market will be deserted and profits will
fall down and so will taxes. The bad effects of this recoil on the
state through the decrease in the wealth of the ruler's. Money
Hence, must flow from the ruler to the community and vice-
versa.(35)

El Assabia, tells us, Ibn Khaldun, comes to an end when the
state enters in mundanities and luxuries, states like human beings
have ages. The standard age for a state is that of three generations
of forty years each. During which time, the state passes over five
stages :(36) the first is that of the emergence of El Assabiya at
the tribal level. The second is the achievement of power monopoly

by that Assabiya. The third is the transition from rural to urban based power. The forth is that of

consumption and mundane life "**El-Taraf**" stage where El Assabiya starts losing its tribal fervor and hence, starts declining. The last and fifth stage is that of the collapse. This is what happened to the "Kalifa" when in later years, it was emptied from its religious motivation. This also has happened to all the dynasties that have succeeded each other in Arabo-Muslim history and this applies as well to all human societies. Our author, puzzled by the inability of the Arabo-Islamic society to regain its ideal Khalifa, Concludes by stressing : that, we strive hard to adopt to our temporal needs by destroying our spirituality so that at the end, we lose them both.(37)

III. The Sallafiya School

"**Salaf**" means past generations of ancestors and is opposite to "**Khalaf**" which is derived from Khalifa and means succeeding generations. The Salafiya movement is mainly an intellectual reaction of Muslim thinkers and reformers against Nationalism and the spread of western secular thought to the Arabo-Islamic world via the levant. Figures such as those of Djamal-eddine el-Afghani, Med Abduh and Rachid Reda, rose to revive Islam and advocate an Islamic reassertion at the image of the earliest dedicated Muslims "**The Salaf Essalih**", the well guided early generations of the faithful. It is an attempt to purify the religion of Islam from all the vicissitudes of imitation and stagnation. The basic principle on which is based the whole movement is that Islam is able to stand up the challenge of modern times and that education and science are necessary to the Islamic community in order to develop and regain its lost glory.

Al-Afghani : (1839-1897) An ardent defender of Islamic renewal and unity. In an Essay entitled : The cause for the preservation of "el-mulk", Al-Afghani wrote, " the first requirement of good social order is that men should seek consensus in common matters and hold to the ties of religion,.fortunate is the umma, every member of which works for the good of everybody aiming at nothing but the common good. They are like a firm band, shaken ^{neither} by tempests nor by earthquakes. It is from the strength of everybody that the umma gathers its strength"(38). Al-Afghani has devoted his life to the task of unifying the ranks of the Islamic people by speech as well as by action(39); he has strived to make the dream of Islamic unity come true. Travelling during his life all around the Arabo-Islamic world, he urged the Muslims to react to their decadent state and fought heresies and imitation. "Sleepers...wake up" that is how he addressed the Muslims wherever he went. He stood against British colonialism in India and Sudan, established himself in France, and with Abduh, edited the "Firmnest band""El urwa el wuthga". He has also written a reply to the atheist thesis propagated by then in Europe by atheists 'communists etc....

Med Abduh : (1849-1905) All along his entire life, Abduh will strive to revive the Islamic heritage. He was an outstanding spokesman : " I spoke out on behalf of two great causes. The first is the liberation of Islamic taught from the chain of imitation and the understanding of religious faith as the members of the early community understood it before discussion arose. The second, I made an appeal on behalf of a political reform aiming at the distinction between the government's right to obedience, and the people's

right to justice on the part of the government"(40). In his "Rissalat-Etawhid" letter on the Unity of God, he concentrates on the need for "Ijtihad" and the reconciliation between Religion and Reason. "the authority of reason, says Abduh, is enhanced by Islamic teachings. Islam is against "El-Jumud", stagnation and imitation and advocates the use of reason as a mean to the distinction between what is good and what is bad and harmful".(41) He has gone so far in his defense of reason that many regard him as a new "Muatazilit"; others, at the opposite, may regard his religious favour and his defense of the orthodox Islamic theory of political authority as conservative.(42) In fact, he has strived to elaborate a compromise between both currents and devoted his energy to prove that Islam can stand the challenge of modern times. He has argued for women's emancipation and for the right of people to freedom, education and social security. His influence on the "Nahda" movement is tremendous.(43)

R. Reda : (1865 - 1935) Reda has reconstituted the biography of his master "Abduh" and his works in his "Tarikh El Ustad El Imam". He has also made an important contribution to the theory of "Al Khilafa"(44). "The Muslims say that it is religion that was the cause of their glory and sovereignty and that turning away from it was what led them to misery and caused their misfortune. They say this without understanding, imagining that there is an irrational secret which enables the believers to attain victory and power and gives them success by miracles. On the other hand, students of human behavior think that the greatest obstacle in the path of Muslim progress is religion itself and that if they abandon it, they can hope to follow the footsteps of Europe.

The time has come then, for the Muslims to understand that in

transforming the law of necessity as applied to the Khalifa of "AL-Ist'ila" **"usurpation"**, into a firm and permanent principle, They have destroyed the structure of the Imama and done away with the sovereignty of the community of Al-Djama'a"(45). He then goes on to list the qualification of the Khalif and enumerates his duties as they were listed by the medieval **"Fukahhas"**, to the council of "Ahl el Hall wa el Akd" he gives a subtle definition. This council, tells us Reda, includes the Ulema, the army officers and all other distinguished and influent members of the society. Deputies from all social classes; constitute the **"Council of Advice"** and that council is the true holder of the community's sovereignty. The "Ahl el Hall" are not the community at large and they are not a small minority of privileged members. They are the influential **"Ahl Eshoura"** members of the community, those whose consenting implies the consent of the community at large.(46) The impact of the Sallafya movement on the Arabo-Islamic world is without precedent. The movement has spread all over the Arabo-Islamic world from east to west. It has generated disciples and adepts who continuing the efforts of El Afghani, Abduh and Reda, are still striving for the triumph of Islam(47).

Notes

- (1)-Koran,2:110.
- (2)-Koran,3:26.
- (3)-Koran,38:25.
- (4)-See"Sirat Ibn Hisham".ibid.
- (5)-Abdelkrim.F,"Sovereignty in Islam",Cairo 1977,p.80
- (6)-Koran,5:18.
- (7)-Koran,59:7.
- (8)Mahmassani.S,"Falsafat Al-Tashri Fi El-Islam",Leiden, 1961,p.75
- (9)-Assad.M,"The Principles of State & Government in Islam", Berkeley, 1961, pp.38-39
- (10)-hadith.

- (11)-Noted in Al-Bokhari.
- (12)-Ibn hisham,
- (13)-ibidem
- (14)-Koran:42:38.
- (15)-hadith el-bokhari.
- (16)-ibn hisham opcit
- (17)-koran:42.38
- (18)-koran:3.159
- (19)-hadith noted in "misnad"of ibn hanbal
- (20)-Al Mawerdi,"El Ahkam Essoltania", OPU. 1983.
- There is a French translation L. Ostrorog,Paris 1901,E. Leroux editor.*this is the text we will be using with checking all along with the original Arabic text.
- (21)-Al Mawerdi,ibid,p.96
- (22)-Opcit, p.99
- (23)-Opcit, p.101
- (24)-Opcit, p.161
- (25)-Al-Ghazali,"Al Iqtissad Fi el Itiqad",Cairo,1320(h) p.95.ed:Sabih.The rule of religion can only be assured through the rule of civil power, because religion requires education and worship which only a good physical shape and the satisfaction of biological and sociological needs such as:food,shelter, social security etc.could allow. Hence,civil role is a condition necessary to the rule of religion.ibid,p.135
- (26)-Al Ghazali,"Al Iqtissad",ibid,p.96
- (27)-hadith noted in El Bokhari wa Muslim.
- (28)-El-Iqtissad,ibid,p.105:another noted scholar who has elaborated on the question of "el-Khilafa" is the judge Badr eddine ibn djamaa(1241-1333)In his"rissalat Tahrir el ahkam" he likeEL-Ghazali,justifies De-facto legitimacy as better than anarchy.
- (29)-the entire title is:"Al Siyassa Echarya Fi Islah Rai wa Roiya", El Jamia el Islamiya, El- Meddinah.
- (30)- Opcit
- (31)-there exist several translations of Ibn Khaldun major work The Prolegomena. The best of which are in French, and in English,that of Franz Rosenthal.El Muqaddimah- an introduction to history, Routledge &Kegan Paul, London 1958,Vol.I-It is the later which will be used in here.
- (32)-Ibn Khaldun, opcit, Book I, Chp.II, parts 8, 1 pp.264 & 311.
- (33)- Opcit, Book I, Chp. III, part 21,
- (34)-Here the Arabic term "El Ghadab" which literally means "Angriness" refers to tribal egocentrism and regionalism :ethnic sectarianism, etc...
- (35)-awareness of Ibn Khaldun to the importance of Economics in political life has led many authors like:Y,Lacoste, G. Labica, Benhassine etc...,to see in him a forerunner of Marxist thought.see Collogue 78 sur Ibn Khaldun,infra,chap,
- (36)-this reminds us of Rostow's"Five Stages" see chap.III,supra.
- (37)-ibn khaldun,ibid,
- (38)-"El Urwa El Wuthqa",Beirut,3^{ed},1933,pp.132-134
- (39)-it is obvious that he is more of a militant activist than an intellectual reformer.

- (40)-R.Redat,"Tarikh El Ustad El Imam",Vol.I,Cairo1941, pp.11-12
- (41)-see Y.Armajani, "Middle East, Past & Present",New Jersey 1970, p. 245
- (42)-Abduh, is certainly and without rival the leading figure of the Salafit movement, at the opposite of El Afghani, the intellectual reformer in him overwhelms the political activist.He strived hard to revive Islam and called for a "rational power" as the minimum.
- (43)was not him who said:I do not care of being accused of such and such - all I care about is to reform the Islamic religion which conservatives are putting down.
- (44)Reda.R,"Al-Khilafa wa Al-Imama el udma",Cairo,1922.
- (45)-ibid,p.11
- (46)-Reda, Journal el-Manar I, pp. 586-587
- (47)-The Sallafiya disciples in the Maghrib have been Cheikh Ibn Badis, M.Bennabi(ALGERIA), Cheikh Ta'alibi,Tahar ben achour (TUNISIA), Cheikh Larbi al Alaoui and Allal el-fassi (MOROCCO), etc...''

Section Three: The Right To Self-determination Globalism versus Fragmentation

One wonders, how today we can still discourse and write about the so-called right to self-determination after all what has been said and written on that intractable "right", which Prof. Verzijl describes as: **"a political phenomenon with slogan like quality and intractable yet indefinable legal claim"**(1). Verzijl notes further on, that the R.S.D. has always been the sport of national and international politics. It has never been recognized as a genuine "positive right" nor will it ever be in the future. People and states, may fight for it, win or lose but for the sake of the law itself. It is better that it should remain so.(2)

Why is (R.S.D) so intractable is a question we will answer, but before that we would like to say a few words on the historical origin of (R.S.D). Western textbooks on International Law and International Relations have it that (R.S.D) goes back to President W. Wilson's fourteen points declarations. Of course, one could easily expand the historical roots of (R.S.D) to the notion of popular sovereignty and the French revolution or even back to the notion of freedom in classical Greek and Islamic philosophy.

Today, the (R.S.D) is a key-idea **"une idee-force"** around which evolve the entire international life. There are two ways to approach that idea either from a globalist perspective or a fragmented one. Prof. C.A. Colliard has provided a similar quality of international principles: the Principles of Globality and the Principles of Novation(3) (R.S.D) as a principal of globality is that **"idée-force"** which is behind every international novation. We now

talk of novations such as (R.P.S.D). the Right to political Self-Determination which is referred to also as the right to political sovereignty or of (R.E.S.D) the Right to Economical (Self-Determination) also known as economical sovereignty or as the Right to Development. We intend to argue about a (R.C.S.D), the Right to Cultural Self-Determination or the right to be modern.etc... In this chapter we intend to concentrate of (R.P.S.D)

I. The Right to Political Self-Determination or The Right to Sovereignty

When Pr.W.Wilson put forward the claim of the state's right to Self-Determination, he was fully aware of the conflictual nature of the right in question⁽⁴⁾.Indeed, the expression (R.S.D) is loaded with dynamite. It carries a self perpetuating dichotomy. It is a self-claimed, unilateral conception of a "Law" which by essence is multilateral.

Prof. Ch.Chaumont has noticed this contradictory nature in (R.S.D) between being a law "right" and at the same time a negation to that law.⁽⁵⁾It is the everlasting dichotomy between the monistic versus pluralistic interpretation of International Law which we have already met with Kelsen when dealing with sovereignty. Kelsen attempts not to take side openly on this issue in order to serve his pure theory of law. Yet it is all obvious that in fact he favors the monistic option which is in harmony with his own logical construction.⁽⁶⁾

In the case of Pr.Chaumont, we are offered the other side of the coin. He believes that (R.S.D) is the torrent which will destroy the dam incarnated by classical international law.⁽⁷⁾. Yet he is aware of the inner contradiction of sovereignty and he himself

divides that so-called indivisible concept into: a sovereignty of preservation and a sovereignty of conquest.⁽⁸⁾ It is then for him easy to side with the former and against the later. But if we are to put his division within a dialectical frame to which he himself was so keen, we will end up with the following dialectical reasoning : what begins as a sovereignty of preservation ends as a sovereignty of conquest in turn giving rise to a new sovereignty of preservation which engenders a new sovereignty of a conquest and so on. This would be like saying that torrent which will destroy the dam will eventually become a dam itself giving rise to a new torrent and so on...Hence, the dialectical perspective perpetuates the dichotomy within the "R.S.D" in the same way ~~than~~^{as} the monistic Kelsenian perspective. Both fail to solve the internal contradiction and that is why we need to out-pass both of them and search beyond for a compromise. The mean alternative hence, imposes itself as the only possible solution to the dichotomy where sovereignty is neither looked upon as one of preservation nor as that^{of} conquest but simply as a sovereignty of existence. A recognised and secured right of existence and self-realization to all competitive claims. This is the aspiration all legal thought is about and it is only at this level that a possibility of dialogue is perceptible.

Another seductive definition of sovereignty is that provided by V.Kleffens in his course at the Hague Academy in 1953. He defines sovereignty as :**"a potential energy which resides within the social group and is either released as a reaction to some causes or as a conscious idea"**⁽⁹⁾ This energetical sovereignty coincides with that dynamite-loaded(R.S.D) which we have already met. Indeed what is sovereignty if not the release of the cultural potential of social groups and the expression of that potential in a creative and constructive way

which Kleffens terms as the "^sconscious idea". Sovereignty as an Energy released in reaction to some causes can only happen within the monistic or the dialectical schemes where there is a thesis and its negation. As a conscious idea, sovereignty or (R.S.D) is more easy to emancipate and its energy instead of being orientated toward destructive and conflictual "**egocentric**" aims, will be orientated toward competitive but constructive and complementary aims which are of common benefits to all. It is true that Kleffens, as a citizen of a small nation (Holland) resorted to an energetical definition of sovereignty in order to match the growing uneasiness of the small states "**vis-a-vis**" the great powers and their willingness to resist their hegemony.

The right of states (people) to political self-determination, at the legal level, has been sufficiently endorsed by the international community.⁽¹⁰⁾ It figures in good place at the U.N. Charter and there is not a single resolution from the G.A. which does not refer to it in a way or another. Theoretically at least, it is admitted by all as a legal principle. The problem which the international community is facing is one of interpretation: where does my right begin and where ends yours?

Resolution 1514 (XV) of Dec 1960 has marked the end of the colonial era and opened wide the doors of the U.N. organisation to the new states⁽¹¹⁾. What followed is what some have labelled as the "**orgy**" of sovereignties.⁽¹²⁾ The frenzy is comprehensible given the long period of frustration. Finally, everyone was declared to be the equal of everyone else and the flag of Panama sided with that of the U.S.A at the U.N. headquarters.

The right to political sovereignty was assured. The ecstasy of independence induced many of the new states to the belief that the

war for sovereignty was over, while in fact, they had only won a battle that of (R.P.S.D) The war, as they were going to discover, was far from over yet. The Ex-Colonial power having lost the battle over (R.P.S.D) are today holding firmly the ground in order to prevent any further losses. Hence, their insistence on the relativity of sovereignty. As M. Bedjaoui has observed: **"Yesterday, we were denied sovereignty under the pretext that we were not as yet fully mature. Today we are still denied that sovereignty because, we are told it is not any more in "fashion" since we live in the era of interdependency. In sum, it is never the right time for us to exercise our sovereignty"**(13).

The new battles still to be won by the third world states are those of (R.E.S.D) and the (R.C.S.D). While the global battle to be won by the entire international community is still the juridical conquest of the right to self-determination in its globality.

So far, we have followed the historical evolution of the concept of sovereignty, in both western and Islamic tradition. We have listed the opinions of legal and political philosophers in both societies.

It is time for us, to start comparing notes and ideas and see where that would lead us. However, before doing that, we should say few words from a global perspective, on the evolution of the concept of sovereignty in the western tradition.

In our historical survey, we have established that the western conception of sovereignty has gone through successive stages from divine **"Plenitudo-Potestatis"** of the King, to the nation-state in the Hegelian sense and from there on, to popular sovereignty to the

actual democratic state. This has occurred as a result of an overwhelming global revolution which has shaken and transformed entirely the western society in every aspect : political, economical, social, cultural, etc...

The old western socio-political structure based on the "**Ecclesia**" and Feudalism was swept away and a new socio-political structure has emerged. This is the capitalist structure with all that goes ^{with} it, a whole series of philosophical and socio-political currents evolving around the central notion of "**Profit**". To mention but the principles : Utilitarianism, Positivism, Pragmatism, Socialism and Secularism. All these currents could be resumed in the broader scheme which is referred to as the Era of Enlightenment.

The rising of the west to ~~the~~ prominent international leadership has been interpreted by various schools of thought. Yet, the interpretation provided by M. Weber remains one of the most convincing⁽¹⁴⁾. Weber tells us that it is the Protestant ethic which has led Europe to capitalism.⁽¹⁵⁾ It has liberated European man from all ascetic irrationalities and has driven him from the passive attitude of contemplation to a dynamic state of readiness for gain and material acquisition. It has promulgated a new code of conduct dictated by the "**BERUFS**" callings, and has defined man's new vocation to satisfy his "**Appetitus Divitiarum Infinitum**"; unlimited lust for gain⁽¹⁶⁾.

Hence, the frantic search or, race for wealth has started almost immediately; huge cities were erected, scientists were mobilized, discoveries made one after the other, inventions multiplied and in no time, we find ourselves facing a new secular

and scientific European society. Under the spell of the scientific achievement in physics and natural sciences, social scientists assumed the social-field reducible to the 'scientific' method and thus emerges the dictum of "Rationalism", which is the reliance on reason to find, through a series of logical deductions from either postulated or empirical premises, the ultimate truth.

Grotius, according to Morgenthau, was the first to express the blasphemous thought that laws exist even if we are to assume that God does not exist and it is on this assumption that he developed his system of international law where the world is governed by objective laws whose existence is rational and independent from any divine will(17).

This trend, was also later on, to lead A. Comte to interpret his own era as that in which mankind, after successive failures to explain the world by magic and theology, succeeded in explaining it by positive knowledge derived from reason. Even Freud, marked by the assumption that all mental phenomena were produced according to laws of cause and effect, has strived to establish a scientific method of psycho-analysis.

Among the currents characterizing the era of "**Rationalism⁺ enlightenment**" is utilitarianism which positively assumes the maximization of pleasure and negatively, the minimization of pain. Hence, the rationalist utilitarian bases his interpretation upon the following assumptions :

- 1) that the rationally right action and the ethically good are identical.
- 2) that the rationally right action is of necessity a successful one.
- 3) that reason's law is universal.

For the **"Enlightened Rationalist"**, the door of learning and understanding lies not in religion and revelation but in Mathematics and Logic as G. Brinton, has observed : **"Reason will clear up the "mess" that superstition, revelation and faith (the devil of rationalists) have piled up here on Earth"**(18). Today, the enthusiasm for "enlightened rationalism" is declining in Europe. The blindness of the rationalists is reflected in their inability to deal adequately and rightly with International realities.

Habermas tells us "that science as a productive force can work in a salutary way only when it is suffused by science as an emancipatory force to the same extent as it become disastrous as soon as it seeks to subject the domain of Practice."(19) Habermas has theoretically demonstrated how human interest distorts the relationship between theory and practice and how positivism, because of its attachment to a particular self-formative process, "Bildung", has erected scientism and its absolutism and failed to stand up to the test of generalisability(20).

Morgenthau, on his part, has, in his later days, discovered how pretentious Rationalism can be; he has concluded that Rationalism has misunderstood the nature of man, that of the social world and the nature of reason itself(21). Reason, Morgenthau believes, far from following its own interest impulses, is driven towards its goal by the irrational forces and ends of which it serves. Even though man is dominated by interest and driven by emotional impulses as well as motivated by reason, he likes to see himself primarily in the light of reason. Hence, he gives his irrationals the earmark of reason. Yet, concludes Morgenthau, Reason uncorrected by instinct is as bad as instinct uncorrected by reason(22).

II. Duality in the International Order Right "Vs" Might

Article 2 (1) of the U.N. charter states that: "The organization is based on the principle of sovereign equality of all its members." The Rapporteur of the committee I/1 at the San Francisco's conference admitted that the wording was novel and needed clarification, he thereby provided the following interpretation:(23) Sovereign equality is constituted upon the four essential elements which are :

- 1) The legal equality of states.
- 2) Each state enjoy the rights which are inherent to its sovereignty.
- 3) Each owes respect to the personality of the state, its territorial integrity and political independence.
- 4) States should carry out in good faith all their international duties and obligations.

Before that, the Charter of the Organization of American states, had established more clearly the principle of sovereign equality. Its article, six, reads as follows: **"States are equal before the law. Enjoy equal rights and have equal capacity to exercise them. The rights of each state are not dependent upon the power it possesses to ensure the exercise of them, but solely upon the fact of their existence as a person of international law."** Thus, the contemporary International legal order is based on the sovereign equality of all states. Scholars have reacted in a variety of ways to this coupling of sovereignty and equality. It is Vattel, who the first, had emphasized the equality of states: **"Since man, he said, are by nature equal and their individual rights and obligations the same as coming equally from nature;**

nations which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same rights and the same obligations. Strength or weakness in this case count for nothing. A dwarf is as much a man as a giant is; a small republic is no less a sovereign state than the most powerful kingdom."(24) Since then, the concept of equality has entertained an intense polemic between those who believe in the coherence of a legal system based on the principle of sovereign equality and those who denounce such a theoretical idealism as pure juridical fantasies.

At the beginning, when the covenant of the league of nations was drafted, lawyers contented themselves with the establishment of a legal equality restricted to the membership of the league. Hence Basdevant(25), Corner(26) and Verdross(27) all contented that sovereign equality should be taken to imply only legal equality. Brierly(28) went further and denounced the principle of equality as an obstruction to peace and progress, but with the increase in the volume of international trade and economical cooperation, the urge to translate "**Legal Equality**" into a more concrete and substantial form has grown stronger and hence, emerged notions such as functional equal capacity for rights and equal opportunity in the management of international affairs. In this respect the U.N. Charter does not go beyond formal equality. It is no more than a preservation of the old colonial status. As H. Bull, had observed : "**The U.N. Charter written primarily by the western power; its preamble drafted in part by the prime minister of South-Africa, was basically similar to the covenant of the league of nations in the protection it afforded to the old colonial order**"(29). What the charter has established is a functional inequality reflected in the unequal distribution of power

between the great powers and the small states. As a scholar has put it :**"What we have in the security council is inequality in the renunciation to sovereignty, a certain impairment of the sovereignty of those at whose expenses this inequality has been established"**(30).

We cannot accept this inequality on legal grounds, even if we are to invoke (article 24) of the charter by virtue of which, the members of the U.N. are said to confer upon those of the security council the responsibility of maintaining peace and security at the international level. The ^{Permanent} members of the security council are not elected, therefore when they exercise their **"Veto"** power, they do not act as representatives of all the U.N. members but rather as sovereign powers and in doing so, they exclude themselves from the binding effect of international decisions with the consequence that there is no equality before the law.

If we are to hold the view that the U.N. is the main legal institution of the prevailing international order, Its different organs should also be seen as legal organs which in their decisions are led by legal considerations. The "Veto" clause destroys the legal construction. It is a fact that the "majority" of small states during the San-Fransisco conference recognized in their memorandums the privileges of the great powers(31). Yet, this was a political qualification which does not count as long as we accept that peace and security in the world can only be guaranteed on the basis of Law and Justice, Besides, the small states were only a minority by then and the majority of today's nations were not present at the San-Fransisco conference.

Now, if we dismiss this legal construction of world order, we

are left with the political construction, that derived from Machiavelli and Hobbes. Within such a frame, the U.N. is merely interpreted as a political institution based on the inequality of nations. This is the dominant view held by so-called realist observers of the international scene.

The political construction of world order is based upon the obvious primacy of national law over international law. The national interest or the principle of "self-help" determines the whole international structure. Most disciples of this current will start by quoting *"Thucydides"*, that is to say: The Athenians addressing the Melians : **The powerful extract what they can and the weak grant what they must**⁽³²⁾. Power is the corner stone of the whole structure. What ensures stability in such a system is inequality because equality is linked to either idealism or instability⁽³³⁾. In order to maintain stability you need power or more correctly, you need a certain balance of power which you can keep functioning only by the use of force. This constant intrusion of power renders almost meaningless any conception of equality between the members of the international community⁽³⁴⁾. That is why Morgenthau believes that sovereignty is incompatible with a centralized hence effective international law. In fact, he argues, sovereignty is the source of international de-centralization. It is relative and depends on the political situation of the time⁽³⁵⁾. Within the U.N, the great powers enjoy a central position. They dictate the rules of the political game, they are at the top of Aron's **"anarchical oligarchy"**⁽³⁶⁾. There is not much left for the small states within such a frame, either they grant what they must, or they rebel and fight a desperate struggle for survival.

Tucker provides us with the latest version of real-politics. Here is how he depicts the international community⁽³⁷⁾ :

"Nations, he tells us, are unequal by nature. In their existence, they are moved by the motive of self-help, which he defines as the "right" of the state to determine when its legitimate interests are threatened or violated and to employ coercive means and measures as it may deem necessary to vindicate those interests"(38).

Since nations are moved by self-help then, pursues Tucker, what characterizes the international community is a struggle for power, the equalitarianism of the third world today is part of this struggle. It does not constitute a real challenge to the prevailing order because it does not aim at its destruction or its replacement by a new one. The aim of the third world nations^{is} mainly to the prevailing international hierarchy where it seeks a better position **"a place in the sun"**.(39) Invoking Heilbroner's(40) comparison of the world to a gigantesque train in which few passengers mainly from the capitalist world ride in the first class coaches in conditions of comfort unimaginable to the enormously greater number crammed into cattle cars that makes up the bulk of the train carriage and returning the argument put forward by the author of the **"Human Prospect"*** about an eventual suicidary action by the poor, he replies stating that in case the threat from the poor becomes imminent, some of the first class passengers may no longer resist to the blandishment of the poor"

Tucker then, goes on to examine the new emerging currents of equalitarianism and interdependency among western circles such as those championed by Macnamara, Myrdal, Farer etc... and disqualifies them for being idealistic fantasies and concludes his analysis by stating boldly that the aim of the challenge to inequality is one of decreasing control over the international system by those who are its present guardians(41).

Notes

- (1) J.H.W.Verzijl, "International Law in Historic Perspective", Volume I Leyden 1968. p.321
- (2) Verzijl Ibid, p.322
- (3) C.A.Coliard, "vers De Nouveaux Principes De Droit International" dans: Colloque De Caen.Pedone. 1975 p.286
- (4) Robert Lansing, the US secretary of state by then, wrote in his diary: "the more I think about the President's declaration as to the right of self-determination, the more I am convinced of the danger of such an idea.the Phrase is imply loaded with dynamite..what a calamity that it was ever uttered? What misery it will cause? See Verzijl, ibid, p.321
- (5) Ch.Chaumont, "Cours General De Droit Int.Public" RCADI 1970 Vol1:129 p.397
- (6) See H.Kelsen , *op cit, infra*.
- (7) Chaumont. opcit p.351
- (8) Chaumont. opcit p.395
- (9) V.Kleffens, opcit (p. 80)
- (10) A. Cristescu, "The Right to Self-Determination: Historical and Current Development on The Basis of United Nations Instruments." United Nations, New York, 1981.
- (11) Resolution 35/118 of December 1960; "Plan For Action For The Full Implementation Of The Declaration of Independence". Resolution 38/16 Universal Realization of the (R.S.D) etc....
- (12) The Expression is that of W.Friedman, "The Changing Structure Of Int. Law, London, 1964 p.32
- (13) Med Bedjaoui, "Non Alignement et Droit Inter"RCADI, 1976, Vol 15I p.407
- (14) Chirot.D,"the rise of the West"American Sociology review vol.50,April1985
- (15) Weber.M,"The protestant ethic and the spirit of capitalism "trans: Parsons.T, Allen &Unwin,Introd.by Giddens A,1978.
- (16)Weber, ibid. (pp88-89)
- (17)Morgenthau.H, "Scientific Man versus Power Politics "Midway, Chicago,1964, p.24
- (18)Brinton.G,"the shaping of modern thought" New York,1953,p.114
- (19)Habermas.J, "theory and practice "trans:Viertel.J, Heinemann,1974, p.114
- (20)Habermas.J,"Knowledge and human interest "trans: Shapiro.J, Heinemann,1972.
- (21)Morgenthau, opcit, p.154.
- (22) Opcit, p.157.
- (23) D.Nincic, "The Problem of Sovereignty In The U N's Charter" Hague, 1970 p. 44
- (24) E. De Vattel, "Le Droit des gens, ou principes de la loi naturelle appliquee a la conduite et aux affaires des Nations et des Souverains." Vol I Chp. 1 p. 15 de: J.B.Scott Carnegie Washington, 1916
- (25) RCADI, Vol. 58, 1936 IV, p. 587
- (26) RCADI, VOL. 35, 1931 I, P. 704
- (27) RCADI, Vol. 30, 1929 V, p. 415
- (28) J.L. Brierly, "The League Of Nations", 3 ed. Oxford - 1942, p. 91

- (29) H. Bull, "Intervention In World Politics", Clarendon Press, Oxford -1984, p. 147
- (30) Nincic, opcit - p. 117
- (31) Boutros E. Ghali, "Le Principe D'e'galite' Des Etats & Les Organizations Internationales", RCADI, 1960 II, p.35
- (32) Thucydides, "The Peloponnesian War", London - 1936, p. 368
- (33) K. Waltz, "The International Structure" Journal of Int. Affairs, No 21, 1967 p. 224
- (34) E.H. Carr, "The Twenty Year Crisis", London, MacMillan - 1937, p. 166
- (35) H. Morgenthau, "The Problem of Sovereignty Reconsidered Columbia Law Review", 1948 p. 341
- (36) R. Aron, "Progress & Desillusion : The Dialectic Of Modern Society", NewYork - 1968, p. 160
- (37) Tucker.R.U, "The Inequality Of Nations", basic book inc. NewYork - 1977
- (38) Opcit - p. 4
- (39) Opcit - p. 91
- (40) Opcit- p. 201[* Robert L. Heilbroner, "An Inquiry Into The Human Prospect", Norton, NewYork - 1974]
- (41) Opcit.p.201

Section Four: comparative analysis between western and islamic concepts of sovereignty

Now, that we have shed some light on the background from which has emerged the western concept of sovereignty, We can move on to compare it with the islamic concept .The classical Islamic theory of public authority as developed by El-Mawerdi, and the earliest "Fukahas", constitute a theoretical consensus among Muslims on how the political structure in the Islamic society is to be constructed. Whether, now, this political structure is democratical in the western sense is of no relevance here. What would be relevant is to ask ourselves the question : "Is this theory a viable and a practical instrument for our social ordering today ?" If the answer to this question is "yes" as we believe it to be, then, why should we care about the compatibility /or the incompatibility of our politics with western canons ?

When L. Gadet defines the Islamic political structure as an **"equalitarian secular theocracy"**(1), he may be right within a western terminological frame. Yet, he is certainly unfair to our criteria of evaluation for we hold our political structure as the best which any human society would aspire to. In western terminology, theocracy, even when softened with equalitarianism, ~~connotes~~ connotes inferiority vis-a-vis democracy which is the prevailing political structure in the west today. Therefore, although dealing with the same issues, Western and Muslim scholars speak different languages and the relationship between the two can hardly be termed as a dialogue. It is a conversation between deaf, where arguments are raised to sustain existing prejudices rather than to emancipate them. As the author of orientalism has observed :**"Note that there is no question of an exchange between Islam's**

view and an outsider, no dialogue, no discussion, no mutual recognition. All there is, is a flat assertion of quality which the western policy maker, or his faithful servant possesses by virtue of his being white and non-Muslim. This is neither science, nor knowledge, nor understanding, it is a statement of power and a claim for absolute authority. It is constituted out of racism and is made acceptable to an audience prepared in advance to listen to its muscular truths".(2)

This, of course, is not intended to deny the good faith of at least orientalist such as Gadet. Yet, if there is no doubt that you can learn a great deal about yourself from outsiders, there is also no doubt that an outsider in trying to describe my feelings is only asking me How do You do ? There is no way he could pretend to answer that question in my place.

One of the most insisted upon issue opposing both is that of the separation between politics and religion. Open any book on "**Oriental studies**" or what in academic circles is known as "**Orientalism**" and you will find this issue of separation a central theme in it(3). It has become the favorite battle ground for theoretical discourse between scholars of both worlds.

In Christianity, as we have seen, this issue was resolved from the start "**Renders unto Caesar, the things that are Caesar's**". In Islam, at the opposite, the union of religion and politics has been confirmed from the start. The Islamic religion orders both this world and the hereafter. Hence, the separation between the two is inconceivable in Islam. Religion and power, as Al Ghazali, has said, are twins, religion is the foundation and power is the guardian. While that which has no foundation is easily

destroyed, that which has no guardian is easily lost.

This issue of separation between religion and politics has already aroused a scandal in Muslim academic circles when in the twenties, Ali Abderrazik, a member of the "Azhar council," published a book : **"Islam and the Rules of Power"**, in which he argued that Islam does separate between religion and politics⁽⁴⁾. Ali has attempted to prove that the prophet was only a messenger carrying a religious duty and not a political ruler. In this respect, he wonders why, if the prophet was a political ruler as most Islamic doctors assume, he has not left us with strong political institutions and a clear cut political theory? Ali explains the lack of such a theory in Islamic thought in favour of his argument. He argued that the prophet had a leadership of prophecy **"Za'ama Diniyya"**, as opposed to political leadership **'Za'ama Siyassiyya"**. Ali's argument on the whole however, is not convincing. His historical examples are ill chosen, for instance, his interpretation of the "opostacy war" as power politics on the part of the first Caliph Abu Bakr, is incredible. One of the main reasons why Ali has written his book seems to be his mistrust of Islamic political rulers who have been using Islam as a legitimizing device, subject to which he reserves the last four pages of his book. Ali believed ^{it} possible to free the Islamic community from tyranny and despotism and to allow the Muslim masses to participate in the political decision as was the case in Europe. There is no doubt that his aim was sincere and honest as far as the Islamic community was concerned. In any case, he has exercised "Ijtihad" and failed, yet that should not prevent us from accrediting him with a good mark following the hadith which commands two or a double mark for "El-Mujtahid" who succeeds and only a single mark for the one who fails.

When asked about this issue, R. Reda replied : **"The assertion**

that the government and the state should be separated from religion is one that necessitates the blotting of Islamic authority out of existence and the abrogation of the Islamic Sharia. Were Muslims to adopt the western position on the matter, we should have laid aside half of our religion; that very half which forms a protecting fence around the other half⁽⁵⁾.

We have seen, how in the western world, this issue has dominated the middle ages. The Augustinian synthesis did not resist the secular trend and at the end, politics were to triumph with Pico, Machiavelli,⁽⁶⁾ etc...

In Islam, from the start, that is the prophet's era, there was no separation between the two. The prophet (PBUH) acted both as a religious guide and a temporal ruler at the same time. This was also the conduct adopted by his earlier successors, the four "**well guided caliphs**". Meanwhile, beginning with "**Muawiyya**", the first ruler of the Ommeyyad Dynasty, the political function (temporal power) was distinguished from the (spiritual power) religious function. Hence, Muawiyya, was the political ruler of the Arabo-Islamic community but he was not, by any means, the religious leader of that same community. The religious function was fulfilled by the advisory council composed as we have seen of the learned and the early companions. Hence, if one can affirm that beginning with "Muawiyya", there has been a distinction between temporal and spiritual powers in the Arabo-Islamic society. One also ought to precise, that distinction is not separation and we will see why.

To make the whole issue of separation clearer to the reader, we may need to invite him to the study of the theory of power in

the Arabo-Islamic society as it has been elaborated by Ibn Khaldun.

A. Laroui has recently provided us with a deep sighted reading of Ibn Khaldun's theory of power.⁽⁷⁾ According to him, Ibn Khaldun, long before Machiavelli, has established that **"a disarmed prophet is always a loser"** without arousing scandal.⁽⁸⁾ It is evident, tells us Laroui, that both men have ^{very} much in common than may seem at first glance. Indeed, both authors lived in the same era, in similar histo-political contexts. An Italy divided in city-states for the later, and a Maghrib (North Africa) no less divided for the former. Both men have practiced politics before turning to scholarship.

Ibn Khaldun, tells us Laroui, like Machiavelli, knew that power is a matter of force (bare naked force). The religious factor in Ibn Khaldun's theory does not create power, it reinforces it and so in Machiavelli's theory. Power emerges in Ibn Khaldun's theory from El Assabiya. Therefore, argues Laroui, Ibn Khaldun, was aware that the combination of spiritual and temporal powers in the Islamic state of the Khalifa is an utopia almost impossible without some divine inspiration. The first four Khalifs, have succeeded in maintaining that combination. because **"divine inspiration"** through the prophet, was fresh by then. In fact, it did not last long (30 years). Hence, argues Laroui, temporal power as Ibn Khaldun has defined it is of two types : despotic or democratic⁽⁹⁾. To make his argument clearer, Laroui goes back to the pre-Islamic period, that of **"El Jahiliyya"**, Dark ages and establishes that the Arab state (political power) by then had a mundane finality; that is, had no other aim but to achieve the temporal well being of either the one (despotic) or the many (democratic). Hence, the state in the pre-Islamic period was a state of necessity, a state of (nature) of bare mundane necessity with no other aspiration but that of

survival.(10)

Islam, tells us Laroui, is considered to be a social revolution because it has succeeded in ascribing a highest and idealistic aspiration to the state. This aspiration goes well beyond the satisfaction of mere necessities. The state in Islam, becomes a mere (instrument) for the achievement of an ethical ideal which is known as "**Makarim el-Akhlaq**" that is a state of virtue and that is what the orthodox Islamic Khalifa is about(11).

It is interesting to note here that Hegel has perceived a similar task to the state. The state of necessities is according to him, only an accident in history because the real aim of the state is to achieve the harmonization of the one and the many. It is no wonder that Hegel admired the Islamic spirit, that "revolution of the orient" which destroyed all particularity and perfectly cleared up and purified, making the abstract one, the absolute object of attention and to the same extent, pure subjective consciousness, the knowledge of the one alone, the only aim of reality(12). The philosopher of history could not fail to seize the ethical Islamic ideal as that which is capable of the greatest elevation while yet remaining tied to the vulgarity of petty interest]. But let us remain with Laroui's reading of Ibn Khaldun. Having established that Islam has elevated the state from a social necessity to an ethical ideal, Laroui goes on to show that the seizure of political power by "**Muawiya**" had dropped the Islamic ethical ideal, and taken back the state to its original substance of the pre-Islamic period.(13) From that time on, the Arabo-Islamic has never known any other form but temporal power. The ideal Islamic state of the Khilafa has remained alive as a model to be implemented but has never been achieved (except during the short reign of Omar Ibn Abdelaziz,:2

years). Laroui, therefore, concludes that the Khalifa as an aim of political power in the Arabo-Islamic world cannot be denied, but as a reality. It cannot be affirmed either.(14)

That Ibn Khaldun was aware of the requiring and almost **"extra-human"** aspect of the Khalifa, nobody could contest that. Ibn Khaldun himself emphasizes the role of the religious factor which he labels as **"El wazie eddini"** in elevating **"El Assabiya"** to the highest possible forms of power, "the Khalifa". Laroui bears fact to Ibn Khaldun's faith as a Muslim who believed in miracles and divine inspiration.(15) What Laroui does not seem to take in consideration is the fact that all Muslims believe in the possibility of the Khalifa and that is why Ibn Khaldun has not dismissed the Khalifa as an **"Utopia"**. In fact the term "utopia" used by Laroui, seems to us a bit strong. After all the Khalifa has existed for more than 30 years in Arabo-Islamic history and it has been kept alive till today: **"Khomeiny's Iran"** but we will come to that in a moment.

Laroui having established the distinction between, the historical, yet, utopian Islamic state of the Khalifa and the temporal historicist Arabo-Islamic state which exist until now, concludes : **"every thing in the history of Islamic thought tells us, that the state is distinct from religion (the value) yet everybody keeps saying that Islam is at the same time state and religion"** (Din wa Dawla) what does this mean ? Wonders Laroui(16)

He replies by distinguishing between religion as a legal code **"Sharia"** in which case the statement above is correct and religion as an ethical ideal **"Maqqasid Sharia"** in which case the statement is incorrect since that ethical ideal has never been

achieved⁽¹⁷⁾. It is an utopia conscious of being one, asserts Laroui. Of course one could reply to him that an utopia conscious of being one is not utopia anymore. It becomes a faith but that is not the point. The point which Laroui rises is crucial to the structure of political power in the Arabo-Islamic society today. The antinomy between temporal versus religious state, is reflected in the dilemma of today's Arabo-Islamic state. When the later applies the Sharia as in the case of "Saudi -Arabia", the state is legal from an Islamic point of view but is not legitimate because it remains inferior to its Islamic aspiration (the ethical ideal). Now, if the state attempts to go beyond its natural aim and achieve its ethical finality, then it turns against itself because the state value is a perfection and as such does not need a state. This antinomy is not exclusive to the Arabo-Islamic society; notes Laroui⁽¹⁸⁾, all human societies confront this antinomy. The Hellenistic ideal versus the Greek Polis, state versus communism in Marxist thought, etc...

The consequences of this antinomy in the Arabo-Islamic society could be resumed in what Laroui sees as a **"divorce between the state and the community"**⁽¹⁹⁾. From this divorce has emerged Suffism and a certain form of internal exile. There is retreat of the community from the state. This is an obvious feature of the contemporary Arab state. No wonder, therefore, if today, there is no single Arab state which can claim to have popular adhesion and support.

Felicity, Laroui says, deserted the state, and as a result, became the property of one man or one group. Internal exile became necessary in order to escape the dictatorship of the state. The citizen turns to his family and clan to enjoy a certain freedom which he does not find in the socio-political sphere. Everything in Arab life, asserts Laroui, reflects this antimony between the state

and the community, even in architecture; the Arab house stands with its back to the street and its wide open court inside⁽²⁰⁾. An extreme form of that internal exile is Suffism "**Mysticism**", indeed, what is Suffism if not an individual seclusion and a total abdication to social life ?

This explains, says Laroui, why we do not find any clear theory of the state in Arab thought. The actual Arabo-Islamic state, is a state of Muslims, but hardly an Islamic state⁽²¹⁾.

Assesements

There is in Laroui's reading of Ibn Khaldun an erudition reminiscent of the later. Yet, there seems to be some over reactions here and there in Laroui's analysis of Ibn Khaldun's theory of power. That a distinction between the ideal Islamic state, "the Khalifa", and the real i.e. contemporary Arab state is necessary today in Arab critical thought, is a conclusion to which we heartedly subscribe. In fact, we intend all along this study to examine the implications that such a conclusion will require in Arab society. Yet, to play-down one aspect in Ibn Khaldun's thought in order to emphasize its opposite, is somehow to read him in an unbalanced way and that seems to be Laroui's weakness. Indeed, all throughout his analysis, Laroui strives to keep away, not to say hide, the theological aspect in Ibn Khaldun, in order to emphasize the theoretician at the opposite of what he believes Ibn Khaldun's critics have done so far.

In trying to make us believe that the Islamic "Khalifa" is an "Utopia", Laroui seems to be telling us that Ibn Khaldun also thought so. That is simply not proven. Ibn Khaldun and Laroui complies to

this , is an orthodox Muslim faithful and as any faithful Muslim believes in "divine inspiration" and holds it to be part of everyday life.

As we have seen, he clearly states his preference for the "Khalifa" as the best form of power. Hence Laroui's word "Utopia" seems to be a bit strong. After all, the "Khalifa", as the ideal Islamic state, not only existed historically for over three decades (632 - 661 A.D.) but also has emerged here and there throughout Islamic history, for instance with Omar II, to a lesser extent perhaps, with H. Rachid, 785 A.D. and later on, in a different form with Salah-eddine El-Ayoubi "SALADDIN". Even today, that ideal continues to be alive in the Islamic society and maintains its relevance : Iran's Khomeini is a good example to that.

Following Laroui's argument about a distinction between Religion and politics in Islam [one has to keep in mind the precedent case of Abderrazik, which strangely enough, Laroui seems to ignore], one has the feeling that the author is urging for a separation between the two. Of course Laroui does not say that openly but if we are to apply to him, what he did to Ibn Khaldun, that is [what Leo Strauss would call reading what is behind the lines], we may as well infer that Laroui is arguing for such a separation. It is, however, obvious that he is not and he makes that clear when at the end of his book he refuses to conclude from the bankruptcy of the Arab culture to the futility of the dogma⁽²²⁾. Nevertheless, one should not ignore totally that inference particularly when bearing in mind the aim to which Laroui is dedicated, that is, the resolution of the Arab crisis.

Separation between politics and religion in Islam is simply inconceivable. Islam (and this we will have the opportunity to

explain (in more detail) is a religion whose essential aim is to achieve human brotherhood and bring about that harmonization between the one and the many which automatically requires a certain fusion between politics and belief. Hence Ibn Khaldun states⁽²³⁾ textually in his section on the words : Pope, Patriarch and Kohen, that the "Khalifa" and royal authority are united in Islam, since the later, unlike other religions, has a universal aim.

Thus, if distinction between politics and religion is conceivable within a certain limit, a total separation between the two in Islam is out of question because in that case, you end up with no religion at all. This has nothing to do with the identification, meaning, that since Europe and the whole western world have adopted the separation; therefore, the Arabo-Islamic world is somehow obliged to adopt the opposite in order to be different from the other. I think the issue is much deeper than that, though the identification factor is part of it; more as a consequence than a cause.

The separation between religion and politics is an amplified version of the separation between revelation and reason in human history. Muslim philosophers and theologians such as : El-Ghazali, Ibn Ruchd, Ibn Khaldun, Abduh etc... Have always rejected the one sided stand of the issue of separation between revelation and reason. One may argue that, in fact, they all have admitted the supremacy of revelation ~~or~~ reason, that is certainly true. Yet, they have not done that without "reason", that is to say, they have strived hard for a mid-way position between on the one hand "Mysticism and religious fanaticism" and on the other hand "positivism and atheism".

We probably will have the opportunity later on to pursue this

point with some details. Let us meanwhile, just conclude that if an Islamic community is conceivable without a state, an Islamic state is not conceivable without religion. What do we mean by that? simply that religion as Al Ghazali has observed is the foundation on which the state is supposed to rest. It may happen and in fact it did happen that an Islamic community was governed by foreign states, that is non-Islamic ones as was the case during the colonial era. The Islamic community then, continued to exist under non-Islamic political control, but that is an "abnormal historical stage" which had to end, either by disintegration of the Islamic community or, as it happened, by the revolt of that community against the non-Islamic state and its collapse. The conclusion to be drawn from all this is that the secularized western notion of sovereignty as a free will disposing of the competence of its own competence is far away from the Islamic notion of "Istikhlaf" vicegerency.

The western notion expresses itself at the international level through the positivistic Kelsenian version of International Law, prevailing today at the International level. The Islamic notion, inherently, opposed to the Nationalist creed, faces tremendous pressure at the international level with repercussions extending to its internal tribalistic structure, causing political instability and a crisis of legitimacy, obstructing the ideological theme of Arabo-Islamic unity and leading to international conflict. These implications are all the more obvious. We intend to examine them next.

Notes

- (1) Gadet.L,"la cite Musulmane"2ed,Paris,1961.p.23[in fact Gadet derives his definition from the teachings of L.Massignon
- (2) Said.E;"Orientalism reconsidered" in Race & Class review, volxxvii, no2, autumn1985p.7
- (3) A good exemple is E.I.J.Rosenthal,"Studia Islamica"vol,2.Cambridge univ press 1971, particularly,his part two,no 10,under the title:Some reflections on the separation of religion & politics in islam.(p.171)
- (4) Ali Abderrazik,"El-Islam wa usul el-hukm"Islam and the rules of goverment ed: Misr,Cairo,1925[Ali's view has come as a result to the development of western secularism amongEgyptian intellectuals.Most prominent figures were Taha Hussein and Khalid Med Khalid who were later to adopt more orthodox positions
- (5) Reda.R,"El-Manar"III,1899,Cairo,p.357
- (6) Machiavelli who according to E.Hommes,went so far as to renounce Christianity. see Hommes, infra, (p71)
- (7) Laroui.A,"Islam et modernite"ed la decouverte,Paris 1987
- (8) Laroui,ibid.p,24
- (9) Opcit, p.19
- (10) Opcit, p.27
- (11) Opcit, p.24
- (12) Hegel, Opcit, infra.
- (13) Laroui, Opcit, p.24
- (14) Opcit, p.32
- (15) Opcit, p.32
- (16) Opcit, p.27
- (17) Opcit, p.32
- (18) Opcit, p.31
- (19) Opcit, p.32
- (20) Opcit, p.33
- (21) Opcit, p.15
- (22) Opcit, p.178
- (23) Ibn khaldun, opcit . pp.472-473

Chapter Two

THE ISLAMIC CONCEPT OF INTERNATIONAL LAW

Orthodox Islamic legal doctrine conceives the world as a multitude of religious communities. Hence, alongside the people of book "Ahl el-kitab" which include mainly , Jews and Christians; are other communities such as Sabeans (El-sabia), Magians Zoroastrians , Budhists, etc.

In order to understand the rules which govern the relationship between the Islamic Community and these other communities, we need to examine the early treatise written by classical Muslim scholars on the subject of the law of nations which are known in Arabic as the books of "Siyar".

"Siyar" is the plural of "sirat". The term has two meanings. Literary, "sirat" means the way of conduct or behaviour, i.e. the way somebody lives and behaves. The most famous example in this sense is the book written by Ibn Hisham, called: the biography of the prophet "Essirat Ennabawi'yya."⁽¹⁾ From this first meaning is derived the second which defines the rules of Islamic International Law according to the teachings of the Koran and the Sunna. Hence, Al-Sarakhsi defines "siyar" as follows:"**Siyar....describes the conduct of the believers (Muslims) in their relations with the unbelievers of enemy territory as well as with people with whome the believers had made treaties**".⁽²⁾ Hamidullah, who is the dean of contemporary writers in Islamic International Law, quotes Ibn Hisham, whereby the prophet addressing one of his commanders orders the following:"**take the banner and fight in the path of God against unbelievers but**

never commit breach of trust, nor treachery nor mutilate anybody nor kill any minor or woman. This is the pact of God and the behavior "sirat" of his messenger for your guidance."(3) Hamidullah, insists strongly on the fact that Islamic doctrine has made of the study of international law under the subject matter of "siyar" an independent branch, separate from the corpus juris of the sharria as a whole.(4)

Early "Siyarists" have divided the Islamic "weltanschauung" worldview into three parts: "**Dar el-islam**" (the abode of Islam) or the territory governed by Islamic Law. "**Dar el-Harb**": The territory of war governed by non-islamic law and finally, The territory of peace "**Dar el-sulh**", territory or space under the jurisdiction of a peace treaty. "**Dar el-islam**" is an expression which has two meanings: one geographical and territorial, the other is a socio-ethical meaning referring to the community of islamic brotherhood "El umma El-Mohammedi'yya". Hence, a muslim may live in (**Dar el Harb**) and still be considered as a member of the islamic community. It is sometimes hard to maintain this distinction between the two meanings for they often converge and transcend each other.(5)

The classical "siyyarists" would usually expose their doctrine on International Islamic Law under the following headings:(6)

I. The Laws of War: this would generally include:

- A) The doctrine of the Just War "**El-jihad**" and the rules defining the conduct of the Islamic army within enemy territory, etc.
- B) Enemy persons: the treatment of war prisoners; their right, duties and so forth.
- C) The spoils of war: rules prescribing the division of the

spoils of war and its distribution between warriors, etc.

D) On apostasy: and how to deal with it.

E) On Dissent: rules dealing with rebels, highway pirates, etc.

II. Peaceful relations: and this would cover:

A) peace treaties.

B) diplomatic relations.

C) commercial relations: mainly custom duties, "El Kharaj"

D) Aman (safe-conduct)

E) Neutrality (Hiyad) rules and cases.

There are several classical treatise on "siyar"(7) One can therefore consult them and seek ample information on these subject matters. What we will concentrate on here is how these early courses on Islamic International Law have come to be viewed by contemporary islamic legal doctrine and whether they are today of any use in the face of the complexities of international life. Thus, we intend to carry on a critical appraisal on their methodology and substance in order to revive the islamic legal tradition. To delimit our enquiry we will content ourselves by concentrating on two important issues which have aroused much polemic lately and these are: the antagonism between **Dar el Islam** and **Dar el Harb** on one hand, and the islamic doctrine of **El-jihad** on the other.

1) **Dar el-Islam v. Dar el Harb**: Contemporary western writers, whether lawyers or orientalist enjoy emphasizing the outdated features of the Islamic Law (Sharia) in general and the Siyar in particular. For the great majority of them, Sharia is no more than a corpus juris of archaic and barbaric rules which by no means could be called as law proper(8) The same goes for "siyar", seen as outdated rules irreconcilable with modern positive law, with the U.N. charter and the International Covenant of Human

Rights.⁽⁹⁾ More severely, orientalist have gone as far as considering Islam as simply a barrier to progress⁽¹⁰⁾ As a converted western scholar has once remarked: "Ever since the Crusades, Islam has been misrepresented in the west and a deeper distrust, almost hatred for all Islamic values has become part and parcel of Western cultural heritage."⁽¹¹⁾

In regard to the islamic vision of the world, a scholar such as Khadduri has hastily affirmed that the islamic vision of the world is a bipolar outlook, opposing "Dar el-islam" to the rest of the world which fits into "Dar el Harb". He does mention "Dar el-sulh", but only as an insignificant late shafiite addition.⁽¹²⁾ To him, therefore, Siyar is no more than a law of war and division of bounty.⁽¹³⁾ Communities seeking to maintain neutrality are non-existent and have no place in the Islamic legal order.⁽¹⁴⁾ Khadduri does not give its due importance to the versatility of juristic opinion between the various Muslim legal schools⁽¹⁵⁾. He selects here and there, those which corroborate his own affirmations and ends up qualifying the Islamic world vision as an exclusively bipolar one without any nuance. A shrewd observer such as he, ought to have noted the pluralistic Islamic world vision which springs from the Koran (groundnorm of all Islamic rules): "We have made you people and tribes, so that you mix amongst yourselves and come to know each other. The most rewarded amongst you are yet to be the most pious." ⁽¹⁶⁾

The peace treaty which the prophet concluded with the Christian tribe of "Banu-Najran" stands still as an eloquent testimony to the Islamic spirit of tolerance and its leaning towards peaceful resolution of disputes.⁽¹⁷⁾ Though orthodox Siyyarists commonly agreed on "Jihad" as a community duty, they nevertheless

also consented to the normalcy of peaceful relations with the unbelievers. Hence the Mallekite Al-awzai declared: "**peaceful relations with the unbelievers are legal**,⁽¹⁸⁾ the prophet has concluded peace with them without requiring a poll tax "jizya". He goes even further and asserts from a Hadith related to Abi-al-Abbas, that the prophet has conceived of a lasting and permanent peace with the Byzantiniens." Abu Hanifa also agreed on this, as well as Shafii, who however objected in regard to the duration of peace⁽¹⁹⁾.

This however is not intended to deny the fact that orthodox siyyarists have generally over-emphasized the fighting spirit of the Islamic community, or, by opposition, that they have neglected and reduced the notion of "**Dar el-sulh**" to a strict type of peace treaty-territory as opposed to territory conquered by force: (**Bilad El-unwa**). It is short sighted to believe that the Muslims alone (out of the blue) determined the kind of relationship that was prevailing then. Romans and Greeks before them, had held similar if not worse visions.

2.The Doctrine of Jihad. It is probably in regard to the **El-jihad** notion, more than to any other, that western prejudice vis-a-vis the Arabo-Islamic community reaches its fit. **El jihad** has become for western media an Islamic cry for the destruction of the western world and its civilization⁽²⁰⁾, and here again, western scholars share a good deal of responsibility in propagating and perpetuating old prejudices and stereotyped consumptive images. "**Jihad**" according to Khadduri, is the litigation between Islam and polytheism, i.e. a permanent war against unbelievers to be carried out by a continuous process, political and psychological, if not strictly military.⁽²¹⁾ He quotes the sword verse from the Koran, stressing "**slay the polytheists wherever you find them**" and

the Hadith; **"fight polytheists until they say: there is no god but God"**, Hence, leaving the reader with the impression that Muslim jurists reached a consensus on **"Jihad"** as an all-out permanent war through which Islam is to be forced on the whole of humanity. This is in fact far from being the case. Khadduri then goes on to show that there exist other more subtle meanings of "jihad". Yet, one wonders of what use could these latter subtleties be to the reader ;once you have incrustated upon his mind that syndrome-like image of the Islamic War? Although the author in question has devoted most of his work and energy to the classical Islamic legal tradition, he has failed to grasp its fineness and keen sense of detail. His enquiries vast as they are, will hence remain as those of a passer-by.

El-Jihad: which comes from **"Jahada"** which means to exercise, is defined legally as the exertion of one's effort and ability towards the achievement of that which is good by means of heart, tongue, hand or otherwise.(22) Only Jihad by hand is taken to mean - military activity. As such, it is a communal duty taken in charge by the head of state. There is a quiet distinction in Islamic tradition between El-Jihad "El-akbar" the great which consists in fighting against the corruptive instincts which incite the soul towards evil, and "El-Jihad El-asghar" (the little) which means participation in warfare. Al Bukhari and Muslim reported a Hadith whereby the prophet has replied to a man who wanted to join his troops for battle: "are your parents alive?" The man said ":Yes". Then the prophet urged him to go and strive for them and provide them with their needs(23). Hence El-jihad al akbar is much more important since it is an individual duty. Every muslim is required to act with all his power and ability in order to enforce the good and fight the evil. (El amr bi el marouf na nahy ani el monkar).

From this same meaning comes also the term "**Ijtihad**" - which is a derivation of jihad and refers to intellectual prowess in the path of virtue.

Orthodox siyyarists generally distinguish four types of military jihad:

- 1) Jihad in the path of god (Holy War - bellum justum)
- 2) Jihad against apostacy (converts to non-islamic belief)
- 3) Jihad against dissenters (el Bughat).
- 4) Jihad against rebels and highway pirates and robbers.

Hamiddulah has divided Jihad into four types :defensive, sympathetic, punitive, idealist⁽²⁴⁾. Ibn Khaldun before him has also distinguished four types. Jihad in the path of god; - tribal warfare; Feuds and raids; War against dissenters. Only the first and last types he considered as lawful because they are carried on with the intent of serving God⁽²⁵⁾. It is true that war against dissenters (last type) is often carried on with the intent of serving the regime rather than God and Ibn Khaldun knows that but he endorses the siyyarists stand on this issue in order to prevent the Islamic society from trial "**fitna**" and we will see why, further on⁽²⁶⁾.

The question that should be addressed now is why? since Islamic war "**jihad**" has different meanings, it has come to us persistently as military conquest. This question requires a tremendous amount of deconstruction on the classical siyyarist legal conception as well as on the modern positive one because both suffer heavily from formal legal absolutism⁽²⁷⁾ and that is what we intend to do next, but first, let us review what contemporary islamic legal doctrine has to say about the Islamic conception of International Law.

Section One: Contemporary Islamic doctrine and International Law

After World War II, with the establishment of the United Nations, the first wave of Muslim states entered the world scene. Muslim lawyers, as a result, attempted a reformulation of the classical siyyarist doctrine in the light of the prevailing new order.

In 1945, Hamidullah published his second edition of "the Muslim conduct of state", whereby he emphasised the following: **"there are two methods to deal with Islamic International Law. First, to treat it ^{as} a dead body: experts as well as amateurs indulge in anatomical operations and dissections, that is, the fate of our subject generally in the West. The second method is to treat it as a living organism. I have tried to do that to the best of my humble capacities."**(28)

Hamidullah reasserted the basic tenets of the siyyarists urging here and there for a more rigorous understanding of Islam whose contribution to the development of international law and to the humanizing of the internal community is noteworthy. Islamic ethical ideals such as: tolerance, justice and equity are emphasized quoting the Koran: **"we have sent thee (O'Mohammed) save as a mercy for all nations"**. The author devoted many parts of his work to peaceful relations, neutrality, etc with the open aim of making Islam acceptable to the Western world.(29)

In 1966, a Lebanese muslim lawyer gave a course at the Hague Academy under the title "the Principles of International Law in the

Light of Islamic Doctrine". Mahmassani opens his course stating that the meaning of the term: Islam is peace and he goes on all along to further show that Islamic Law is nothing but peace.(30)

Almost during the same period of time, in Egypt, Cheikh M. Abu Zohra published his treatise on "International relations and Islam" in which he confirmed the Siyyarist doctrine and declared it to be totally compatible with positive International Law. Jihad argued the Cheickh should not be understood as offensive war but rather as defensive. This latter point is backed with Lenient Koranic verses and Hadiths.(31)

El Ghunaimi's thesis brings a modernist tune like that of the liberal , but his argument is much more muscular. He starts by declaring that "Siyar" is but a doctrinal exertion, not a rule of the Sharia. The legal opinions derived from the "Siyar" are interpretations delivered within a historical context devoid of any binding effect on today's Islamic society.(32). Islam is much more progressive than any so-called positive ethic."Adherence to the philosophy of humanitarian International Law is in Islam, a branch of the faith and after the five basic pillars, is the sixth."(33) El Ghunaimi considers Islam's contribution to the development of International Law to be unequalled neither by Greek or Roman Laws, which could not have been the historical sources of principles which they never knew and rules which they never applied. Thus, he elaborates: "Western jurists read the history of International relations beginning with Greeks and Romans, then going to the deep slumber of the dark middle ages and waking up to the knocks of the renaissance thinking that these knocks were the work of European hands and western efforts, while in fact, some of these rules were carried out by returning crusaders and some were studied at the Universities of Spain and Italy, from where have emerged the

fathers of modern International Law(34)

The voices we have just heard are among the most prominent advocates of the contemporary Islamic legal theory in the field of International Law, ~~Alongside to~~ alongside them stands a secular current whose proponents are either non-Muslim lawyers or Muslim scholars who have graduated from western universities and who in general espouse a secular western type of reasoning and would look at 'Siyar' as Hamidullah has put it "as a dead body".(35)

An Islamic Critical Legal Theory

"THE CALL FOR IJTIHAD"

What characterises contemporary Islamic thought in general is an amazing phenomenon of contradictory attitudes in the face of which an unfamiliar western scholar would stand totally puzzled. This comes simply from that double psychological complex (superiority/inferiority) which is so typical of the contemporary Arab mind.(36) In the field of legal theory, the contemporary Arabo-Islamic lawyer finds himself trapped into a frustrating dilemma. He has no choice but to either hold to his Islamic credo as that which is irreproachable, or else, espouse a secular western type of approach and as a consequence end up dismissing the whole Siyyarist legacy as an outdated fabric. Hence, he is either emphatic and arrogant holding Islam to be far higher than western material trivialities or shy and apologetic trying his best to justify his belief.

We will attempt to play these positions one against the other all along our study in order to reach a compromising^{e a} mean between them. We will adopt neither of Hamidullah's alternatives. Hence,

we consider International Islamic Law neither as a dead body nor as a living organism. We simply attempt to view it as in a "half-half" type of situation and from there, see what can be done to revive the Islamic legal tradition and its conception of world order.

What are the results that one can derive from the study of the "Siyar" and contemporary Islamic doctrine on International Law?

First: Orthodox islamic legal theory is heavily handicapped at the historical level. The corpus Juris known as "Siyar" has remained untouched for centuries with first the famous closing of the door of "El-ijtihad" and second, the dislocation of the Islamic Community (Umma) into several principalities, and finally, the plunge of the whole muslim world into that chronic and long decay. All these factors have contributed to the preservation of the Siyar treatise, which no student has ever opened since. No wonder that they should appear today as Anachronhistic tables. Hence the need today for a critical appraisal of the "Siyar". Why on earth do we need today to know what the law says about what the horses of the Islamic cavalry should be eating: crops of corn, rye or oat? Or whether an unbeliever's slave could be purchased by a believer how, when and where?. These and similar legal trivialities should simply be thrown out. Alongside there are Siyyarist rules which need to be more elaborated, for instance, rules showing good manners in dealing with foreigners, promoting neighbourhood and friendship etc.....

Second: Contemporary Islamic legal theory in the field of international law suffers heavily from the "Siyyarist legacy" and requires a serious revision of its failing methodology gnawed by zealous legalism, sterile imitation (Taqlid) and "Bricolage", i.e.

piecing together antagonistic rules (Talfiq). Muslim lawyers are requested nowadays to surmount the dialectic of negation and strive for a critical method in order to snatch the "sharia" Islamic Law from the hands of those politicians and their false turbans⁽³⁷⁾, whose art consists in piecing together contradictory norms in order to maintain a facade of concordance and disguise the "mess" inside. That way the Pseudo-doctors treat themselves and their masters to a tranquil consciousness.

The task is enormous and requires at first hand, the elaboration of an Islamic critical legal theory and the conception of a rigorous methodology with which to proceed at the deconstruction of the prevailing system and accomplish the following:

- A. Definition of Islam, Islamic Law and Ijtihad: exertion of intellectual effort in order to provide theoretical and doctrinal guidance.
- B. Definition of the Arabo-Islamic national legal order (Nationalism) and its intimate connection with the International order.
- C. The elaboration of a universal pragmatism so as to enhance dialogue, communicative action and reach a genuine universalisation of the rules of International Law.

Before indulging in these issues, let us first examine the doctrinal basis of the Islamic critical legal theory. The attempt to demythologise legal doctrine goes back to "Ibn Taymiyya" who as we have seen has fought against heresies both in the form of legal conservatism as well as enlightened rationalism. He was the first to elaborate a legal policy⁽³⁸⁾ "Essiyyassa Echariyya"

Ibn el Qiyyam (EL-JAWZIA) is Ibn taymiyya's disciple. He

continued the work of his teacher and argued strongly for a genuine understanding of the sharia, the rules of which are not immutable commandments but simply changeable guidelines which have no other aim but to serve human beings in the best possible way.(39) He is accredited with a generous definition of the Sharia as: that which seeks to bring out the best of man and serves him well. Hence, whatever means leads to that is Sharia's own and whatever lead men to the opposite are not. Sharia is all about justice and mercy - it is indeed God's mercy.(40)

sha'ttibi(41) : sha'ttibi could well be considered as the founder of the Islamic analytical school of jurisprudence. Four centuries before Montesquieu he elaborated his theory - sur l'esprit des lois. "Maqassid Echaria" - in his work "El-Muwa'faqat"- (concordances) in which he advocates a new method for a better understanding of Islamic Law and a more sober realization of its intent, incarnated in the accomplishment of noble virtues (**Makarim el-Akhlaq**). sha'ttibi argues that the aim of Islamic Law (Sharia) is the fulfilment of social life and its preservation. This requires the satisfaction of the following:

- 1) Basic necessities: there are five such necessities: religion, human life; prosperity ; property; sanity. These are prerequisites to social life.
- 2) Basic needs:institutional and social means to fullfil biological and natural needs such as food,schelter, etc
- 3) Ornaments (Tahssinat): refinements and good manners sought by wise and rational people. (Makarim el-Akhlaq)

These, then, are the hierarchical priorities which Law's task is to regulate and organize in such a way as to ensure order, social harmony and stability.(42) sha'ttibi distinguishes among legal

rules two categories: **"El-Kulliyyate"** general rules and **"El-Juz'iyate"** secondary rules or rules of detail. The first rules stand as "oughts" to which the second (is) comply. It is the jurist's task to preserve harmony between the two through (Ijtihad). Here sha'ttibi provides us with a technic called (**El-Muw'ama**) meaning "harmony" and which consists in watching over the (is) so that it never goes beyond what the (ought) prescribes and at the same time, keeps an eye on the (ought) so that it does not become as a negation to the (is); in which case the (ought) is simply suspended for a while according to the rule of (**Istihsan**) juristic preference⁽⁴³⁾.

To apply his theory on (**Makassid Echaria**) Esha'ttibi relies heavily on legal notions and technics such as: **"El-maslaha el-amma"**, public utility; **"sadd Edara'ih"**, fulfilment of legal lacuna, **"Dar'i el mafassid"** repudiation of harms, abuse of authority and **"Istihsan"**. With a combination of these legal tools, Esh'attibi reaches a sound analytical insight in the depth of Islamic Law and concludes by stating that the Sharia's aim is to serve the human being and brings out the best of him.⁽⁴⁴⁾

It is our intent to apply sha'ttibi's technique of (Muw'ama) conciliatory communicative action to the Islamic understanding of International Law and contribute as much as possible to the reproachment of Islamic legal doctrine with that prevailing today at the international level. We move on now to consider the Arabo-Islamic community and its place in the international order.

Notes

- (1) Ibn Hisham -opcit.
- (2) Sarakhsi shams Al-din M b. Ahmed. Kitabel Mabsut. Vol. X (P.2)Cairo 1906.
- (3) Hamidullah (1943) (p. 10) " Muslim conduct of state" Lahore.
- (4) Opcit, (p. 68)
- (5) K. Cragg, The House of Islam, California, 1969, (p.2.)
- (6) Hamidullah, opcit.
- (7) Among others: Sharh Essiyar El Kabir - Sarakhsi - 4 Vol. Hyderabad, 1916
 - Echafii. Kitab El um (Vol. 3) Cairo 1961, also (Errissala) Cairo, 1938
 - Kitab Ikhtilaf El Fugaha, ed. J. Schacht, 1933.
 - El Bokharri, Vol. II - El Muatta, Malek (p. 296). Ettermidhi (1915) (p. 292)
 - Abu Yousef, Kitab el Kharaj. Beirut (p. 191).
- (8) J. Schacht, " The legacy of Islam", 1nd edition, Oxford, 1974 (p. 396)
- (9) A.J. Anderson, "Islamic Law in the Modern World", London, 1959 (p.97)
- (10) A. Hourani, "Europe and the Middle East". London 1980. (p.14)
- (11) M. Assad," The principle of state and government in Islam",
Berkeley,1961(p. 98).
- (12) Khadduri (1966), (p. 12) " The Islamic Law of Nations . John Hopkin Press.
- (13) Opcit, (p.5)
- (14) Opcit (p. 19)
- (15) Which N.J. Coulson describes as follows: "A tree, whose network of branches and twigs stems from the same trunk and roots; a sea, formed by the merging waters of different rivers; a variety of threads, woven into a single garment; even the interlaced holes of a fishing net". "A History of Islamic Law",
Edinburgh, 1964 (p.86)
- (16) Koran
- (17) Armand Abel: "La convention de Nedjran et le developpement du droit des gens dans l'islam classique".Revue Int. Du Droite de l'antiquite,
Bruxelles 1949/2(pp.1. 20).
- (18) Tabari, Kitab, Ikhtilaf El Fugaha (opcit) p. 19)
- (19) Opcit, (p. 15)
- (20) R. Nixon, "Superpower Summitry "- Foreign Affairs Review, Fall 1985 (p. 8)
- (21) Khadduri (1966) (p. 16) Khadduri: has softened his view a little in his "war and peace in Islam"(1979) yet on the whole, his view of Islam remains biased. See his latest, "the Islamic Conception of Justice" (1984) which is according to him, flawed and lacks uniformity and consistency (p. 432) Baltimore.
- (22) Hadith noted in Al-Bokharri wa muslim. See Hamidullah (p. 168)
- (23) Hamidullah , opcit.
- (24) Opcit.
- (25) Ibn Khaldun (p. 74) Vol. II.
- (26) Supra. chapitre,iv
- (27) For modern forms of legal absolutism,see chapitre,v. infra.
- (28) Hamidullah (1943) Preface
- (29) Opcit, parts I and IV.

- (30) S. Mahmassani, *The Principles of International Law in the Light of Islamic Doctrine*. RCADI, 1966, I. 117, ed. Sijthoff leyden, 1967.
- (31) M. Abu Zuhra, "El-alakat Eddawliyya Fi al-Islam", Cairo, 1964 (p. 47)
- (32) M.T. El Ghunaimi, *Al Ahkam El Amma Fi Kanun el ummam* (General Principles in the Law of Nation). Alexandria, 1971 (p. 45), See also, "The Muslim Conception of International Law and the Western Approach". Hague, M. Nijhoff, 1968.
- (33) El-Ghunaimi. First Egyptian Seminar on International Humanitarian Law. Cairo, November 1982. A general review of humanitarian Int. Law in Islam ed. Egyptian society of Int. Law. p.47
- (34) Ibid. (p. 48)
- (35) Such is the position of scholars like: Boutross Ghali, Shafii Med. Bachir, or those of the Maghrebin School such as A. Mahiou, Benouna, etc. See our Chapter, iii, *supra*
- (36) Raphael Patai, "The Arab Mind". New York, 1973 (p. 201).
- (37) M. Abdul once said in a poetic verse: I do not mind being called a heretic, all I care about is to save Islam from those who though wearing turbans are harming Islam.
- (38) Ibn Taymiyya, Chapter I, *infra*.
- (39) Ibn el qiyam, "i'lam el Muaki'in an Rabi el alamin". [Rule in regard to the validity of juristic doctrine] ed T.A. Saoud Beirut.
- (40) Ibn El qiyam, *ibid*, (p. 372) Vol. IV.
- (41) Abu Ishaq Ibrahim abu Mussa from the city of El-Sha'ttiba (Spain) died in the year (790 hijra) Author and Malekite Judge. Among his works are: "El-Muwa'faqat", ed. A. Draz. IV Volumes. Cairo. "El-itissam", two volumes. etc
- (42) Sha'ttibi, *El-Muwa'faqat*, Vol. IV (p. 194).
- (43) *Ibid*, (p. 11) Vol. II.
- (44) Sha'ttibi's analysis of the intent of rules which he calls (El-ma'al) that to which the rule is destined. Has given birth to a contemporary current attempting to continue his endeavour, among others, are T. Ben Achour in Tunisia and Allah El Fassi in Morocco who has written "Maqassid Echaria wa Makarimuha". Casablanca, 1963.

Section Two: The Arabo-Islamic Order

Facing the challenges

The Muslim world spans half of the globe. It reaches from Morocco to the mountains of Afghanistan; from the Muslim enclaves of South-Eastern Europe to the African sub-sahara. It constitutes one fourth of the world population.

The Arabs, are the heart of this Muslim world, assembled in a regional organization : The Arab League (22 nation-states). The Arab world has through Islam reached its highest level of development. It has remained a prosperous entity for centuries.

The Arabo-Islamic expression is a two-words phrase, ressembling "Arab", which is a racial and linguistic epithet attributed to the semitic inhabitants of the Arabian Peninsula, and "Islamic" derived from the religion of Islam. The expression would need no further comments were it not due to the misuse that has raised confusion around it. Scholars and students alike have come to use this combined expression without any advanced alertness to the various connotations that it purports. ~~over~~

The Arabs are the people who have received the religion of Islam through the Prophet Mohammed (PBUH). Islam has brought the Arabs together. Through it, the Arabs have founded their empire and have reached the highest levels of civilization. With the Arab conquests, Islam has spread to cover areas ⁱⁿunhabited by non-Arabs such as : Iran, Turkey, Pakistan and North-Africa, etc... The Arabo-Muslims have emigrated to these areas in large numbers as in the case of North-Africa and have Arabized it. Yet, countries such as

Iran, Turkey, Pakistan, Afghanistan, etc... have remained non-Arabized though they have espoused Islam. Hence, they are parts of the "**Dar el-Islam**" i.e. the Islamic "Umma".

So, the meaning today of the expression "Arabo-Islamic" is intended to refer to the original Arabs as well as to the people who have been Arabized such as the Berbers of North-Africa, and who today constitute the arab-world, but there is in here a small problem because not all the arabs are Muslims. Indeed a small minority of arabs who were living along the borders of the Byzantinian and Sassanid empires had converted to Christianity^{ty} and other religions and have remained citizens of the Islamic "Umma" under the statut of "Ahl-Edhimma".

When in the begin^wing of this century, nationalism born in Europe has spread through colonial contact to the Arabo-Islamic world and has given birth to the Arab Nationalist movement "Pan-Arabism," the non-Muslim Arabs played a leading role in propagating and reinforcing the Pan-Arabist movement so as to secure a better position within the Arabo-Muslim society. This is today admitted even by harsh critics of Islam such as B. Lewis⁽¹⁾.

In the Arabo-Islamic world there has been since a polemical debate between Pro-Arabs and Pro-Muslims on which should be prior to which; "Uruba" Arabhood or Islam. In my opinion, the Arabs without Islam are as much a nonsense as Islam without the Arabs would be. Both are tied together to the extent that one is a synonym of the other..

Right now and before evaluating the position of the Arabo-Islamic world at the international level, I believe it is necessary to examine the issues of Nationalism and Arab Unity which are indeed at the heart of Arab political life.

I. The Arab National Legal Order

Among those who have theorized about Nationalism, one can distinguish Gellner's book and E. Haas's article as two of the most elaborated theoretical attempts on the phenomenon of Nationalism.

Gellner, considers Nationalism to be the historical outcome of the process of rationalization in the weberian sense. Rationalism he tells us⁽²⁾, is vested in the capitalist division of labor, the history of mankind has gone, according to Gellner, through three different stages: (Pre-Agrarian, Agrarian, and Industrial). Mankind accordingly is somehow condemned to industrialization and as a consequence to nationalism. Gellner affirms, unlike E. Khedouri, another student of nationalism⁽³⁾, that the phenomenon of nationalism does not impose homogeneity; it is rather, homogeneity which is imposed by objective and inescapable imperatives which appear on the surface in the form of nationalism⁽⁴⁾.

With nationalism, says Gellner, human society enters the age of high culture when men communicate by means of written impersonal context-free expressions such as : to whom it may concern; types etc...⁽⁵⁾ Gellner offers a typology of nationalism; four possibilities each with two sub-alternatives but does not quite succeed in backing them with historical evidence.

E. Haas, for his part, though mainly endorsing Gellner's thesis, sees in nationalism a convergence of political and territorial loyalties which he sums up as a civil religion⁽⁶⁾. Like Gellner, he tries to elaborate a typology, seven types divided between revolutionary and syncretist ideologies. Yet his scheme is as vague as Gellner's.

We have in the earlier part of this study shown, how the rationalization process has been brought about in Europe. The Middle-East has not experienced a similar process. Hence, Nationalism in there was introduced in a "**Prussian**" manner, that is , it entered there as a conqueror and was imposed on the indigenous socio-political structure.

The colonial era reinforced the nationalist creed and forced the tribal segmentary indigenous structure to adapt itself to the nationalist imperative. Hence, Nationalism in the Arabo-Islamic world has not come as a result of a new division of labor but was more or less a reaction to colonialism championed by christian Arabs and connoted with anti-Ottoman feelings. There is no need in here to go over the endless debate between El-Hussari and his opponents⁽⁷⁾. What we believe is of interest, is the examination of the socio-political impact of the idea of the modern nation-state on Arab political life. This is at the heart of today's Arab political discourse⁽⁸⁾.

After the glorious era of Pan-Arabism, comes today the reign of what an Arabo-Muslim scholar has labelled "**little nationalism**"⁽⁹⁾. Arab politics have, since earliest times, been characterized by an ambivalent dual character stemming, as we have already seen, from the globality of the Islamic religion where the religious and the political are integrated.

To this indigenous double nature, modern times have added a third component, that of modernity which in political terms is translated into nationalism. Hence, Arab politics have come today, to a noticeable tri-dimensional constituency where by Nationalism,

Arab Unity and revolution stand side by side in a dialectical relationship(10).

Laroui in his "**Contemporary Arab Ideology**" has divided the historical evolution of the Arab political structure into three stages : (Colonial - liberal - national). He has extracted from this division, a triple Arab political personality represented by the politician, the clerk and the technocrat, this triple constituency could well be said to represent an Arabo-Islamic cultural affinity(11).

The issue facing Arab political life today is how to dissolve these three constituents of Arab political life into a harmonious one. The national stage being, the latest historical stage of Arab political consciousness, is looked upon as the promising stage where such a reconstitution could be carried out successfully. Yet, as Laroui has noticed, it is not at all working that way, the national state is in fact doing the opposite. "It is imposing by force on its citizens a technical reason which to say the least is alien to them and while imposing it, the national state keeps criticizing the mutilations which this same technical reason, is said to have caused over the western citizen"(12).

The Arab national state develops, hence, a paradoxical attitude. On one hand it advocates a certain policy while on the other hand it practices its opposite. It champions authenticity in discourse and seeks modernity in practice.

How is all this "mess" translated into the "**Juridico-political**" jargon ? In most cases, it is presented in a Mozaic theo-secular formulation(13), whereby the national constitution

would read in its article number one; that the state is a secular one, in its number two, that Islam is the official religion of the state and in its article number three, that the national state is an integral part of the indivisible Arabo-Islamic "Umma"⁽¹⁴⁾.

In all three forms cited above, the Arab state embodies an alien western conception and remains an artificial "mimicry", that is why the Arab state, no matter what form it chooses and despite its permanently declared 99% popular adhesion, will always remain far away from the Arab masses to the extent, that it is today widely depicted by these masses as the funny state of "MICKEY"⁽¹⁵⁾.

II. The Arab State & Legitimacy

Legitimacy has become today a vital issue in the entire world, every national state must stand the test of legitimacy in order to gain recognition as a genuine representative of its people.

The Arab state has a serious weakness in that respect. We have already talked about the Divorce which separates the state and the community in the Arab society. Let us look now at the prevailing form of legitimacy in the Arab world today, that known as " **De facto legitimacy**" which rests on the hazardous and expedient device of "**Pourvu que ca dure**".

Theorists consent that in order to be legitimate, a state has to fulfill certain basic conditions which are⁽¹⁶⁾ :

- 1) a consensus about national identity,
- 2) a consensus about national territory,
- 3) a consensus about national priorities.

These~~s~~ are among the essential conditions that a state should meet in order that the ruled accept the rightness of the ruler's power; none of these is met by the Arab state. At the level of identity, nationalism is in a continuous and everlasting conflict with ethnic~~al~~ and religious factors. At the level of territoriality, the colonial legacy, is the more visible source causing here and there fratricide wars of frontiers. Finally, at the level of national priorities, the situation is worse, since the race of power crystallizes every single political force and mobilizes it for a day-to-day survival.

M. Weber, has defined three types of legitimation processes⁽¹⁷⁾ : (traditional - charismatic - rational). When this Weberian typology is applied to Arab politics, one sees clearly that the traditional and rational legitimacies compete fiercely against each other, while the charismatic legitimacy plays the role of the referee who, depending on the historico-political context, would side sometimes with the traditionalist, some other times with the rationalists; (Feisal v Nasser). Hence, though marginalized, the Charismatic type, remains very important in Arab politics to the extent that some observers would impute the actual Arab political crisis to a lack of charisma.

There is however, an element which, though often neglected, is determinant and confers on the Arab political regime in general a legitimacy of its own through the ensurance of political stability. Indeed, despite its artificial character, the Arab state has gained after a short period of political instability, a certain regularity and political continuity which in fact many third world states might envy.⁽¹⁸⁾ This relative stability is reflected today through the prevailing legitimating process or what may be called "**De facto**

legitimacy" This is due to the stability of the Islamic political structures. Islam, as we have seen is a globalistic ethic which provides enough room for the coalition of the political forces in the society. Hence, Islam is ideologically suitable for the Arab regime notwithstanding the political *"e tiquette"* which it chooses; republic, monarchy..etc..Ali Merad has particularly emphasized this feature. He has noted that the most important constant in Arab ideological discourse is the reference to Islam⁽¹⁹⁾. In each case, the regime tends to exhaust the Islamic argument which corresponds with its policy and goals. In the so-called traditional regimes, emphasis is placed on the values of piety and religious fervor, while in the revolutionary ones, emphasis is put on social values such as social justice, equity,etc... which provide legitimacy to the regime.

So, there is the Arab regime, playing social forces one against the other and striving hard to maintain a workable balance between the heterogenous social demands. It is important to keep in mind that the contemporary Arab regime when criticised on the ground of legitimacy by its opponents is often criticised with reference to the *"sacro-sainte"* western notion of constitutional legitimacy. Very seldom, have we noticed, . . . critics of the Arab regime show any consideration for the *"De facto legitimacy"* which despite all what could be said, remains the dominant form. The Arab regime centralizes *"Legitimate Violence"* for the sake of political stability as a compromise and as a transitory stage to a more democratical political form.

At the moment, no other option seems available. The Arab political opposition directed from outside, to the regime in place carries in most cases a personal touch and reflects tactical rivalries, rather than substantial political policies. That is why M.

Hudson believes that opposition leaders may be right, in labeling the incumbents as despotic rulers, but certainly wrong in ascribing their behavior to innate human evil because placed in the same position they invariably would do the same thing⁽²⁰⁾. This also explains in part the Arab popular resentment about political changes in leadership "El Haj Moussa" or "Moussa El Haj"; does not make much difference.

Classical doctors such as El Ghazali, Ibn Djamaa, etc... have legalized the "De facto legitimacy" not, as often assumed because of conservatism or an alleged political opportunism but simply because there was no other option available to them and that in order to avoid anarchy and chaos (El Fitna wa el mihna) they had to submit to the reality and legalize the existing authority rather than stick to a formal legalism which in any case was not going to be met anyway.⁽²¹⁾

In that sense, one may, as does Laroui⁽²²⁾, speak of an enlightened "Arab despotism" which today strives hard to reach an ambiguous and untractable legitimacy. Among the sources of Arab's state legitimacy, S.E. Ibrahim ⁽²³⁾ lists five. These are:

- 1) legitimacy by default (de facto legitimacy)
- 2) oppression.
- 3) effective problem solving.
- 4) dream selling.
- 5) crisis politics.

Nobody would deny that (1,2,4,5) are the most frequent means through which the contemporary Arab regime strives to achieve its legitimacy ⁽²⁴⁾. Yet one should not deny also that option number three is becoming more and more attractive (thanks

to oil money). Indeed, it would be vain to ignore the tremendous efforts deployed by some Arab states in that direction with the hope that by doing so they would succeed in securing popular adhesion and legitimacy. Hence, "every Arab regime seems to suggest to its citizens in a thousand and one ways that they are much better off with the present regime and that things would never be better, which implies that any consideration of a probable political alternative amounts to courting a calamity". This type of **"Legitimacy of currencies"**(25) is however on the verge of collapse. The golden age of oil has begun its withdrawal and the Arab regime will very soon face legitimacy single-handed.

Genuine legitimacy is not something which can be purchased, nor is it something which bears the ruler's stamp. A power is legitimate authority when it stands on a reciprocal communicative relationship between the rulers and the ruled. Power gains legitimacy only when through the vigour of its sociability ^{it} reaches the people's concern and not ^{when} by brutal force; ^{it} silences them.

III. Arab unity

Whenever an Arab meets his fellow from other Arab countries, they both start emphasizing how they are so closed brothers and criticising the failure of their respective governments to translate their brotherhood into political unification.

Hence, Arab unity is the theme of Arab discourse at all levels. Every six months or so, we hear about some Arab attempts toward political unification which of course ends in total failure. It has become almost a rule that when Arab unity is proclaimed solemnly between two countries ^{it} means that it is forgotten all about. Western journalists and orientalist enjoy this versatility in Arab politics,

they seldom miss the opportunity to make fun of it.

The traditional emotional approach to Arab unity has today retreated behind political pragmatism. There is no more question of hazardous political involvement; instead, our enlightened monarchs and supreme guides, under the inspiration of their foreign advisers, talk more today about "**scientific political unity**", that is, regional economic integration. Now that we have a respectable model "**C.E.E**", we are going to seek a viable regional integration of small geographical units as a first step toward the big historical project i.e. Arabo-Islamic unity.

Meanwhile, we are going to unify the Arab Emirates under the auspices of S. Arabia. The brothers enemies, Irak and Syria, the Nil Valley, Egypt and Sudan, and finally the Maghrib.

In order to prepare Arab people for the big historical project, our "**supreme guides and enlightened monarchs**" are going each on his own to start a campaign for Arab unity. So, they rule their respective population with an iron hand, fortify their frontiers and prevent Arab citizens from moving around in their so-called homeland and from meeting each other. Very often, they will start fighting each other and use their "**state apparatus**" to encourage their population to hate the neighbours. This is how Arab unity is prepared and it is no wonder that the Arab masses are fed up with it.

It has also become one of our features to talk much without achieving none. You can hear this cry from the Gulf⁽²⁶⁾ to the Atlantic,⁽²⁷⁾ that we have developed a complex of verbalism. Do we talk really too much? or are we at the opposite; what a scholar has labelled as "silent societies"?⁽²⁸⁾

There is a certain dichotomy in Arab politics between nationalism and Arab unity. It is of course wrong to assume that there are two distinct political forces; one in favour of the nation-state and the other in favour of Arab unity. It is one and the same political force which changes its order of priorities and hence, appears sometimes as pro-national, some other times as pro-unity. Following the Marxist dictum that one has to be nationalist in order to be a good internationalist, Our bureaucrats shift their sympathy from one issue to the other depending on the political context. That is why the so-called "enemies" of Arab unity are so hard to find and identify. Those who pass for one moment as the champion of Arab unity ~~are~~ those same persons, who a moment later would do their best to block any genuine move toward its implementation. They are the first to use the slogan and also the first to obstruct its coming into being.(29) While the slogan of Arab unity enhances their national position and acquires them some political prestige, Any serious implementation of unity is a risk to that prestigious national position. As a scholar has observed :**"if the political decision about Arab unity is an easy target to seek, it is all together another matter to seek the implementation of that decision"** Hence, he concludes that **"The future of the Arab world depends much more on Arab bureaucracy than on its alleged leaders"**(30). In reality, notes another scholars :**"It is an illusion to believe that Arab unity is going to be achieved by Arab people, equal to that other illusion which sees unity as the fruit of governments' arrangements and meetings. In order that the Arab unity succeeds, both are necessary and their co-operation and complementarity is required. leaders as well as people should strive together for Arab unity"**(31).

Djamel Abdennasser has come close, "certainly the closest in recent history" to the achievement of Arab unity. His charisma has allowed him to cristalize the Arabo-Islamic aspiration to unity and though he has failed to bring the ideal to reality, Nobody could contest the fact that he had done much for an Arab political consiousness. There are sound reproaches to his **"pan-Arabism Dream"**; he has certainly played the Arab card in a bad way. His theory of circles has given priority to the arab circle vis-a-vis the Islamic one and that I believe was his mistake. There are of course, historical and political factors which explains his political option : the emergence of socialism in the Arab world and **"Hizb el Baath"** as well as the incarnation of Islam by the Arab reactionary regimes etc...,

All in all, Djamel has failed to seize the Arabo-Islamic reality in its globality and was traped in the internal **"Arab v Islam"** dichotomy of that time. In his later days Djamel realized his error. Standing before the **"Kaaba"** he thus declared: **"I now fully realised the need for a greater Islamic Unity which will ensure power to the Islamic community"**(32).

Notes

- (1) B. Lewis, "The return Of Islam", in "Religion & Politics In The Middle-East", by M. Curtis, Colorado - 1981, p. 18
- (2) E. Gellner, "Nations & Nationalism", basil blackwell, London - 1983, p. 34
- (3) E. Kheddouri, "Nationalism", Hutchinson, London - 1960[Kheddouri's analysis is much richer in historical and philosophical insights but less articulated as a theory of nationalism. One can also mention F. Hinsley excellent study on the phenomena of nationalism in European history.]
- (4) Gellner, opcit - p. 39

- (5) Gellner, *opcit* - p. 45
- (6) E. Haas, "What is Nationalism ?", *Int. org. Review I.O.* summer 86, Vol. 40, No 3, p. 709
- (7) S.G. el Hussari, "Ara' wa Ahadith Fi El Watania Wa El Qawmiyya", Cairo - 1944, pp. 88 - 98[views and addresses on Patriotism & Nationalism : this was a reply to a question put to him by H. Zayyat on Arab dissension]- El Hussari criticized Ibn Khaldun's view on Arabs as anti-Arab.see his article : is dissension an Arab feature, *Dowha Review* No 118, Oct. 1985, Emirats
- (8) see in this respect :
 - * in Algeria : the writings of M. Kacem N.B.Unionist Ideologies & The Nation State, *Attkafa review* No 92, Avril 1986
 - * in Tunisia, the debate between H. Djait & R. Benslama, see also "identite culturelle et conscience nationale en Tunisie", *Actes du colloque de Tunis*, ed:CERES.1974.
 - *In Morocco, the debate on the review "Lam'Alif".see also Med El-Djabiri,"El-Assabiyya wa dawla"Dar el beida 1979.
 - *In Egypt one could refer to the theory of the three circles(Nationalism-Arab unity-Islamic umma)as it has been elaborated by Sheikh Hassan El Banna(founder ofthe Muslim Brotherhood movement)or by J.Abdennasser in his"Philosophy of revolution."or else,in the recent works of Anouar Abdelmalek, *supra*.
- (9) El Baki el Hermassi, in contemporary North-Africa, ed. H. Barakat, "States & Regimes In The Maghrib", Croom Helm, 1985, p. 157
- (10) This tri-dimensional feature has been emphasized particularly by :
 - * El baki el Hermassi, "Leadership & National Development In North-Africa", Berkeley -1972, who distinguishes three ideological perspectives : National scriptural, liberal and radical.
 - * Anouar Abdelmalek, "La Pense'e Politique Arabe Contemporaine", ed. Le Seuil, 1972
who distinguishes two main currents : Islamic Fundamentalist, Liberal Modernist. With each various sub-groups.
 - * Kamel S. Abu Djaber, "Political Trends In The Middle-East" in : "Governments & Politics of the Middle-East", ed. Tarek Y. Ismael, Dorsey Press, 1970who lists : Islamic Reformism (1880 - 1918), Nationalist Liberal (until 1948) and Nationalist Socialist (from 1948).
 - * C.H. Moore, "Politics in North-Africa", little brown, Boston, 1966,who talks about three "modes" moments of political consciousness : liberal assimilationist, traditional anti-colonialist and radical revolution
 - * one could also mention :M. Camau, "Pouvoir et Institutions Au Maghreb", where most of these thesis are discussed. CERES, Tunnis, 1978
- (11) A. Laroui, "L'ideologie Arabe Contemporaine", Maspero - 1977, p. 19
- (12) Laroui. *opcit* - p. 130
- (13) the feature is derived from the Arabo-Islamic heritage. It is present in the Koran : The Pharaon, Qarun, Moise. And is almost present in every historical stage of the Arabo-Islamic society (Harun Rachid, Djaffar el Barmaki, el Kadi Abu Youcef, etc...) Ali Shariati refers to it (see *supra*), (Note 27).
- (14) see for example, Saadi Djamina, *La Charte National : Analyse De Discours*, OPU, ed : 1985, p. 265 , or ,
Abdelfatah Amor, "Arab States Constitutions & the Notion Of El Umma", Arabica

Review No 30, 1983, pp. 267 - 287

- (15) This mockery is widely spread in Arab countries, it is particularly noticeable in the popular political discourse in the Maghrib.
- (16) M. Hudson, "Arab Politics : The search For Legitimacy", Yale Uni. Press, 1977
- (17) Max Weber, "Legitimacy Politics & the State", in W. Connolly, "Legitimation & The State", Basil Blackwell, London - 1984, p. 37
- (18) the feature is noted by A. Laroui in "Arab and American Cultures"
ed : G.N.Atiyeh, Washington, 1969
- (19) Ali Merad, "The ideologisation of islam in Contemporary Muslim World" in,
"Islam and Power" ed : Kudsi-Dessouki, Croom Helm, London, 1981.p.37
- (20) M. Hudson, opcit - (p. 403)
- (21) See for instance the view of M. Kerr, "Islamic Reform", Cambridge - 1966
- (22) Laroui, opcit - (Chp. I, Infra)
- (23) S.E. Ibrahim, "The new Arab Social Order", Croomhelm, London - 1982, p.
- (24) T. Ben Jelloun, "Le Degre Zero De La Democratie". Le Monde, 11 Sept. 78.
- (25) S.E. Ibrahim, opcit.
- (26) A. Shariati, "On The Sociology of Islam" trans : H. Algar, Berkeley - 1979, p. 39
- (27) Laroui, (1977) p. 29
- (28) A. Khattibi, "The Decolognization of Arab Society" in Barakat's, "contemporary North-Africa", Ibid
- (29) B.Ghalioun, "The Idea of Maghreb Unity" Arab Studies
review no.8 June, 1986p. 20
- (30) A. Bouhouche, "La Technocratie et son Impact Sur L'Integration Dans Le Monde Arabe", R.S.J.E.P, Algiers, No 3, Sep. 1980, p. 414.
- (31) Djait.H, "La Personnalite Et Le Devenir Arabo-Islamique", ed Seuil, 1974, p.18.
- (32) Dj. Nasser, "The Philosophy of the Revolution", Cairo - pp. 67 - 68.

Section Three: THE ARABO-ISLAMIC COMMUNITY IN THE INTERNATIONAL ORDER

The Arabo-Islamic Community is ^{today} far away from reflecting that unitarian spirit dreamed of by Nasser, . . . The real question is how Arab unity is going to be achieved? This is the question that has found no answer so far.

Western scholars . . . object to our vision of Arab unity as a vague and abstract utopia. There is no doubt, that seen from a western like angle, the "Umma" is a thing of the past, irrelevant to nowadays realities. This positivistic blindness, as Morgenthau would call it, does not negate the Islamic community as such. It only tell us, that the western world does not want to hear or deal with such a united Arabo-Islamic entity because its emergency into the world scene will bring about changes within the International system that the western world will resist and fight with all its energy.

This is a basic rule in western international policy. Don't they teach in western universities that among the six rules of the balance of power theory, rule number four requires the big powers to oppose any coalition of individual actors tending to assume a position of predominance within the international system?(1)

Lawyers have objected to Kaplan's thesis about the political foundations of international law.(2) They have quoted Grotius stating: "quite untenable is the position, which has been maintained by some, that according to the law of nations, it is right to take up arms in order to weaken a growing power which, if it becomes too great, may become a

source of danger. This is abhorrent to every principle of equity. The possibility of being attacked does not confer the right to attack".(3)

Hence, legally speaking nothing opposes the coming into being of a united Arab-states (U.A.S.) as a major power in the world, yet, politically speaking this is altogether another story. Western hegemonical powers would have to outreach their strategical scheme and remodel their maps and zones of influence. That; they would do only if obliged. So, it is therefore, not exaggerated to impute the actual dilemma of the Arabo-Islamic society to external factors.

The Arabo-Islamic community has always been seen by western international lawyers as part of what they label "The Barbary powers".(4) With the treaty of Paris concluded on March 1856, between the European nations and the Ottoman state, the door to the law of the 'so-called civilized nations" was cautiously opened to the first muslim state. Since then, the integration of the Arabo-Islamic society to the world order has taken a slow path and is far from completed yet.

Badr has distinguished three different stages in the evolution of the Islamic legal international conception(5). During the age of expansion, the first century of (Hijra), the Islamic world view was an offensive one, nourishing the aim of winning the whole world over. Then, came a stage of interaction during which the Islamic world view became rather defensive and this lasted till the middle ages. Then, starting as early as the thirteenth century, an era of coexistence began with the first treaty signed between the Mameluk sultan "Al ashraf Khalil" of Egypt and Don Jaimes II (the

Just) King of Aragon on Behalf of Spanish and Portuguese kings in January (1292 AD). That treaty according to Badr ,was to seal the era of coexistence between the western and the muslim worlds.

For our part, we believe that the era of coexistence between the two worlds has not yet started. The actual period would very well fit into that second stage, which Badr has described as an era of interaction because coexistence requires both parties to recognise the right for each other to freedom and dignity, and that is far from being recognised to the Islamic world.

The Arabo-Islamic entrance into the world scene has historically taken two forms: the first, is what we may call a formal adhesion. This occurred right after World War II, when the by then few Arab states (six) joined the San Fransisco conference and adopted the United Nations platform. This was more of an absorption by the international status-quo of the Arab states rather than a genuine adhesion on their part. The United Nations' charter as Bull had remarked, was but a reformulation of the colonial legacy(6). The rather passive Arab attitude in regard to the United Nations partition plan of Palestine in 1948 is a further proof to that.

The second form of adhesion by the Arab states came later on and was a genuine and effective adhesion. It came first in the form of a law of decolonisation: "the right of people to self-determination" and was a decade later to blossom into the right to development and the need for a new International Economic order. This time, the Arabs paid a heavy price to win their place in the international stratum. They fought not only against Nazism but also against colonialism and earned their independence(7)

The formal adhesion has led someone like Khadduri to conclude hastily that "twentieth century Islam has reconciled itself with the secular international system".⁽⁸⁾ While the second effective adhesion has led to the reassertion of Islam and its emergence into the world arena as a potential destabilising force,[†] the international tension has risen to such extents that violence and terrorism have become "monnaie courante" in the mainstream of international life and this, in western public opinion, is in a way or another linked with Arabhood and Islam.

We have seen how the territorial nation of the secular "nation-state" is alien to the Arabo-Islamic culture. Arabo-Islamic lawyers as well as western lawyers have often emphasized how superficial Arab states are⁽⁹⁾ Yet, the former have had no choice but to claim for those artificial states, the right to self determination at the international level. We will see later on, how they justified their contradictory position. The point that we are trying to make clear now, is that the Arab national legal order is intimately linked to the International legal order and that unless the Arabo-Muslims secure the legitimacy of their national order, they will continue to be a major potential for destabilization at the international level.

How this is so, is obvious. Nationalism has not come as an accident in the history of the Arab world, as we have seen earlier; It has come within the broad scope of the capitalist international division of labour. The pure legal theory produced by western lawyers in the field of international law was but the logical outcome of that same process, since indeed, it proceeded to the division of the world into a multitude of territorial sovereignties. There is ample evidence also, that international lawyers relied on domestic law notions such as (property and contract) and transplanted them by analogy to the International order which in

their eyes was no more than a market for territories and sovereignties.(10) Thus, while in Europe, Nationalism has followed a sustained historical movement from within, in the rest of the world, it was externally imposed by brutal force on the indigenous culturally harmonious units such as the Arabo-Islamic one causing thereby disintegration and fragmentation.

Today's Arab rejection of that compartmentalisation at the international level and its insistence on a global approach to the solution of international problems is all the more natural. Indeed, of what help is the formal political sovereignty of Arab states if it is limited to trivial formalities such as a flag and a U.N membership? What does political freedom mean other than the ability to develop a prosperous and democratic society and to ensure a free existence to every citizen in honor and dignity? These are the concrete notions which matter in the eyes of Arab people and not the all abstract formalities which the international legal order prevailing today provides them with.

Of course, this is not meant to say that the Arabo-Islamic society rejects nationalism as a fact, for it has an internal tribal structure which allows it to absorb nationalistic trends and patterns. This however should not be confused and interpreted as a voluntarist acceptance of nationalism but rather, should be looked upon as an externally imposed fragmentation which will obstruct any genuine indigenous buildup of democracy as long as the western powers continue to cultivate hegemonical schemes and entertain political clients and elites here and there in the Arab world.

Isn't it amazing that the only Arab regime that had succeeded in gaining popular support and adhesion (Nasser's) was staunchly

fought by all western powers? While it is obvious to everyone that the more an Arab regime is totalitarian and corrupt, the more it is supported by them.

What does the Arabo-Islamic community want from the International order? Do Arabo-Muslims only seek a better place in the sun within the prevailing international hierarchy as has claimed Tucker, or do they aim at a more profound revision of that hierarchy altogether?

It is obvious, that the Arabo-Muslims are seeking a better place in the sun. What could be more normal? Yet, I believe that the long term goal of the Arabo-Islamic claim for self-determination is to open the way for a genuine mature anarchy and world order. Indeed, to seek a new world order is to forecast a global international system where multidimensional state interaction is based on a set of shared values accepted by all which would make it possible for every state to achieve its own self-determination without infringement upon the rights(11) of others .

Our insistence on a more equal international distribution of political freedom, health and power, does not stem from our envying the fate of others but simply from our basic need as human beings for justice and fairness. We want to secure our existence without threatening that of our next-door neighbor. We want all nations to work mutually in order to defeat poverty and oppression and ensure that everyone gets his due with respect to that of others. We do not seek power for the sake of power, i.e. we do not strive to replace the USA or the USSR at the security council. We want every community to dispose of its right to self-determine its political, economical and cultural being without necessarily negating that of others.

This is a realistic claim which without neglecting the overwhelming power element, strives to emancipate it. Power is not military might, has never been and will never be. Power in the legal sense is the ability to convert what is into what ought to be, achieving hence a genuine legitimacy of authority. The wife of the Abbassid Caliph El-Muta-wakil (241.H) is reported to have said to her husband, the day when she watched the all of Baghdad taking part in the funeral of Ahmed Ibn Hanbal. "that is (El-Mulk) power".(12)

The international community, argues J.R. Dupuy, is an expression which recovers a conflictual reality(13) within which everyone seems to care only about his own fate while in fact the ^{salute of each nation} ~~salute of everyone~~ is in the ^{salvation} ~~salute~~ of all. The aspiration fights the reality. "He, who contemplates the international system, argues Dupuy, from a metajuridicial angle is shaken by the obvious contradictory behavior of states, which in their majority ignore if not violate human rights in daily routine business while at the same time they vote at the U.N resolutions which flagrantly outlaw their daily behavior. Everyone rejects the faults of others(14)

There is today a need for courage and a sense of initiative at the international level. The North holds to the device of order and urges the rest of the world to accept the facto status-quo. The South contests the order which in fact it sees as a disorder and requires concessions from the north so that international justice prevails. Every camp anticipates the first step from the other.

Both need to compromise and look ahead to an era of mature coexistence, if not long ago. "Nobody dared to suggest that the equality of states in the general assembly of the U.N, implies the

equal value of civilizations anymore than the equality of souls before God effaces the inequalities of persons with regard to intelligence and wisdom".(15) Today we Arabs,dare to say so. All people on earth should find their way to freedom and dignity, to peace and prosperity.

This may seem very idealistic, true, but isn't this aspiration, utopian as it may be,which is at the heart of international law?

Isn't that, the real grotian quest for world order which refuses persistently to submit to the cold juristic logic of the realist? He may contend as did Ibn Khaldun: "that the human soul is ardently in love with praise and people go all out for this world and for the rank or wealth that belong to it. As a rule, they have no desire for virtue and they do not care for those who have it".(16) Yet, unless we agree that there ~~are~~^{is} some kind of virtue that we all long to achieve, law will remain that illusory science of norms with which the human being will clothe his impulsive desires.

The prevailing international hierarchy is a two-fold phenomenon. There are a few rich and powerful states and a majority of poor and weak ones. It is necessary for the benefit of all, that those states whose self-determination already occurred, refrain from obstructing the way, so that those left over achieve theirs. This is not to argue for a preferential treatment but only for fairness, because it is our opinion that by making that move toward accepting others, the established nations will secure their own right to self-determination.Through the establishment of a middle class of nations, the international community will achieve a viable pluralism and hence reenforces the legality of international order.

How could nations, while searching for consensus within their internal structure in order to achieve legitimacy, refuse to seek ~~that~~ some consensus at the international level? It is obvious that nations will contribute to world prosperity and peace only insofar as world prosperity contributes to theirs.

The Arabo-Islamic community does not request from the international legal order more than what the latter grants to everyone of its unit, i.e. the right to political, economic~~al~~ and cultural self-determination. The Arabo-Islamic community wants to ~~to~~ be an accepted partner, not a sphere of influence, a pitch for power politics manoeuvres.

As a community, we are entitled to question the claims of positive international law. What kind of law is that which permits the spoiling of the Palestinian people from their homeland and convert them to eternal prosecuted refugees? What kind of law is that which gives the western powers every now and then the right to intervene military and otherwise on matters of exclusive concern to the Arabo-Islamic people(17)? What kind of law is that, which reduces us to a gathering of national identities denied over most basic rights and human dignity?

These and similar questions, we are entitled to raise and seek an answer to with the help of the international community. Scholars have asserted that Islam could contribute through its universal message of brotherhood and its personal law to international 'Detente' and cooperation. This is certainly what Islam stands for and the more so today, since it is in need for help to regain its human face.

Notes

- (1) "The idea that the balance of power theory constitutes the foundations of International law is elaborated by M. Kaplan, N. Katznebach. The Political Foundations of International Law. New York, 1961. M. Koplan, Systems and Process in International Politics, New York. 1957 (p.23)
- (2) Alfred Vagts. Deltov F. Vagte. The Balance of Power in International Law, AJIL: 1979, Vol. 73 (p.560).
- (3) Opcit , Vagts.
- (4) J.M. Mossner, The Barbary powers in International Law, in "Grotian Society Papers", ed: by C.H. Alexandrowicz, Martines Nijhoff - 1972 (p.221).
- (5) G.M. Badr, A Survey of Islamic International Law. ASIL, April 1982 (p. 57)
- (6) Bull, See Chapter II (infra)
- (7) Today the Arabo-Islamic States, 37 in all, represent 38% of the world population
- (8) Khadduri: (1966) p. 67 (1979) p. 296. opcit.
- (9) See among others: Y.B. Achour, L'etat nouveau et la philosophie politique et juridique Occidentale. Tunis. 1980 (p. 204). N.E. Ghazali, Cours de théorie générale de l'état. OPU. 1983. [Western lawyers also very often deny nationhood to most of Arab states. for instance, Schwarzenberger refers to an Arab "nation-state" member of the U.N as that: [Mauritanian entity] whatever this ex post-invention of the Arab league may be supposed to mean. See his, "The Dynamics of International Law". Professional books, 1976. (p. 27).
- (10) Carty, A., The Decay of International Law, Manchester (1986), p. 57.
- (11) R. Bermejo, Vers un NOEI: aspects juridiques. ed: Fribourg, Suisse, 1982 de fines NIEO as "un système de relations dans des domaines multiples (économiques, Juridiques, sociaux, institutionnels, culturels et autres), fondés sur un ensemble de valeurs, reconnues et acceptées par tous les états pacifiques, grâce auquel le développement choisi par chacun des états sera garanti dans des conditions équitables." p.104
- (12) A. Muslim Jurist, Founder of the Fourth Juristic School "El-Hanbaliyya"
- (13) R.J. Dupuy, in Le Droit du peuple à disposer d'eux-mêmes. in Mélanges à Ch. Chaumont. ed: Pedone Paris 1984 (p.279)
- (14) Including the author, who seems to reject the blame on those who vote resolutions, i.e. third world states. Dupuy, opcit.
- (15) R. Aron, Peace and War. Translation R. Howard and A. Fox, London, 1966 (p. 403).
- (16) Ibn Khaldun. El Muqaddimah, Vol. II (p. 88)
- (17) From the end of World War II, up to now, there has been as many military interventions in the Arab world as you can count. (Suez, 56, Lebanon 58, three Israeli-Arab wars, 1948, 67, 73) (Algeria, 54, 62), Israel intervening in Lebanon 82, in (Tunisia 87) (in Iraq, 1985). American Military Aggressions on Libya (86 and 88) etc.....

Chapter Three

The Right To Economic Self-determination.

Section one: The Economical Dimension

This is the nerve center of the International debate. It is variably referred to as the right to economic "**self-determination**"; the right to economic sovereignty; or in much more recent international literature, the right of people (state) to development.

There should be no wonder, as to why the emphasis is today on the economical factor. Do not we live in an economical era? That of the one dimensional man? Therefore, shall we be surprised if today nations as well as people want to measure how much right they have got? The over emphasized economical dimension of the development issue has led to the emergence of an opposite current shifting the focus from economism to moral and legal grounds⁽¹⁾. Hence, the claim for the right to development. In order to understand the whole international debate on the issue of development we need to examine both dimensions: the economical and the legal.

Within the former, the assumption is that development is before everything else a question of economic "**output**". On this assumption is constructed the whole western paradigm of development with its two examples: The liberal and the socialist. Once having analysed the western paradigm on development, we will examine the Arabo-Islamic world's attitude to its vis-a-vis.

Within the later dimension, development becomes a question of legal rights: How this right is interpreted differs within the western legal paradigm from the Anglo-Saxon school to the French school and from both of them to the Arabo-Islamic school. These are some of the issues we intend to rise and deal with in this chapter.

Development within the western paradigm(2)

As we have shown in our first chapter, the rise of the west and its emergence as the dominant center of the world has come out as a result of a long lasting evolution with a successive chain of events and counter events.

Now, whether one adopts a Weberian interpretation in regard to that phenomenon, or a Marxist one, the end result is the same, whether through empiricism and rationalization or through historical materialism and class struggle, the end result is a common western attitude toward the meaning of development. This common attitude is embodied in the shared belief that development is linked casually to "economism". Hence, we will refer to this attitude as the western paradigm.

T.Kuhn, in his book "The Structure of Scientific Revolution", tells us, that a paradigm is a world view, an accepted model or pattern shared by all members of a scientific community. It is a way of viewing things, of understanding them. A paradigm is animated by normal science which when investigating the validity of the claim contained by the paradigm starts discovering anomalies, the paradigm enters then in a crisis which leads to a scientific revolution and the construction of a new paradigm. When the paradigm changes, the world itself changes with it.(3). Kuhn

used many examples, mostly drawn from various fields of natural sciences. In astronomy for instance, he tells us that prior to Galilea, we had a Plotemaic world view of the universe in which the earth was the center of the universe and the sun and all the planets rotated around the earth. That was the prevailing paradigm, the way people viewed the world and this affected their attitude in all aspects, religious psychological and so on..Galilea₂ started asking questions to which he could not find answers within the prevailing paradigm. A lot of anomalies occured and he come up with a new paradigm which resolved his questions in which he saw the earth as a minor planet rotating around the sun in a small solar system, in an insignificant galaxy. The result was entirely a different world view, that was a scientific revolution.

In the field of development, we have a dominant paradigm. It is undergoing a severe crisis,but nevertheless,is still considered as the only prevailing paradigm.This paradigm,we chose to call "Mecano-materialistic paradigm". It conceives development as the increase of the material power of man, in the form of GNP or technological mastery or pleasure. It is mechanical because it understands development as a mechanism i.e. as a process of accumulation and empiricism, set in motion by a historical force, the acquisitive spirit and it functions according to determined laws and rules.It is also materialistic because it reduces the developmental process to matter and excludes all non-material factors.In order to shed some light on the Mecano-materialistic nature of the western paradigm,let us examine how this world view has come into being;how it answers the question of existence.

The stars did not always exist, they were formed out of masses of dispersed gas. Once formed,the whole stellar system, with all the stars in it, goes through an evolutionary process stage by stage, like our sun.Some stars acquire planets and form solar

systems. Hence, the Earth was formed. As its surface cooled, so chemical-compounds were formed. Thus, matter began to manifest new properties non-existent before, the properties of chemical combination, then organic compound were formed out of the complex linking of atoms and the first bodies arose which began to manifest properties of life. Living organisms went through evolution leading to the emergence of the "Ape" our so-called ancestor from which man descends. Human society was thus formed. New processes with new laws have allowed and shaped social life and thought.(4)

This Darwinian version of the origin of life has made the idea of religion and God redundant. Science has taken the place of God liberating humanity from the bondage of superstition and religion. Thus Feuerbach could argue that **"unbelief has taken the place of belief, reason the place of the bible, politics the place of religion, Earth the place of heaven, work the place of prayer, material wants the place of hell, Man the place of the Christian."**(5).

The Mecano-materialistic paradigm has two scientific sub-communities or examples: the liberalist exemplar and the socialist exemplar. Many among western scholars have looked upon this two exemplars as constituting two independent paradigms of development. Lately however, many have shifted to a mono-paridigmatic attitude. An exemplar, tells us, Kuhn, is a concrete technical problem solving procedure developed by scientifics within the paradigm(6). The exemplars share, the basic features of the paradigm but they do not constitute paradigms by themselves. Thus capitalism and Marxism are exemplars of the same mecano-materialistic paradigm. They share in common basic features and assumptions on the development issue although they differ as

procedures on how to achieve development.

The Materialistic paradigm of development is based upon pre-supposed assumptions about human nature, good life and the good society. First the paradigm assumes that people are rational i.e. that people know what is in their best interest and will act to achieve it. Second, it assumes that a good life is maximization of pleasure and minimization of pain. What brings pleasure is assumed to be consumption and what brings pain is assumed to be work. Therefore, a good life is assumed to consist in a maximization of pleasure and minimization of work. Last, the mecano-materialistic paradigm assumes a good society that which succeeds in providing its hedonistic members with what they desire. But, because the desires are unlimited while the resources are limited, then, we have the problem of "**scarcity**" which is at the heart of the economic inquiry. Thus, the good society is the one which succeeds in tackling the problem of scarcity and providing its citizens with the maximum of pleasure with a minimum cost. In both exemplars of this paradigm Economics are the central issue and the substance of development.

I. The Capitalist Exemplar.

Within the liberal framework, the problem of scarcity is tackled as follows: the development of the society is a function of its economic production. Every society has inputs i.e. resources (land-labour, minerals, tools, etc.). These inputs when wisely allocated raise the outputs whether in the form of goods or services. Thus, the more output you get, the more you develop.

A. Smith defines the wealth of nations along this line. Among the society's resources, tells us Smith, labour is the most

important of all, so he argues that the output is a function of the quality and quantity of ^Qlabour force. To illustrate his points, he gives us his famous example of the pin factory where through the division of labour and specialisation, production is multiplied⁽⁷⁾. The second important resource is capital. You have got to have capital in order to develop your energy sources and your physical capital i.e. man made tools which are used to produce other goods. In order to do that, you have to build factories and transform energy. Industrialisation thus, becomes the key. In order to accumulate capital, you are obliged to save and not consume your output. Who will save? The capitalists, answers Smith. In doing so, the capitalist argues Smith, is seeking his own gain but all along, he promotes an end which was no part of his intention by pursuing his own interest⁽⁸⁾, the capitalist frequently promotes that of the society more effectively than when he really intend to. Thus, the capitalist will save, invest, produce, re-invest and re-produce more and that is how wealth is acquired⁽⁹⁾.

Another important factor of production emphasized within the liberal frame, is that of trade and international division of labour according to the comparative advantage policy. Because there are regions, we are told, which have advantages in producing certain specific products, it, therefore make sense for country "A" to specialize in the production of wine for instance, while country "B" will specialise in the production of cotton. Then both countries will exchange wine for cotton and both will be better off.⁽¹⁰⁾

Entrepreneurship and the spirit of initiative are also important, tells us J. Shumpeter. Entrepreneurs are the real engineers of growth⁽¹¹⁾. All these factors combined together will allow the society to develop and become rich. The liberal exemplar as seen from Smith's earlier quotation derives the political strategy from the accumulation process itself. All you need to do is trust the

capitalist. In seeking his own interest, he will seek yours⁽¹²⁾. He is guided in his endeavour by ^{an} "invisible and magic hand"; the laws of the market. They are a neutral and objective device dedicated to growth. Thus, the policy required is that of "**Laisser faire, les capitalistes**"⁽¹³⁾ which means that the state should only provide the convenient atmosphere conducive to business and that is social order and political stability. As Smith has put it "the state should protect the rich against the poor"⁽¹⁴⁾. Today, economists of the Chicago circle still argue along this line⁽¹⁵⁾.

Within the liberal frame, development is a linear process. The best illustration is that of Rostow's five stages growth model⁽¹⁶⁾. It is like piloting an airplane, all you have to do is succeedⁱⁿ your take-off; if you do that, you are developed no matter what comes on at the touch-down.

Hence, within the liberal exemplar, development is first of all a question of economic performance. This is confirmed by S.Kuznets who defines Economic growth as a long term rise in the capacity of the country to increase its supply of goods and services to its population⁽¹⁷⁾. This growing capacity, he tells us, is based on advanced technology, institutional and ideological adjustments. There are notes Kuznets, six characteristics of Economic Development; these are:⁽¹⁸⁾

- 1) The high rate of growth of per-capita product and of population.
- 2) The high rate of productivity (of outputs per unit of all inputs)
- 3) The high rate of structural transformation of the economy, moving from agrarian economy to industrialization and from there on to services.

- 4) Social restructuration and ideological changes.
- 5) The universalization of the economic growth model due to the development of transport system and communications.
- 6) Economic performances are accountable to modern technology.

This has worked well for western Europe and since, it has been assumed of universal validity and relevance. In the post war period and following the emergence of the soviet union as a major Anti-Liberal power, Some economists in the liberal school began to suspect the efficiency of the "*laisser faire*" doctrine particularly for the newly independent nations, where state intervention under the spell of the Marxian ethic was very much in "*vogue*". They also were worried with what they labelled as neighbourhood effects or "**externalities**" on the market system and which they argued, were reflected as far as the economy of the third world nations were concerned in the following two vicious circles:

First, you have a vicious circle on the demand side, the poor countries have a low capita income and this means that the market is very small which in other terms mean that investment is very low or what comes to the same, that capital stock is very meager. Since without capital, you cannot have productivity, so your per capita is low.

On the supply side, on the other hand there is a low rate of saving and as a consequence, a low investment level; therefore you have a low level of productivity and as a result, you have a low per capita income. Hence, you are caught in a poverty circle. How then are you going to break the vicious circle?

The Neo-Liberals suggested planning and state intervention as a

regulator of the market economy. This is the only way out, argues R. Rodan. The classical economists forecast proved wrong because they neglected "externalities" i.e. the deficiency of social overhead capital which caused diseconomies. Planning will allow a control of externalities, fill out the lack of social overhead capital and break the vicious circle of poverty. Hence, Rodan suggested his "big push theory" or the balanced growth model⁽¹⁹⁾. The idea is to plan a wide range of investments so as to create demand for every product and establish a balanced growth pattern.

R. Nurkse another proponent of the Big push theory⁽²⁰⁾, argues that the theory's aim is to restore the balance between supply and demand because it is the "inelasticity" of the demand at low level income which cramps the inducement to invest in industry.

Hirshman, A., conceived a solution to the poverty circle somehow differently. He argued for an unbalanced growth model whereby a system of backward and forward linkages would through induced investments resolve the supply/demand equilibrium⁽²¹⁾. According to him, the linkage effect of a given product line is an investment generating force set in motion through input/output relationship. When productive facilities that supply inputs to the productive line, or utilise its outputs are, inadequate or non-existent, backward linkages lead to new investments in inputs supplying facilities and forward linkages to investment in output using facilities. All you have to do is select an economical area for the first investment in such a way that investments in complementary areas become compulsive rather than permissive⁽²²⁾.

A. Lewis, on his part, has emphasized that the problem in the third world countries is first of all a problem of capital⁽²³⁾. Since there are in these countries an unlimited supply of labour, then, all

you have to do is to transform the abundant labour force into capital. How? Simple, the capitalist sector which is the sector using reproducible capital has a higher level of production than the remaining parts of the economy which are at subsistence level. As production increases, the capital sector will expand and absorb progressively the subsistence sector under the form of labour capital. You have to keep income concentrated in the capitalist sector, so that you can reinvest and absorb more labour intensive capital until you absorb completely the labour capital, abolishing henceforth unemployment and generating growth. This is the famous grow now, trickle-down later theory.

Through these and other formulas, western economists sought to resolve the problem of underdevelopment. The third world countries which have applied these technical devices have succeeded in raising their growth rates but in spite of that, they did not seem to have achieved development. Unemployment is rising, inequality widening, malnutrition spreading, illiteracy and lack of technical skill growing. As a result, new formulas were elaborated and suggested. This time, through the United Nations and its development frame.

A direct attack on poverty and a policy of meeting basic needs, were thus, advocated. Growing inequality in income distribution, made urgent the need for social justice and growth with equity⁽²⁴⁾. Since Agriculture is the dominant economic feature in the third world countries, appeals were made to integrate this vital sector and construct development along a balanced rural-urban strategy based on labour intensive technology so that employment could be assured as well as income distribution and social equity. Hence, we had all sorts of calls for growth with equity from Dr. Seers and his Sussex group, to M. el Haq at the BIRD to J. Grant at

the Overseas development center, Ted Owens at AID and so on....

The international commission for development ended during that period its report advocating: "that the objective of cooperation for international development is to help the poorer countries to move forward into the industrial age and establish a good partnership between the "haves" and the "have not".(25)

This was the promethean outlook of the liberal economic thought which realizing by then the weaknesses of its pre-assumptions and facing tremendous pressure from the emerging consciousness of the third world countries, tried to cope haphazardly with the situation. The growth ethos was losing its shine. It becomes suspected(26), limited(27), troublesome(28), destructive(29), almost a disease causing fever and anxiety(30). The continuously evolving opinion of one of the brightest economists of the western liberal of that era, certainly reflects the point more eloquently. In 1969(31), Dr. Seers, conceived development as involving not only economic growth but also conditions in which people in a country have adequate food and jobs where income inequality is greatly reduced. Eight years later, in 1977(32), reviewing his conception, Dr. Seers discovers that he has left out one essential element and that is self-reliance. Development hence becomes for him, the realization of the potential of human ascent or personality.

Western economic theory is unable to understand the meaning of development, because it is so intimately bound up with the special conditions, problems and pre-conceptions of the industrially advanced countries, that large portions of it, have to be abandoned before we can come to grips with the problems of the underdevelopment^{ed} countries. Third world nations have fought for

independence. And independence, Seers tells us, is not merely the aim of development. It is also one of the means. It is a force of mobilising popular support and the force is blunted if a government is obviously far from independent⁽³³⁾.

Development is a normative concept. If it has to be defined, then, no one can define it better than those who are concerned with it. This, according to our own reading of Seers is the conclusion that he reached. The aim is therefore, as he pointed out, to change international attitudes so that it becomes impossible for the political leaders and social scientists of Europe and North-America to continue overlooking and aggravating often inadvertently the obscene inequalities that disfigure the world.

II. The Marxist Exemplar.

Emerging as the historical development of the capitalist exemplar, the Marxist or the socialist exemplar did not question the pre-given assumptions of the capitalist system. The communist manifesto has praised the progressive historical role of the "**bourgeoisie**" and Engels went as far as supporting and justifying French colonization of North-Africa⁽³⁴⁾. The goal of Marxism is the abolition of the private ownership of the means of production and the realization of a classless communist society. K. Marx is the father and engineer of this exemplar. Later on, Lenin, Kautsky and Rosa were to elaborate the official version of his teachings and adopt it in the form of "Diamat".

As we have said, Marx did not question the accumulative process. He took it as the basis of his historical materialism. We will come later on to that, to the Marxian Exemplar. Development is a historical process on dialectical materialism, that is, a

historical process which expresses itself dialectically through labour and the relations of production. Human society, according to Marx, has gone through five stages and known five modes of production⁽³⁵⁾. What characterises the capitalist mode is its internal contradiction, that is, the dialectically opposed relationship between, on one hand the capitalists, owners of the means of production and the "Proletariat" the workers, who, on the other hand are deprived by the former of their wage-labour, which is taken by the capitalists under the form of a **"surplus-value"**. The more the proletariat is exploited, the more it is likely to force a class consciousness and start a revolutionary movement which will liberate the whole society from the capitalist strangulation. Hence, revolution will absorb the private ownership of the means of production and will install a socialist society which through collective ownership and self-managed economy will reach the communist ideal.

This is **"grosso-modo"** the Marxian scheme of how societies develop. With Engels and Lenin, this theory will become a practice and guide the Bolshevik revolution in Russia (1917). The Soviet Union became the Marxian Exemplar of Development in the world and the rival of the prevailing capitalist exemplar.

The new nations of the third world, still under the trauma of colonialism, welcomed the Marxian exemplar which they saw as an ally and a precious **"comrade"**. Thus, China was attracted to the Marxian exemplar under the leadership of Mao. Cuba under Castro, Africa under N'Krumah, the Arab world under Nasser, etc... They all adopted the Marxian exemplar and believed development possible within that frame and that frame only. Due to the deep differences between all these nations, we have come to a variety of socialisms, we nevertheless will engulf them all under the label of the

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political economy theory and examine its leading currents.

The Marxian theory unlike the capitalist one conceives development under three methodological indicators. First, development is a historical process, the same process which has brought development to Europe and N.America has also brought underdevelopment to the rest of the world. This has been done through a process which has accumulated the plunder of the third world⁽³⁶⁾, the devastation of the African continent and the ripping of its labour force(the slave-traffic) etc...⁽³⁷⁾ No word is really strong enough to express what F.Fanon has termed as the "Deracinement" of the colonized⁽³⁸⁾. Hence, underdevelopment is the consequence of development. How did this happen? To answer this question, let us follow the industrialization of Europe.

There are four stages which the political-economy theory distinguishes in this evolution. These are: The economy of scale, the import substitution, the multinational corporation, the export orientated economy. The first stage occurred in Europe when the process of capital accumulation took place. Capital started growing much more rapidly than the labour force and it followed that while capital was abundant; the labour force was scarce, the result therefore was that wages started growing and profits declining. This was not to please the capitalist who resorted to immigrants to solve this problem.He thus hired peasants from the countryside just as A. Lewis has demonstrated to us. Then, when he could not find them anymore, he was obliged to export his capital out of his country wherever he could fructify it according to the comparative advantage scheme. He also used automation to create redundant labour but capital was so abundant that he had to invest abroad and chase wealth wherever he could find it. He invested in two kind of economic assets, either in agricultural plantation of the Latifundian type or in extractive industries: gold, mines, oil, etc...

The investments of the capitalists did not transform the indigenous economies. All that happened was the establishment of Economic zones "**enclaves**" around the exploited farms and mines and the construction of a railroad system linking them to Ports. This has led to the colonialist nightmare. Not only did the capitalist destroy the indigenous economic tissue but he also tied it to the capitalist central system creating thus, dependency and economic subordination,

The indigenous societies never benefited from the capitalist adventure and the thesis of the "**civilizing mission**" is as much a myth as the legend of "tarzan"(39). The technology used in the economy of scale was the same rudimentary technic used before and after the capitalists investments. Changes however occurred in the economic indigenous structure. People who had been subsistent farmers were turned into landless labourers or workers into farm and factories. This allowed an enormous increase in ~~the~~ productivity and the gains were shared among three categories of people. First, the European investors, second, the qualified European technical experts and the managerial staff, third, the small minority of local elite constituted by the indigenous hierarchy. The question, hence, is what did these people do with their gains? particularly the expatriated and the local elite? The answer is, they used it to import goods and luxuries from Europe, cars, furs, drinks and so on ... As a result, the indigenous economy developed a pattern of consumption which requires a high concentration of income. With such a pattern, the indigenous economy was well in its subordinated state to the capitalistic system.

The next stage was that of import substitution, following the

economic repression and World War II, the local elite started producing locally what it used to import from Europe. Luxuries which required capital intensive technology which in turn required a high concentration of income. So the gap between the minority of the "**petite bourgeoisie**" and the population started widening; luxuries, "villas" with pools and tennis courts sided with ghettos. The third stage was thus reached, that of the "octopus". The MNC's emerged as the new sovereigns of the world market⁽⁴⁰⁾. Mostly American centered corporations invaded the world. Even Europe felt some uneasiness with their upsurge⁽⁴¹⁾.

MNC's moved into the third world with their capital intensive factories, reinforcing concentration of income and deepening the capitalist seizure of the world. MNC's brought to the third world countries further concentration of income. Their financial contribution turned out to be a financial drain, a "decapitalization". The balance of payments outflows were accentuated through import overpricing and inflated royalties⁽⁴²⁾.

We now live in the fourth stage of the capitalist system which is characterised by what Frank calls "**a supposed redemocratization of the world order. The aim is to maintain and institutionalize the insertion of the third world countries into the capitalist system**"⁽⁴³⁾. We have seen how MNC's have revitalised the international market through the injection of capital into its divers antennas all over the world. Countries such as India, Brazil, Egypt, Taiwan, S.Korea, etc...were encouraged to produce light industrial goods and some heavy industries for exports. This trend spread during the 1970's to Malaysia, Phillipines, Sri Lanka, Singapore, Morocco and Ivory Coast etc.. Because of the nature of their products, these economies competed against each other by offering to foreign investors cheap

labour and providing plant facilities, electricity, transport and so on...tax relief and every kind of incentive for foreign capital to come and produce for the world market.

Politically the whole state apparatus had to be adapted to the third world's new role in the international division of labour. Since then, one government after the other have been falling over itself to the capitalists. Thus, took shape the trend toward liberalization in the state noticeable in the late 70's, early 80's. This has been reflected in the new alliance between labour and the oppositions with governments often more rightist but which nevertheless appear less evil than the "**Military Juntas**"; such as the Free government in Chile, Magalães in Brazil. Aquino in Phillipines, the coming Civil government in Haiti and so on...

The second methodological indicator of the political economy theory is the globality of the phenomenon of development. It is not anymore the GNP per capita which determines the level of development but much more the equal distribution of income, the right of people to self-determination, self-respect and dignity which are all considered to reflect the developmental task.

Here, the political economy school has found itself confronted with a big doctrinal problem. The unexpected turn of the Soviet revolution to a bureaucratic drive and its flirt with dictatorship and state capitalism has led many political economists, particularly from the third world, to a reinterpretation of the Marxian heritage⁽⁴⁴⁾. Hence, the classical figure of capitalism versus socialism has been converted to a much wider and universal configuration of a world system perspective where the imperialist center of the capitalist system stands as the axe around which rotates the peryphery i.e. the rest of the world. This new formula derived from the dependency theory of Dos Santos and Inostroza is

elaborated today by E.Wallerstein, S. Amin, E.Arighiri, among others. Hence, Wallerstein, a political economist with a deep insight into the history of capitalism tells us: "that the world system today is one, a capitalist system of production around which is shaped the universe. The socialist societies¹² are, no matter what part of the system, and getting integrated more and more to the capital system"(45). As A.Frank has put it: "Socialism is banking on the capitalist west"(46).

This is visible today in the Economic arena through the accelerated integration or reintegration of the socialist economies in the International division of labour through trade and production. To illustrate his view; Frank points out that the socialist countries import technology from the west and in order to pay for it, they export two third of fuel and raw materials and one third of manufactured goods. Yet, in turn, they export to the third world two thirds of manufactured goods of a low order of technology and import two thirds of raw materials. Hence, they occupy an intermediary place in the international market system and as such they are an integral part of that system(47).

This global view of the issue of development has helped to enhance the third world position at the international level. The belief that the reality of development is an integrated wholeness led to the conclusion that the third world countries have to struggle in order to develop. It is not a struggle against, as much as, it is a struggle for something, a struggle for independence, In order to exist by yourself, you have to achieve a first condition and that is according to S.Amin, to delink yourself from the capitalist trap(48). Wallerstein, on his side, asserts that "intelligent analysis, demands knowledge of the complete texture of social reality and historical phenomena¹³. Such a global view presents to

our sight the emergence of the world system perspective as a consequence of the dramatic challenge to European harmony over the world, which has called into question all European egocentric constructions of social reality"(49).

C.Furtado, who has expressed so eloquently the Latino-American conception of development asserts : " That enough is enough, history cannot any more be made without us". Furtado dethrones the Marxian ethic of its prophetic aura : "based on a theory of history that made a powerful impact because it filled obvious gaps in the social sciences and was vague enough to adopt itself to any number of situations without entailing serious contradictions; the ideology of scientific socialism played a major role in spreading industrial civilization in areas where the process of accumulation has been weak or non-existent"(50).

S.Amin, on his part, stresses that the social fact is one, an indivisible one which is neither economical nor political, nor ideological. It may be looked upon from a specific social angle but any exclusive approach has no chance of remaining scientific if it neglects to measure its limits and prepare the way for a global social science(51). Along the same line argues also, A.Abdelmalek.

What is remarkable in the third world economists attitude vis-a-vis Marxism is their desperate attempt to **"Third-worldlize Marxism"**. They really try hard to extract from Marxism some sort of "know how", some sociological guidance for the achievement of development in the third world. The authors I mentioned are all, despite differences in details, unanimous in claiming with Sartre, that Marxism, is **"La Philosophie indépassable de notre époque"**. They all perceive the issue of development in terms of production and relations of production. They are willing to expand the Marxist notion of the proletariat(52), but on the whole, they

would not transcend the Marxist cage and are thus, unable to provide a clearly defined "third worldist" alternative to development. They are pragmatic and realists to an exaggerated point, which for the most prevent them from seeing reality other than what it seems to be. Their reflection lacks of humanism. Afraid as all Marxist are of the humanitarian value, they speak much more as technical experts than as human beings. We will come back later on, to this point

Let us before closing our review of this issue examine how S.Amin, for instance, eliminates the transcendental factor we raised a while ago. "questions which transcend the existence of man as a social being are valid, yet historical materialism does not respond to them because it does not ask them. The action of social transformation does not imply or require them. Such a position holds open the door of reintegration into the social transformation camp to those who continue to be pre-occupied by transcendental question^s; but who do not reduce the future of humanity to a passive reflection on these questions"(53)

S.Amin, concludes emphasizing that this is not a matter of political tactics but of fundamental convictions. Now, in this article, S.Amin, is reviewing the green movement and replying to its challenge as a spiritually enhanced doctrine. From this passage, we like to infer that Amin, notwithstanding the fact that historical materialism^y does ask^s the transcendental questions and provide them with clear cut answers, qualifying them either as "Opium" or reactionary forces; ^{he} is accusing these transcendental questions of reducing the future of humanity to a passive reflection. As if the present state of humanity within its materialistic cage in both socialist and capitalist societies is far from being a passive one? A state where the human being has lost meaning and becomes a

fetichist commodity jungled between social desintegration in the liberal society, and social extrangulation in the socialist society is conceived by Amin as an active reflection on the question of man's existence and being.

We will continue our argument with Amin later on(54). Meanwhile let us, move to the third methodological indicator of the political economy theory which is its structural conception of the phenomenon of development. In order to understand development and underdevelopment, we have, first, to understand the structural relations which exist^s between, on the one hand, the Market forces, i.e. supply and demand and on the other, between the internal and external factors.

First, the supply/demand relationship, the key determinant of economic development is, according to the political economist theory, the distribution of income. tell me who has the income and I tell you what sort of economy you have. The distribution of income determines the structure of final demand. Who is going to decide what sort of goods and services are to be produced? Logically, it is who has income who decides. Therefore, if we are to produce goods in order to satisfy consumption patterns, we have to add extra costs. If we want to avoid these extra costs, we should then produce what the income holder decides. In a poor country, the local elite, who has the income requires a transplant clinic, then, that is what they will get. We will not produce paramedics out in the village, we will obey what the income holders command. In some cases, like in the "oil Emirates" you can be lucky and dispose of such a mass of income that you can produce both a transplant clinic and paramedics in the village and satisfy all kinds of consumption patterns. Even the most fantaisist, but that is another story to which we will come later on in another chapter(55).

With an equal distribution of income, the situation is different, you have people who demand basic needs and you respond to their demand. You cannot introduce new consumption patterns until you have satisfied completely the basic ones. Thus, like in almost all the socialist countries, you start by giving everybody shelter, food, work, education, health services and so on..

The structural relationship between demand and supply determines, on one side what kind of goods you produce and this determines in turn what technology you have, who gets jobs and so on... On the other hand, it determines who controls the social surplus. The concept of the social surplus goes back to A. Smith, you take the total output of the country and subtract from it the necessary consumption and that leaves you with the social surplus which you reinvest in order to generate more growth. If it is the capitalists who control the social surplus, then, they will align themselves with external capitalist forces and part of their profits will be sent abroad as a hedge against inflation and the threat of revolution. So, the internal dynamic is linked to an external central dynamic. In order to be in control of your social surplus, you need to destroy the capitalist connection, liberate your economy and therefore, what you need is a socialist economy which through collective ownership of the means of production and self-reliance will allow you to achieve development. Political Economists are optimistic. Historically, the capitalist system is condemned, so all you have to do is wait for the internal contradictions to cause desintegration. (56)

Notes

- (1) Indeed development has become the new name for peace. The church has played a leading role in the promotion of the notion of a right to development. The notion itself is attributed to either cardinal FERTIN or to Mgr. Duval (Algiers). It figures in the text: l'encyclique *Popularum Progressio*. ed onvures, Paris 1977, Pope Jean (XXIII). The tremendous role played by the theology of liberation in the promotion of human rights in Latino-America.
- (2) In this analysis, we are indebted to the course of political Economy that we have received during the summer of 1977, from Dr. James Weaver at the American university, Washington D.C.
- (3) T. Kuhn, "The Structure of Scientific Revolution"
Chicago University Press. 2ed. 1970.
- (4) Gregory. F., "Scientific Materialism in 19th century Germany".
Reidel pub company. Holland. 1977
- (5) quoted by F. Gregory, *opcit*, p.52
- (6) Kuhn provides us with his concept of "Exemplar" in the postscript to his second edition, as a response to the criticism of his thesis by Margaret Masterman, in, Lakatos I and Musgrave A. *Criticism and the Growth of Knowledge*. Cambridge. England 1970, pp. 59-89
- (7) A. Smith, "An inquiry into the nature and cause of the wealth of nations", with introduction by: J.R. McCulloch, ed: Balfour and Co. Edinburg 1827
- (8) Smith, *ibid*, Book I Chapter II p.31 It is not from the benevolence of the butcher, the brewer or the baker that we expect our dinner, but from their regard into their own interest.
- (9) Smith's concept of individual "parsimony" as a source of capital formation, prompted W. Bagehat, the late nineteenth century editor of the *Economist* to comment that A. Smith thought that there was a Scotsman inside every man. Indeed, one is unable to understand the worldwide fame of Scottish parsimony until he has read Smith's thesis on the wealth of nations.
- (10) Michelman Irvings, "The Roots of Capitalism in Western Civilization",
N.York 1983, p. 279
- (11) J. Shumpeter, "The Theory of Economic Development", an inquiry into profits, capital, credit, interest and business cycle. trans: Redvers o.
Harvard Univ. Press. 1934
- (12) Smith, *opcit*, see note 8
- (13) Smith. *opcit*, p.31. When the capitalists were asked by the French Minister Colbert what do you want the government to do in order to help you? The capitalists replied: *Laissez nous faire*.
- (14) Paraphrasing Smith, Book V Chp.I. entitled: "On the Expense of Justice"
- (15) views held today by liberal economists such as Harberler or M. Friedman. See

his latest: "Free To Choose". New York. 1980

- (16) Rostow, W.W., "The Process of Economic Growth", Clarendon Press. Oxford, 1960
2nd edition. The five stages are: the traditional society, the pre-conditions for the take-off, the take-off, the drive to maturity, the age of high mass consumption.
- (17) Kuznets, S., "Modern Economic Growth: Findings and Reflections" American Economic Review 63/1973
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- (23) Lewis, A., "Economic Development with Unlimited Supply of Labour", in Agarwala and Singh. "The Economic of underdevelopment. New York 1963
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- (26) Shumacter, "Small is beautiful" ed 1976.
- (27) Club De Rome. "limit to Growth, the Human Predicament" New York. 2ed 1974
- (28) Because of nuclear treat.
- (29) The green movement.
- (30) Heilbroner, ibid Chap Two infra.
- (31) Seer, in Alkin L. Mobogunge, "The Development Process", A Spatial perspective, Hutchinson Uni. Library, S. Africa 1980, p.35.
- (32) D. Seers, "The New Meaning of Development" International Development Review, No 3, 1977.
- (33) D. Seers, in Wilber's book, "The Political Economy of Development and Underdev." Random house. N. York 1973, p.13
- (34) L. Fewer, "Russian Patterns of Development" Anchor books. N. York pp. 450-451
- (*) Dialectical Materialism (abbreviated)
- (35) The fifth being the socialist mode of production. Later on, in his writings, Marx talked about a sixth mode "The Asian Mode of Production" as the mode which characterises countries of Asia.
- (36) P. Jalee, "Le Pillage Du Tiers Monde" Seuil-Paris. 1967.
- (37) Rodney, W., "How Europe Underdeveloped Africa" Dar-Essalam, 1972.
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- (39) Aron, A., seems to think the opposite. See his, "Ideology and Development in the Meaning of Growth" Pamphlet II, 25, London. 1976
- (40) Said, A. "The New Sovereigns" N. York, 1976

- (41) Schreiber.j.j,"Le Défi Americain" Paris,1966
- (42) Muller.R,"The MNC's and the Underdevelopment of the Third World" in Wilber's book. opcit, p.146.
- (43) Frank.G.A,"Crisis in the World Economy" Heineman-1980 p.323.
- (44) See the recent works of E.Wallerstein, Amin S, G A Frank, E Arighiri "Dynamic of Global Crisis", MacMillan Ltd.1982 London
- (45) E.Wallerstein,"World Inequality", black Rose books, Montreal 1975,p.16
- (46) Frank, opcit, p.16
- (47) Frank, opcit, p.316
- (48) Amin.S, "L'accumulation a L'echelle mondiale" ,ed:Anthropos Paris.1970 p58
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- (52) Frank.G.A, "Critique and Anti-Critique", MacMillan-1984 and the flexibility he shows in his interpretation of historical Materialism.
- (53) Amin-In Development as social transformation . opcit, p.274
- (54) See our next section.
- (55) See Chap two section one.
- (56) For a critic of this passivistic attitude,the political economists would argue for a unified action among the different exploited forces in the world.Non-Aligned bloc, tricontinental alliance,etc.are some of the frames suggested...

Section Two: The Arabo-Islamic Attitude 'vis-a-vis' The Western Paradigm On Development

Having described the main feature of the western Mecano-materialistic paradigm with its two exemplars, let us now, examine the Arabo-Islamic world's attitude towards it, as it has expressed itself in Arab thought and praxis. Early in this century, when the Ottoman empire started desintegrating, the European powers were busy dividing the Arab-Islamic world between themselves. The old sick man of Europe was agonizing when Russia started annexing parts of Asia minor. The Constantinople agreement guaranteed the French and British interests in the Empire. The treaty of London, included Italy. Finally, the secret "Sykes-Picot" agreement in May 1916, ended the division of the Arabo-Islamic Empire by transplanting through the Balfour declaration of 1917, an artificial "Zionist state" in the heart of the Arab Land, Palestine. Since that time, the Arab-Islamic world has undergone major changes and events, attempting to define itself vis-a-vis the western world. The eternal question of who am I ? Has so far been answered by another question : who is the other?

This subject has been dealt with so extensively that by now, the question seems almost settled and most people would tend to believe that Islam is reconciled with liberalism and that nothing compatible separates them. In reality, nothing is further from the truth. The relations between Islam and liberalism has always been treated in a "Partizan way" and as such, it has been provided with a partizan answer. Islam has very seldom questioned the tenents of liberalism. It has always tended to look to liberalism from an Anti-Communist attitude. Islam has never defined itself in regard to liberalism in an objective way. It has always tended to view

liberalism as the counterpart of Marxism. Therefore, and since Marxism is held to be frankly "atheistic", the answer could not be but favourable to liberalism, that is why most people have ended up believing that Islam is compatible with liberalism but not with Marxism.

Muslims scholars of the "Nahda" have perceived liberalism as no more than a politico-juridical structure embodied in the concept of Democracy. The defensive position from which Muslims approached Democracy has led them to produce an apologetic attitude to its "vis-a-vis". This was reflected in their insistence on the fact Islam is much more democratic than democracy^a itself. Early Muslim views of Europe such as those of the "Sallafiya" were more mature and had much more self-confidence on Islam, though they too, were very impressed by the European model. Seldom, was there any attempt to analyse the philosophical foundations of liberal thought. M. Akkad tried to some extent but his view had much rethoric in it and did not escape the apologetic trend⁽¹⁾. Taha Hussein⁽²⁾ and Ali Abderrazik reinforced the apologetic trend by supporting secularism and rationalism.

Islam and liberalism are far apart. In fact, they are incompatible. Seyyed Tabatabai, in his multi-volume commentary on the Qur'an, "El-Mizan" (The Balance)⁽³⁾, has argued that Islam is opposed to the liberal assumption that truth lies with the majority rule and that Islam does not allow for unlimited freedom. He admits that Islam has allowed man the licence to enjoy all pleasant and beautiful things in life, provided he does this in moderation. Yet, it would be absurd to conclude from this, or from the saying "there is no compulsion" in Islam, that the individual is given "Carte Blanche" in Islam to do what he pleases. How? questions Tabatabai, can Islam allow unlimited freedom and at the

same time require belief in the unity of God, his prophets and the hereafter ?

The meaning of no compulsion in Islam, aims simply to prevent the use of force or coercion in regard to belief and matters of faith. Some dialectical materialists, argues the author, claim that Islam by contravening the principle of contradiction, which is the driving force of all evolution in human history, dooms the Islamic community to a "statut-quo". An easy reply to this charge, asserts the author, would be a "boomerang" one, i.e. sending back the charge to historical materialism which aims at the dissolution of all contradictions. The author prefers, however, to answer the charge through an epistemological exercise, arguing hence, that "valid propositions are of two kinds; relative like those of science or reason and absolute values like those of religion. The islamic state, being the realization of an absolute value contains the relative value (science) but does not submit to it. In other words, the Islamic state being "perfect" is in no need for change, meaning that if changes occur, they should do so within the Islamic framework and not alter it"(4). The view of Tabatabai may sound in a more earth to earth language as otherworldly and hence, reactionary. We believe it is not. In any case, it reflects already a huge change in attitude, a regain of self confidence and intellectual temerity.

Liberalism as a philosophy is opposed to Islam. Islam is man's knowledge of himself through God's revealed knowledge. It includes man's knowledge of himself by himself i.e. philosophy. Western philosophy in all its various contemporary versions, is reductionist, expert and fragmented. Religion at the opposite is wholistic, global and divine. That is why religion is much wider in its horizon and this also explains why Islam has absorbed all philosophical currents under its mantle. No wonder, therefore, that while some have claim Islam to be liberal, others have done the

opposite by asserting that Islam is socialist etc...As we have already stated, Islam is neither this nor that and the Islamic state is neither a democratical state nor a proletarian one. It is an Islamic state.

Among those who argue for an Arab development within a liberal frame is Y.Sayigh. With him we enter a new dimension of the problem of development in the Arab world, the technical one. Sayigh is not deeply concerned with philosophical issues⁽⁵⁾, he is much more technically orientated, though he has recently started expanding his view on Development⁽⁶⁾. It is however one of his marked features that when analysing Arab economic issues on which he has extensively written, he tends to emphasize the supra-national character of Arab Economy and concentrates on showing all the advantages of an Arab Economy's Complementarity. It is in this respect and in regard to his committed effort to contribute to Arab Economic unity that he is worth mentioning. Sayigh thinks that the outlook for Arab development, judging by the present situation and the increasing power of separatist sentiments (irrespective of declarations to the contrary) is very low. This assertion is based on the recent conviction that an Arab society which is developing in the profound and genuine sense and which has a high level of performance, which is just in distributing its opportunities and rewards, which is free and able to provide scope for its citizens to participate in decision making, which protects its national and regional security and strives to liberate the occupied Arab land and put muscles into its national will, is a society worth the sacrifice⁽⁷⁾. Of course, nobody denies that. Yet, it is only a far away projection and the question remains how to achieve it?

The study of A.Brahimi, is technically much more rigorous with

its global approach to the issue of Arab development⁽⁸⁾. It is particularly worth mentioning for its socio-political maturity. Brahimi makes it clear that we have a choice: either to continue fragmented as we are concentrating on the national welfare system, ^{is} rising the slogan of Arab unity while living in economic subordination; or to try and construct a regional, viable economic sector through the restructuration of the forms and relations of production, Self-reliance and mobilization of our resources and people. That is the only way to reaffirm the depth of our Arabo-Islamic civilization⁽⁹⁾.

There are many other scholars who are concentrating their efforts, trying to understand the present dilemma of the Arabo-Islamic society and finding ways out and remedies by providing guidance and theoretical insight.

One such a scholar ^{is} Ali Shariati, an Iranian sociologist with a deep grasp of Marxism. We have already talked about the atheistic character of the Marxian philosophy which is at the origin of the a priori hostile Arabo-Islamic attitude in regard to communism.

There is a second Marxian characteristic to which we would like to alert the reader and that is, the mythical appeal which Marxism has exercised on the Arab world. This ethical appeal of Marxism resides in its humanist feature as an equalitarian doctrine and certainly not in its "pseudo-scientism".

The Marxian social equity aim is very close to the Islamic "Mussawat", ^{is} there has been a great deal of talk about Marx's humanism. Ali Shariati, tells us that Marxism is humanist despite its declared anti-humanism⁽¹⁰⁾. He quotes many times Marx himself to show how clear is the humanist spirit in his teachings. Marx wrote in 1847, "that Christianity preaches contemptibility, objectness, servility and humility, in short, all

base qualities. The proletariat refusing to accept this debasement, has much greater need of courage, self respect, pride and desire for independence than of bread"(11). Shariati wonders whether the author is Marx? That very Marx who holds morals to be but a superstructure of the "bread" structure? Shariati declares that western humanism rests generally on the mythological foundations of ancient Greece which considers man as the touch-stone of truth and falsity. Protestantism, Capitalism, Marxism and Facism are four brothers raised in the same household and nourished of the same materialistic creed although now, they have followed each a different career(12). Hence, according to Shariati, when the intention is to deny the west and resist its hegemony; Marxism is the most effective weapon and this for no other reason than, if we are to borrow Marx's terminology say Shariati, Marxism is only a superstructure resting on a bourgeois liberal infrastructure(13)

Other *factors* have also facilitated the Marxist intrusion in the Arabo-Islamic world such as colonialism, liberation movements. It remains that no matter how much Arab consciousness has used western thought in its different versions, as a tool for action; western thought in general is alien to the Islamic "Umma" and is rejected sooner or later. Marxism has penetrated the Arabo-Islamic world during the "Nahda" Arab renaissance. It has since, constituted the axial frame of revolutionnary Arab thought, it has given birth to the "Baath Party" today still dominant in Iraq and Syria, to Nasserism and Pan-Arabism in Egypt. All this was accompanied with ^a tremendous amount of political and ideological literature on the issue of Marxism and Arab socialism. We will mention but few examples.

Hence, M.Sibai's thesis on "Arab socialism" is often mentioned among the most illustrative Arabo-Islamic apologetics(14). Sibai

argued against nationalization in Islamic socialism and provided five principles on which stands Islamic socialism: the right to life, the right to freedom, the right to knowledge, the right to property and the right to dignity. As a reaction to Sibai's thesis, Sheikh Med Shaltut, supported Nasser's policy in Egypt and authorized nationalization⁽¹⁵⁾. Yet, it is S.Moussa, who is considered as the father of technocratic socialism in the Arab world⁽¹⁶⁾.

There are many others and in order to make a long story short, let us say that Nasserism and Baathism are the most elaborated forms of Arab socialism. They have contributed to the shaping of Arab revolutionary consciousness and have reinforced it. They share, however, a common weakness in their philosophical basis and that is their non-reliance on Islam and their preference for "Pan-Arabism" in the struggle for self-determination. This is not to say that the authors of these movements ignored Islam. We have already quoted Nasser in that respect. As for the Baath founder M. Aflak, his Christian faith has not prevented him from paying tribute to Islam. Hence, in his theoretical thesis, he has noted: "I believe that Islam possesses a magnificent moral experience and a tremendous human aspect which can enrich the Islamic people and their culture. Islam is a revolution that can only be understood by revolutionaries. Further on, he adds, a momentous event occurred in our life with the coming of Islam, an event of both national and human significance. I do not believe that the Arab youth gives it enough importance and I do not find them concerned to study Islam in depth. I believe that Islam can enrich our life both theory and in practice"⁽¹⁷⁾. This may help to understand the genius of Aflak and his success in mobilizing Arab masses. Baathism like Nasserism has failed to achieve Arab unity and Arab development. They nevertheless have much merit in guiding the

Arab world to unity and increasing its political consciousness.

The leftist debate has since haunted the Arab mind. C. Maqsd, one of the most outspoken representative of that current has resumed the crisis of the Arab left, and has defined it in terms of the erroneous attitude of Arab thinkers vis-a-vis communism⁽¹⁸⁾. This attitude, entertained by an Arab inferiority complex, has prevented the Arabs from understanding Marxism.

Socialism, asserts Maqsd, without an international, self-sufficient status, becomes a mere political speculation, whose socialist directives can be applied without thereby endangering any of the basic prevailing non-socialist systems. This negative attitude, continues Maqsd, has led to a tendency towards accommodating traditional conservative forces. What is needed therefore is a re-thinking of our leftism, a strengthening of the ideological foundations of Arab socialism. Emotionalism toward communism is a sign of the lack of self-confidence. It leads to the loss of confidence by Arab masses in the leadership of Arab left.

Communism in its "Diamat" version has become the enemy of the Arab left. It may well be, says Maqsd, that **political life in the future will consist in a struggle between a stagnant reaction and a stagnant communism on the one hand, pitted against the vital forces that work for progress**⁽¹⁹⁾. One could not be more rightly anticipating since the author wrote his essay in 1960. This is how political literature in the Arab world has interpreted socialism; this was the dominant view of Arab socialism during the 1960's.

Let us see what is happening today and how this view has evolved. In a recent work, A. Abdelmalek has dealt with this

issue⁽²⁰⁾. He starts by pointing out the conceptual ambiguity surrounding contemporary terminology and terms such as: Nationalism, third world, etc...These concepts, he dismissed as confusing and suggests instead of nationalism **"nationalitarianism"** which he defines as a phenomenon in which the struggle against the imperialist powers of occupation has its object, beyond the clearing of the national territory and the independence and sovereignty of the national state, in that reconquest of identity which is at the heart of "renaissance" undertaken on the basis of fundamental national demands. The world, notes Abdelmalek, is conceived in Europe's image; whatever does not conform to it, is rejected as an exception. Abdelmalek suggests instead of "Third World", a tricontinental league, at the image of the famous trilateral American Commission, whereby non-aligned countries from Asia, Africa and Latino-America would form a coalition or a "front" against imperialism.

Abdelmalek believes that Marxism represents a critical synthesis of British political economy, German idealist philosophy and French utopian socialism. He quotes Mao, in joining theory and praxis, advocates self-reliance as a global encompassing dynamic and declares openly that he does not adhere to any rigid orthodoxy. What is of importance to him, is the civilizational strategy which should mobilize the tricontinental front in the struggle against imperial hegemony. Abdelmalek, inspired by Nasser, develops a theory of historical fields "Les Champs Historiques"⁽²¹⁾, where the third world is divided into two major circles: One is Asia, with China at its centre and the other is the Afro-Asian-Islamic world circle with Egypt as the center.

The role of the Orient in seizing the historical initiative is reflected in the shift from Economism to civilizationism. Invoking

Mao's famous East wind, the author argues that the Eastern wind is prevailing over the western one. We can but sympathize with Abdelmalek views though some of his conceptual tools are no less ambiguous than the ones they intend to replace.

Another author, who has written much about the Arab world and its economy is S.Amin. We know how close Amin is to Abdelmalek views. Yet, there is a fundamental difference in their outlooks and undoubtedly, that of Abdelmalek seems much more equilibrated. S.Amin, develops his argument along historical materialism⁽²²⁾. He conceives the historical evolution of human society into three stages: communitarian, tributary and capitalist⁽²³⁾. His analysis of the international system based on the Metropol/satellite scheme, conceives historical forces of two sorts: those of revolution and those of decadence. The first and indispensable condition for development is according to Amin, a total rupture "delinking" with the capitalist system⁽²⁴⁾. Like Abdelmalek, Amin advocates self-reliance and gives much consideration to the non-aligned bloc, his analysis of the Islamic word is however superficial and deceiving.

In an article entitled: is there a political economy of Islamic fundamentalism?⁽²⁵⁾ He concentrates on the analysis of Seyyed Kutb's book "Islamic Social Justice"⁽²⁶⁾, and shows little understanding of Islam. Amin sees fundamentalism only ^{as} an extremist interpretation of Islam. Somehow, he seems to consider Islamic fundamentalism as the rival of Marxism. Henceforth, believing that the choice in the Arabo-Islamic world is either for this or that. Thus, when he raises the question: Does fundamentalism possess a viable political economy ?⁽²⁷⁾ He is in fact misunderstanding the whole Islamic issue. It is as if someone would ask whether Marx has advocated any ritual prayers for his fellow proletarians? I do not defend fundamentalism. Infact, I

condemn all forms of dogmatic fundamentalism be they Islamic or non Islamic.

Elsewhere S.Amin, is much more promising and less objectivistic, for instance, while analysing the Arab Economy (28), He argues that the example of Iran's revolution has proved that the Islamic people refuse and reject western forms of development without being able as yet to formulate a coherent strategy. He also asserts that Arab Unity is a historical necessity and a concrete possibility in the near future. He does not seem to be afraid that his argument may sound "non-scientific".

The attitude of our progressist intelligentsia on the whole, is still heavily handicapped by the materialist dogma. Marxism, like any other human philosophy, has a negative and positive potential. I agree that the positive potential, judging from its contribution to the liberation movements, has been tremendous. Yet, as an observer has wisely noticed "Marxism is only a ruse of history to promote the accelerated Westernization of people who have remained outside until recent times" (29). Such a deep evaluation coupled with the similar observation noted earlier with C.Furtado, (30) certainly requires a certain alertness. This will allow us to consume heartedly the humanitarian soul of Marxism which, in our opinion lies beyond materialism, in the brotherly equalitarianism, a spirit very close to Islamic communitarianism, "El-Mussawat".

Among western scholars who have studied the relationship between Islam and the western paradigm is M.Rodinson. In his "Islam & Capitalism (31)" Rodinson discovers no major contradictions between the two, except minor points such as "Riba" usury and so on... He finds Islam very rational, much more than Christianity and Judaism and concludes thereof that the

Muslims can construct their development along the capitalist mode of production. Marxist as he claims to be, Rodinson cannot conceive of any role for the Islamic religion other than as an ideology of class struggle. The Muslim world, he asserts, is specific but not exceptional. Hence, it will not escape the laws which govern human history (32). Once more, we are back to the Marxist deterministic trend. The author of "Islam and Capitalism" concludes that if the Muslim world does not conform to Marxism, it will suffer a severe crisis and the consequence will be a detachment of the Masses from their traditional faith. There is no other alternative, either capitalism and as a consequence Marxism or desintegration (33)

Rodinson though aware of the deep attachment of the Islamic people to their faith, seems to believe that Islam is finished, in order to survive, it has to adopt i.e. to compromise and faces the modern reality, otherwise, it will lose its adherants. It is as if he is analysing the agony of some European political parties, say, the French Communist Party. Islam, we ought to remind Rodinson, is not a vulgar political program. It is a divine religion and as all Muslims, we believe that the deep attachment of the Islamic people to their religion is indestructable.

The problem with Marxist scholars who have analyzed the Arabo-Islamic world is as A. Kreutz has put it: "in their references to the Middle East, one frequently finds that their economic and social analysis is lacking or deficient and that their knowledge of the full historical context is insufficient. There is hardly any feeling of solidarity with the working people of the non-western cultures and there is definitely not enough ordinary human compassion and understanding, their comments are

sketchy and occasional and often without the necessary connections, either with the logical sequence of their own general interpretative theory or the obvious facts of social reality".(34)

The same sort of intellectual blackmail is uttered from the other side of the Atlantic ocean, by B.Lewis(35) who warns that the Islamic community used as it is to dictatorship and Totalitarianism will not mind in the beginning a "bite" of communism before shifting back to liberalism. We move to examine the opinion of another western orientalist, who with much more understanding of the Arabo-Islamic reality, notes that the Arabo-Islamic society has a potential for innovation in the theory of El-Fikh, through which the Arabo-Islamic community should construct its unity not as a defensive measure against the aggression of modern times but rather as a means for a genuine modern project(36). Islam as a refuge and as a resistant strategy can only prepare the way for an Islam historian. The globality of the Islamic belief asserts, Berque, is an irreplaceable gift. It is the fire which should enlighten the Islamic community and the world at large(37).

Notes

- (1) El-Akkad.M, "Al Democratia Fi Al Islam", Cairo - 1952
- (2) Taha.H, "Mira'at el Islam", Cairo 1959. see also, P. Cachia, "Taha. Hussein" London-1956
- (3) Tabatabai.M.H "Tafsir Al-Mizan", collected and translated by: J.M.Kirmani, Teheran 1982
- (4) Tabatabai, ibid pp. 69-70
- (5) Sayigh.Y, "The Determinant of Arab Economic Development",

Croom helm.London, 1978.

- (6) Sayigh.Y,"The Arab Economy". Oxford, 1982
- (7) Opcit 168
- (8) Brahimi.A, on "Dimensions et Perspectives Du Monde Arabe",OPU.1980
- (9) Brahimi, ibid-p.33
- (10) Shariati, "Marxism & Other Western Fallacies",Berkeley 1980
- (11) Marx's "The rheinisher beobachter"(1874).Shariati. opcit , p.60
- (12) Shariati, opcit , p.50
- (13) Shariati, opcit, p.49
- (14) Sibai.M, "Al-Ishtirakiya.Al-Islamiya",Dar-elQuawmia,Cairo1960.
- (15) Shaltut,M "Al Ishtirakiya wa el Islam", Cairo - 1961
- (16) Abu Jaber.K,"Salama Moussa, Precursor of Arab Socislism", Middle East Journal, Spring 1966
- (17) Aflak,M "Fi Sabil el Baath",Beirut,2ed-1963(pp.122-124)
- (18) Maqsud.C,"Azmat el Yassar al Arabi", (The Crisis of Arab Left),Beirut-1960
- (19) C.Maqsud has started as a member of the Phalanx,then joined the Arab national bloc, then the Jumblatt socialist party (1956), then, the Baath. He is now representing the Arab League in the United Nations.
- (20) Abdelmalek,A "Nation & Revolution", London - 1981see also his "Taghir el Alem", ed. Maarifa, Beirut - 1985
- (21) Abdelmalek(1981), p. 201
- (22) Amin, note 48, infra.
- (23) Amin, infra.
- (24) Amin, "La Deconnexion", Paris - 1986
- (25) Qutb.S,"Al Adala Al-Ijtimaya Fi el Islam"el-Marif, Cairo 1749
- (26) Amin.S, "Is There a Political Economy of Islamic Fundamentalism?" Full reference in bibliography
- (27) Amin, opcit.
- (28) Amin.S "L'economie Arabe Contemporaine"ed:minuit, Paris-1980, p . 161.
- (29) Strauss.C, L Interview with the newspaper "Le Monde"22/1/1979.
- (30) Furtado(*infra*)note.50. *Section One*
- (31) Rodinson.R, "Islam et Capitalisme", ed: Seuil Paris 1966, the English translation is by B. Pearce, Plinguin, London 74
- (32) Opcit, p.217.
- (33) Opcit, p.226
- (34) Kreutz.A, "Marx and the Middle East", in islamic culture, Vol LVIII No.4
- (35) Lewis.B, in W.Laqueur's book The Middle East in transition London (pp.311-324).
- (36) Berque.J, "L'islam au temps Du Monde".ed:Sindbad.1984 p251
- (37) Berque , opcit, p.254

Section three: R.E.S.D . The Legal Dimension

It is very ironic to see international lawyers arguing strongly with each other about the "binding" and "non-binding" character of UNGAR's. While, they almost unanimously agree on the fact that even the so-called binding rules of international law are not that binding.

The most demystifying blow to the binding rules "Jus Cogens" has been the recent "Iran's hostages case", where one of the most "sacro-saint" of all peremptory norms of International Law, which is "Diplomatic immunity" has been torn apart without much legal fuss.

This could easily lead us to conclude that there is no such a thing as an international binding rule. All there is, as Hobbes has bluntly yet, correctly depicted it, is a society of wolves biting each other in a permanent struggle for survival where only the fittest will survive. Indeed, there is no use in trying to distinguish between what does constitute an International norm and what does not, because there is simply no consensus on what is binding and what is not. What might be binding for you is not necessarily so for me and vice-versa. As R. Higgins would put **"The identity of international law in areas of pressure from change is very much in the eye's of the beholder"**(1).

W.Friedman is wrong in assuming that only the five great powers have the will to effectively apply their political decisions(2). Small states also have that will; and "will" is much more than military might, otherwise, how are we to admit that

a small state like Iran could defy the most powerful of all; arrogantly humiliate it and get along safely with it ? The problem with powerful nations as Morgenthau has wisely noticed it; is that they never learn from history except when it complies with their schemes(3).

As to the legal nature of U.N.G.A.R's, particularly those promoting development, We have described the debate on this issue as an ironic debate; even in the case of agreement on the right to development, would still remain the question of what use is the agreement itself to the international community? Recognizing the right of people to development is not going to change much to the nature of the human society and its basic power oriented structure.

In other terms, the recognition by the international community of the right of people (states) to development is not in itself a concretization of that right into a reality. Development is something which does not need United Nations aprobation in order to become a reality. Hence, it is something which comes first and then imposes itself on the U.N. frame.

It is like in Domestic Civil Law where a new born child comes first and is legalised after; that is registered in the civil covenant. Why then the need for legalization ? In the case of the child, legalization is necessary as a social recognition for an eventual legitimation when the child reaches maturity. In the case of development, legalization is necessary as a pre-legitimizing step.

Logically, third world states should wait until they achieve development and then request legitimation. In requesting now the

legitimation of their right to development, they are running ahead of time and inviting other nations to recognize something which does not exist yet. Hence, the refusal of the "Developed nations" to comply with their demand.

Looked at from the third world perspective, the same issue presents itself in a substantially different manner. The third world states have achieved political independence and have become members of the United Nations entitled to the same rights and duties as all other nations, that is to say, the new born child has been legalised. Having reached maturity, he is being denied legitimacy. This does not seem to make much sense.

We will come back to this point later on, let us now examine the different interpretations of the right to development as provided by the legal schools.

I. The Anglo Saxon School and The Right to Development.

As we have seen earlier, the movement which has led Europe and America to the prominent position of leadership in the world is the scientific revolution. In the field of legal studies, this has produced what one may call "**Legal Scientism**" a sub branch of that more general positivistic Vienna school. Kelsen emigrated to America where he established the reign of the pure theory of law. In England, the disciples of Austin produced the "**Fitzmaurician School**", which has it that the judge does not make Law but simply applies it⁽⁴⁾. This old orthodoxy is still dominant in the Anglo-American legal tradition⁽⁵⁾. Yet, it is today challenged vigorously by scholars who conceive law not as rigid rules but rather as a purposive legal process⁽⁶⁾.

The Anglo-American school interprets the right to development as mainly a human-right; that is a right of individuals rather than states. Why ? The answer encompasses a combination of many elements running from positivistic formalism to purely ideological ^hrethoric.

First, it is held that law as a purely technical device should not concern itself with meta-juridical values whether political, economical, or else...The notion of development because of its unlimited scope runs across the spectrum of social sciences and causes formidable difficulties to the legal discipline. As a result, legal efficiency's sake requires us to keep away from it.

Second, and here the ideological element expresses itself clearly the right to development claimed by third world states is a serious threat to the cherished individual liberty. In focussing on the right of people (states) the third world's claim challenges the eminence of liberalism as the ideology of the free world and hence, advocates the triumph of socialism.

As for the first point, the best anglophone critique of the notion of the right to development as a right of state elaborated by International Development Law, comes from Professor Schwarzenberger⁽⁷⁾. It may be useful in this respect, to examine Prof Schwarzenberger view on International Law before looking at his opinion on this matter.

Schwarzenberger sees International Law as a normative system which does not condition but is instead conditioned by the rule of force. International Law expresses according to him, power relationships instead of regulating them⁽⁸⁾. Hence, International Law is powerlaw (naked or disguised). It is also a rational Law of

reciprocity. It could be a law of coordination but it is a law in the proper sense only in the first two cases. The three categories of law mentioned above coincide in Schwarzenberger's view with ideology - reality - utopia, examining the emerging International Development Law, Schwarzenberger urges us to limit our understanding of International Development Law to International Economic Law (a sub-division within the general IPL). Unless we do that, we are going to blur the relationship between Lex Lata and Lex Ferenda. The new terminology brought in by third world lawyers is highly exposed to ideological misuse and is dismissed by Schwarzenberger as "academic irrelevancies"(9).

It is up to those who want changes in the International Legal Order to prove the effectiveness of these changes. Schwarzenberger raises strong reservations about the meaning of Development. What does it mean ? It is too vague; then, he goes on to describe the proponents of an International Development Law as optimistic idealists who rely on Dubious sources, "Soft Laws". Their argumentation ignores the real international power structure and their main goal is a departure from the rational and realist law of reciprocity, the rise of majority rule at the United Nations tells us Schwarzenberger affects the appearances rather than the reality of the power game. The author ends his appraisal of International Development Law with some interesting remarks, for instance, he outlines the need for:

- a) A rigorous definition of development,
- b) A critical attitude towards governments who speak on behalf of states, elites, groups, etc...
- c) A critical attitude of the common western origins of apparently irreconcilable western and eastern ideologies.

Schwarzenberger concludes by asserting the validity claim of

the orthodoxy in Benthamite terms :**"The greatest hapiness of the greatest number has not done too badly across millenia before their unasked development"**(10). He thus, urges for the re-establishment of a Non-Development Law. Schwarzenberger claims to be neither pessimistic nor optimistic (foreword or backward looking).

In his view, he is a scientific lawyer and his approach is in the terms of his disciple :**"down to earth, practical and realist"**(11). This approach is assumed to be free from national self interest and the effect of power politics. It just happens however, that this view coincides with the conservative stance of G. Britain at the international level and is thus, far from being value free. In regard to the Benthamist device, the greatest number which Schwarzenberger has in mind has certainly nothing to do with the three billions of people who are from the non-western world. It may seem easy to dismiss urging legal changes as non-existent, ignore them and indulge in self-conceived comfortable legal formalism. **"The old ways, as Falk has put it, are simply not working and the sooner we can allow ourselves to acknowledge the reality the better the chances are that we can do something about it"**(12).

The best illustration for the second point is provided by Prof. Weil's article: **"Toward a relative normativity in International Law"**(13). Weil argues that International Law, which he, borrowing from Guggenheim, defines as the sum of juridical rules which regulate international relations; is sick, primitive and imperfect. All this, tells us Weil, is due to the ineffectiveness of the sanction mechanism. Nowadays however, another imperfection is added by the emergence of a certain "duality of norms" in International Law; soft versus hard laws or **"coutume civilisée et contume sauvage"**. The result being the

inability of the lawyer to delimit the edge of normativity i.e. the point from passing non-juridical norms to juridical ones⁽¹⁴⁾, Weil recognises that International Law without higher moral values is a mechanical body with no soul and he also admits that the new norms brought progress which no one could deny, *he is ingenious enough to deny it however*⁽¹⁵⁾. Weil is afraid that the idea of the international community or that of a "juridical consciousness" may become codes easily manipulable by the third world states toward the negation of the inherent pluralism of the prevailing order *which is fact third world states perceive as egocentric*. Hence, Weil does not support the new norms which, according to him, are blurring the distinction between "**Lex Lata-Lex Ferenda**". To attempt today the elaboration of the international order of tomorrow, is, according to him, like making a key which does not open the lock it intends to. That a sociologist^{ist} argues Weil, analyses the infinite "nuances" of the reality is one thing *read acceptable*; but that a lawyer who depends on the simplifying rigor attempts the same task is a different matter altogether. *read unacceptable*. That the I.C.J has failed to condemn Iran in the hostages' case, is a mistake which Prof. Weil, regrets deeply because that was according to him, the ideal opportunity to reinforce the higher norm *some sort of the ground norm*. Yet pursues Weil, it is not too late. Lawyers have plenty of time to react and reject the new norm because they are the source of the dilemma of International Law⁽¹⁶⁾.

There is not much to say about Weil's heretical article, except that it is as Abi Saab has seen it : a yearning for a lost paradise⁽¹⁷⁾ or as Falk has described it: a slightly hysterical effort to stop the World from changing⁽¹⁸⁾. One cannot help to see in Weil's argument and his pairs that same rhetorical redundancy which so often is reproached to third world's lawyers. Doyen

Charvin has quietly nicely denounced in a Bunnuel's title, "**Le Charme Discret Des Courants Doctrinaux**"⁽¹⁹⁾. The realism which Occidental Lawyers so proudly exhibit in their confrontation with the rest of the world is no more than a Cynical accommodation to ^{the} other's tragedy. The tendency to ignore the genetics of international rules, pursues Charvin, is part of a cold logic which seeks to isolate the norms from their causes. Occidental international lawyers, asserts Charvin, who are so fond of transpositions from domestic law, never resort to the principle of "**Nemo auiditur propriam, turpitudinem allegans...**", nobody can claim rights for himself from his own wrong doings; instead they resort to the ineffectiveness of a law which through their doctrinal discourse they contribute to weaken⁽²⁰⁾.

Occidental lawyers and this apply to lawyers in general are in reality caught into that old dilemma of the two duties "to make a living and to make a meaning". In order to ensure the first, they are obliged to stick to the main-stream and defend the statut-quo and those constitute a majority everywhere. Those who dare to challenge openly the mainstream and search for a meaning without ignoring the imperative of a living are quiet few.

In regard to the Anglo-American school and its conception of the right to development. P.H. Brietzcke⁽²¹⁾ has attempted to reconcile the dichotomy inherent to the right to development "people versus states right". Brietzcke tells us that the only hope to overcome bureaucratic manipulation is through a patient educational process; prudence and moderation are required if we are to avoid misperception. Pragmatism cautions that the NIEO requires the redistribution of the international political surplus. Yet a peaceful bargaining for first and second world's support for

the right to development necessitates a lessening of North-South and East-West tensions. Commenting the multiplicity of norms in International Law, Brietzcke refers ironically to those "normes sauvages" which some wish to domesticate and others to annihilate and suggests that the U.N. norms on the right to development should legitimately be called "Organic Laws" designed to remedy the "Lex-imperfecta" prevailing today with the condition that they should specify concrete duties correlative to the rights being created. This, the author believes, will resolve the pertinent issue of auto-interpretation(22).

The right to development according to him has run far ahead of meager philosophical foundations and a sense of direction. Increased consensus would in fact result only if political arguments were converted to an intellectual dialogue; into ideas and ideals with the power to move people. Behind all claims to rights are beliefs, stresses Brietzcke, these beliefs could provide a sense of direction to the right of Development(23). Development as a human right is so depressing a prospect in the face of so much promise that an uplifting conclusion from A. Sakharov seems appropriate : "the ideology of human rights is probably the only one which can be combined with such diverse ideologies as communism- social democracy- religion, technology and those which may be described as national and indigenous. It can also serve as a foot-hold for those who do not wish to be aligned with theoretical intricacies and dogmas and who are tired of the abundance of ideologies, none of which have brought mankind a simple happiness. The defense of human rights is a clear path towards the unification of people in our turbulent world and a path towards the relief of suffering"(24).

II. The French School & the Right to Development

France has always strived for self-determination. Indeed it is known as the homeland of revolution and French people everywhere and when would like to have it their own way. The Gaullist tradition has recently given a new impulse to this French feature which many would call "French Chauvinisme" but are not we all chauvinistic somehow ?

In the field of legal theory, French lawyers were prompt to raise the right to development to a new legal discipline⁽²⁵⁾. The school of Reims under the inspiration of the late Ch. Chaumont has played a leading role in stressing the urgency for the recognition of the right of people (states) to development. Other current such as the work of M. Miaille have contributed to the elaboration of a critical approach to the study of law⁽²⁶⁾.

Today all what relates to the right of development is assembled under the title : "**Droit International Du Developpement**", abbreviated as "D.I.D". International Development law, tell us, French lawyers, is the sum of principles, rules institutions and procedures which aim at the development of all people and states⁽²⁷⁾. This integrated corpus derives historically from the colonial legacy through what once was known as "**Le Droit D'Outre-mer**" or "**Le Droit De Cooperation**", from that historical affiliation, it has inherited three distinctive features:⁽²⁸⁾

- 1) The geographical object "Third World States",
- 2) A certain "paternalism" reflected in the notions of Aid , "SGP", etc.. 3)
- 3) A positivistic methodology.

Virally stresses that D.I.D. is nothing more than a part of international law⁽²⁹⁾. Yet, he distinguishes in the D.I.D. three relevant remarks⁽³⁰⁾ :

- 1) D.I.D. is a sum of legal principles but not rules of law.
- 2) D.I.D. is a synthesis of political negotiations.
- 3) D.I.D. is a conflict of interests.

Virally denounces what he calls "juridicentrisme" whether that of third world lawyers who tend to interpret "U.N.G.A.R." as a source of law; or that of western lawyers who speak of a "soft-law" which obliges without being an obligation⁽³¹⁾. Hence, he concludes by ironically inviting the lawyers to turn into politicians and concentrate on the rich promises of political bargaining rather than stick to a juridical formalism which is not going to be met by political practice anyway.

M.Flory for his part has devoted most of his work to the elaboration of "DID", which he conceives as a purposive law "**Un Droit De Finalité**" a law which has a finality and aims at achieving a clear cut objective, the eradication of underdevelopment⁽³²⁾. DID, stresses Flory, rejects "**Pharisaïsme**" and the good consciousness of a certain "**Juridisme**" which ignores the essential⁽³³⁾. Flory distinguishes three main legal currents in regard to DID⁽³⁴⁾:

- 1) Positivist Orthodoxy , who sees DID as a destabilizer, those are according to Flory Lawyers who do not want to take sides in what they conceive as a metajudicial debate.
- 2) Third world radicalists who either reject DID as a mean for further underdevelopment or else conceive it as an effective new International Order.
- 3) Accommodationists or reformers who believe DID to be a genuine instrument for adapting International Law to new economic

international realities and an efficient platform for the promotion of a North-South dialogue based on equal participation and multiculturalism⁽³⁵⁾. He sees himself as an adept of this last current.

Pellet also would fit along this third current⁽³⁶⁾. He criticises both conservatives and radicalists who engage in wishful thinking more than in analysis of positive International Law. International Law is not an ideal philosophy or some kind of mental games "**Jeux De L'Esprit**". It is rather a guide for concrete social action⁽³⁷⁾. Pellet wants to grasp International Law in all its infinite variety and refuses the positivistic black or white dictum⁽³⁸⁾. In between legal and non-legal norms, there exists a twilight zone of normativity which a lawyer cannot simply ignore. Hence, he advocates a dynamic role for the lawyer which beside guarding the norm, should aim at bringing about understanding and encouraging agreements: "soft-law" is the mean which allows for the integration of changes which are now unavoidable. UNGAR's hence, play a tremendous role as a source of inspiration and moral support. They create international expectations, exercise pressure and provide vehicles for changes. In addition, they orient the development of International Law in the form of "Statut-nascenti" and as a delegitimizing device of international rules which are outdated⁽³⁹⁾. In any case, concludes Pellet, those rules, soft as they may be, are better than none. Thus, DID constitutes a compromise in regard to the global perspective of the NIEO⁽⁴⁰⁾.

G.Lacharriere for his part, proposes an interesting transposition between law as "ut"; that is as an ought and law as "quia" reality⁽⁴¹⁾. All existent international laws are "ut" laws disguised in "quia" laws. This is his famous realist notion of the international legal policy⁽⁴²⁾. Lacharriere stresses that third world proponents of a "naked" undisguised international law of

development is a good lesson of realism given by the third world lawyers to the orthodoxy. What in Lacharriere's view constitutes a weakness in the third world argumentation is in fact that they have nothing to offer in replacement of the old liberal device which ties automatically the pursuit of individual interest with that of national egoistic claims⁽⁴³⁾.

In 1979, at a workshop organized at the Hague Academy, on the right to development at the international level, It was argued by French scholars that the right to development has surprised and shocked certain habits of thinking in terms of Aid and Cooperation and has aroused defensive reflexes in the west⁽⁴⁴⁾.

H. Sanson, argued that the right to development is better understood when looked upon as a meta-juridical notion. It consists in resolving the apparent contradiction between being and non-being through a synthesis which he labeled : **"etre par soi et par autrui"**, being by one-self and by others⁽⁴⁵⁾.

The secretary general of the academy, emphasized the distinction between "Mechanist utopia", which is based on the belief that all you need in order to solve international problems are complex procedures and abstract technical formulas; and "prospective utopia" which is a motivating force, in advance of history without ignoring the difficulties ahead which can only invite to much commitment and willingness to outpass obstacles⁽⁴⁶⁾. He reaffirmed the notion of the international community against its critics and argued that community and conflict go hand in hand. Their inseparability, Dupuy thinks, can only indicate to us how the international community ideal is a strategical asset to the project of peace and international stability⁽⁴⁷⁾.

III. The Maghribean School and The Right To Development

The U.N. charter expresses clearly the will to employ the international machinery for the promotion of the economic and social advancement of all nations⁽⁴⁸⁾. , this has remained a shimerical slogan despite three decades dedicated to what Pellet calls the ideology of development.

The third world move towards a NIEO, has already altered the old bipolar balance of power. The decision making process has been shifted from the security council to the general assembly. A whole series of resolutions voted by the general assembly are now despite what some may think, effective legal means for consecrating the right of all nations to equal sovereignty and development⁽⁴⁹⁾.

This has started with resolution 1514, December 1960, abolishing "De Jure" as well as "De Facto" colonization. A decade later, this was followed by successive resolutions stressing the right to development for all nations. In October 1970, resolution 2625, was adopted by consensus as a declaration on the principles of international law concerning friendly relations and co-operation among states in accordance with the U.N. charter. It stated openly that all states enjoy sovereign equality and have equal rights and duties; they all are equal members of the international community; not -withstanding differences of economic, social, political aspects or else.

After that, came the program for action toward a new international economic order (Resolution 3201 May 1974). President Boumedienne of Algeria, opening the special session of

the GA on that occasion declared : "In the eyes of the big majority of mankind, the prevailing order is as much unjust and outdated as the old colonial order from which it derives. The dynamic to which this system maintains itself and grows is that which makes the poor poorer and the rich richer. It constitutes the major obstacle to the development of all third world nations"(50).

The same year, a charter of economic rights and duties of states was adopted by the general assembly (Resolution 3281 XXIX) Dec 1974), despite the strong reservations of western nations. Article one of the charter proclaims the sovereign and undeniable right for every state to choose its economic, political, social and cultural system in accordance with the will of its people without outside interference, coercion or threat in any form whatsoever. Article two, recognises that every state has and shall freely exercise full permanent sovereignty, including possession, use and disposal of all its wealth and natural resources and economic activities.

Since then, third world states have been advocating global international negotiations in order to find remedies to international problems; hunger and starvation, underdevelopment and technological monopoly, wealth distribution and terms of trade. In Dec 1979, a resolution (34/138 and 139) was voted by consensus at the G.A. calling for global negotiations in regard to international economic cooperation and the promotion of development. As a result, a series of meetings were held here and there(51). Dialogues were promoted universally as well as regionally(52). On the whole, however, not much has been achieved yet.

What we have labelled the "Maghribean School" in regard to

international development law is the contribution of the Arabo-Islamic society to the right of development at the international level. Indeed, the Arabo-Islamic society has played a leading role in the clarification of what the substance of the right to development is about. As Bedjaoui has put it **"The Algiers Charter of Human Rights, The Algiers Summit of 73 and the U.N. special session "74" will remain as the Bandoeng of development"**(53).

In 1976, an international colloque was held in Algiers on "Development and International Law"(54). Lawyers from the two coasts of the Mediterranean gathered to examine international vital issues such as : The sovereignty of states, the right to nationalization, the legal validity of U.N.G.A.R's etc...

Analysing the charter of economic rights and duties of states, F. Anjak, pointed out that the charter constitutes from the legal point of view, a prototype of the new mode for the elaboration of international rules (55). All in all, and in the words of the late Algerian Foreign Minister Benyahia(56) "The colloque achieved a critical assessment of the role of law avoiding mystification and establishing the vanity of any attempt which aims at the separation of the rules of law from its basic supports which are the economic social and cultural realities".

In 1982, the North-African lawyers participated to a **"table-ronde"** at Aix en Provence on **"Normes Formation in D.I.D"**(57). Their contribution came as a reply to Prof Weil's article.

Prof Mahiou stressed the fact that the new norms incarnated in DID have brought a new dimension to the legal discipline. It is true, reckons Mahiou, that DID is still ambiguous and lacks a sense of

direction but this should not lead us to conclude that there is a duality of norms. In reality the norm is one but the content is double. What we need henceforth in order to unify that content is an international social law⁽⁵⁸⁾.

Pr. Benouna's reaction was much firmer in regard to Weil's argument, Whom he describes as fighting a rearguard-battle (*Un combat d'arriere garde*)⁽⁵⁹⁾. International Law, stresses Benouna is not sick, it is the mind of some lawyers which is really sick. Our interpellation of international law is not a matter of scientific curiosity. It represents for those concerned a question of quasi-existence in regard to their future in the international society⁽⁶⁰⁾. In reality, notes Benouna, the change is not appreciated in the same manner between North and South. There, it is a question of economic restructuring and adaptation. Here, it is a question of survival, identity and existence⁽⁶¹⁾.

Prof Benchikh has denounced "DID" as the law of underdevelopment⁽⁶²⁾ a means for further unequal dependency, neither SGP in trade nor the euphorism of the Lome' convention has altered in any way the foundations of the unequal exchange and the overwhelming exploitative character of the capitalist international Division of labour⁽⁶³⁾. As a consequence Benchikh has urged for a "**Deconnection**" from the capitalist system. He has labeled it "**Distantiation**"⁽⁶⁴⁾ Self-reliance according to him is the key factor in any genuine move towards the achievement of an integrated development.

M Bedjaoui is probably the most outspoken voice in the Maghrebean School. His appeal for a NIEO has been constant and uncompromizing⁽⁶⁵⁾. The novelty of our times, asserts, this author, resides in the divorce between law and force. Force cannot anymore impose its rule. The third world, remarks Bedjaoui disposes today

at the international level of a rule for the creation of law. That rule is the rule of the number (majority) as opposed to the rule of force. Beyond all academic speculations lies the fact that international development law which is the sum of UNGAR's, is an authentic development of international law. Those who advise us today, remarks Bedjaoui, not to go too fast and be in hurry are in reality afraid of losing their privileged positions in the international stratum(66).

Development is an international problem of the first order and that is why the inter-dependence and solidarity of nations must not take for ever the shape of the horseman and his mount(67). The right to development is a right "erga omnes" to develop. It is a right claimed by a state which is "master in its own house" and which is opposable by it towards all others and at the same time it is the right of the state as an active protagonist in international relations and represents a right over others namely a right which may be exacted by that state from other states as well as from the entire international community(68).

There is an organic link which ties together state sovereignty, permanent sovereignty over natural resources and the right to development in the same chain, which is only ^{as} solid as each of its individual links. If the "right to development" link is especially frail, the same will be true of sovereignty itself(69). Bedjaoui does believe in the necessity for a consensus between North and South. Yet, he expresses his fear that such a fragile hope cannot stand the latent and omnipresent pulsions of confrontations(70). He has strongly advocated the establishment of an international fund for food resources in order to fight and eradicate starvation and hunger and give an effective substance to the notion of the common heritage of mankind and international solidarity(71).

Assessment.

In this chapter, we have examined the notion of development both as a concrete economical model (liberal or socialist) and as legal right stipulated either by international economic law (the Anglo-American School) or by International Development Law (French and the Maghribean Schools). In regard to the first dimension, We have shown how the Arabo-Islamic society rejects the western empirical and material reading of political economy and its hegemonic pretentions. In regard to the second dimension, the right to development, we are offered almost the same dualistic alternative in the form of an orthodoxy and its critical opponents. Of course this is not to say that the Anglo-American school represents the liberal option while the French school represents the radical. It is true as has observed Slinn that the Anglophone School does not have the equivalent of "Chaumont's Reims" and is on the whole more conservative⁽⁷²⁾. It is also adamantly positivistic ⁽⁷³⁾ Yet, it is nonetheless true that among all schools including the Maghribean there, are liberals and radicals, positivists and legal analysts etc... As Pellet would argue; after all Mahiou is not very far from Weil⁽⁷⁴⁾. The same could be said of Bedjaoui and Falk, Flory and Benouna, etc.. What is mostly lacking to the Maghribean school is a sense of historical identity. All its proponents have in their majority received their education from western (French) Universities and are in a way or another dependent on French leftwing rhetoric.⁽⁷⁵⁾ It is therefore no surprise to find them unaware of what ties them to their prestigious Maghribean jurist ancestors :Ibn khaldun, Ibn rushd, sha'ttibi.etc⁽⁷⁶⁾.

The so-called "**Orthodox**" positivists exhibit a cynical realism which tends to present reality not as it is but rather as "**they**" see it should be. For those enlightened mentors of a "**Scientific Law**" third world claims for justice and equity are mere "**words**"⁽⁷⁷⁾, DID is a "**mirage**", UNGAR's are not international rules. Law is whatever they say it is, the source of all instability at the international level. As if there has ever been a stable international order which is today threatened by the third world's claim for a right to development.

There is undoubtedly in the positivistic stance a paranoic nostalgia for the golden age of the "**Law of the Civilized**" and the undisputed reign of the imperialistic rule. The neutral and value free appreciation of the legal norm which is claimed by the so-called scientific lawyers is bold ^hrethoric. Indeed orthodox as well as their critics are fully engaged in the political debate, the former no less zealously than the latter; everyone seems dedicated to serving his political aims. Hence, if there is no doubt that the orthodoxy serves well "**the Reagan - Thatcher alliance**", there is also no doubt that the French School serves well the "**Gaullist tradition**", or that the Magribean School serves well; what one may call the "**Boumedien's legacy**". The question, the real one, is who cares for the legal norm ? It is true, generally speaking, that the weight of academic opinion; as Gautron has put it, is rather low compared to power-politics. Yet, if lawyers continue to believe that it is not their business to make law, then one is entitled to wonder how and who is going to care about the quality of the legal norm ? We do believe with Carty⁽⁷⁸⁾ that law is what lawyers produce and the sooner this is admitted the better it is for law.

Law tells us Touscoz⁽⁷⁹⁾, even as a highly developed technic is an art rather than a science and the role of the lawyer is to appreciate the sufficient effectiveness and legitimacy of the rule

in a given society. Law asserts Touscoz catches only a glimpse of reality and that is why if we are to avoid "Juridicentrisme", ^{we} need to grasp more fully the legitimacy of meta-juridical elements, such as, political-science, sociology, ethics etc..(80)

Realists contend that the legal executory norm cannot be changed unless the basis on which it stays i.e. "the power relationship" is modified. Now, how can we possibly modify that power relationship ? Realists would contend that it is only possible by making war. Hence, their discourse of law is a discourse war, a Hobbishan permanent state of war, that is why Schwarzenberger prefers to define international law as a law of war "**De Jure Belli**" rather than "**Jus Pacis**"(81). Thus, according to the realist, law is a coercion, full stop. How do the coerced conceive of that coercion ? or, is that coercion legitimate ? These are questions out of the legal scope of the realist.

When Kelsen confronted this problem, he solved ^{it} by legitimizing the coercion through his hypothetical "groundnorm". He never bothered to define "legitimate coercion" other than by hypothetical assumption because that would have led him to destroy the whole legal pyramid. The legal pyramid of the realist is thus shaky and in terms of Quadri, cannot simply stand on its feet(82).

The rule of law as a legitimate coercion is a legal rule in a state of grace, "Divine Law". Hence, in Islamic legal theory legitimacy is the essence of law. It supersedes legality while in western secular thought the order of priority is reversed. As a western lawyer has put it, "there is a long haul from legitimacy to legality"(83)

The aspiration behind the right to development and the NIEO

perspective is the logic opposite to that of the realist. The modification of the rule is seen as the first step to the "delegitimation" of the power relationship and its eventual modification. Hence, it is a discourse of peace and dialogue for the achievement of pacific changes. It is the whole difference between a "Coup à la Pinochet" and an accession to "legitimate coercion à la Allende".

What the Magribean School is trying to make clear is that development is a global dynamic process. The legal discourse can hope to reach a definition of development only if through legal humility. It welcomes a process of integrating metajudicial insights and norms. Development has been defined as a **"dynamic process of cumulative liberation and transformation of psychological, political, economical, cultural and social structures of a given social group, according to its own rythme and values"**(84). In order to grasp that, the legal discourse needs to drop its technical arrogance and commits itself to the enforcement of the developing task. Laroui believes that the Anglo-Saxon school is most ~~de~~ than any other weak, vulnerable, given to circumstances; it is the school which complains about the lack of Arab's understanding for its objectivism and its sympathy towards Arab desseins while in fact it is the most open of all schools to ideological priori's(85). Djait, on his part believes that it is the French school who ~~who~~ rather, is the most paternalistic of all and that Parisian intellectuals are savant dictators(86). As we will attempt to show in the next chapter, it is the German school which seems to be the closest to the Arabo-islamic thought. The Arabo-Islamic lawyer will defend international law to the extent that the later defends his right to development. If the western orthodoxy refuses him that right, then he will advocate a total rupture with that orthodoxy, to each his own law and to each his religion.

Some have asserted that a total "rupture" from the dominant international system is an "utopia". History proves them to be wrong. China, Albania, USSR have all in a form or another exercised autarcy and it did not fail them if we are to judge by their positions today. Of course, people today talk about the heavy price that a "Stalin" has required from his people. Naturally everybody knows that development requires a high price in a form or another⁽⁸⁷⁾ and only the people concerned are to decide whether it is worth the price or not. The point is not that we favour "rupture" instead of international cooperation but rather that we ought to keep our distances from an international order which consider us as "undesirables".

A widely spread tactic among western lawyers for denying third world states the right to development and advocating instead a policy of human rights, is their pre-cautious stance towards what they generally conceive as dictatorial third world governments⁽⁸⁸⁾. Bedjaoui replies to this charge by pointing out that it is because we are denied our rights and participation at the international level that by extension, our people are denied in their turn their rights and participation within our national legal orders⁽⁸⁹⁾. The individual pursuit of the right to development vis-a-vis his state can only weaken the state and would occur at the very time when the state needs to be strengthen if it is to neutralize the negative effects of the international factors which counteract its collective development. In laying claim to development, the individual would undermine the state at a time when the later is engaged in the attempt to secure him that same development⁽⁹⁰⁾. This may sound like a "trickle-down" theory of rights but it remains nevertheless true to most extents. As long as international development or international economic law is understood only as a corpus concerned with the technical task of

providing legal tools for the conduct of international business, it will remain useless and will keep the tension between North and South. Before you do business with some body, you need to trust him and be confident about his good faith. DID should aim precisely at bringing about that trust and all along sets the technical ground for an effective equal partnership at the international level.

Before closing this chapter, it is worthwhile to stress an important aspect in the right to development and that is its theological aspect⁽⁹¹⁾. As the pope has himself asserted, development is the new name for peace. The influence of the Christian ethic on DID is undeniable⁽⁹²⁾. DID is indeed a theology of liberation. It can only be understood as a global right pertaining to the state as well as to the individual⁽⁹³⁾. It is an undeniable right of all nations without discrimination and only dialogue and international negotiations could lead us to a workable definition of what development as a right is about. I would like to stress that DID crystallizes in my opinion that Hadith which I have quoted earlier and which preaches **"that a believer is not a true believer until he likes for his brother what he likes for himself"**⁽⁹⁴⁾. Those who have been reading international law as a discourse of force and war will no doubt continue to do so, despite the repeated lessons of history or transcendental wisdom. They have long before doomed the human specie to a gloomy fate.

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Chapter four

The Right to Cultural Self Determination

Section one: The Cultural Dimension In International Law

The expression "legal culture" is emerging today as we witness a growing interest in the role which culture plays in the formation of legal norms⁽¹⁾. This trend has come as a logical consequence of the failure of Positivism as a legal methodology. Does one need to forget that the first objectif sought by positivistic normativism is the purification of legal theory and its deculturalization? The result obtained by a half century of zealous positivism has been exactly the opposite of its declared intent, that is, a culturally biased legal theory which has driven the modern society and with it the entire international community to a deadline.

It is our thesis, that only a revived legal culture based on dialogue and communicative action will, allow legal theory to regain its vital function of guidance and mediation between the different components of the social life-world.

Culture, following Geertz, could be defined as a historically transmitted pattern of meaning embodied in symbols through, which men communicate and develop their knowledge about life.⁽²⁾ The sphere of culture has been avoided by lawyers who under the spell of positivism have come to see it, as that nebulous amalgamous alien to the legal world. Hence, despite the recent emphasis on cultural rights at the international level particularly

within UNESCO'S frame, very little as yet has been achieved in the rehabilitation of culture within the legal sphere.

One of the major obstacle still lying ahead in that respect is the obsessed positivistic exigency of a functional definition of the phenomenon of culture. The positivistic jurist rejects whatever is not reducible to fragmented and standardised calculable norms. Attempts have been made to classify cultures linked with legal systems "open and close legal systems"(3). At a more general level, scholars have divided cultural systems according to the traditional classification : sub-national, national and international systems.

No doubt, the comparative democratisation of legal and intellectual life in the twentieth century has led to an important increase in sensitivity towards a better understanding of the cultural world. As wallerstein has put it : " it is elementary to say : this new intellectual focus on "culture" comes out of disillusionment with the efficacy of transforming the world by altering its economic or political forms"(4) . Culture, hence has become the alternative through which "the intrusion of human agency is intrinsically possible and constitutes a source of hope."(5)

In the field of international law, Scholars have long ago advocated a culturally inspired theory of international law : Professor Northrop has long ago argued that "the cultural values and moral principles of the world in all their living law diversity and unity, rather than precedents, power politics, momentary expedients, constitute the realistic basis for resolving the ideological conflicts and disturbances of our world by peaceful means ."(6)

Recently, at the proceedings of the American Society of International Law, scholars have commonly argued that the world legal system is based on trans-cultural values⁽⁷⁾. YASUAKI for instance, observed that Western, methodology is still overwhelmingly dominant in legal education. Textbooks and cases currently in use are "Westernocentric" and bear little mention if at all to non-Western values and contributions. The academic situation of international law has remained overly conservative and has failed to liberate itself from traditional "Eurocentrism". Hence, what is required of international legal education is the development of a deep sense of and commitment to intercivilizational law.⁽⁸⁾

In similarly provoking terms, Professor Dorsey has criticised Western ethnocentrism and its hegemonical nature. He has warned that such stubborn egocentrism will inevitably lead to nuclear Armageddon.⁽⁹⁾ Dorsey asserts firmly that the nation-state system is a cultural system which has failed to distribute power and wealth equitably among cultures and that it is high time to relinquish all such hegemonical world frames and adhere to a genuine universal democratic society whereby everyone is entitled to his freedom and free to justify it in terms of his preferred theological or philosophical traditions⁽¹⁰⁾. Dorsey is convinced that a cultural priori is necessary to the formation of a human cosmopolitarian society, he therefore appeals for a cultural pluralism, at the international level.

To meet these appeals from western scholars, third world lawyers are required to retaliate by a similar commitment to international solidarity. They should strive to free their own societies from totalitarianism in all its forms : fascism dictatorship and religious fanaticism.

In this chapter, we intend to argue for the right of ^{the}Arabo-Islamic cultural entity to self determination. In order to do that, we need to step out from the narrowness of the prevailing legal methodology to an extensive form of knowledge. Indeed, it is our conviction that legal philosophy as the matrix of all social sciences should keep open its doors to reflexive and critical thought stemming from its sub-branches and seek in that flow of ideas a stimulus to its agonizing methodology.

Hence, we intend to desert orthodox legal rethoric for a change and attempt to establish a dialogue. We will introduce basic features of the Arabo-Islamic culture with the aim of provoking the reader's curiosity and initiating with him a dialogue on the merits and draw-backs of the Arabo-Islamic culture, on means and ways to integrate it with the international society and allow for its participation to the establishment of viable cultural pluralism at the international level.

I. R.C.S.D : The legal dimension

It is only lately that the right to cultural self-determination has been emphasized in the united nations literature. The basic U.N .document in this respect is the declaration proclaimed by the fourteenth session on november , 1966 and adopted by the general conference on international cultural cooperation. Taken as a whole, the declaration tells us, Cristescu, must be interpreted in the particular light of the right to self-determination⁽¹¹⁾. The declaration states in its article one :

- I - Every people has the right and the duty to develop its culture.
- II - Every culture has a dignity and value which must be

respected and preserved .

III - In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage of mankind.

Article V reads as follow :

cultural cooperation is a right and duty for all peoples and all nations, which should share with one another their knowledge and skills.

Hence, in order to promote international cultural cooperation, the general conference has felt compelled ; first, to stop deculturalization and ensure protection to the traditionnal cultures which are the object of much pressure exercised upon them by the consumer culture of modern times and second, to advocate acculturation as a mean to promote international cooperation.

One method of fighting against the standardization of ways of living and mass consumption is by preserving cultures. The universe of machines and amenities of civilization, while they lessen men's labour and guarantee a well being to which only a privileged minority could formerly aspire, do not offer men a justification for living, there is no need in here to go over all the ravages which has provoked the introduction of the modern way of life in traditionnal societies such as those of Africa and Asia, We have given the reader a glimpse of that in the last chapter. What we feel important to stress in this section is that the right to cultural self-determination is an indivisible part of that global principle of self-determination. It is the part which has been neglected because of the erronous guidance provided by the western paradigm in regard to which every thing is reducible to economic terms: How much ? never have Africa and Asia been so miserable than when they have met colonial Europe, the fact that the promethean ethic

never succeeded in gaining the off-share of those lands is an eloquent indication of the vigour of indigenous cultures and their ability to acculturate modernity and adopte it, @ll they need in order to succeed is sympathy from the international society and its willingness to accept them as they are and recognise their right to cultural self-determination. The cultural rights of a people mainly involve the power to maintain, revive, develop and make known to the world their own values. In doing that, they develop from times to times patterns and values which are universal in their spirit. Hence they enrich the commun patrimony of mankind and contribute to the advancement of international norms.

International law, we are told⁽¹²⁾, is formed by the actions and customs of separate sovereign states. Their actions always reflect their fundamental inner aspirations and needs which are at their turn but a reflection of their ambitions and own legal traditions. These traditions will form a customary international pattern and will eventually be recognised as a customary International Law. This process is the one that has set up classical international law in the 16th and 17th centuries. Only then, it was restricted to a small club of nations. As Virally has put it : "We always have a tendency to favor contemporary juridical systems which have achieved a high degree of technical advance such as those derived from the Roman law" (13). Or as Verzijl has stated : " The prevailing international law of our days is mainly of western European origin"(14).

Today, it has become obvious that International Law cannot any more stand on this. exclusive European basis, without losing further ground with internatinal reality. Jenks, has rightly observed : "In today's International Society, a world in

which the distribution of power and influence has changed radically; International Law can hold the allegiance of the world at large only by establishing its claim to continuing acceptance of the legal thought of widely varying traditions and cultures. It can no longer be a project of a group of closely related systems but must rest on the broader intellectual foundations necessary to give it worldwide authority"(15).

As a contribution to the promotion of a multicultural international legal system, Jenks has attempted to domesticate that rebellious concept of sovereignty within a wide and universal pool of legal traditions and has shown that it is possible to arrive at a global consensus in regard to the principle that all sovereignties should abide by the law(16). Hence, sovereignty has a meaning only if defined and regulated by law. It is easy for realists to dismiss Jenk's vision as an idealist utopia and to argue that domesticating sovereignty in theory is one thing, doing it in practice is quite something else(17). Jenks is aware of the trap which consists in his endeavour to make lawful, "**The source of lawlessness**". Jenks realises very well that sovereignty is a juristic monstrosity and a moral enormity(18). Yet, it is probably because of that arrogant nature that he has embarked on with his team in an adventurous expedition which consists in truly emancipating the international community from all short-sighted and egocentric strategies and directing its efforts towards a new law of mankind(19).

The cultural dimension is the last one to be emphasized within the scope of international law. In 1971, Bozeman launched the campaign by publishing her "**the future of law in a multicultural world**"(20). It is somehow ironic that an

American scholar should draw attention to the missing cultural dimension in international law. It is after all America which best incarnates cultural imperialism at the international level.

II : International Law in a Multicultural World

In 1983, under the auspice of the United Nations university a workshop was held at the Hague academy on the future of international law in a multicultural world⁽²¹⁾.

The general secretary of the academy opening the workshop, summed up its agenda by the following question: Does the emergence today on the international scene of cultural systems other than the western which prevailed so far, endanger the future of international law, or on the contrary, does it add new currents to it making it richer?

Scholars from different parts of the world attended the workshop. Some argued that the emergence of Multiculturalism has provoked a degradation of international "norms"⁽²²⁾, while others less severe, talked about a slight "inflation" of norms⁽²³⁾. Virally contested the argument of "degradation" and asserted that multiculturalism's effect on international law vary depending on which international issues we are dealing with⁽²⁴⁾. The universality of norms is much more admitted in the fields of science and technology than it is in personal status.

Bozeman argued ironically against multiculturalism⁽²⁵⁾ and refused to admit the notion of the right to development making hers implicitly Galbraith's thesis about underdevelopment being due to religious totalitarianism, she claimed that development cannot be granted as a right to those who keep sitting on a motionless outlook.⁽²⁶⁾

Bedjaoui remarked that the question is wrongly put. It is not multiculturalism which degrades international law but rather the opposite. Multiculturalism is still only an aspiration put forward by the majority of the people in the world while international law is still particularist.⁽²⁷⁾ There has, argues Bedjaoui, never been any golden age of international law and the question is how and what are the means available so that our multicultural world can progressively influence international law and convert it into an instrument of peace and development⁽²⁸⁾.

Once again we face the everlasting dichotomy that we have been facing all over this study; that between the one and the many, between the individual and the state. At the cultural level, this expresses itself as the right of every culture to be itself while keeping its duty towards other cultures. Sanson, has attempted during the 1983 workshop, to provide theoretical ground for conciliation. He, thus, distinguishes three modes for the coexistence of cultures : Pluralism of tolerance, Pluralism in laicity, Pluralism of equality. All three serves the common aim of mankind, that of elaborating an ultimate law for the human species.

Nonwithstanding what has been said at the Hague workshop, the tension on the cultural dimension has risen at the international level and reached its culmination with the US withdrawal- from UNESCO- followed a year later on by that of Britain. We are told that the reason for this Anglo-saxon withdrawal is part of a counter-offensive operated by the alliance "Reagan Thatcher" at the international level in order to stop the thirdworld's stronghold on the united nations, machinery⁽²⁹⁾. It is obvious that UNESCO under the leadership of the "Muslim M'boy" militated for a truly

multicultural international order. Its efforts for the establishment of a more equitable informational order and its commitment for the preservation and the promotion of cultural values other than those of the western world were not to please the hegemonical tendencies of the capitalists.

III . Toward A Sociology Of International Law

There is today a widespread concern about the failure of law as a technical device for the resolution of social conflict and political disputes at the national as well as the international levels. The emergence of the phenomenon of "terrorism" is the most cynical evidence for what one could call the "legal crash".

No doubt, this is due in part to the power-politics discourse so overwhelming in our environment. As Habermas has observed, the spiritual situation of our age is quite sad⁽³⁰⁾. Indeed one looks in vain around for a peaceful corner to retreat to. Law serves force instead of educating it. Such seems the device of our jurists scientists. Specialization, fragmentation expertise and even science fiction have so penetrated the legal mind that one does not feel any pride to claim himself a Jurist. A critical reassessment of the concept of law has thus become an urgent necessity. One may notice that a trend is emerging all over the academic world with the declared aim of demystifying legal positivism and reviving natural law tradition through communication and social interaction.

In regard to International Law, which Grotius sought as a motive for world order, for he openly states: "that the law of nations is a more extensive right, deriving its authority from the consent of all, or at least of many nation". We have already quoted his contention that positive law can never enjoin what natural law

forbids not forbids what the latter permits. Therefore, to the father of the discipline and to his forerunners, International law can never be reduced to a set of technical devices. What the discipline requires today is as Berman has advocated : an integrated jurisprudence including all legal schools and currents. "A jurisprudence which will emphasize that law has to be believed in in order to work. A law which involves not only reason and will but also emotion, intuition and faith. It involves in brief a total social commitment." (33)

A sociology of law is hence, more than ever needed in order to dismantle the positivistic strangulation which today reduces law's effect and annihilates its essential function: that of social mediation. This sociology, Third world nations have attempted to elaborate it through the law of development "DID" but as we have seen earlier, It has met with staunch refusal from the western nations for whom, a true sociology of international law is first and foremost a sociology of power and force.

International law can be enhanced as a mean for world peace and international cooperation only if as Schachter has urged: "international lawyers adopt a theological approach which goes beyond apparent facts to examine the values and ends served by the law: An approach which enables us to understand more clearly the purposive and instrumental role of the law". In order to do that asserts the same author, we should interpose no a priori limit about what is relevant"(34).

Indeed, how are we to understand inexpressive norms and formulae without a clear consciousness about their teleological real substance ? For instance, Carty has noted "western legal theory greets the concept of economic self-determination on the inalienability of economic national identity as essentially

incomprehensible unless translated into a formal concept of legal freedom, the exercise of which is intrinsically limited. Or, adds Carty, third world nationalism loses its identity as a political entity and submits in the North-South context to a logic of conformity and imitation"(35). What is the aim of a critical sociology of international law ? we have already answered that it is the elaboration of truly multicultural international law, the promotion of dialogue and communicative action among the members of the international community. Only such a peaceful course could open wide the doors of international cooperation and orient the activity of the international community toward the resolution of those perpetual and shameful pleas of mankind such as : hunger, malnutrition, illiteracy and fanaticism.

In order to reach an international consensus on the priority of such an action, we need to reach first an understanding on the limits of our national interest. Only by consenting to sacrifice our egocentrism and by showing our readiness for self criticism and self control can we overcome our tragedy and rise to the level of a free and civilized human being. The pedagogy which we intend to extract from a critical sociology of law is that which will help us to admit otherness and teaches us ways of living together in peace and harmony.

The need for such an international legal culture is widespread among scholars(36) and lawyers. Prof. Bull's testimony is the one which stems directly to mind, so deeply attached and committed he was to international harmony. Bull has devoted all his life long to the service of our anarchical society. Never has he ceased to look for means and ways for overcoming our chaotic dissarray and establishing order and justice. Among other things, he has advocated the cultivation of a cosmopolitan culture as the basis for

international detente and solidarity. This nascent culture conceived as a mean conducive to that kantian premise of a pacified international community, needs according to Bull, to absorb non western cultural values if it is to be genuinely universal and provide a foundation for a universal international society.(37)

Such a culture exists already in the form of a diplomatic international culture and what it needs in order to be universally agreed upon, is to integrate^{the} third world's cultural affinities and values which present a universal inclination and are conducive to agreement. Of course, the so called realist lawyers would openly mock such idealist themes. To them, international law is that technical instrument which comes in rescue whenever naked power does not swiftly conclude. Besides, they would argue as Brownlie^h openly does " that international law consists in self-limitation and that is something which third world states can not perform because of their fanatical nationalism and religious bigotry.(38)

They seldom confess, as a moderate lawyer like Franck^h(39) would do, that the real destructors of international law are the super-powers whose eagerness for power and wealth has no equal. Those are the ones who set the bad examples by stamping on the law every time their interest is at stake. What one can say to these people, is to remind them of that ponderous reflection of Lauterpacht : " My dear man, do not give yourself airs, we are all realists in the sense that we wish to avoid a frustration of our effort, we are all envious to find out what things actually are. We all wish our endeavour to be effective and not futile " (40)

Notes

- (1) See, the collection A.R.S.P. ed by Heransgegehen .V, Stuttgart. particularly 1985, ed with Horgensen.S, under the title: "Tradition and progress in modern legal thought".
- (2) Geertz.c, "The interpretation of culture" basic books London. 1973 Geertz's definition stems along the pattern theory of Kroeber.A, and Klucholn.C, see the latter 's work, "The nature of culture". Univ press, Chicago, 1952, (p.189)
- (3) The classification is derived from anthropology and applied to legal theory. see for instance, Friedman.L.M, "on the interpretation of laws". Ratio-Juris, vol,1 n.3, december, 1988. (pp.252-262)
- (4) E. Wallerstein, Geopolitics and Geocuture, cambridge Univ press . 1991 (p. 12)
- (5) Opcit , (p . 12)
- (6) Northrop F. C. The taming of nation : a study of the cultural basis of international policy , 1959.
- (7) A.S.I.L proceedings of the 75 anniversary . 1981. Washington DC .
- (8) A.S.I.L ibid, see particularly the intervention of O. Yusuaki . (pp ,164- 167)
- (9) Dorsey. G.L, Agora Masdougai - Lasswel Redax .
Ajil January 1988 vol 82 n° 1 (p. 50)
- (10) See also his latest . Beyond the United Nations. hereinafter book, 1986
- (11) A. Cristescu, (opcit - p. 15)
- (12) B. Landheer, *on the sociology of int law and int relations . 1956 (p.7)*
- (13) Virally.M, "La Pensee Juridique" Paris, 1960 (p. 33)
- (14) In.Falk, R.C.A.D.I - 1966 . II Vol 118 (pp. 34-35)
- (15) W.Jenks, "Sovereignty within the law" Lomdon, 1969 (p. 3)
- (16) Opcit , (p. 7) .
- (17) G. De Lacharriere, "Opinio juris et negociation D'une convention internationale" in . table ronde D'Aix en Provence - opcit (p. 173)
- (18) Jenks.W, "A New World of Law", London - 1969, (p. 33)
- (19) Opcit , (p. 35) .
- (20) Bozeman.A.B, Princeton Uni. Press, 1971
- (21) Workshop at the Hague Academy. ed: by R.J. Dupuy. Martinus Nijhoff 1984
- (22) Opcit (p. 43).
- (23) Opcit (p. 183)
- (24) Opcit (p. 203)
- (25) Bozeman argues that U.N.G.A.R's are not binding international rules and she quotes Grotuis, see in that respect. R. Higgins, Grotuis and The United N, in. Social Science Journal 37/1985, (p. 119).
- (26) Bozeman , Opcit.
- (27) Bedjaoui , (p. 209)
- (28) Opcit . (p. 209 et s....)
- (29) We are told that the main reason for their withdrawal is the conservative

crusade Launched by Reagan and Thatcher against Third World military for a new international order of information. See Le Monde Diplomatique, (Fevrier 1987) BELENOS La Crise De L'UNESCO

- (30) J. Habermas, Observation ... MIT press 1985
- (31) Crotuis , Dejure , opcit, (p . 25)
- (32) Crotuis , chapitre one , infra .
- (33) H . J . BERMAN , Law and revolution : the formation of the western legal tradition .
Harvard univ press , 1983 . " préface " .
- (34) D. Schachter, "International Law in Theory & Practice",
• RCADI, 1982, Vol 178 (p. 24)
- (35) A. Carty, "Towards A Theoretical and Sociological Framework For The Study Of
The Right To Economic Self Determination Of People"
see also his contribution to Aix . opcit .
- (36) H. Bull. the Anarchical society. Macmillan 1977. (p. 316)
- (37) Opcit, (p. 317).
- (38) I. Brownlie , The role of international law, (p. 218) Netherland law Review
33/86.
- (39) Franck. th. chapter V supra.
- (40) H. Lauterpacht, on Realism in, International law.
Cambridge. 1975, vol I , (P.54)

Section two : An Epistemological Inquiry: Contemporary Thought and the Crisis of Truth⁽¹⁾

Today, which ever intellectual horizon you choose to scrutinize you often, will end up facing a crisis of some sort. Every single aspect of our social life, everywhere, seems to be in crisis. We have crisis in the world economy, we have it in both industrial and non industrial countries. We have crisis of nationalism and internationalism. We have also crisis in every social discipline from politics to legal thought, to Arts and Aesthetics. We have simply a global crisis, that of knowledge. What does man know ? That is the question. It is indeed a question which has haunted man since earliest times. Does man know sufficiently how to cope with his extravagant nature or does he stand blind in a cave deciphering reflected images and distorted truths ? Though as old as man himself, the question is still with no agreed upon answer. It will probably never reach one. Unless wisdom comes in rescue.

Man has turned and returned this question in his mind, providing it every time with assumptive answers and deserting them one after the other. The more he discovers the falseness of his premises the more he has been eager to come up with more fantasist ones. Crisis is then, the dominant mood everywhere., In America, Europe or what we have been referring to as the western world as well as in the rest of the world. How then does the so-called developed West cope with its crisis ? To know that, we need to review western contemporary critical thought in all its variety. Hence, we will examine what the Frankfurt school has to offer in this respect, particularly ^{its} ~~his~~ leading mentor J. Habermas. We will also examine the hermeneutics of H. Gadamer and L. Strauss. To end up this epistemological excursion, we will attempt to cover

post-structuralism in France M. Foucault as well as F. Lyotard and the deconstructionism of J. Derrida. Once this is done, we will move on to compare our findings with the Islamic episteme.

I. The Frankfurt School

In their respective books, D. Held⁽²⁾ and T. Bottomore⁽³⁾, introduce us to the Frankfurt school. It all started with the establishment of the Institute of Social research of Frankfurt university in February 1923. The aim of the institute was to encourage social and philosophical discourse and help to clarify the epistemological ambiguity caused by the distortions of Marxist thought through determinism and positivism. In other terms, the theory versus praxis issue which is central to the Marxian Diagram, was at stake and thus, was at the origin of the coming into being of the school. In 1922, tells us Bottomore, Felix Well, the son of a wealthy merchant, organized in the summer a seminar attended by Lucaks⁽⁴⁾, Wittfogel, Korsh, and Pollock, outspoken members of the Hungarian and German communist parties. The theme of the seminar was a re-interpretation of Marxism. As a result of this seminar, the institute was founded and Horkheimer was appointed as its first director. The Frankfurt school, through the works of Horkheimer, Adorno and H. Marcuse wanted to give a shape to a critical theory in the field of social science, theory through which, the society can grasp the source of its instability and resolve the disequilibrium between what is and what ought to be. Hence, the method used by the Frankfurt school is much more globalist than that of political economy. The school is Marxian in its foundations, one of its declared goals is to reconstruct historical materialism.

In order to achieve that, Horkheimer and Adorno start by a critic of positivism in its larger scope. The positivist philosophy

with all its branches, such as the scientism of the "**Vienna Circle**", the empiricism of Berkely and Bacon, the value freedom of Weber. Positivism in this sense, is based on the assumption that what ever does not exist as a matter of fact is of no relevance to science as such⁽⁵⁾. In the terms of M. Schlick, the mentor of the Vienna Circle, positivism is not the denial of the existence of a transcendant external world. This would be just as much a metaphysical statment as would ^{be} its affirmation. Hence, the consistent empiricist does not deny the transcendant world, but shows that both its denial and affirmation are meaningless. The empiricist does not say to the metaphysician : What you say is false, but says I do not understand you⁽⁶⁾. Hence, positivism for the Frankfurt school is biased and cannot assess its own objectives or the purpose for which it is employed; since it regards the world as a domain of neutral objects. The social world is objectified through the adherence to the principle of the uniformity of nature. Thus, nature is considered as a potential instrumentality and knowledge restricted to a technical function. In other terms, the ideals of positivism, objectivism and value freedom, are themselves no more than values and pre-given hypotheses which orient science toward a mean^d-end rationality championed to the exclusion of all others. Positivism is thus reductionist and leads to "**decisionism and instrumental reason**"⁽⁷⁾.

The rise of instrumental reason is, according to the Frankfurt school, not to blame per-se. It is the organization of production (capitalism) which threatens the survival of society, The sixteenth and seventeenth centuries, nurtured the principle of individualism, the pursuit of rational self-interest and overtime, This was transformed into labour productivity figures and measured by standards external to man. As a result, propositions concerning

productions, organisation, the use of science and techniques are judged true or false according to whether or not the means to which they refer are suitable or applicable for an end which remains unquestioned.

This has led in H. Marcuse's terms to the **"one-dimensional man"**(8) and as consequence to a decline in critical thinking and the split between theory and practice. According to the Frankfurt school, Marxism, in its "Diamat version" of the second international, has taken a positivistic drive and is in need of a reconstruction. Before going any further, we may need to review some of Marx's arguments as he has himself formulated them: **"The first historical act of man, tells us Marx, is the production of material life itself"**(9). "Labour, says he, is in the first place, a process in which both man and nature participate and in which man of his own accord, starts, regulates and controls the material reactions between himself and nature. He opposes himself to nature as one of her own forces, setting in motion arms and legs, head and hands, the material forces of his body in order to appropriate nature's production in a form adapted to his own wants. By thus, acting on the external world and changing it, he at the same time changes his own nature"(10). "Nature, continues Marx elsewhere(11), for the first time becomes purely an object for mankind, purely a matter of utility and ceases to be recognized as a power for itself. Here, the theoretical discovery of autonomous laws appear merely as a ruse so as to subjugate nature to human needs, whether as an object of consumption or as a mean of production"(12). On the other hand, tells us Marx(13); in the social production of their existence, men inevitably enter into definite relations of production appropriate to a given stage in the development of their material forces of production. The totality of these relations of

production constitute the economic structure of society; the real foundations, on which arise a legal and political superstructure and to which correspond definite forms of social consciousness.

The mode of production of material life conditions the general process of social, political and intellectual life. It is not the consciousness of men that determines their existence but their social existence that determines their consciousness. As material wealth grows through the capitalist mode of production, the worker finds himself increasingly devalued, alienated from what he produces. He may build a luxurious palace but he himself is ill-housed or even homeless, so that, what he creates with his own hands appears to him as a hostile alien object belonging to others, not to him. The worker, hence, is alienated in the very act of production. He does not work because he feels the need for work but in order merely to exist. Work becomes a sacrifice of the self. The direct relationship between the worker and production produces intelligence, but for the worker, it produces, stupidity and cretinism. Thus, it is quite obvious, stresses Marx from the start, that there exist a materialistic connection of men, which is determined by their needs and their mode of production and which is as old as man himself. This connection is evertaking on new forms and presents a history independently of the existence of any political or religious nonsense, which would specially hold men together(14).

The contradictions inherent to the capitalist mode of production will grow and blow up the whole capital structure. The Proletariat will rise and through revolution will resolve all capitalist contradictions, abolish the private ownership of the means of production and realize the communist society. Then and only then, tells us Marx, when the enslaving subordination of the individual to the division of labour and with it the anti-thesis

between mental and physical work has vanished; when labour is no longer a mean of life but has become life's principle need, Only then, will it be possible completely to transcend the narrow outlook of bourgeois right. Only then will the society be able to inscribe on its banners : from each according to his ability, to each according to his needs(15).

That is how Marx sees human history. His interpretation has succitated an incomparable interest and has in a way or another influenced since then theory and practice in general. There is no doubt, that Marxism has succeeded in denouncing the inhuman character of the liberal ethos and that, we believe , is the real merit of Marxism. As a revolutionary philosophy, it has failed to requestion the logic of the capitalist system. Marx never hides his admiration for the historical progressist role of the Bourgeoisie(16). What he denounced was the aggressivity shown by the bourgeois and their disdain of social justice. Marx attempted to recapture the dynamic of the accumulation process within a more egalitarian frame. His desire was to introduce a little humanism into the inhuman capitalist machine. He never declared that, we know he could not, because he wanted or believed his doctrine to be an objective science.

This obvious weakness in Marxism has led to an everlasting quarrel among Marx's disciples on what really Marxism means. After Marx' death, Engels ended the Marxian doctrine by introducing the concept of "**Motion**". Engels has defined motion as the mode of existence of matter. The inherent attribute which comprehends all changes and processes occuring in the universe(17). Lenin on the basis of Engels's "Anti-duhring" was to lay down the foundations of what was to become "Soviet Diamat", the petrified mechanical interpretation of dialectical materialism, what was to form the

philosophical core of Soviet theory and formalized as the orthodox official Marxism, was to close down the theoretical prospect of revolutionary synthesis⁽¹⁸⁾.

Scholars have observed that : "Replacing the concept of practice with that of motion is the first step along a path which denies humanity an active part in transforming itself making it instead the puppet of mechanical law of nature and hence, history"⁽¹⁹⁾. Althusser came along and in order to reinforce the diamat version, suggested a new reading of Marx⁽²⁰⁾. He divides Marx into two., the young idealist and the mature scientist and bases his division on a certain epistemological "coupure", break which he believes is clearly visible in Marx's writings "Early and Late"⁽²¹⁾. Althusser, therefore argues for a "Diamat" path to structural determinism and declares Marxism to be "anti-humanist"⁽²²⁾. That has led Benoit to the conclusion that Althusser's reading of Marx is accomplice of positivistic ideology⁽²³⁾. The deterministic and positivistic reading has killed Marx. Marx, argues Benoit, is dead because of Lenin, Stalin, Althusser and all those who have confiscated his thought and converted it to a fanatical, intolerant Praxis⁽²⁴⁾.

Rose has made that even more clear by stressing that socialism and capitalism though quite different, have nonetheless, in both societies led to an incorporation of science into close correspondence with the technological and ideological needs of state and industry. In this sense, the critique of science as the domination of nature (man) may also be generalised as describing the situation in both the USSR, Europe and N. America⁽²⁵⁾. Today argues Rose, the domination of nature and bureaucratic rationality are said by many to represent an almost irreversible trend,

potentially disastrous. Only a clear recognition of the present alarming situation in the actual phase of imperialism will make it possible to develop the forms of genuine science and demystify the paper-tigers "technology and modern science"(26). This brief overview of the Marxian patrimony and its doctrinal quarrel was felt necessary in order to follow Habermas thinking and his criticism of Marxism. Since this has been done, let us now move to him.

Jurgen Habermas : his project is to strive for a critical theory in social science. It is as Held has put it :**"a struggle for the critical soul of science and the scientific soul of criticism"**(27) The rise of technocratic consciousness with its disintegrative effect on the public sphere is to be stopped if emancipation from domination is to remain a project of humanity and we cannot stop it, unless, we restore to philosophy its due right as a theory of guidance. As long as our guidance is trusted to instrumental reason, we are going nowhere. Instrumental reason leads to self reflective impoverishment. What went wrong then with western thought and philosophy ? To show us the distortion that has corrupted western thought, Habermas invites us back to review with him Hegelian and Marxian premises for there lies the source of modern western thinking in both its idealist and materialist forms.

Habermas goes back to Hegel's lectures of "**Yena**" to derive Hegel's definition of the self "I" as personality and as universality and also his definition of labour as that specifically human mode of relating to nature including language, labour and family, designated as symbolic representations. The labour process and interactions mediates the relationship subject/object, each in its own way. Hegel conceived them as diverse forms of the formative process(28). Therefore,

Habermas present us with his thesis : "a radicalization of my thesis would read: It is not the spirit in the absolute movement of self-reflection which manifests itself in among other things, Language, labour and moral relationship, but rather, it is the dialectical interconnection between linguistic symbolization, labour and interaction which determines the concept of spirit"(29). It is quite obvious that Habermas remains close to Marx. What he reapproaches to Marx however, is his little consideration of the "interaction" element in his dialectical analysis. Although Marx, says Habermas, takes account of both labour and interaction in the form of relations of production; he, under the unspecific title of social praxis reduces communicative action i.e. interaction, into instrumental action(30). Because of this, Marx' brilliant insight into the dialectical relationship between the forces of production and the relations of production will quickly be misinterpreted in a mechanistic manner(31).

Epistemologically speaking, Marx locates the learning process associated with social evolution in the sphere of labour and the result is a slide toward positivism because labour is equated with purposive rational action which refers either to instrumental action or rational choice. Habermas attempts a reconstruction of Historical Materialism by breaking it into pieces and reconstructing it so as to make it reach its original goal which is the unification of the knowledge process.

In his analysis, Habermas puts Hegel and Marx on equal footing. Neither the "Yena" lectures nor the German ideology have clarified the dialectical relationship adequately. Hegel has neglected the object, Marx the subject. Hence, they have both failed to reach the truth. The self-formative process of spirit as

well as that of our species, essentially depends on and requires the development of norms which could fulfill the dialectical relationship in an interaction free of domination, on the basis of reciprocity allowed to have its full and non-coercive scope(32). In his "knowledge and human interest", Habermas points out to a genuine self-reflection where "knowledge for the sake of knowledge comes to coincide with the interest in autonomy and responsibility. Reason then, would obey an emancipatory form of cognitive interest which aims at the pursuit of reflection"(33).

Habermas distinguishes three forms of knowledge interest:(34) technical - practical - emancipatory. Only in its last form, that is as emancipatory knowledge interest, does knowledge shows interest in a reflective appropriation of human life, an interest in reason, in the human capacity to be self-reflective and self-determining. This is a cognitive interest with a quasi-transcendental status. Every consistent epistemology, tells us Habermas is caught in a vicious circle from the beginning and that is: the faculty of knowledge is itself already a form of knowledge. Hence it cannot achieve its goal since it is that goal already. This, tells us Habermas cannot be solved by the problematic method of pre-given unproblematic assumptions because this only lead us to distorted knowledge(35).

Marxism, through its emphasis on the objectification of knowwledge, has ignored the epistemological justification of social theory. Man is not only a tool making animal, he is also a language using one and learning takes place in both these two dimensions of man. The result of the learning process are passed down in cultural traditions which provide the essential resources for social movements. "Authentication" is the process by which people who have been the victims of distorted communication

try to free themselves by a re-interpretation of their essence. The ultimate test of ideas is the degree to which they are accepted and utilized in practice. The belief that the object of scientific knowledge exists independently of the epistemological framework on the basis of which they are investigated and that we no longer understand science as one form of knowledge but identify knowledge with science. In a word, scientism is the belief of science in itself(36). Hence, methodology has replaced epistemology in western thought after Kant.

Today, says Habermas, revolutionary self-confidence and theoretical self-certainty are gone and not only because in the meantime bureaucratic socialism has turned out to be a worst variant of what was to be fought against. Technocratic consciousness has emerged as the dominant form of political reality in the capitalist system(37). Politics does not any more bear the constructive goal of a betterment of the society. It has become orientated toward the avoidance of risks and the eradications of dangers. The legitimation system of advanced capitalist society tends to become a systemized technocratism based on the ability to guarantee a minimum level of welfare and sustain economic growth(38).

The Proletariat has been dissolved in the capitalist society and domination as the other side of alienation has been divested of its undisguised expression. Recalling Marx's Methaphor, Habermas contends that if the critical mind or the head of revolution is still there, the heart, i.e. the proletariat is not anymore; alienation has been deprived of its palpable economic form "**Misery and class exploitation**" and has been replaced by socio-technical manipulation and consumer's sovereignty(39)

Habermas asserts that liberation from hunger and misery does not necessarily converge with liberation from servitude and degradation for there is no automatic relationship between them. State regulated capitalism suspends conflicts and makes them latent. Yet, political economy is an insufficient basis for the development of a theory of society⁽⁴⁰⁾. What is the solution then ? Habermas proposes his theory of communicative action and the elaboration of a universal pragmatism⁽⁴¹⁾.

II . Universal Hermeneutics

Hermeneutic is the discipline concerned with the art of understanding texts. In Gadamerian Hermeneutics, understanding must be conceived as a part of the process of the coming into being of meaning, in which the significance of all statements (texts, arts, etc...) is formed and made complete⁽⁴²⁾. Gadamer denounces the pretention of method in regard to truth. Absolute reason he declares is impossible for historical humanity and prejudice is unavoidable. Hence, he affirms : "There is undoubtedly no understanding that is free of all prejudice, however much will of our knowledge must be directed towards escaping their thrall. This indicates the limitation of method, but not that of science. A discipline of questioning and research, a discipline that guarantees truth"⁽⁴³⁾. Understanding in Gadamer's view is not some sort of a mysterious communion of souls in which the interpreter grasps the subjective intention of the author; rather it is a fusion of the author's horizon with that of the interpreter.

Gadamer defines the central task of a truly historical hermeneutics as the examination of prejudices and the attempt to distinguish between legitimate prejudices and illegitimate ones⁽⁴⁴⁾. How do we do that ? Gadamer does not openly face the

question but he indirectly suggests that the solution to that puzzle remains somewhere in the commonly shared meanings that constitute the human linguistic community⁽⁴⁵⁾ In other terms, in dialogue and communication.

Gadamer like Habermas transcends the dialectic of the enlightenment, subject/object, and as Bernstein has observed⁽⁴⁶⁾ goes well beyond that to search for the best way to play the game of life. In fact Gadamer believes that language is a game that plays us⁽⁴⁷⁾. That is why prejudice instead of being an obstacle to truth is at the opposite the essential pre-condition for it. We do not reach truth. It is rather truth which comes to us and happens to us: "in understanding, says Gadamer, we are drawn into an event of truth and arrive as it were too late, if we want to know what we ought to believe"⁽⁴⁸⁾. We are drawn to the truth by the common understanding of our linguistic community and our critical openness to tradition. Prejudices reflects our situatedness in time and history. They have been driven out from scientific inquiry in applying the cartesian method.

Gadamer rehabilitates prejudices as a necessary condition for arriving at the truth. In distinguishing between prejudices that make understanding possible and those that hinder it, Gadamer suggests an intermediate way between the polarity of strangeness and familiarity between tradition and modernity. Hence, he asserts, that the "the true home of hermeneutics is the intermediate area because both the enlightenment and romantic orthodoxy fail to grasp tradition as a freely chosen action of preservation⁽⁴⁹⁾. Our prejudice is always self-reflective, that is, they reveal us to ourselves, they are parts of our life and of our self-understanding. Hence, they are legitimate prejudices. False or illegitimate prejudices are those which do not meet these criterion. They come to nothing in the working out. Hence concludes Gadamer,

Hermeneutics is the science which consists in a discipline of questioning and research, a discipline that guarantees truth⁽⁵⁰⁾.

Leo Strauss: reading between lines: The crisis of modernity according to Strauss is primarily that of modern political philosophy⁽⁵¹⁾. As is generally admitted, modern culture is emphatically rationalistic, believing firmly in the power of reason. Surely, if such a culture loses its faith in reason's ability to validate its highest claims, then it is in crisis. Strauss joined his voice to attack positivism and historicism charging modern thought of treason vis-a-vis traditional wisdom. In his "Six Essays on Political Philosophy", Strauss tells us, that historicism, in the very act of proclaiming that no human thought can be universally valid because of its relativity, advances a thesis claiming that which it denies to others. Value judgements which are forbidden to enter modern sciences through the front door continue to enter them through the back door, that which modern science refers to as psychopathology⁽⁵²⁾. The conflict between different values or value systems is said to be insoluble for human reason but this as yet, is never proven. If we cannot decide which of the two mountains whose peaks are hidden is the highest, cannot we decide that a mountain is higher than a mole-hill ?⁽⁵³⁾.

In an article entitled "Athens and Jerusalem", Strauss's aim is to *stop* the process of the western decline. He believes that philosophical truth has become repulsive and undesirable or as he puts it "Intellectual honesty is not love of truth." It is a kind of self-denial which has taken the place of love of truth because truth has become repulsive and one cannot love what is repulsive. Yet, just as our opponents refuse respect to unreasoned belief, we on our own part, with at least equal right, must refuse respect to unreasoned unbelief. Honesty with oneself, regarding one's unbelief

is in itself no more than unreasoned unbelief⁽⁵⁴⁾. In fact, seems to tell us Strauss, truth has always been not only repulsive but dangerous to the society's existence. Ancient philosophers such as Plato, El Farabi etc... have succeeded in transmitting knowledge of truth through a combination of wisdom with the amount of truth needed by the society in order to preserve its equilibrium and harmony. That is why they revealed their knowledge indirectly and in an esoteric style, using either mouth-pieces or writing between lines. The whole dilemma of the human society is resumed in the conflict between philosophy and religion, i.e, between "Athenes and Jerusalem"

Civilization argues Strauss, needs religion in order to flourish. Man is a being that can understand to some degree that knowledge of evil and good is evil for him. Religion intends to teach him to live simply without knowledge. The human being cannot withstand the burden of knowledge. Evil is the price for knowledge and hence the motivation behind the thirst after knowledge. Had the human being not sinned (Adam) he would not have earned his freedom. Eve, claims Strauss, is the first philosopher. She arose against tradition and rebelled and the snake was only half lying when it told her that she will become God if she ate from the tree of knowledge. As seekers of knowledge, people set themselves in permanent opposition to God.

The Christian belief in the possibility of a synthesis between "Athenes and Jerusalem" is responsible for the naive trust in modern philosophy. Christianity embraced philosophy as its crowning glory, oblivious to the fact that its Queen would become soon its vainquisher and destroyer. Philosophy has vainquished Christianity. So great is the belief in philosophy that the modern heirs of Christianity continue to cling to the hope that western

philosophy could replace God and withstand the death of God. Enlightenment is believed capable of establishing good order and political bliss. Strauss concludes that social science is in danger of mistaking peculiarities of say mid-twentieth century modern society, for the essential character of human society. To avoid this danger, it is compelled to engage in cross-cultural research⁽⁵⁵⁾.

III : Post structuralism and Deconstructionism.

In France, Foucault raised almost an identical voice to that of the Frankfurt school. Like Habermas, Foucault is disappointed by the project of modernity. Modern society is a "**disciplinary jailhouse**". The only way out is through deconstruction of the prevailing discourse and the establishment of a communicative action. Foucault has labelled his epistemological thesis as an "**Archeology of knowledge**"⁽⁵⁶⁾. He argues for a reconstruction of knowledge not on the basis of past tradition as reflected to us by documents and history of ideas, but on an archeological investigation whereby dynamic monuments of a discursive action take the place of the old bureaucratic documents. To carry out on his investigation, Foucault proposes an original method and suggests a new terminology : Discursive formations, archives, clinic, madness etc... Everything that tells you how sick is the modern society and how urgent is its need of a therapeutic cure. The dissipation of human science is due to teleologies and totalisations.

Foucault attacks strongly the concept of sovereignty which he believes is the source of the disciplinary system based on punishment and seclusion⁽⁵⁷⁾. In order to liberate the society from the prevailing "**panopticism**" the widespread universal technic of coercion, we need to recall the vitality of our archives.

The concept of "archive" is central to Foucault's thought. The archive, for Foucault, is the general system of formation and transformation of discourses. The archive does not have the archaism and stubbornness of tradition and at the same time, is not the absence of memory which welcomes any new discursive item. It is in between tradition and modernism and it helps to set the rules of a practice in which discourses can self-modify and substitute independently and regularly⁽⁵⁸⁾. Foucault's escape from materialism and economism has led him to seek knowledge in a secluded field of psychopathology and semiotics⁽⁵⁹⁾. His attempt, like that of the Frankfurt school is a direct attack on the capitalist mode of production and its juridical framework centered around the key concept of sovereignty. Hence, what he calls for is an insurrection of subjugated knowledge.

Archaeology would be the appropriate methodology and genealogy would be the tactic. Foucault defines genealogy as the union of erudite knowledge with local memories, that union allows the establishment of a historical knowledge of struggle, a knowledge free of subjection to power, an emancipated knowledge⁽⁶⁰⁾. Foucault denounces those who strive to impose a certain form of knowledge under the false label of science. As he puts it: "when I see you straining to establish the scientificity of Marxism, I do not really think that you are demonstrating once and for all that Marxism has a rational structure and that therefore its propositions are the outcome of verifiable procedures; for me, you are doing something altogether different. You are investing Marxist discourses and those who uphold them with the effects of a power which the west since medieval times has attributed to science and has reserved for those engaged in scientific discourses"⁽⁶¹⁾

In a society like ours, asserts Foucault, the relationship between truth, right and power is distorted and we are forced to produce the truth which produces wealth in the first place. The "foucauldian" structural analysis of power demonstrates how the mechanism of exclusion, prohibition and madness lend themselves to economic profit and that is why they were colonized and maintained by the state system or the juridical political theory of sovereignty. This later apparatus has produced during the seventeenth and eighteenth centuries a new mechanism of power "the disciplinary order".

Our order today derived from these premises, has produced a "society of normalization" where the disciplinary mechanism have triumphed over the rights and legal codes. The solution to our dilemma is not an opposition of sovereignty to disciplinary mechanism, because both are integral parts ~~parts~~ of the general mechanism of power today but rather ^a on the construction of a new right, an anti-disciplinary one which at the same time is "anti-sovereignty". How and what is that right Foucault does not tell. He has sought to deconstruct the arbitrary present social order of the modern society and to that extent we can say that he has effectively done so(62).

IV . The Islamic Episteme

The Kor'an states : "say knowledge is only for God""God knows but you do not"

Knowledge in Islam is often compared to a tree with various branches as different sciences. The tree grows and produces leaves and fruits in conformity with its nature. No branch is allowed to grow beyond its limits because it will destroy the tree's

harmony, that harmony which reflects the globality of knowledge in Islam.

One of the best articulated epistemology of knowledge in Islam is that provided by Abu hamed El-Ghazali⁽⁶³⁾; who lists three criterias of knowledge :

(1) The source : where he says, we have revealed knowledge which is acquired by prophets and is beyond the reach of either reason, experimentation or language (senses) and non-revealed knowledge which comes from reason, experimentation, language and acculturation.

(2) The level of obligatoriness : where we have, individually required knowledge "**Fard-Ain**" that is knowledge which is essential for an individual in order to survive eg. social ethics, law, etc... and socially required knowledge "**Fard-Kiffaya**" which is essential to the survival of the community as a whole. eg. agriculture, medicine, architecture, engineering and so on ...

(3) The social function : where we have praiseworthy knowledge, that is to say sciences which are useful to social life such as professions and ethics and blameworthy knowledge which is damaging to that social life e.g. sciences of magic, torture, witchcrafts etc...

Ibn Khaldun recapitulates the same epistemological articulation⁽⁶⁴⁾. The quest of knowledge is not an easy task, warns us El-ghazali, it is a long and permanent search which will take man from the realm of senses "**El-mulk**", that is, the first stage of knowledge, where man's ability develops through senses and leads him to an intermediary stage, that of "**El-Djabarut**" which enables man to reflect on himself and teaches him to think. Once man reaches this stage, he is shaken and frightened by the discovery of his power. He starts nourishing doubts and errs blind

until divine guidance and revealed wisdom comes to enlighten his path and leads him to the realm of genuine knowledge that of "**El-Malakut**", the universal wisdom of the one sovereign God. Beyond that stage, says Abu Hamed, knowledge is reserved to prophets and saints(65).

Hence, according to the Ghazalian episteme, knowledge is truth and truth is light since light comes from God, "**Whom ever God has not enlightened his path, what light has he ?**"(66). As we have seen with Habermas(67), there is in the Islamic episteme a distinction between praiseworthy and blameworthy knowledge. In order to avoid the later and reach the former, man is required to grasp the globality of things and their essence "**Jawhar**". He needs to avoid fragmentation because it distorts truth and leads to fiction and reification.

Philosophy "**Sonia**", the old mind's craft which is so typical of the occidental mind, is according to Muslim doctors a dangerous craft. It fools man and mirrors to him, his chance to conquer himself and erect his invulnerability(68). Following his impulses, the human being constructs for himself an illusion of power the more he seeks to achieve it, the more he finds himself caught in a "**closed gate**"(69).

El-Ghazali has accused Muslim philosophers of entertaining dialectical speculation and elaborating a science of incoherence(70). Ibn Rushd has retaliated by denouncing the incoherence of dogmatic incoherence(71). In fact, both worked heartedly for a reconciliation between religion and philosophy, that is between revelation and reason. Averroes, blaming the whole issue on Dialecticians and sophists "**El-Mutakallimun**" who have entertained the dichotomy, argued strongly "**that philosophy**

is the sister of religion and that truth does not contradict truth but confirms it"(72). In the "Tahafut" he is even clearer when he asserts: "Religion exists through inspiration and is blended with reason. He who holds that it is possible that there should exist a natural religion based on reason alone, must admit that this religion is less perfect than that which springs from inspiration"(73).

Notwithstanding this historical synthesis in Arabo-Islamic thought, today's Arabo-Muslim intellectual are still divided on this issue between on one hand, the zeallots theologians who do not hesitate to decreet most Arabo-Islamic nations as "Apostate"(74) because of their secularization; and on the other, the no-less zeallots "Occidentalized" who declare religion to be obstacle toward progress and modernity(75). The former are no less dogmatic than the later, both step away from the globality of the Islamic episteme.

In Islam, truth does not depend on either theological orthodoxy or pure reason. The first reduces Islam to a religion which has performed only during the short period of the well guided caliphs and the second reduces Islam to a personal faith. It is obvious from historical and sociological experimentation that the hypotheses are false and that the truth is somewhere in between. It consists in a reconciliation of both validity claims.

We have to reckon, however that the margin of reconciliation is a thin one since as Iqbal has observed :Religion grasps reality as a wholeness, while reason or philosophy catches only piece-meal reality. Religion is global and reason reductionist(76).Hence, if we are to nourish any hope for an eventual reconciliation between the two, we should first admit the supremacy of religion. Indeed,

Hay Ibn Yakdhan, the hero of Ibn Tofayl, reaches truth by a reasoned approach to global reality, combining his "**Fitra**" natural instincts and pre-dispositions, with rational observance, he comes to the knowledge of God and revelation(77).

To argue for the supremacy of revelation over reason is not to deny the role of the later in the formation of knowledge, to do that is to preach for that virtue which Thomas Aquinas calls, intellectual "**Docilitas**"(78) which far from being a constraint is the intellect's humility vis-a-vis that which is an act of freedom which recognises a superior value.

Today, the Arabo-Islamic society's obsession with development and its everlasting strive to achieve it is the best proof there is to the fact that Islam rejects fatalism and stagnation. All arabo-muslims should strive to be that unified community which the prophet (Peace be upon him) has advocated in his saying : "**there always, will remain among my followers, a community of truth, that neither disprooving nor disagreement could turn away**"(79).

Someone in the past, has, while travelling around met an old cultivator working hard in his field planting trees. He was astonished to see such an old man showing such a will to life while being so close to death. He asked him : Do you expect to eat from the fruits of your trees ? The old man replied : No. We have already eaten from the trees that others have planted. Today we plant so that others can eat. This will to life is what El-Mawerdi has defined as "The broadest hope", or "El amal el-fasih"(80), that which makes possible what for a normal life is an impossibility.

What Arabo-Muslims are after is a reasoned Islamic mode of life, which will make our existence and by extension that of others, much more enjoyable and fulfilling than it is right now. In securing our future we do not want to threaten or harm that of others, we want to live in honour and dignity for life without dignity is worst than death to us⁽⁸¹⁾.

Some may dream of reaching far into space, of domesticating planets and comets and riding them as horses in order to conquer the wide and infinite space. We are in no need of sharing their dream, we have a much more promising dream and that consists in the conquest of ourselves and our selfishness. In order to promote our specie's wisdom, we need to learn how to love each other, care for each other as brothers do. In any case, we ought to keep in mind that we are here only for a short while, we will soon pass away leaving behind either an eternal bliss or an eternal blame.

Assessement

In our epistemological inquiry, we have attempted to cover western critical thought as it is expressed by contemporary philosophical currents as well as the epistemological premises of Arabo-Islamic thought. The conclusion that we arrive at is that both reach a common synthesis despite what might appear as a priori prejudices.

Among western contemporary philosophers, Habermas seems to us to be the closest to what may be referred to as "a consensus on truth", Habermas openly believes in the ability of reason to reach sound and emancipated knowledge through communicative action and universal pragmatism. We can say that we share this belief heartedly with him. Habermas proposes as a mean^s to reach

that emancipated knowledge a critical theory which consists more in avoiding false assumptions than in finding "truth". Indeed, Habermas criticises every body : Hegel, Marx, Weber, etc... We have seen his criticism of the first two. As for Weber, Habermas tells us that he has construed rationalization "Zweckrationalitat" and has failed to grasp the selectivity of the capitalist system⁽⁸²⁾. As for Kant and his autonomy of the will, Habermas points out that "by presupposing autonomy and that means the will's property to being a law onto itself, as an independant abstraction rather than an interactional structure of complementary action, Kant expels moral action from the very domaine of morality itself and ends up with strategical action which opposes communicative action"⁽⁸³⁾.

In his critical reading Habermas seeks to reconstruct not to deconstruct, he observes the defficiencies and attempts to fill them up. He finds a way out from Weber's closed gate in the same manner that he escapes Kant's imperative subjectivation. In all his intellectual "promenades"; he avoids that lust of certainty and the mirages of truth. His knowledge is overwhelming⁽⁸⁴⁾, yet when criticized, he shows the humblesness of an illiterate. There is not much between his outlook and that of Gadamer. Yet, there is a difference in emphasis on details. Gadamer shows some hastiness in asserting the universality of Hermeneutics and adopting an anti-foundational stance. Habermas argues that prejudice can be dissolved through communicative action and asserts that "we would not be able to ascertain the internal structure of action oriented to reaching understanding if we did not already have before us in fragmentary and distorted form, to be sure, the existing forms of a reason that has to rely on being symbolically embodied and historically situated"⁽⁸⁵⁾.

The difference between Habermas and Gadamer is much more a difference in tone than in substance. While Gadamer cannot help declaring that he has found his way to what guarantees truth, Habermas moderately points out that "maybe one day...". World War II, has ^{au}thought all young Germans as well as other youth that war is the worst form of social degradation, Habermas recalls what H. Marcuse told him when he visited him in hospital shortly before his death "I know wherein our most basic value judgements are rooted, in compassion and in our sense for the suffering of others"(86).

Today, the spiritual situation of the age is quite sad no matter where we look North, South, East or West, what we see is in Habermas' terms: "The devastation of the communicative capacities of the life world"(87). Man seems to be condemned to suffer his reason. This, Muslim philosophers have reached long ago. Most of them have retreated to suffism and individualistic carelessness. Those like Ibn Ruchd, Ibn Khaldun, Abduh, Esh'attibi etc... who believed in man's reasonability have strived hard to leave us with thoughtfull guide-lines through which we could communicate and solve our social difficulties.

Western culture has always looked upon Muslim philosophers as Dogmatic Theologians who because of their religiosity cannot accede to western enlightened thought. Hence, they are unable to understand thwestern mind and vice-versa. Even someone like Ibn Ruchd who handed over Greek philosophy to the western culture is either seen as a sophiste or else as an atheist philosopher(88). Nobody among western scholars seems able to admit that he could be a great philosopher and at the same time an orthodox Muslim believer. He is either like us or different but he cannot be both. The same applies to all Muslim scholars. This vision is simply

erroneous. It is true that Muslim scholars are philosophers up to a certain point, from which they enter the "El-malakut", the world of inspiration and are guided by the divine light toward the essence of knowledge and the truth of God. The western scholar in most cases does not go beyond that point and hence loses contact with them. To him, that domaine is reserved to metaphysics and does not interest him much if not at all⁽⁸⁹⁾. Divine inspiration is universal, God enlightens whom he pleases. Yet unless we resolve to some kind of inspiration, we are unable to communicate. That explains why peace is so hard to achieve among nations. All we can do is hope like Habermas that one day may be ...

Notes

- (1) G.A. Rauche, "Contemporary Philosophical Alternatives and the Crisis of Truth" Martinus Nijhoff Hague. 1970
- (2) D. Held, "Introduction to Critical Theory", Hutchinson London - 1980
- (3) Bottomore.T, "The Frankfurt School", Harwood Ellis - Sussex - 1984
- (4) Luckas, had much influence on the school through his criticism of Marxism and his analysis of the "reification" phenomenon. Later on, however, he was to retreat to amore orthodox Marxist position. He even criticized the Frankfurt school proponents for being too emphatically "Bourgeois".Bottomore,opcit.
- (5) Keat Russel, "The Politics of Social Theory", Blackwell, Oxford - 1981, p. 140
- (6) quoted from, J. Bruce. Caldwell, "Beyond Positivism, Economic Methodology In The 20th Century", London - 1982, p. 14
- (7) see the work of Horckheimer, "The Eclipse of Reason",Oxford - 1947
- (8) H. Marcus, "The One Dimensional Man", Boston - Beacon - 1964
- (9) Marx.K, "The German Ideology" 1846, ed in New York, 1947 p. 30
- (10) Marx.k, "The Capital" Vol I, ed: London 1938p. P.156 Allen & Unwin
- (11) Marx.K, "Grundrise" Narmandsworth. Penguin 1973, p. 410
- (12) ~~the~~ *ci*.
- (13) Marx.K, "A Contribution to the Critique of Po-Economy" edM. Dobb Preface p. 20
- (14) Marx, "The German Ideology" ibid - p. 33
- (15) Marx.K, "Critique of the Ghotta Program"ed : Dutt Allen & Unwin London 1938
- (16) Feature clearly visible in the communist manifesto.

- (17) Engels.F, "The Anti-Duhring" Lawrence and Wishart London - 1969 preface - on dialectic p. 402
- (18) CF.Hence in Marxism like in Islamthere has been a closing of the gate of Ijtihad.
- (19) Hilary Rose and Steven Rose"The Political Economy of Science"MacMillan - London 1976 p. 12
- (20) Althusser.L, "Pour Marx" ed : Maspero (p. 104), 1962
("For Marx" Penguin 1969 pp. 229-230).
- (21) *op, cit.*
- (22) *op, cit.*
- (23) Benoit.J.M, "Marx est Mort" Gallimard 1970 (pp. 239)
- (24) *ibid*, (p.250).
- (25) Rose, *opcit* (p.29)
- (26) *Opcit*, (p. 30)
- (27) Held,*opcit* (p. 254)
- (28) Habermas."Theory and Practise"trans:J.Viertel, Heineman London 1974 (p. 141)
- (29) Habermas *opcit*, (p. 143)
- (30) Habermas - *opcit*, (p. 169)
- (31) Habermas - *opcit*, (p. 170)
- (32) Habermas, "Knowledge and Human Interest" Heinemann London p. 212 1977.
trans : by J.J. Shapiro Habermas argues: that it is in accomplishing self-reflection that reason grasps itself as interested.
- (33) Habermas - *opcit* , (p. 211)
- (34) Habermas - *opcit* , (p. 7)
- (35) Habermas - *opcit*- (p. 68)
- (36) D.Held and B. Thompson, "Habermas Critical Debates" MacMillan Press Ltd. 1982, (p. 222)
- (37) Habermas, "Communication and the Evolution of Society", trans: T. MacCarty - Heinemann 1979 (p. 194)
- (38) Habermas Critical Debates - *opcit* -(p. 223)
- (39) Habermas, "Theory and Practise" (p. 269)
- (40) Habermas, "The Theory of Communicative Action" Vol I trans : by T. MacCarty. Heinemann London 1984
- (41) Habermas, "Communicative and the Evolution of Society" under the title : What is universal pragmatism ? Habermas tells us that its goal is the coming to an understanding, the achievement of agreement which terminates in the inter-subjective mutuality of reciprocal and shared knowledge, trust and accord with one another. Habermas - *opcit*, (pp. 198- 199)
- (42) Gadamer.H.G, "Truth and Method", Sheed & Ward London.1975 (p. 146)
- (43) *opcit*, (pp. 446 - 447)
- (44) *opcit*, (p. 246)
- (45) Gadamer p. 245 Appendix, supplement II
- (46) Bernstein.R.J,"Beyond Objectivism and Relativism"b blackwell,

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- (47) Godamer appendix - opcit
- (48) opcit , (p. 446)
- (49) opcit, (p. 250)
- (50) opcit, (p. 250) .
- (51) L. Strauss, "Six Essays on Political Philosophy" PEGAUS, New York.1975.
Leo Strauss is very acquainted with Arabo-Muslim philosophy. He particularly has used El-Farabi "the second teacher" in his works as well as the Jewish Philosopher Maimonide, who has translated much of the Arabo-Islamic philosophy of the Andalusian Era.
- (52) Strauss, opcit, introduction
- (53) opcit, (p. 17)
- (54) Drury.S.B, "Leo Strauss in Perspective" Political theory, Vol 13, no. 3 August 1985.
- (55) Strauss, "Six Essays" p. 22see also his, "Liberalism and the Modern Project" in K.F.Koerner,"Liberalism and its Critics" Croomhelm, 1985 where Strauss criticises strongly the liberal ethos, positivism and historicism which can lead but to Nihilism."Once, we realize, argues Strauss that the principles of our action has no other support than our blind choice. We do not believe in them anymore.(p. 194). Modern value free social science can gather facts but is powerless to evaluate them in any meaningful way. Thus, it is unable to answer man's most urgent need of right and wrong. If liberals truly believe in freedom, argues Strauss, then, they most detach liberalism from the 18th century affiliation to Nationalism and imperialism and return to an earlier concept of universal brotherhood and humanism. (p. 330).
- (56) Foucault.M, "L'archeologie Du Savoir" Gallimard,1969
- (57) Foucault.M, "Discipline and Punish", Gallimard, 1975
- (58) opcit, p. 171
- (59) M.Foucault, "The Juridical Apparatus in Legitimacy and the State" ed: by W.Conolly. Basil Blackwell, 1984 p.203
- (60) Foucault, "L'ordre Du Discours" Callimard 1971"Lecon inaugrale au college de France" Dec, 1970
- (61) ibid- p. 205
- (62) Hence, his entire work is a deconstruction of the prevailing social system without a parallel alternative for a reconstruction of a new system.
- (63) El-Ghazali, "Al ihya'a" ibid - (pp.4 - 65) see also his Mishkat Al anouar or Farid Jabre, La notion De La Ma'arifa chez El-Ghazali ed: Les belles lettres orientales CNRS 1958
- (64) Ibn Khaldun, opcit.vol.II, (p.214).
- (65) El-Ghazali, opcit in this respect El-Ghazali uses the following verse :take what you see, forget what you hear at sunrise, what use is saturne to thee ?
- (66) Koran : the sourat of light.we have already quoted Ibn Khaldun using it.

- (67) Habermas Typology of Knowledge -infra
- (68) Nietzsche, has talked about "Sehbst uber windung" see his Thus spoke Tara thusa, where he teaches the death of god.
- (69) where as Weber has put it man stands in complete helplessness before the tremendous cosmos of modern economic determinism.
- (70) El-ghazali, "Tahafut El-Falasifa" Dunya. Cairo 1947
- (71) Ibn Ruchd, "Tahafut Ehahafut" ed: M. Bouyges Beirut, 1930, English trans: S. Van den Berg London 1954 2 Vol
- (72) Ibn Ruchd, "Fasl el Makal " ed : Sh. Bouamrane SNED 1977 (p. 64)
- (73) Ibn Ruchd, Tahafut -opcit (pp. 584) , 3 and 6
- (74) such as A. El Mawddudi, see Med Amara El Arabi review no 335, October 1986
- (75) a good example is, Muhyi Eddine Med, "rebellion against contemporary Arab taught"(tawra ala El fikr el arabi el muassir),el mektaba el assrya. Beirut 1964
- (76) IQBAL, chapter one , section . infra.
- (77) Ibn Tofayl, "Hay Ibn Yakdhan", Eng. trans.: L.E. Goodman, NewYork - 1972
- (78) T. Aquinas, chapter one , section one - Infra
- (79) Hadith noted in the Sahihain
- (80) El-Mawerdi, "Treatise On The Arts Of Life And Religion". Kitab Adab Eddunia Wa Eddine, Cairo - 1973, pp. 60 - 65
- (81) Dignity is a central notion in Arab culture, In this respect see section three- infra.
- (82) Habermas: which consist in fragmentation and division leading to three types of rationalities: Cognitive instrumental, moral practical and Aesthetic practical. Corresponding to science - law - art. A non-selective pattern of rationality would embrace all the three, and the Every day Praxis can be cured by creating unconstrained interaction between the three, see Habermas, 1984.
- (83) Habermas, "Theory and Practice", ibid - (pp. 150 - 151) Kant defines the autonomy of the will; it follows that in the order of ends, man and every rational being is an end in himself he is never to be used merely as a mean for someone (even for God), without at the same time being himself an end..for the moral law is founded on the autonomy of his will as a free will "Critique of Practical Reason", trans: White Beck, L. Indianapolis 1956, p.136
- (84) Here is a testimony to that : "It is not altogether easy to assess the work of a scholar whose professional competence extends from the logic of science to the sociology of knowledge, by way of Marx, Hegel and the more recondite sources of European metaphysical tradition... At an age when most of his colleagues have painfully established control over one corner of the field, he has made himself master of the whole in depth and breadth alike. There is no corner-cutting, no facile evasion of difficulties or spurious enunciation of conclusions unsupported by research: Whether he is refuting Popper, dissecting the Pragmatism of Ch. Pierce, delving into the medieval antecedents of Schelling's meta physics, or bringing Marxist sociology up to date. There is always the same uncanny mastery

of the sources joined to an enviable talent for clarifying intricate logical puzzles. He seems to have been born with a faculty for digesting the toughest kind of material and then refashioning it into orderly wholes".G. Liehtheim, "From Historicism to Marxist Humanism", New York - 1971, p. 175

- (85) Habermas. (1984), opcit, pre'face (X/i)
- (86) Rorty reports the anecdote in R.J. Bernstein, "Habermas & Modernity", Polity Press, 1985, p. 174
- (87) Habermas, "Observations On The Spiritual Situation Of The Age", trans. Andrew Buchwalter, MIT Press, 1985.p. 19
- (88) see the views of occidentalists on Averroes in the work of Mohmoud Kacem, Ibn Ruchd and his philosophy of religion, librairie Anglo-Masr, 1969 where T. Aquinas, E. Renan, Asin Palacios, L. Gauthier views are examined see also George F. Hourani, "reason and Tradition in Islamic Ethics", Cambridge Univ. Pr. 1985 p. 266 or Multiple Averroes, "Aetes Du Colloque International" (850 anniversaire) Paris September 1976, CNRS: Les belles lettres 1978
- (89) that is what has driven someone like Hellmut Ritter to write that these scholars (meaning Muslims) are much more far sighted than we Orientalists. We could learn a great deal from them, p. 179. H. Ritter in, Classicisme & Declin Culturel Dans L'Histoire De L'Islam. Symposium Bordeaux. Juin 1956. ed: R. Brunchevic & G.E. Von Grunebaum.

Section Three: A cultural identity in search for international recognition

The Arabs are among all nations, the one most remote from positivistic legal orders and the closest to natural ones. This assertion coming from an authority such as Ibn Khaldun has for long been used by Orientalists in a negative sense with the open intention of presenting the Arabs as primitive peoples in need of colonial tutorship. Ibn Khaldun has from this observation, inferred that Arabs are very attached to their natural freedom. He tells us, Hence that Arabs never obey rules because of coercion, if they do so, they do it generally either in respect of the morality which their desert's code of honor has thought them, or by fear of God⁽¹⁾.

The everlasting conflictual social dynamics which characterise Arab society, the dialectical dichotomy which opposes the city center "Al-Madina" to the "rif" "Al-Badawa"; are so distinctive features of Arab sociology that a learned anthropologist such as Hodgson has termed them; "Islamicates"⁽²⁾. Laroui, investigating the meaning of freedom in Arabo-Islamic society has noticed that orientalists have misconstrued that meaning by relying on its interpretation exclusively on the Arab dictionary. There is a variety of meanings and symbols of freedom in Arab culture which the dictionary does not include. Laroui invokes four such instances: The rural style of life "El-Badawa", the tribe "Al-äshira", piety and mysticism.⁽³⁾

Arab culture holds life in the countryside as the purest expression of natural freedom. The Bedouins are free people. All over history, they have been feared by authorities, cajoled, exempted from taxes and hold in great esteem. The rebellious poets "Ass'alik" represent in public eyes the genuine expression of Arab identity. The tribe is a vital space of freedom. Piety and mysticism

are urban forms of internal freedom, elaborated as strategies in order to escape urban authorities and preserve that original natural freedom of man.

This eagerness of Arabs for freedom explains somehow their perpetual refusal and rejection of artificial social mechanisms which tend to deprive them of that intrinsic freedom with which they are born.

As a consequence of what precedes, instead of undertaking an examination of let us say : the foreign policies of the existing Arab States, their behavior at the United Nations, the treaties which they conclude with other nations, all of which are interesting topics favourite to lawyers since it provides them with empirical evidence. But topics which will fail, I am certain, to inform readers of the deepest reasons why the Arabo-Islamic society claims so vehemently its right to cultural self-determination and refuses the strangulating tight space within which the prevailing international order confines it to.

For all that, I prefer to invite the reader to an intimate intrusion into the gist of Arabo-Islamic culture and personality and introduces him to informationnal sources capable of reshaping, the distorted image which a long tradition of imperial hegmonism and instrumental orientalism have inerusted in his mind.

It is our intention thus, to escap² legal formalism in this section and proceed with the help of anthropological inquiries to shed light on the sociological foundations of the Arabo-islamic society's yearning for cultural self-determination.

Notes

(1) see in that respect, chapter II of the "Al-muqqàddima" entitled "

'Arabs are natural people".

(2) Hodgson. M , the venture of islam, Chicago Univ press 1974 (pp. 57-59)

Hodgson has coined the term "islamicate" to refer to social and cultural features associated with Arabo-Islamic way of life without being necessarily linked to religion.

(3) Laroui. A "Islam et modernité " opcit (p. 135)

or for a more detailed analysis of freedom. his work . " Mafhoum El-hurriya" Casablanca- Arab cultural center - 1983 .

I . The Arabo-Islamic Paradigm in deconstruction

The title may sound a bit pretentious for observers who could object to the existence of any such a paradigm, we nevertheless believe that such a paradigm exists. The Arabo-Islamic world exists. It is a delimited geographical space stretching from the Atlantic to the Gulf, sharing one religion; Islam, one language Arabic and looking a head for a common destiny. Hence what we refer to as the Arabo-Islamic paradigm is simply the form of thought which defines the Arabo-Islamic society, the Arabo-Islamic personality and way of life and which spells out values, conducts and attitudes toward life in general. The central assumption of the Arabo-Islamic paradigm is the oneness of the Arabo-Islamic entity which is conceived as a universal " **Umma** " , based on the assumption of unity and oneness. The Arabo-Islamic paradigm rejects all exclusive and reductionist methods and adopts a wholistic " theo-analytical " methodology.

The goals of the Arabo-Islamic paradigm are:

1) To Promote of the Arabo-Islamic identity and personality into a universal model through the integration of various elements which constitute it and their synchronization into a harmonious and a pluralistic entity.

2) provides guidance and direction to peoples and nations in order to implement in a successful manner the Islamic message of peace and human brotherhood.

The Arabo-Islamic paradigm endures today a severe multidimensional crisis . It almost appears as a deficient paradigm not because of any intrinsic impediment but simply because of its highly requiring performances. No wonder, therefore that observers believe this paradigm to be utopian and almost mythical(1).

" Le discours Arabo-Islamic en vigueur est situé aux antipodes de la réalité sociale"(2). There is a huge amount of mythical residuals anchored in our sub-consciousness which need to be driven out. More than ever before, we need to elaborate a ponderated reflection on our state of affairs. We cannot afford to enter the twenty-first century without a clear vision of what we are and what do we need to do? More than ever before, we need to start a deconstruction of our prevailing modes of thought and codes of conduct.

A . What is Islam?

Islam is often obscured by a whole series of meanings attached to it by different people. Charlatans use Islam as a means for life. Politicians use it as a device for ruling, medias talk about "Islams" in plural. We are told that there exists a tender islam and a tough one(3). There also seem to exist a subjugated islam as opposed to a rebellious one etc.....

An Egyptian moralist has many decades ago pointed: "I saw Islam, that great spreading tree of peace under which is shelter from the blast of life and its sights; turned in the hand of men into poisoned arrows with which everyone tries to wound his brother."(4)

Sha'ttibi every here and there recalls that saying of the prophet (peace be upon him) which asserts: "Islam has been born alien and will end up as it begins, blessed are aliens."(5) Islam is an act of submission to the will of God. It is not as Orientalists often define it, an arbitrarily imposed capitulation of man face to providence but a rather a willing adhesion to the appeal of God. It is an act through which the human being recovers his good nature and

peace of mind. It is the achievement of a state of sublimity.

In islam, there is a chain of being which links the creation to creator. Man is located in the midst of that chain torn apart between good and evil. Reasonable man follow^s the path of good guided by revealed wisdom.

Islam is a religion based on human brotherhood verily says the prophet (PBUH) " they will be a muslim only thy who likes his brother"(6). "No Superiority has an Arab over an alien nor a white over a black, save in pity."(7) "There is no compulsion on islam"(8) . "Say the truth is from your lord,whoⁿever will let him believe and whomever so will let him disbelieve."(9)

This is briefly what islam is about. It preaches moderation, care and self denial. The islamic "Umma" is united, as As the prophet has urged : "When all the members of the community are conscious of their responsibilities and when they discharge their duties by the love compassion and sympathy they bear to one another, they forme a single body : if an organ suffers,the whole body responds with general fever."(10)

It is quite obvious that the Arabo-islamic community is far from resembling the to prophet's model. What is worse and more frightening is the fact that it does not even seem heading in the right direction.

Islam is a simple religion which because of its simplicity becomes hard to implement. The point for us to day is not to equalize the prophet's model that is out of question as mentined by

the prophet (PBUH) himself. but to preserve the sense of direction and ensure implementation of a vital minimum according to which we will be defined as muslims.

The Arabo-Islamic society has converted its prospective utopianism to a mechanist one. It is high time for us to stop dreaming about our forefathers (the early companions of the prophet) and accept living a modest form of islam. This has tremendous implications for our life . We could live our islam (that of 2000 years) with less glory perhaps than our ancestors but with at least some of their realism and courage. We are the best among nations in so far that we perform and produce human civilization. Any nation could be better than we if it meets succesfully this criteria. It is also high time for us to realize that we are not any worse than other nations. We do not need to catch up with the western world nor with any other but with ourselves. We do need to regain our self-confidence and our faith in our religion.

Islam is what ever the muslims make of it.⁽¹¹⁾ It is their way of life. It may vary from place to place or from people to others. But it is nevertheless one religion which resembles all muslims in one charismatic entity "El-umma Al-muhamaddiya" .

B . The Arabo-Islamic personality.

Here is an essential historical and cultural identity which time and space have engrained as an identification of the Arab being. El-Faruki explains the process by which this identity has come into being : "The geographical fact that most of their land was desert and lay at the crossroads of countless migrations in all directions had surely being their curse and blessing

at the same time. A threat of extinction internalized and surmounted with will and imagination. The Arabs bore their poverty with pride and steadily practiced renunciation, always ready to wager their lives for the sake of convictions. From the dawn of history, they were poets, mediative on matters of destiny, masters of the forces of life throbbing within them. Even when the desert ended, as on the banks of the Nile, or between the two rivers, the tropical bounty of nature did not₄ arouse or wet their appetite. The taming and disciplining by centuries of desert space-time has engrained a mastery before which their will to live could only bow in obedience and respect. The wisdom of the Arab being was cristallized in a body of proverbs and poems to which the obsession with language gave a fertile imaginativeness to which desert existence has made them prone. All these factors, combined to temper their cosmic will to life and to whet their aspiration to truth, beauty and goodness. Thus, the realization slowly dōwned upon them that they are the vortex of history, the focal point at which divinity breaks through to real existence. It is all the same wether this preparation was itself the cause or the effect of providential choice."(12)

Ibn Khaldun has given us a detailed analysis of that Arabo-Islamic identity so that we do not need to dwell an its socio-psychological elements. At the theological level. An Arabo-Islamic philosopher has observed, that within the Islamic chain of being : "The Islamic "I" run simultaneously a double series of adventures, one in extension and the other in depth or intention. It constitutes and explicits itself. The incomtemporability between the proper horizon and the interworld leads the society to an excessive need of

escape from reality which in turn leads to utopia. No matter how harsh may be the environment, the islamic personality maintains an optimistic attitude toward life"(13).

At the political level, Arabo-Islamic identity symbolises Arab-unity. A Berber from North Africa or a Kurde from the North of Iraq is nonetheless an Arab and spontaneously identifies as such. The feeling runs deep among Arab people that they are members of a solid and unified charismatic entity. Here is how an Arab analyst depicts the popular basis of Arab unity : "out from official chancelleries and far away from bureaucratic circles. There lives an ironmonger in Koweit city. A vulcanisator in Homs, a seller of "Falafil" in Cairo, a shoemaker in Annaba, a shepherd in the Atlas mountains, a fisherman accomodating his net in Tangiers, a fig seller walking behind his donkey in Djerba, a story teller amusing folks in Marrakech. A craftman, a carpenter, etc... those ordinary people who with a slice of bread and some dates reach contentment, shiver under the sounds of Oum Kaltoum's melodies, lough and applaud Ghawar's tricks, are moved by poems and refined prose. Those represent the Arab people".(14)

The Arabs will never get tired of Arab unity; what propably increase that feeling in their mind is the fact that their unity is strongly contested by the west. Europeans particularly hold a double standard. Their unity is presented as a rational and constructive enterprise while that of Arab people is often denounced as an irrational and emotional idea. (15)

C . The Arabo-Islamic Culture

Arabic language is the cement with which is built Arab Unity. "Is Arab who ever speaks Arab." This reported maxim has been an effective policy of cultural homogenization. Orientalists headed by such prominent figures as E. Renan denigrated Arabic language and presented it as a dying language, good only to move simple minded people. We have seen with Habermas how language constitutes a vital means in the development process of societies. M. Chelli, in a recent study of the "Arab speech" has shown that the real power of language resides in its potential to communicate and instill a will to the society so that it acts in a certain way and enjoys doing so (16). Language permits "self-realization" asserts Moncef. If the Arab nations have so lamentably failed in their development programs; it is simply because of the borrowed linguistic syntaxes from which they tried to transplant these schemes. (17)

In most Arab countries, there has been an "Arabisation" campaign, the aim of which was to spread wide the teaching of Arabic as a mean to the recovering of Arabo-Islamic identity. While some noticeable progress have been accomplished in terms of fighting illiteracy and ignorance, little has been done to reform Arabic language so as to meet the requirements of modern technology. As Berque has put it : " Real culture does not descend from the top of the bureaucratic pyramid but ascends from the global semiology, when an ascendent dynamism of research and discoveries drains every body with it". (18)

Like any other language, Arabic has particular features which heraults of Pan-Arabism have repeated ~~at~~ satiety. Today, Academies all over the Arab world are striving to reform the Arabic language. Yet. As long as the Arab society is kept away from that process, nothing deep and promising is going to emerge.

When the influence of the western culture reached the Arabo-Islamic world via the S^t Joseph Institute at the Levant and with the first promotions of Arab graduates sent to Europe by M^{ed} Ali, there emerged a trend in Arab literature which continuous up to nowadays directing Arab culture toward steril mimetism and blind imitation. This so called modernist wave has through novelties and frivolous fantasies, aimed at some sort of a "Big-push theory" in Arab literature. This has provoked the following remark from an Arab critic : **"our ignorance and our backwardness pushes us to admire and like every thing that is European to the extent that many among us believe that the good, all the good is in the imitation of Europe"**(19).

Our "national-states" conceived and animated quite often according to European models reduce our cultural being to a series of folk songs and arty-crafty works dedicated to promote tourism. No wonder therefore, that our culture is of very poor taste today. Whether in literature, music or else where, our cultural production is dominated by extremist trends. In poetry, proponents of the classical school are fighting fiercely against modernist poetic styles. In theatre, the school of the thousand nights faces the challenges of Brecht and B.vian. The trend is simply overwhelming and reflects the political climate where the young bearded "fundamentalist" who regard himself as a reincarnation of some early comp^ggnions of the "sallaf". faces the most chauvinistic atheist beside whom Sartre would look as a conservative. Ours is the era of islamic fundamentalism.

Notes

- (1) See, chapitre one (part III . infra).
- (2) See E.Zakariya, Les Arabes a l'heure du choix ed: Bouchene Decouverte . 1991.
- (3) Le Monde 17/02/ 87 H. Tinco " L'islam des emmigrés" .
- (4) Al-Manfaloti . M.L "" Al-nazarat" vol I . Cairo 1960 (p. 18) .
- (5) Hadith.
- (6) Hadith.
- (7) Hadith.
- (8) Coran .
- (9) Coran .
- (10) Hadith.
- (11) M.S Al-ashmawy, L'islam politique ed : Bouchene 1989.
- (12) Ismael Raji Alfaruqi, " Urba and Religion" Djambattan-1962. Amsterdam.
(p. 8)
- (13) M.A. Lahbabi, de L'etre a La personne , SNED .1974 . (p. 343).
- (14) Shaker . M , The popular basis of Arab unity, Review Arab affairs n° 43 .
Sept 1985.
- (15) See in that respect : F. Mellah . de L'Unité Arab . Harma ttan 1985 (p. 24) .
- (16) Moncef Chelli, La parole Arab - Sindbad - 1980 (p . 17) .
- (17) opcit (p. 25) .
- (18) J. Berque, Bibliographie de la culture Arabe contemporaine
Sindbad-UNESCO 1981(p.30)
- (19) Sardar I , Science Technology and development in the Muslim World .
Croom helm London. 1977 (p. 42).

II . Meeting History

The Arabo-Islamic world stands today at the verge of history. It faces a cruel choice which is unpleasant in both its alternatives. It is ordered to take a decisive resolution in order to settle down once and for all that everlasting conflict which ^{sees} turns it apart: Opt either for identity or modernity (1).

What a cruel choice indeed(2)? What makes it bitter is that dogmatic certainty with which scholars and analysts intend to impose it on the Arabo-Islamic world in a black or white fashion as if truly, it ought to gamble its existence on a head or tail game since they make sure to remove away from your mind the slightest chance to reach a compromise(3).

The Arabo -Islamic world will undoubtedly find its way back to history in a way or another. The tests lying a head on its road will show. Wether it will succeed in forging its own fate or fail.

On the agenda facing the Arabo-Islamic society, the issue of human rights takes a central position. This topic has become the favourite target of western medias. There appears a certain eagerness to confound Islam with the human rights charge and reveal thereby its anti-humanistic essence(4).

Faced with this oppressive charge , the Arabo - islamic society retaliates with a similiary hasty conclusion . Indeed most Arabo - Muslim writters dealing with this issue would start by emphasizing the fact that islam has promoted a genuine and progressist human rights policy at times where Europe was bluntly violating them within the mist of its dark ages (5).

Hence , a wide gap separates both worlds in respect to the human rights issue . In this section we intend to examine :

First : the islamic theory of human rights .

Second : the confrontation taking place between both worlds on the issue .

Third : explore means and ways to reconcile them and incite both worlds to enter into a constructive and fruitful dialogue for a universal promotion of human rights .

Notes

(1) F. ZAKARIYA .opcit.

(2) See, the brilliant anthropological insight on the cruelty of developmental choices in. B.Berger's " Pyramids of sacrifices":political ethics and social changes . opcit.

(3) F. Zakariya, opcit. (p. 4)

(4) Hence, the famous film relating the death of a Saudi princess which has caused much trouble between England and the Saudi's kingdom, the Salman Ruchdi's, affair, the spectacular inquiries conducted by french t.V on the women's condition in YEMEN, etc...

(5)The Trend is obvious in most recent writings on this topic. See for instance : M.M .Shalabi, rector of the islamic institut in Alexandria (Egypt) : Islamic law between realism and idealism . University house - 1982

A . The Islamic theory of human rights .

Islam is a revealed religion which seeks to deliver the human being from all evil in order to promote his good nature . Islam has proclaimed the human being as a vicegerent of god on earth and has entrusted him with the task of ordering good and fighting evil. To help him in his mission, God has granted him certain rights .

Rights, according to islamic doctrine, is an attribute sanctified by revelation and authorized by the legislator. Hence , the notion of rights in islamic law is of a dual nature. Indeed beside the rights recognised to the individual, stand god's rights⁽¹⁾. Those are attributes that regulate the sacred religious duties "Ibâdat" which every believer is required to perform and respect .

This dual nature of rights in islamic law is not without recalling to our mind that whollistic substance of islamic ethics which we have already encountered in the precedent chapters . As stated before , the difference in paradigmatic perception of legal phenomenons is at the root of all the mis-understanding between western and islamic cultures. Yet difference is not incommensurability.

When for instance, the rector of the "Al-Azhar" university declares that: "comparison between Western norms of public international law and those of the Sharia is impossible and unacceptable"⁽²⁾, It is obvious that what he has in mind is the fact that one cannot put on the same footing, a holy scripture with positive law. Once the differences are openly admitted and recognised, nothing, either in the Sharia or in positive law is by itself sufficient to command incommensurability. Doctrine which

constitutes a vital part in both legal systems does provide a fertile ground for compromises and general agreements. In liberal theory, right cannot be conceived of outside the individual's realm. The individual as Mille has put it is "Sovereign"⁽³⁾. He conceives, defines and enjoys rights according to the Kantian principle of self-determination. The state, seen as the "state supreme" of individuality is required henceforth to promote and protect the individual's rights. No wonder if at last, liberal theory has promulgated a human rights policy which in fact is no more than a capitulation to "superman"⁽⁴⁾. Within the realm of islam, things are quite different. Rights have no meaning outside the intent of the legislator. As a result, islamic doctrine has elaborated from the start a "theory of abuse"⁽⁵⁾ in order to preserve a harmonious balance between god's rights and those of the individual. Hence, is considered as an abuse of right every attempt to usurpate the legislator's intent which inevitably leads to a damaging of others rightie God's right⁽⁶⁾. The theory of abuse in islam is based on the Hadith ordering "that there are no damage nor damage in islam". LaDarar wa La Dirar.⁽⁷⁾

Therefore, in order to ensure a good balance between rights, islamic doctrine has investigated thoroughly every aspect of each elements within the theory of right and has provided us with a sophisticated legal machinery tied to that effect .⁽⁸⁾

B . An Arabo-Islamic Charter on Human Rights

When the universal declaration of human rights was proclaimed Geneva 1948, Arabo-Islamic states felt some uneasiness to ratify it, Since that declaration was clearly based on an unstated

secular premise⁽⁹⁾. As a result, most Arabo-Islamic states expressed strong reservations in regard to its provisions, some of which were directly in conflict with Islamic religious principles.⁽¹⁰⁾

Since that time, Arab Muslim scholars have been urging for the elaboration of an Arabo-Islamic charter on human rights.

At the regional level, the Arab League following a request from the United Nations, proceeded by resolution (2443 /48 in 3/9/68) to the creation of a permanent Arab committee on human rights.

This committee held its first congress in Beirut on December 68. Where strong recommendations were made in regard to the installment of national sub-committees on human rights as a pre-step to the elaboration of an Arab charter on human rights.⁽¹¹⁾

By the 10 of September 1970, the Arab League Council designated an expert commission and entrusted it, to prepare a draft proposal of the Arab charter on human rights, the proposal entitled " the Arab declaration on human rights ", is still buried in the offices of the Arab League.

In recent times, the secretariat of the Arab League has reactivated the plan and requested from a new commission another draft.

Dr. Ousfour, one of the experts consulted, resumes the issue facing the commission as follows: " the question facing us is one of form and content. Should we consider the Arab charter on human rights as a specifically Arab interpretation of the policy of human rights tied to the ethical and religious peculiarities of that community or should we just content ourselves with confirming the

universal declaration on human rights? Hence, we are caught into the dilemma of specificity versus universality", (12)

The dilemma has been unsurmountable so far and this explains why nothing has emerged from the multiple projects which the league has commended and which till nowadays remain dead letters buried in the Arab league head quarters.

C . A Fruitless Polemic

What is remarkable about Arabo-Islamic literature on human rights is the extremism adopted by both offenders and defenders of islamic law in that respect .

S . Al adeeb for instance , argues that the totalitarian ethic of islam prevents the elaboration of any consistant islamic policy on human rights in harmony with international law (13). Al adeeb is not the only Arabo-muslim scholar to hold such a thesis . All "Occidentalistes " (14) would argue along this line charging islamic law with deficiencies in regard to vital issues such as: minorities rights. *women* ' rights , free speech etc .

Islamist on their part would retaliate by invoking redundant apologetic and arrogant arguments emphasizing again and again the supremacy of islamic law in regard to human rights which it has promoted and defended at times where Europe was still living dark ages (15).

Hence , we end up with a deceitfull literature on the topic of human rights. A literature entrapped with subjectivism, incapable of conveying any sober analysis on the issue involved.

Subjectivism emerges very often as a result of a lack of

knowledge. Offenders of the islamic doctrine on human rights ignore in most cases the philosophical premises of islamic law in the same vein as Islamists appear to ignore the philosophical premises of secular thought.

As an example of that mutual ignorance, let us examine the controversy raised between both camps in regard to the rights of women.

Occidentalists charge Islamic law as being offensive in regard to women, since it grants them a "statut" inferior to that granted by modern secular thought. Islamists return the charge and accuse secular thought of "libertinage" which thus, has converted women to a cheap ^{USA} consumer's good.

In between these two extremist positions, one is to wonder, where does the truth stands?

On one hand, it is true that the Arabic society because of its patriachal family structure has always condemned the women to a lower rank. During the pre-Islamic period, the Arabs used to bury alive their young daughters in order to escape any potential scandal which will bring shame on the whole family or tribe.

Islam has emancipated the Arab and educated him to treat women with kindness and pay them due respect. Unfortunately. "Arabs are not always good muslims" very often, particularly during times of Islamic decay where illetracy and fanaticism become dominant~~s~~, Arabs recover their pre-islamic arrogance and deverse their ruddness on their women. Hence, jailing them behind closed doors, hiding them under dark veils, secluding them into ^{USA} kitchens, using them as slaves or submissive concubines, treating them with fear suspicion and hatred as if ~~they~~ were carrying a charge of

dynamite which may blow up any time.(16)

On the other hand, one cannot ignore nor deny that Arabs have by times of islamic renaissance, wether in Baghdad, Damas, Fes or Courdou ; paid due respect to women and cultivated " le culte des Dames " up to its reffinements (17). As Najla, the first Arab women to get a PHD from^{an} Americain universities has put it : " side by side with the veil, there always has been a long and well established tradition of liberty and good breeding ". (18)

Hence, the question is not one of law wether in its islamic or positive versions but one of mentality and daily behavioral patterns. Such a conclusion is reached by Saadi-who at the end of his work laments :

" there is a formal concordance between international norms and Algerian law in respect to constitutionnal, civil and economical rights of women. Yet, this equality in paper, is the veil which hides a reality made of discrimination and segregation". (19)

Another issue which has raised intense and polemical debates is that which revolves around concepts such as: free speech, freedom of religion and so forth.

Occidentalists, would often mock the basic islamic rules called " El-hudud" and depict them as barbarian rites which are totally anti-humanistic. To some extent, this may seem true at first glance when these rules are looked upon apart from their islamic context. However, as soon as one starts investigating the "islamic" social framework within which these rules are to be operational, The first pre-impression vanishes quickly. Few remarks need to be made in this regard.

(1) The Islamic legislator has severely conditioned the

appliance of "El-hudud" with tough and intricate conditions as to render their appliance almost exceptional.(20)

(2) He has advised the believers to avoid resort to such rules as much as possible and has prompted them to close an eye on sinners as long as they hide their crimes and do not confess them publicly. One can mention in this regard the prophet's saying:

" Whoever commits one of these dirty sins and keep it to himself he has no charges to answer except to God. If he confesses his crime publicly, then, he should be punished accordingly".(21)

As the juge Abu Yussuf has put it : " The appliance of "Al-hudud" is intended as a remedy to the society. It brings social peace and stability, limits the number of prisoners, frightens criminals and promotes social tranquility".(22)

Societies applying " El-hudud" such as in Saudi Arabia or Pakistan have achieved a high level of social security which many observers have confirmed. One may add that methods of punishment applied in modern secularized societies such as the Electrical chair or the Gaz chamber are no less inhumane than their Islamic counterparts. The whole issue is in fact , one of cultural predispositions.

This debate on human right has reached its climax between both worlds when S. Rushdi's edition of the "satanic verses" appeared on the book-shelves of a Londonian Library. Rushdi in his novel mocks the Prophet (peace be upon him) and his companions and makes ridicule of them. Since Rushdi is a muslim, this amounts to a public act of apostasy punishable by death according to a Hadith that states " when a muslim changes his religion, kill him" .

Imam Khomeiny thus, issued a fetwa ordering the killing of

Ruchdi. Western intellectuals stood on behalf of Ruchdi and defended the right to free speech related in that by a huge mediatic propaganda.

The issue became an international affair with political ramifications going well beyond its personal nature. Does the right to free speech entitles the individual to insult people and make fun of their most cherished religious values? The Coran orders to Muslims not to insult others people's Beliefs so that they do not insult yours in return. The debate between Occidentalists and Islamists on the human right agenda is an endless and fruitless polemic. It can hardly even be termed a debate.

Occidentalists dealing with Islamic human rights miss the point when adresssing islamic societies; they exhort them to abandon their religion and rejoin the western secularized social model, instead of encouraging the islamic societies to carry out a ponderate reflection on modern imperatives and instead of seeking within islamic doctrine ideas and values which could contribute to the promotion of a universal culture on human right; they retreat behind paternalistic and egocentric rhetorics in the same way as their islamists adversaries take refuge behind the perfectionism of a theory which they never succeed^m implementing coherently .

D . An Islamic contribution to the promotion of human rights

The meaning of the word islam is the making of peace . By advocating values such as brother-hood, tolerance, charity and mercy, islam has made a due contribution to the promotion of a humanistic code of conduct. Yet, islam's greatest achivement resides in the restoration of dignity to the human specie. Islam

regards man as a breath from the spirit of GOD, hence, it elevates the human being to a level of nobility which no other specie can reach . It declares man as a dignified human being.

Dignity is one of those distinctive features of man. Allal EL Fassi defines human dignity as that supreme morality which man has over other creatures⁽²³⁾. In this respect, islam stresses that all human beings are equals regardless of race, creed, color or rank . The utmost mark of human dignity in islam is paid to the human being at his funeral.

Dignity is one of those puzzling concepts to which legal philosophy is unable to confine a precise definition. The concept is prolifically used in legal instruments connected with human rights . The preamble of the United Nation's charter lists . "Faith in the dignity and worth of the human person as a basic ideal which the international community is requested to strengthen" the universal declaration of human rights solemnly declares: " all human beings are born free and equal in dignity and rights". In the American convention on human rights (article 5) in the helsinki accords (principle V II) in the African charter (art 4) in the European convention (art 3).

The concept of dignity has required an international audience such as that it is universally considered as a legal and moral ground for protest against any degrading and abusive treatment of persons.

O.schachter, asserts that the intrinsic meaning of human dignity is left to intuitive understanding, conditioned in large measure by cultural factors ⁽²⁴⁾

Etymologically, dignity comes from the latin dignitas and is translated as " worth" in French "valeur". In Arabic dignity is translated as " Karama" a word derived from the verb " Karrama" which means the making of something worth of honour and praise.

Thus the Coran states: " We have honoured the sons of Adam transported them on land and sea, gratified them with goods and bounty and accorded them preference among our creation". (25)

Commentators of the Coran have seldom grasped the intrinsic meaning of that act of honourification. Ikrima according to A. El-Fassi, is the only one who has provided a concise interpretation, Hence, he thinks that God has honored man by endowing him hands and fingers so that he could work and eat with his hands in dignity.(26)

The notion of dignity is well ingrained in Arab culture long before the coming of Islam. The Arab character made of stubbornness, Anarchism and excess of pride was softened by the desert code of honor. The Arab Bedouin cultivated values such as "Al-Hilm" forgiveness and magnanimity, " El-Murrowa", courage and bravery. " Al-iffa" purity and retention or self control. " El-karam" generosity and a keen sense of hospitality.

Dignity is a cherished value to point such that Al-Muttanabi has said:

live in honor or die in dignity

covered with flags and glory.(27)

Dignity is a two fold notion. It has a subjective element (how one feels or think about another) and in this regard the Prophet is reported to have commanded : " a believer is not a genuine muslim unless he wishes for his brother what he wishes for himself".(28) and an objective element how one treats another and in that respect Islam has stressed that every one should treat others as he himself would like to be treated.

Affronts to human dignity are multiple and can take different forms. O. Schachter has listed twelve cases, among which the following cases seem to be widely recurring.

1) statements that demean and humiliate individuals or groups because of their origins, status or beliefs.

2) vilification or derision of beliefs that people hold in reverence. Teaching that particular races, ethnic groups or religious hold "ridiculous" or dangerous views, or otherwise belittling cherished beliefs.

3) denial of the capacity of a person to assert claims to basic rights

4) punishment of detained persons by psychological or physical means that are meant to humiliate or ridicule their beliefs, origins or way of life.

5) dissemination of negative stereotypes of groups (ethnic, religious, social) and implications that members of such groups are inferior.

6) Psychiatric treatment that involves coercive means to change beliefs or choices that are lawful.

From the listing above, It is quite clear that violations of human dignity of thousand persons is daily routine toward which the international community has grown accustomed and in front of which it is quite badly equipped in order to react.

Instead of continuously seeking to confound each others while remaining quiet apart in total ignorance of each others potential qualities. Western scholars as well as islamists need to take conscience of their mutual nihilism. Extremism can only engender hatred and violence. The only remedy to the prevailing situation is reconciliation.

In order that a serious debate attract both camps around the vital issues of human rights, both parties have to move in direction of one another, the western world has to admit openly the existence of an Arabo-islamic social model different in various aspects from its own. But sharing in common with the western world the same sincere desire of mutual coexistence, cooperation under the supremacy of law, and the promotion and safeguard of

human dignity. The Arabo-islamic world on its part needs to open up somehow its rigid and rigorous shiism so as to encourage doctrinal exercise with the declared aim of meeting history and the world at large.

Notes

- (1) Generally, muslim doctors divide rights into three categories those which pertain to God ,those of the individual and those which are common to both . see in that respect :
Al shatibi .in , Al muwafaqat . vol II, opcit.
- (2) See, the introduction of cheikh Jad-el-haq. In Msilhi's book. human rights between the sharia and international law.ed-Nahda-cairo-1988.
- (3) I.S Mill, de la democratie. La liberté: textes choisis par Fr. Perroux. Paris ed dalloz 1953
- (4) See , B. De Jouvenel , La civilisation de puissance . Fayard 1976.
- (5) Dr. Fethi Dureini, the theory of right abuse in islam ed: Rissalat-1981.
- (6) Fethi Dureini, opcit. (P.38)
- (7) Hadith reported in Muslim and El Bokhri .
- (8) See in particular ' El- muafaqat' of shatfibi - opcit.
- (9) See in that respect. Jan Hjarpe , in k . Ferdinand and M.Mozaffari, United Nations declaration on Human rights (P.28) Islam : state and society, curzon press- 1988.
- (10) Such as articles (18 freedom of religion) and article 16 on marriages etc ...
- (11) Boutros Ghali, la ligue des états Arabes, (P. 634) dans, les dimensions internationales des droits de l'homme de K.vasak.UNESCO-1978.
- (12) Med Ousfour, the Arab charter on human rights-(p.215) in, democracy and human rights in the Arab world. center of studies on Arab unity-Beirut 1983.
- (13) S.Al Adeeb, la definition des droits de l'homme en islam. dans Revue

générale de droit international public . tome 87/1985 n° 3. (p.625)

- (14) Laroui has coined this term to qualify Arabo-muslim scholars who are impregnated with western thought and education and who seek to implement the western model- in islam et modernité, ed decouverte 1987. (p.162)
- (15) Recent writings, follow this trend see for instance ; Med ElHusseini Msilhi, Huquq Al insan beina Sharia wa elqanun Dawli. with a préface signed by the rector of the Alzhar University Sheikh Jab Alhaq, ed Nahda , Cairo . 1988.
- (16) " C'est une bombe a retardement qui met en danger l'honneur patriarcal" . Kateb yacine, Alger Republican n° 0, decembre 1989 ,
- (17) Very famous are in that respect the clubs entertained by Zoubeida in Baghdad, Wilalada in Spain, et
- (18) Najla. A, The Arab World : past present and future, Chicago 1953 (p. 313).
- (19) N. Saadi, Lafemme et Laloi en Algerie. ed : Bouchene UNU. Alger 1991(P . 157) .
- (20) El-hudud: are the punishments prescribed either by the Coran or by the Prophet's recommendations. Such as adultery (Lopidation) theft (hand amputation) robbery, crime, apostasy (death) etc see for instance Mohamed Said Al achmawy, l'islam politique, laphomic/bouchene1983 (p.98)
- (21) Hadith reported by Malik in ' al muata'
- (22) Abou Yussuf, Khitab el khqraj - ed bulaq (1302 h)
- (23) Allal el fassi, " maqassid Ashariâ el islamiya wa Makarimoha". 4^e edition 1991(p.235)
- (24) D.Shachter, Human dignity as a normative concept. Ajil oct 1983 (vol 77 n°4) p.848
- (25) Coran
- (26) Allal el fassi, opcit (p. 236)
- (27) El Muttanabi , see Supra .
- (28) Hadith .

III . Islam and Modernity

The first serious attempt towards the elaboration of critical Arabo-Islamic theory bursted in Laroui's theoretical analysis of the Arab ideological crisis⁽¹⁾. Laroui, hence, argued for an Arab system which though still undefinable, seems to be omnipresent and determines Arab politics.⁽²⁾ The Arab being, asserts Laroui, defines himself more through what he rejects, than through what he is.⁽³⁾ He does not seem to resignate, neither to the secular nation-state, nor to industrial alienation whether in its capitalist or socialist versions.

Laroui repeatedly stresses that the Arab world forms a cultural entity within which every single part engages the whole and "vis-versa".⁽⁴⁾ ^{ing}acquirement profits to all the parts. What the Arab society clearly rejects is occidentalization.⁽⁵⁾

Today, the Arab national state is locked into the positivistic cage from where it imposes its implacable logic on its citizens. The main concern of the Arabo-Islamic citizen is to get himself out from the jailhouse of dictorship and achieve total freedom. Arabs, says Laroui, are exiles in spirit. Their specificity is not a historical accident but a desired will to truth. It represents a strategic aim and must give rise to a renewal of our socio-political organization. Arab ideology should recover from its state of alienation and be in advance of itself and the western world. It should banish particularism, promote a unified critical Arab theory. Unless this is done, the Arab dream of unity will remain buried under the sand⁽⁶⁾.

Since then, other Arabo-Islamic scholars have urged for a similar awaikening . Thus El-Khatibi and Arkoun have echoed the

need for a double criticism. The former sees it necessary to the decolonization of Arab thought from internal as well as external barriers.⁽⁷⁾ This alone will enable us to decipher the hidden knowledge of our "**silent societies**" and invest it in the elaboration of a salutary sociology⁽⁸⁾.

Arkoun, on his part, argues for an applied Islamology, which will allow the demystification of the prevailing ideological discourse reflected in the artificial combination of : " *état, Orthodoxie, culture savante*".⁽⁹⁾ Analysing the issue of development in the Arabo-Islamic world, Arkoun lists three conditions for the liberation of the Arabo-Islamic society.⁽¹⁰⁾

A . Traditionalists " vs" Modernists.

As we have mentioned before, Arabo-muslim intellectuals are divided in two opposed groups, Berque has found an interesting label for this division ; There are he tells us : "**Ahl al assil bila massir wa ahl al massir bila assil**"⁽¹¹⁾. Those who hold to their authenticity while having no future. And those who look upon the future without any care for their past.

S.H Nasr resumes for us the debate between both camps as follow⁽¹²⁾: The traditionalists "**ulemas**" are very often criticised^{cc} by the the modernists as being conservatives, reactionary, ignorant of European political and philosophical theories. Yet, they are the real custodians of the islamic tradition and its protectors without whom, the very continuity of the tradition would be endangered . The modernists, he notes , have far the most part one feature in common and that is their predilection for the western label. This inferiority complex is a calamity for the Muslim world since it afflicts that very group which one could expect to face the

challenge. Modernists have, according to Nasr, produced most of the apologetic literature. The most brilliant students of Harvard, Oxford and "la sorbonne" have far less confidence in western civilization than the westernised orientals. That is why concludes Nasr, any attempt to harmonize islam and western secular thought is doomed to failure from the start simply because they begin without exposing all "isms" to a thorough criticism in the light of islamic teachings and also because, they consider islam as a partial philosophy which needs to be complemented by some form of modern ideology, rather than as a complete system in itself, whose very totality excludes the possibility of its becoming a mere adjective to modify some other noun which is taken unconsciously as central in place of islam.

Modernists asserts Nasr, reject islam without knowing it probably because of that very fact. While both rejection and acceptance requires knowledge of that which is to be rejected or accepted, Lacking confidence in their own traditions, modernists are like a " **Tabula -Rasa**" waiting to receive some kind of impression from the west, in dress fashion as in philosophical and artistic crafts, They have no role to play at the source where decisions are made.

Nasr's judgement may seem a bite too harsh. It certainly needs to be balanced by a similar critic of traditionalists who often are no more than demagogues and reactionary conservatives whose real aim is to preserve their privileges and save their interests rather than seeking to glorify traditions.(13)

On the whole however, one has to admit that the moderate intellectual has always played a leading role within the Arabo-islamic society.

The " Ulemas" represent within the Arabo-islamic political structure the influential core of the "Ahl al hall wa al akd "

those who bind and loose. They know the rules of the sharia in their subtle affinities and exercise "ijtihad " in order to provide remedies and solutions to the socio-political problems facing the society. Their recommendations formulated in directives "Fattawis" are binding rules for the whole community. Today, they have lost that distinguished position as Nasr has put it **"they have been driven out of their olympus"**.⁽¹⁴⁾ The ulemas have been domesticated by the new division of labor established by the modern Nations-States. They have, thus, become simple obedient employees of the regimes.

In a recent study of the Egyptian society. G. Kepel, has observed the emergence of a new branch within the **"ulemas corpus"**.⁽¹⁵⁾ This group tells us Kepel, is outplaying both the classical "Fukahas" and the modernist who because of their closeness to the power circles have lost their legitimating function.

This new group is that of the **"Islamists"** who seek to instaurate the islamic republic. The Arab masses, in any case do not seem to be willing to support any group or government which will not show concern to both tradition and modernity. They expect whomever want their support to show attachment to their identity while at the same time appease their anxiety about the future.

The only way to restaure hope to the Arab people is to revive the **"Ijtihad"** methodology. The famous version according to which the gates of **"Ijtihad"** were once shutdown by the consensus of the "Ulemas" is a myth⁽¹⁶⁾. That so-called historical event has never prevented scholars such as Ibn Taymiyya, Ibn Khaldun, Shattibi etc... from producing works of outstanding quality. The fact, as we see it, is not a matter of bureaucracy but rather one of productivity and intellectual creativity. It is the sterility of the Arab mind which has given birth to that legendary act of

intellectual capitulation. It is high time to reopen those gates and free the Arabo-islamic mind.

The liberation of the Arabo-islamic genius requires the over taking of those sterile and trivial antagonisms which tend towards opposing tradition to modernity, reason to religion etc... It requires a reconciliation of the orthodox "fakih" with the modern university doctor in order to produce what Ben Achour labels the "Zeitouni-sorbonni". That is a brilliant synthesizer. (17)

An authentic "**Mujtahid**" is an intellectual of a global vision, someone enjoying alongside his wide knowledge (the mastering of classical and modern thought), a strong personality, a rich and powerful sensitivity, cosmopolitanism and a strong cultural open mindedness. The profile many seem highly demanding but as al Mutanabi has put it :(18)

Edifying tasks require outstanding will as virtue requires a generous soul.

B . Modernity : that uncertain promise

The issue of modernity has become the central issue in contemporary thought. It arouses every where intense and polemical debates.

In Europe .Habermas has attempted to adopt a middle way position between neo-conservatives and deconstructionists(19). He believes that modernity is an uncompleted project. Western technological achievements are valuable scientific acquisitions which undoubtedly add and enrich our life-world "aufklärung" . Yet, European societies have paid a much too high price for it. Hence, he

condemns" the devastation of the communicative social potential through the instrumentalization of professional life. The mobilization of the work place, the extension of competition and performance pressure, even into elementary schools. The monetarization of services, relations and life's stages. The consumerist redefinition of personal life spheres, the bureaucratization and legal regulation of private and informal spheres of action and above all the political administrative incorporation of school, family, education and cultural reproduction in general". (20)

Neo-conservatives like D.Bell criticise modernity and consider it as the project of the bourgeois culture: pragmatic, rationalistic and materialistic. They recommend religion as the solution.(21)

Post Modernist Lyotard defines "modernity" as that "Which designates any science that legitimates itself with reference to a meta-discourse, making an explicit appeal to some grand narrative such as dialectic of the spirit, the hermeneutics, the emancipation of the rational or working subject, or the creation of wealth"(22).

Post-Modernists consider modernity as an outdated issue. We already have entered Post-Modernity, the era of informatised societies and banal truth. "It is, according to lyotard, the era of the sublime where the philosopher does not narrate anymore but creates"(23).

Habermas criticises both neo-conservatives and post-modernists^s deconstructionists. The former because of their hypocrisy. Since On one hand, they welcome the process of societal modernisation and on the other hand they lament about its cultural poverty. They confuse cause and effect and seem ready to throw out the baby with the water. The later, because of their nihilism, they want to

make us believe that they stand nowhere. That is simply inconceivable. It is an ad-hoc negation which can but leads us back to context dependent reason. Habermas asserts that : **"Social purposes are better served by beautiful ways of harmonizing interests rather than by sublime way of detaching oneself from other's interest"**(24). Indeed one of Lyotard's claim^s is that since consensus is impossible, the best thing is to hold to performativity and to the temporal covenant(25).† Yet how can we expect justice from the temporal covenant which in essence is oriented to promote the interest of someone over that of another ?.

It is quite easy to understand the sublimation which blurs the deconstructionists from a historical perspective, Western culture has jumped from the medieval dark ages to an enlightened era. We know what happens usually to anybody who comes directly to light from total darkness. He is blurred and may well confuse his blurriness with sublimity. That is what we believe, has happened to the deconstructionists. They have come to light through western cultural contact with the Eastern theory of "illumination" via the works of Diderot, Voltaire, Shopenhawer, Nietzsche, etc.... Instead of absorbing light progressively and selectively as does a Habermas and others like him, † They have been blurred with the spectrum of modernity and led to nihilism. As Rorty has put it, **"we could agree with Lyotard that we need no more metanarratives, but we also certainly ought to agree with Habermas that we need less dryness"**(26).

C . Modernity In the Arabo-Islamic Society

Habermas tells us that the term modernity is derived from the Latin location "Modernus" which was introduced to distinguish Christian era from the pagan past⁽²⁷⁾. Yet, the belief persists that modernity is an anti-religious phenomenon. Does being modern means to be at odds with religion. The question is at the heart of the Modernity debate within the Arabo-Islamic society?

We understand by modernity a state of mind " un état d'esprit" in harmony with its own time and space, a psychological attitude which expresses a willingness to assume history. Hence, we consider all living nations today modern in the sense that they are all in their variety contributors to the project modernity.

All the people of our era have witnessed man's conquest of the moon. They all have shared that exiting and proud historical moment with the American team of Astronauts, well aware that behind the technical prowess, hides the obsessive and frantic lust for power inner to man's nature. Thus, while the achievement is by itself a modern act symbolizing our reasonable quest for progress. The motives lying behind, cristallized into that fierce arm's race in which nations are totally engaged; are far from being modern. We could put it otherwise and assert that modernity is a moral virtue which honours the human being and qualify his dedication for the betterment of the human condition.

From that definition, we can infer that modernity is not modernization which consists in the edification of large urban centers related with high-ways and communication networks. Hence, while most occidental nations are modernised societies, they are not necessary all modern.

Therefore when modernity is presented to the arabo-islamic world in the form of modernization; it is automatically rejected because of its identification with "occidentalization" which in turn is linked to imperialism, colonialism and zionism.

Occidentalisation has it that modernity is technology and nothing else. Thus, if the body does not fit into the bed, then all you need to do is cut the body and and makes it fit. We have while dealing with development explained the reasons why the Arabo-Islamic world rejects economical determinism. We need to say a few more words on technology.

D . Islam and Technology

Recently, a scholar has reviewed the argument put forward by those who hold Islam to be incompatible with technology and resumed those arguments into the following :(28)

1) Islam is a religion requiring performances and rituals which are incompatible with the pre-requisite of technology.

2) Islam is based on divine causality and this is completely at odds with scientific rationality.

3) Islam promotes an unbalanced relationship between men and women and hence blocks social development.

We could of course reject all these charges as unfounded, biased western ethnocentric prejudices and put them aside. But we could bear them attention and examine their validity claim. We have in our epistemological inquiry established that Islam is a rational religion which encourages and promotes scientific research. We have also examined the issue of laicity and demonstrated that Islam while elaborating a laicity of its own does not consent to a total separation between religion and politics.(29)

As to the charge related to the Islamic rituals and their negative effect on the society. This seems to be as a xenophobic remark which has no historical consistency. Have those rituals prevented the Muslim from the Abbassid Era from achieving remarkable scientific breakthrough in the fields of mathematics, medicine and Alchemy? Do religious rituals today prevent the Chinese or the Japanese from technical skills?

There were times, where our ancestors tried to resist modernization. Anecdotes about Saudi-Arabia "ulemas" rejecting the phone and similar gadgets are famous.⁽³⁰⁾ This however, far from being a shameful conduct is a natural instinct. We all abhor novelties specially when they are imposed upon us in a violent way.

Today, the era of glorious certainly has passed away: we have come to realize that not all novelties are worthed. We need to be selective in our modernity. We need to keep our vigilance awake in order not to be blurred by the magic of modernity.

In all fairness, we should not reproach to the Arabo-Islamic society its hypocritical stand vis-a-vis modernity. Our desire for it is tempered by our fear of its devastating social costs .

It is like someone playing with fire, like Chronos in his char, we ought not to step beyond a certain line.

Modernity is a dream toward which mankind has been longing since earliest times. Technology is the tool which makes the project look more real than it is. We therefore, ought not to confuse the mean for the end nor should we lose sight that in order to conquer modernity, we need first to conquer man's good nature and win his dedication to love and brotherhood.

E . Islamic Fundamentalism : neither ghosts nor puppets.

There has been much fuss about this social phenomenon which has burst~~ed~~ lately all over the islamic World⁽³¹⁾.

Western analysts who abhor whatever does not correspond to their sacred " canons" of scientism have reduced it to a non-rational mouvement. They have with the help of a media system dedicated to scoops and novelties, made of islamic fundamentalism the uncontested number one of all international events.

The story begins with the outburst of the charismatic figure of Al-Imam Al-khomeiny who from Paris guided the Iranian islamic revolution against the Shah's secular regime. The triumph of the Iranian islamic republic sent a strenuous wave all over the islamic world which produced here and there strong echoes.

The collapse of the communist bloc and its desintegration has prompted and reinforced islamic fundamentalism as the last refuge against western cultural imperialism.⁽³²⁾

An acquainted student of islamic history would easily identify this trend of Islamic fundamentalism as a reccurent one which bursts every time the islamic community confronts a real threat. This historical mecanism has already given birth to a ~~serie~~^{series} of fundamentalistic movements such as : Shiism, Kharijism, whahabism and so forth. The recent version labeled radical islam⁽³³⁾ is the off-shot of that secular extremism ^{reached} pruned by such prominent leaders as Ataturk and the Shah . The later is unanimously identified as the father of secularism within the land

of islam : " all resistance to the impetuous torrent of modernity is futile because that torrent is so strong that it will pierce mountains, flies in the sky, sweeps away the nation striving to survive with a medieval mentality and primitive superstitions and condemns them to perish or to be enslaved and humiliated".(34).

The failure of the national state regime whether in its socialist or liberal version has left the Arabo-islamic society with no other choice but to retreat to that old and comforting refuge which is religion. Islamic fundamentalism is first and foremost a cultural phenomenon. It expresses in a violent way the distress of a society facing the threat of deculturalization. The fundamentalist thus, is a terrorized citizen who attempts to hide his terror through simulation and religious identification.

The more the threat becomes stronger, the more he is inclined to proselytism and provocation which he proudly displays in dress and conduct. There is no wonder therefore that he ends up a terrorist; that is the negation of negation itself.

Remarkable in this respect, is that cultural wave to which Islamic fundamentalism has given rise all over the Arabo islamic world.

It has been labeled according to that first battleground of Al-jihad "the Afghan wave". The wave consists of cultural festivities which take place particularly within "ghettos" of large urban centers.

Hence, during religious ceremonies such as the Friday's prayer, The places nearby the mosques are invaded by islamic "zeallots" who display on the ground an impressive bazar : video films and cassettes of the most famous preachers; perfumes and islamic toothpaste (siwak), robes and tchadors; buletins, books and reviews glorifying the islamic ideal city etc... hence, one is submerged by a strange feeling of nostalgia and cultural affinity and let himself be

easily consoled by that securing mass schizophrenia.

This state of mind which seeks refuge and peace within the realm of fantasy and illusion will last as long as the muslim being feels threatened, prosecuted and humiliated in his intimate values and convictions. Islam could well have remained that inoffensive lamb which it has always been, had not the western world first become a wolf. Modern culture ought to open its gates to muslims in the same way that themselves are requested to dig a passage from the closed gates of "Ijtihad" in order to rejoin modernity and humanity at large.

Assesement

We have embarked in this chapter on an adventurous expedition which consists in an attempt to retrace the cultural dimension of international law.

Throughout the exposition of the basic cultural features of the Arabo-islamic society, we have strived to establish the vital link which ties together norms and values. We have gone so far as to argue that a legal norm which has no cultural substance backing it is an illegitimate norm which fails to command adhesion because of the lack of symbolic validation inherent to its artificial and bureaucratic essence.

In order to carry on such an intricate quest, we have ^{felt} compelled to desert the orthodox legal methodology of positivism. Such a reductionist methodology is unable to "reflect" socio-cultural phenomenon in their globality and wholism.

We have from the start ^{de}made it clear that our aim is not so much to indulge into some grandiose objective analysis of international law as it is to try and contribute to its enrichment through our own subjectivities.

It is our feeling that dogmatic positivism is out of date. Entrapped as it is within a net of bureaucratic procedures and formalities, hindered by a fallacious and artificial terminology : Territorial sovereignties, contracts and so on It can no longer follow the path initiated by post modern international society in direction of regional community building and (block's) constitution. Economic protectionism and the growing need for regional security outlets, will reinforce this pattern and ring the collapse of the positivistic stronghold on international affairs. As wallerstein has put it . "1989, rings not the begining but the end of Pax Americana"(35).

Law is impeled within such an extensive international atmosphere to regain its mediating function in order to pave the way for change and trans_ formations within the world strata.

Can the world community submit eternally to the logic of force, brutal power politics and obey only those who by the sword and the bombs entertain the reign of terror?

Can the world community still tolerate an order which relies exclusively on tyrants and dictators implanted throughout the periphery by the imperial powers of the center?

Can the world community remains indefinitely deaf to the aspirations of millions of people who long to live in honor and dignity, who dream unceasingly of being ruled by honest, diligent and competent rulers? The late Sir Holmes Jr, is reported once to have said to a class of law students : " Your business as lawyers is to see the relation between your particular fact and the whole frame of the universe"(36).

That, we have strived to achieve by alerting the student of international law to the importance which cultural factors play in the formation of international norms. Our hope while doing that is to contribute to the cultural decolonization of international law.

Notes

- (1) A. Laroui L'ideologie Arabe Contemporaine . Maspero, 1977.
- (2) Opcit, (p. 217)
- (3) Opcit, (p. 225)
- (4) Opcit, (p. 29)
- (5) M. Dahmani, L'occidentalisation Des Pays Du Tiers-monde" Economica , OPU. 1983.
- (6) Laroui, opcit, (p. 213) .
- (7) Al Khatibi. A, The Decolonization of Arab Sociology in H . Barakat : Contemporary North-Africa. Croom helm London 1985, (p. 13).
- (8) Opcit, (p. 15)
- (9) Arkoun .M , Modes de la Pensée Arabe en Occident musulman Maisonneuve Larose 1984.
- (10) Arkoun .M , see chapitre V (supra).
- (11) J. Berque, Islam : La philosophie et les sciences UNESCO (p. 70)
- (12) S. H. Nasr, The Western World and Its Challenge to Islam in K. Ahmed. Islam : its meaning and message ; ed : London Islamic Council 1976 , (pp. 216 - 239)
- (13) For a critic of the traditionalists , see . M.S. Al ashmawy . IL'islam politique ed : bouchene 1989.
- (14) Nasr ,opcit
- (15) Gilles Kepel, "Les Ulèmas, L'Intelligentsia et Les Islamistes En Egypte", Revue Francaise Des Sciences Politiques No 3. Juin 1985 Vol. 35 (pp. 424 - 445)
- (16) W. B. Hallaq "On The Origin Of The Controversy About The Existence of The Gate of Ijtihad". Studia Islamica L XIII, Maisonneuve Larose- Paris - 1986. see also in this respect the opinion of Med IQBAL : The closing of the door of Ijtihad is pure fiction suggested partly by the crystallization of legal thought in Islam and partly by that intellectual laziness... if some of the later doctors have upheld this fiction, modern Islam is not bound by this voluntary surrender of intellectual independence (Iqbal- opcit - p. 169)
- (17) Yadh Ben Aschour, "Islam Perdu, Islam Retrouve". Annuaire De L'Afrique Du Nord.1979 (p. 10)

- (18) Famous poem by al-mutannabi , *An Arab poet born in Irak - 950 A.D.*
- (19) J. Habermas The uncompleted project. in Post Modern Culture. ed H. Foster
Pluto Press, 1983
- (20) J. Habermas "Considerations On The Spiritual situation of our age" opcit.
(p.19)
- (21) D. Bell, The Winding Passage : Essays and Sociological Journeys Basic
Book. 1980, (pp. 301 - 353)
See also his : The Coming of Post Industrial Society- 1973
- (22) J.F. Lyotard, La Condition Post Moderne : Rapport Sur Le Savoir, ed.
Minuit1979.(p.7)
- (23) J.F. Lyotard, Reponse à la question : Qu'est ce que le PM?" Revue critique,
Avril 1982 No 419 (p. 367)
- (24) Habermas. The uncompleted projet. (opcit p.9)
See also. Bernstein's Habermas and modernity - polity press 1985. (p.93)
- (25) Lyotard (opcit) p. 107.
- (26) Rorty in Bernstein, opcit (p. 172)
- (27) Habermas. The uncompleted . (p.3)opcit .
- (28) H. Sanson islam et technologie.
dans, technolgiest est developpement au Magreb ed : CNRS.1978
- (29) See chapitre one, part III. infra.
- (30) R. lacey. the kindom. Enfana collins - 1982
- (31) There is an abundant literature on this subject. It is undoubtedly the topic
most written about in all international affairs.
- (32) See in that respect. H. A. Smail L'imperialisme cultural ? quelques
reflexions sur la notion RASJEP - VOI XXVI - n° 2 juin 1988.
- (33) E. Sivan, radical Islam : medieval theory and modern politics. Yale
University . 1985 .
- (34) Attaturk's speeches, translated by J. Bell . london, 1925. (p. 263).
- (35) Wallerstein , opcit . (p. 2)
- (36) H. Berman , opcit , See the preface.

Concluding Chapter

Conflict Vs Dialogue

The Dilemma Of The International Community

When people get tired of fighting each other, they resort to talks and diplomacy and when again, they become tired of talks or are in short of arguments, they revert to war. This Clautzwickian dialectic of peace and war is a prominent feature of the human condition. It is particularly a feature which has characterized the historical relationship between the western world and the Arabo-Islamic one.

During the 1970's, it became a fashion, to emphasize dialogue and mutual understanding at the international level as well as at the regional Dialogues which all came to a deadline in the face of the staunch refusal of the western powers of the notion of global international negotiations as opposed to their favorite "case by case" formula. It may seem very rational to dismiss the vision of a global international negotiation as an "Utopia" irrelevant to the reality of the international community. Yet, it is no less rational to contest the blindness of the one-sided policy of "case-by-case".

In this chapter, we intend to examine what are the chances for dialogue as a mean to help promote an international order ^{one} much equitable and balanced than the one prevailing now. Tremendous ^{is} effort is displayed both in the fields of legal theory and international law in direction of a communicative action and a practical rationality which will allow for a peacefull settlement of disputes and help to promote cooperation and a new

International consciousness which will enable the international community to free itself from egocentrism and discrimination.

We will also examine what can be done in respect to regional cooperation and what is known as the Euro-Arab dialogue. It is our belief that such a dialogue is the road to "detente" and reconciliation.

section One: Legal Theory : From Harsh Positivism, to Smooth Communicative Action

What is law?

This is the everlasting question which moral philosophy and jurisprudence seem unable to provide with a satisfying answer. Is law the will of the strong? Or, is it rather, the device of the weak? Does law ensure order, or does it apply justice? Socrates used to think that law is a form of flattery and deception and that it is better to suffer wrong doing innocently than to do wrong legally. Indeed, he did so and was condemned by that deceitful law. Since then, the question of whether a legal rule can be considered so even if it is an unjust has haunted the mind of jurists and has led to their splitting into two opposed schools.

To the natural law school, which runs from Socrates and Ciceron down to St. Thomas, the Spanish philosophers, Vittoria and Suarez, to Puffendorf, Kant and Locke, Moral principles which objectively define right and wrong, are the substance of legal rules. Hence an unjust rule is not legal.

To the positivistic tradition which runs from the Sophistes

down to Hobbes and Bentham down to Austin and the late Kelsen, law is a social fact, an order backed by threat and as such it has nothing to do with morals.

The late version of this unending debate is provided by "Fuller Versus Hart" early in the sixties.⁽¹⁾ Hart argued in "The concept of law" that the legal system is an order backed by threat; "the gunman situation writ large"⁽²⁾. Hart suggested his division of legal rules into primary and secondary rules, whereby the secondary rules would be power-conferring and would serve to legitimate the primary rules. This, he holds to be of paramount importance in the history of human society. It is as important as the discovery of the wheel⁽³⁾. It allows, according to him, the human society to quit the "pre-legal" stage and enter the legal one. Hence, Hart stresses, "... a transition to the legal world occurs when the society first conceives and applies to its affairs the notion that a rule may confer a power to make or change rules of duty". Such is the role of the rule of recognition⁽⁴⁾.

What Hart obviously misses in his notion of law, is, in the words of Fuller "a recognition of the role legal rules play in making possible an effective realization of morality in the actual behavior of human beings"⁽⁵⁾. Law, asserts Fuller, is not one way projection of authority. It cannot be based on the managerial model because law is a purposive activity. It is an act of communication and that is something more than surviving. It is a way of being alive"⁽⁶⁾. Law, according to Fuller, should not be associated with force or with efficiency. Such an association is a departure from the principle of law's inner morality and constitutes an affront to man's dignity as a responsible agent⁽⁷⁾. Fuller distinguishes

between the morality of duty: "do not steal" and the morality of aspiration "love your neighbor". The latter alone, asserts Fuller, aims at preserving and enriching our social existence.⁽⁸⁾

Fuller has left us since and Hart has come to admit that the relationship between law and morality is not as simple and clear cut as first, it was thought to be. To argue for instance that a legal system such as that of the Nazi regime is sound and legal is to justify those for whom Hart's model is the incarnation of the colonialist situation, where by the indigenous population would obey the law of the white man either by fear or by a vague sense of obligatedness.⁽⁹⁾

Nowadays, the jurisprudential debate has shifted to the level of interpretation and legal reasoning. Hart has come to admit the existence of a penumbral zone between the legal and non-legal worlds. Within that zone of doubt, Hart recognises that judicial discretion plays an important role in legislation and the creation of norms⁽¹⁰⁾. Hart has even gone further and admitted openly that natural law theory's chief and very great merit, is to show the need for an understanding of law in the context of other disciplines.⁽¹¹⁾ Now if that is so, then Moles is justifiably right in charging Hart with the responsibility of cutting adrift modern legal theory from its philosophical insight.⁽¹²⁾ Moles, not only condemns Hart for his misunderstanding of the Austinian legacy, but also considers the Hartian model as fundamentally flawed and false.⁽¹³⁾

On the whole, however, there seems to be emerging a general awareness among lawyers in regard to the obvious complementarity of morals and law. Dworkin, for instance, takes a

middle way position between Fuller and Hart and attempts to reconcile law and morals. In his latest work, he argues that : "law's empire is defined by attitude, not territory or power or process, law's attitude is constructive it aims in the interpretive spirit to lay principles over practice, to show the best route to a better future. It is finally a fraternal attitude, an expression of how we are united in community though divided in project, interest and conviction."⁽¹⁴⁾ Dworkin argues that the ideal of law as integrity not only permits but fosters different forms of substantive conflict or tension within the overall best interpretation of law and in that, he fully agrees with Habermas' critical potential of interpretation. Where he seems to retract, is when he insists on our ability to reach a coherent and monistic truth.⁽¹⁵⁾ Hence, at the end Dworkin remains trapped within the positivistic bias and despite his mixed monism fail to apprehend law as a social communicative mediator.

Silverman, on his part, has urged for a dualistic legal theory which combines analytical standards with insight from natural law theory and provides a genuine next step towards post positivist reconstruction of legal reasoning.⁽¹⁶⁾ Silverman distinguishes within the positivistic school, two currents : pure monism such as that of Hart and Kelsen and mixed monism such as that of Dworkin. In his opinion, both currents are unable to apprehend complex legal phenomenon in which occurs a structural transformation converting illegality to legality.⁽¹⁷⁾ A legal phenomenon, tells us Silverman is any event relation, or act to which legal culture gives special significance. In order to give a complete account of the normative structure of legal phenomenon, Silverman presents us, with his three stages theory of structural legal transformation:

formal illegality, problematic illegality and legal illegality. While positivism condemns for instance the United States constitution and its ratification as illegal because not conformed to the rule of recognition prevailing then, Dualistic legalism considers it to be the inaugural event in a narrative setting a new legal system.i.e. the achievement of legal illegality.(18)

This last point has been the topic of much argumentation. Positivism in general has shown a rather rigid stand vis-à-vis legal changes and revolutions. Bentham was appalled by the French revolution, Kelsen considers the idea of revolution as a blow to that of a legal system and Hart though sharing the same premises with his predecessors has come under constraint to adopt a wait and see position. This is reflected by the circularity of his argument in regard to the authorising rule, whereby we cannot have obedience to law until we know what the authorising rule is and we cannot know what the authorising rule is until we have obedience to law.(19)

It is because of the refusal to recognise legal fictions that positivism cannot conceive of legal changes. Hence, it either rejects revolutionary government as illegitimate or else, considers them such, in the case of the Nazi regime, legal. Indeed, legal fiction which Fuller defines as " a statement propounded with a complete or partial consciousness of its falsity and recognised as having the utility"(20) or as a useful device ensuring equilibrium between rules and principles so that neither the scope of the rule nor that of the principle exceed each other .

There is an urgent need today to conceive law and morality not as opposed notions but as complementary components of the same

social lifeworld. Law, as Bodenheimer has argued, belongs to both spheres of empirical reality and normative ideality. Its anchorage in these two domains may be uneven and shifting. Yet, law is of value to human society only when grasped as a bridge from a human "all too human" world to a higher and more noble realm.⁽²¹⁾

Indeed, the debate between those who uphold a procedural ethic of right and those who advocate the supremacy of the ultimate good, will stimulate our social integration only if both parties acknowledge the complementarity of their competing validity claims and strive mutually for an emancipated legal theory.

Lawyers should seek to forge a midway in between the two extremes in order to rejuvenate that practical rationality and wisdom like knowledge "Phronesis" which our illustrious predecessors from Aristotle down to Averroes and St Thomas, Sha'ttibi and Austin have all sought to preserve. There has been a time where positivism could be looked upon as a revolutionary doctrine which bursted in order to correct the mythical fallacies propagated by natural law theoretical excesses. Today, in its turn, positivism has become a dogma and is strangulating modern legal theory.

To deny that doctrinal current altogether is to commit that same mistake which has discredited positivism. Therefore, as Virally has wisely advised:⁽²²⁾

" Nobody seeks to replace positivism or deny its merit. Yet, its short-comings are all too visible. Those who have forged it have greatly exaggerated some of its aspects while oversimplifying some others. It is about time to submit it to a thorough reappraisal."

A neo-positivist such as MacCormick today would argue that the demand from people to be law abiding is never and can never be morally a neutral demand.⁽²³⁾ That law embodies ideology does not commit analytical jurisprudence either to legitimating or to denouncing particular legal orders. The analytical approach offers a theory of reasoning that replaces certainty by the plausibility of a democratic search for consensus⁽²⁴⁾. On the other hand, moralists would contend that the fact that practice has failed to extract itself from the social context does not mean that we should disavow the objectivist ideal and its technological breakthroughs all together. Instead, both currents should seek to enhance that wisdom which Aristotle called "**phronesis**" that unending and ever-renewing human-energy which resolve unexpected conflicts whenever they occur.

To conclude this brief excursion in the realm of legal theory , lets us state that the point is not so much to establish the closeness of the natural law theory to the islamic one , as it is to underline the fact that human society is in need for both law and morals. If it is to be granted that the Arabo-Islamic society in order to emerge from religious fanaticism needs a sober and vigorous shaking of its deficient mentality, then, it should also be granted that western society is in a similar need for moral enhancement in order to step out from the cold and annihilating positivistic logic.

In islamic legal reasoning, Shattibi has argued for a purposive law whose aim is the achievement and the preservation of the

society's well being. His analytical theory which we have summarized in an earlier chapter combines a multitude of legal devices to maintain the equilibrium between secondary and primary rules. It is true that islamic legal theory has that privilege of disposing of a stable and undisputed recognition rule. Yet on the whole, it is not as performant as it should be because of stagnation and neglect and is as much in need of revitalization as does its positivistic counterpart.

Islamic legal theory has experimented a variety of currents and schools stretching from the mere subjectivism of "**Ikhwan-Essafa**", to the analytical reasoning of "**Al Hanafiyya**" wa "**El Malikiyya**" to the legal formalism of Ibn Hazm. In its infinite variety, Islamic law is technically well equipped and can easily adopt to historical and political circumstances as shown earlier. One reason for this subtlety is its richness of what Chaim Perelman would call "**confused notions**".

In order to illustrate this last point, we may resort to explain the meaning of Hadith which stipulates, that the divergences noticeable among muslim jurists are a mercy to the community. Now, taken in its literal sense, this hadith obviously stresses that divergence is a typical feature of Islamic legal reasoning from which one can infer that muslim Jurists will never reach consensus "**Ijma**" nor agree on an interpretation. That would certainly be a hasty conclusion because, as Sha'ttibi has shown. Sharia's aim is the preservation and betterment of sociability. Hence, the intention of the legislator can only be grasped within a whollistic vision of the sharia's goal. Within such a global frame, the Hadith cited above should be interpreted along similar Hadiths provided on the same subject, particularly that which precises that "My community will never agree upon an error". Thus, we end up

with a new understanding of the first Hadith which implies that divergence among Muslim jurists, on the validity claim of a rule, is a mercy because it is an indication of genuine pluralism and it allows the community to elaborate different interpretations of the same rule so as to meet the socio-political context. That is why Shattibi has been so adamant in his claim that the Sharia should be grasped as a whole: "it is well established evidence among Muslim jurists that Sharia is looked upon as an image whose details confirm its unity; its particularities its generality; its relativity its absoluteness, etc...in the same way as the different organs serve the human body."(25)

Notes

- (1) See, the debate in Harvard Law review 71-1958 (p. 598 and p. 630)
- (2) Hart, L.A, The Concept of Law, Oxford ed 1986 (p. 24)
- (3) Opcit, (p. 41)
- (4) Opcit, (p. 43)
- (5) Fuller, L.L. The Morality of Law. Yale Univ. Press, ed. 1969 (p. 205)
- (6) Opcit, (p. 186)
- (7) Opcit, (p. 162)
- (8) Opcit, (p. 183)
- (9) Duncanson. I, "Hermeuneutic and persistent questions in Hart's Jurisprudence". TheJuridical Review, Edinburg, 1987 (p. 129)
- (10) Hart's revised revision can be found in: Hart.L.A, "Essays in Jurisprudence and philosophy". Oxford. 1983; Essays on Bentham. Oxford, 1982.
- (11) Hart (1983), (p. 10).
- (12) Moles.R.N, " Definition and rule in legal theory, a reassessment of Hart's

and the positivist tradition". Basil Blackwell, 1987, (p. 219).

(13) Ibid, (p. 251).

(14) Dworkin. R, " Law's empire". Harvard Univ. Press. 1986 (p. 413)

(15) Or what he calls the "soundest theory".

(16) Silverman. G .M, Dualistic Legal phenomenon and the Limitation of Positivism. Columbia Law Review, Vol. 86, No. 4.

(17) Opcit, (p. 825)

(18) Opcit, (p. 851)

(19) Moles, opcit, (p. 95)

(20) Fuller.L.L, Legal fictions. Stanford Univ. Press, 1967 (p. 7). Fuller the author reports Bentham's description of a legal fiction as a syphilis, Silverman (note 16, infra) tells us that positivism has failed because of its inability to rely on legal fictions.

(21) Bodeinheimer. E, "Law as a bridge between is and ought".
Ratio Juris Review, Vol.2, No.1, July 1988, (p. 141).

(22) Virally.M, La Pensée Juridique, Paris 1960. (Preface XII).

(23) Mac cormick.N, otta . weinberger " An institutional theory of law",
Holand , 1986 (p. 104).

(24) Opcit (p. 127).

(25) Shattibi, opcit (p. 37) vol II . "El-Mu'affaqat".

Section two: Misery and Grandeur of International Law

Is there a crisis, within the field of international law? We have all over our work met with a number of scholars who have raised serious doubts and suspicion in regard to international law. Some have gone further to challenge, the proper existence of such a discipline⁽¹⁾ while others, though not denying it, have asserted that it is in a deep state of crisis, if not one of decay.⁽²⁾

When nowadays, the student of international law attempts to gain insights on the issue and refers to recent literature on the subject, He is bluntly deceived to find none. What particularly hits him is that astounding retreat of lawyers behind omnipresent power politics which is almost always disguised under the modernist plea of realism, or else, that legal formalism delivered insipidly under the eternal excuse of "the Jurist's humility". There are some more subtle technics, such as that which consists in elaborating on the infinite sub-branches of the discipline or in classifying data, etc... Hence, what the student is left with is either sketchy theoretical outlines or else vague and abstract generalisations. It is all too true that ours is the era of the vanishing treatise.⁽³⁾

In a recent edition, De Lepus offers us her definition of the concept of international law, ascertaining that international law theory is in a state of anarchy.⁽⁴⁾ The author provides us with her midway concept which seeks to reconcile normativism with social process analysis. In the "preface" she urges for an inter-activism which will explain how international rules emerge in the international society. Yet, she fails to elaborate on the meaning of

"inter-activism" which a priori is an obscure device. De Lepus sees ⁽⁵⁾ international law as a normative system, rules and obligations, Which may be created and continuously revised by a process in the way suggested by the social process school. After this hazardous depiction of the dilemma of international law the reader has certainly a clearer idea of the anarchy ravaging the discipline. De Lepus, despite noticeable efforts to trace the formation of international rules in form and substance, fails to tackle vital issue^s dividing the international community and her theoretical essay, as a reader has noted, raises more questions than it answers.⁽⁶⁾

Professor Nguyen's new edition "Droit international public" is worthy of mention here.⁽⁷⁾ It is a voluminous compilation of material (theory and states practice) it offers an elaborated outlook on what goes on in the field. The authors retrace the historical formation of the discipline and in this respect they follow the traditional historical route from the Greeks and Romans to the Middle Ages to the Renaissance, etc... Their historical survey is the morest Europeo-egocentric that one can get and this is very surprising coming from an Asian native. Not a hint is given to non-stern^{we} influences on the development of international law. Their exposition of the doctrinal debate is much more balanced and include "le militantisme juridique" in all its variants. Anglo-Saxon, French and third-worldist. The authors conclude the doctrinal debate by stating that despite the emergence of a unifying doctrinal trend which they label as "neo-positivisme pragmatique", Yet, they observe that no preference should be given to labels, for no theoretical refinement can replace the lucid observation of reality in its heterogenous diversity and infinity.⁽⁸⁾

The authors opt for a contextual understating of law. Their stance is almost somewhere in the middle of the French paradigm and the work as a whole presents a rather conservative and optimistic view of the international society.

A more promising theoretical enquiry is provided by the Italian scholar, A. Cassesse. Under a title which by now has become a classic,⁽⁹⁾ Prof Cassesse undertakes to provide the students with a vivid picture of the present international society with all its vicissitudes and conflicting patterns. The international society which Cassesse depicts is divided horizontally "East-West" and vertically "North-South". Through a successful combination of positive vigour and analytical insight driven from political science and international relations, Cassesse provides us with a multifarious enquiry into the sources of division and the promises of future perspectives. Examining the present order, Cassesse notes that the old "Westphalian" order is still there, like the skeleton that can only be seen on x-ray⁽¹⁰⁾. It constitutes the frame work on which all the rest is based. The author also notes the general dislike of third world countries of intricate legal technicalities and their cultural lean toward more general principles of international law which by being loose and flexible provide the ideal ground for negotiation and the formation of international rules.⁽¹¹⁾ In his concluding epilogue, Cassesse stresses that the competition will continue between the old and the new international orders. He adopts a realist position and contends that one cannot turn an apple tree into a fig tree just by putting a nominal tag on it. Yet, he expresses the hope that the international rule will find its way to the promotion of international co-existence and the protection of human rights.

What emerges from the recent literature on international law is on the whole hardly comforting . Franck's enthusiastic salute of O. Schachter's course at The Hague Academy as a brilliant treatise on international law is probably the exception which confirms the rule.

Prof. Schachter adopts a teleological approach to the study of law⁽¹²⁾. An approach which examines the values and ends served by the rule of law and enables us to grasp more clearly the purposive and instrumental role of law.

Schachter contends that international lawyers do not and cannot limit their analysis to rules and obligations and ignore the facts and consequences that give those rules and obligations their full meaning. These and similar, Sharp notes, are typical to that theoretical "brio" which the author has shown throughout his prolific literature. The rest of the course, unfortunately is dedicated as an apology to American interventionism (Nicaragua, Iran). As someone has put it, Schachter's work can be read with profit but only if so read with skepticism.

In concluding our review of the recent literature on the subject of international law, we cannot afford to reserve its due place to the contribution of Arabo- islamic jurists to the development of the discipline. Yet, we will attempt to provide the reader with the latest in that domain. Two outstanding works edited by two outspoken Arab jurists are worth mentioning here.

The first is Bedjaoui's latest "Droit international" : Bilan et perspectives.⁽¹³⁾ A voluminous compilation of contributions by no

less than seventy jurists from all over the planet. The work according to Bedjaoui has three ambitions:(14)

I- To innovate in respect to editing and publishing.

It is an attempt to create a new style which surpasses a collectif manual and is a forum, a lively club where jurists from all over the world can meet and talk at ease with each other.

II- It is an initiation and an introduction aiming to provide pedagogical training specially designed to stimulate a genuine cultural pluralism.

III-It is an attempt to set ground and prepare a plat-form for reflexion and thought because very often, wars start in the mind of people.

Examining past records of international law, the eminent judge recognises that some progress has been made in regard to such vital issues such as : human rights. developement and environment (15) . When tracing the future lines for the evolution of international law Bedjaoui cannot refrain from expressing fear about that gloomy vision of the late R. Aron who openly mocked the idealism of jurists, and asserts strongly that unless the international community demonstrate its willingness to step over that naked and egocentric realism by mobilising its energy and unifying its ranks against the misery of our actual anarchy, International law will retreat and open wide the gates of war and anihilation.

The second work is that of the Egyptian international jurist El-Ghunaimi, whom we have already met earlier. Under the eloquent title " Islamic law of peace, a comparative study" the Egyptian scholar undertakes to provide the reader with an up to-date version of how Islam cohabitates and reinforces positif

international law (16). El-Ghunaimi criticises those who like khadduri attempts to spread a negative image of islamic law by exaggerating, its antagonism vis-à-vis modern law. He believes that the antinomy is surmountable and both islamic and positive international law seek to reinforce and preserve international peace and they both aim at consolidating international cooperation and mutual understanding. Once this is clearly and convincingly demonstrated, El Ghunaimi moves on to examine islamic law's position in regard to the classical international agenda : territory, diplomacy state responsibility-law of the sea, etc... Every there and then, the author emphasizes islamic law's readiness and total agreement with positive law. Minimising disagreements whenever they occur and concluding his work by stating that islamic law is universal and that it will not fail in that respect to reinforce and enrich international law.

Al Ghunaimi's treatise on islamic international law is almost the unique attempt in its genre through out the islamic world. Though I find it apologetic in tone. I still believe that it constitutes the best and more accurate version of islamic international law. Of course Al Ghunaimi does not have that grasp of positive international law which a Bedjaoui has. Neither has the latter that islamic culture which the former displays magnificiently, the efforts of these two jurists mixed together would have been much profitable to the international community than neither of them has been separatly. To say this is by no means to deny the tremendous contribution that each of them is making to the development of a truly multicultural international law.

The student is unable to understand the lethargic state of the

theory of international law if he does not turn to examine the reality of the international society. Notwithstanding the all too obvious anarchical chaos which characterises the international scene and which Tucker has depicted so well, What strikes the observer is that deep dichotomy separating the reality from theory. Nations repeatedly and insistently proclaim on every occasion their willingness and longing to be law-abiding while continuously and regularly behaving in an opposite way. The reflection of this paradox on the theory of international law has taken the form of a coupling between two contradictory principles which the doctrine has swiftly absorbed. These principles are : "Pacta sunt servanda" and "Rebus sic stantibus". In this bizarre antinomy is summarised the misery and grandeur of international law and that of the human condition all together .

"Pacta sunt servanda" agreements are to be kept, and nations should abide by that to which they have committed themselves. This is the basis of the law of nations, the ultimate ground-norm without which international law is simply inconceivable. It is, Oppenheim tells us, the initial legal hypothesis, a sociological rather than a legal notion⁽¹⁷⁾. Puffendorf describes it as the most refined expression of all the beauty of human life⁽¹⁸⁾. P.S.S is the cornerstone on which rest the whole legal pyramid . It is a sanctified notion whose origin is deeply religious⁽¹⁹⁾. It offers a harmonious world view of order and stability and promotes the sanctity of contract as that essential of life in any social context.

" Rebus Sic stantibus" nations have the right to get released from their commitments and treaties cease to be binding when there has been a fundamental change in circumstances. As a notion,

RSS is a two-edged sword⁽²⁰⁾. It can be invoked for defensive as well as for offensive reasons. The world view which stems from it, is one of perpetual changes, conflicts, turmoil. Hence, if P.S.S comforts the idealist aspiration for world peace and order advocated by Rousseau and Kant, 'RSS' on the contrary supports the realist vision of Hobbes and Aron. Bismark believed R.S.S to be the privileged tool of the great powers with which they could maintain a workable balance of power at the international level.

Bederman, in a stimulating recent study⁽²¹⁾, has provided us with a deep sighted analysis of the tension between these two principles and their historical roots. Conceived first as the keyboard for the game of power politics, RSS was later on to be adapted by the United Nations platform as a peaceful mean^s for changes and adjustment.⁽²²⁾ The Vienna convention has attempted to reduce the tension produced by R.S.S, by specifying the conditions under which changes are to be invoked as justification for release from obligations. These are according to Article 60 of the convention:

- I- the existence of the circumstances invoked constituted an essential basis of the consent of the parties.
- II- the changes could not be foreseen at the time of negotiation.
- III- the changes would transform radically the obligations.
- IV- the changes should not be the result of a breach by the complaining state.
- V-the changes should not affect the establishment of boundaries.

This has proved to be a vain attempt since, RSS, as Bederman has concluded, continues to upset likewise the functionalist, the realist, and the critical jurist. Like the physical realities of

gravity and motion, It remains anchored to international law and despite all the zealous novelties of legal imagination, We cannot escape it.(23)

In the Arabo-Islamic culture, the notion of P.S.S holds a central position. In Arab social life, The 'words given "El-Kalima" is the mark of manhood. Coranic exhortation to honour the "Aath" and preserve the sanctity of promises are numerous and firm. The notion is so central in in the culture that no writer on Islamic law has ever omitted its omnipresence(24). Western tourists cannot fail to notice nowadays that merchants and businessmen in the Middle East continue until today to conclude their transactions verbally and very seldom resort to written contracts and that mainly because good faith and trust are dominant within the islamic culture.

At the international level, mainly because of the absence of good faith, the Arab world as an effective force within the third world bloc. Has recently resorted to R.S.S and proclaim the urgency to review the rules regulating the international society. This is the whole debate on N.I.E.O and development.

In order to find the reasons for this preconceived standard western view of the Arabo-Islamic society, we may need to dig deep into the roots of orientalist philology. Yet, we feel that we have done enough of that already. What may help our understanding of the contemporary Arabo-Islamic international attitude is perhaps to try and look at how the Arabs view 'RSS' today. As we have argued in Chapter One, there is a long haul between the era of colonialism and that of liberation, between the "Westphalian" order and NIEO. Within the new-emerging order, 'RSS' incarnates in

Arab's eye their right to self-determination, or, in other words, their right to a decent life, a life with dignity and honor, the right of a cultural personality to be treated as the equal of all other entities which compose the international community. It is probably a self-judgement and 'RSS' is to some extent a self-attributed judgement. The whole question which remains, expecting an answer from the international community, is whether or not it is able to emancipate 'RSS' and convert it from that destructive and rebellious potential to a constructive and universally based legal right.

In contemporary legal doctrine, the controversy has focussed on the issue of interpretation of international rules. We will examine the gulf crisis in the next section, right now, let us follow the controversy from the start.

The editor of A.J.I.L has aroused the issue in 1970 when he loudly asked: Who killed articles 2(4) of the United Nations charter? (25) Franck imputed the death of that article to the great powers who have entertained the cult of power and drained small nations behind them. "It seems, he says, that it is not an age when men act out of principles, simply because that is what gentlemen ought to do. But living by power alone is nerve-racking and costly business. To do it, much must be surrendered by the citizen, individual freedom, a large part of his national income and the chance to live in that comparative tranquillity which comes from being liked by others and liking oneself".(26)

Franck's thesis has been criticised. Henkin has argued that the point is greatly exaggerated and that we have not to judge law by

looking only ^{at} its weaknesses. Henkin believes that article 2(4) does not mock us from the grave but still rules us⁽²⁷⁾.

Reisman for his part has argued that coercion is necessary, though it should not be glorified. He openly states that what he has in mind is a virtuous sheriff entering an anarchical western town of old times and securing order and stability. If the sheriff fails in his task, then, self-help will prevail⁽²⁸⁾. Reisman suggests the notion of "an ongoing self-determination" as a criteria by which to distinguish legitimate self-defence from aggression.⁽²⁹⁾ Schachter replying to Reisman has observed that such a notion is vague and in fact does no more than promote the use of force as a mean for the settlement of disputes. Schachter marks a good point in observing that verbal condemnations at the U.N are costly and that the absence of sanctions in international law does not mean all along the validation of the condemned acts.⁽³⁰⁾

This is how the debate is going on between Americans international jurists. In practice, our decade the 1980's, is witnessing at the international level a western counter-offensive. It all started with the much mediatised styles of "Rambo politics" and "Iron Britannia". Combining strategical retreat with sudden strikes, that is deserting international institutions where you are vulnerable such as the United Nations general assembly and UNESCO and reinforcing it where your position is dominant like within IMF and BIRD, etc. Intervening here and there (Granada, Malvinas, Nicaragua, .. Irak, etc....) to make everybody realise that the western sheriff, defensor of order and freedom, is still in control and that international law is a primitive system of norms with yet no meaning at all.⁽³¹⁾

So, is Carty's claim about the decay of international law a valid one?⁽³²⁾ Of course the answer to that question depends on how we conceive of international law. If we agree to the fact that there has been a golden age of international law; that of the colonial legacy; for the western world, and NIEO for the third world, then certainly what we are living today is a decay. However, we may also contend that since there has never been any golden age of international law. It is still only an aspiration, then, what we are witnessing now is that normal state of nature which Carty endorses so strongly⁽³³⁾. What in reality provokes disgust and a strong feeling of uselessness^{ness?} in the international jurist is that passivity and submissiveness of lawyers to harsh reality and their snobish retreat behind standardized formalities.

If there is decay therefore, it is not one of law which Carty himself admits, "it is not the worst of literature"⁽³⁴⁾, but rather a decay in world legal culture and civilisation. The human being is not an instrumental but a purposive being. His sociability should not be sought whether in the form of nation-states or otherwise as a means to obtain maximum power and wealth. It should be sought as a mean to freedom and dignity. The human being is endowed with a gift and entrusted with a mission. The gift is reason and his mission to cultivate human nobility. Only a good balance between his animosity and reasonableness can ensure to keep him within the right path. The belief that a man can be superior in his animosity to another is as much a myth as the belief that man can be more rational than his other fellow. If we are to agree with Habermas that the animosity in man's nature has so far triumphed over his reasonableness and that what is necessary today in order to complete the project of modernity and establish a

communicative action is our determined commitment to make the good and the just triumph over vice and evil .

Franck has observed that there are signs which clearly indicates that a universal reassessment of the classical definition of national interest is taking form.⁽³⁵⁾ Indeed, in legal theory as well as in politics, a growing interest is taking place for moral reassertion. Kenan tells us "that of all the multitudinous celestial bodies of which we have knowledge, our own earth seems to be the only one even possible surrounded with so much natural beauty, heartfulness, and magnificence. Isn't there, whatever the nature of one's particular God, an element of sacrilege involved in the placing of all this at stake just for the sake of comfort, the fears and the national rivalries of a single generation? Isn't there a moral obligation to all of us to be the protectors and guardians of this gift instead of being its destroyers?"⁽³⁶⁾ He then goes on to add that the renunciation of self-interest, which is what morality is all about, can never be rationalized by purely secular and materialistic considerations. A concept of national security that ignores the same legitimacy need for othernes's security, lays itself open to the same moral reproach.⁽³⁷⁾

Commenting on the need for security, Buzan applies it to Waltz's three levels (individual, state, international system) and ends up with a wholistic view which he labels "systemic security" thereby asserting that systemic security is the road to a mature anarchy.⁽³⁸⁾ Modesty put aside, the real achievement is to step over anarchy and not to fructify it. A mature anarchy may be more devastating than a benign one. In Buzan's mind, it refers to a noticeable progress towards peace and stability, yet, the aim is too modest. A universal consensus is an easy target at one condition,

belief in it. Nothing is impossible for a motivated and well inspired reasonable man.

In legal theory as elsewhere, the real solution to our perpetual fight is to establish trust and good faith among ourselves and our only source of inspiration is love and magnanimity. Unless we make a real effort in that direction, we will remain what our instincts command us to be; wolves. Our wondering in the field of international law's theory is unlimited because of the urgency that we feel in establishing bounds among lawyers all over the world. A fruitful communicative action is possible only if international lawyers, start raising the walls which like that of "Berlin" have been separating them for so long. That is why I believe that my discussion with lawyers and scholars from different parts of the world is not only productive but also a necessary step to the initiation of a truly multicultural spirit which is indispensable to a universal pluralism..

Prof. Coll has made recently an attempt to save international law from its best friends⁽³⁹⁾ because as the saying goes; we only need protection from friends. Coll examines the current state of principles and terminology. Global consciousness which he links to the idea of global community and legal absolutism which he defines as that general tendency to interpret the U.N. charter against aggression and use of force in an extensive way. Here, he seems to be referring clearly to Franck's thesis examined above.

Describing these two expressions as "grandiose idealism" Coll suggests instead as alternatives: Just war and prudence.⁽⁴⁰⁾ I find Coll's suggestion very promising and I shall attempt to provide the

reasons why. The concept of the just war "Belum justum" is indeed a very useful concept. It has been dropped by positivism because of its obvious religious flavor. Nowadays, since primitive legal scholarship is regaining ground, the concept of the just war could turn out to be one of the most helpful that legal theory has produced. Indeed if we are destined to continue fighting each other, let us at least do it properly. The main problem which we will be facing in regard to the concept of "just war" is as Coll has pointed out : how to reach a consensus on its exact meaning? The concept itself is widely known. Every major cultural system in the world knows it in a form or another and there should be no major obstacle in reaching a common definition . Of course, many would object that the international commission of jurists has spent almost a decade trying to reach agreement on a minimum definition of aggression without much result. But then, we may need to be reminded that we do not so badly need to reach a clear cut, precise scientific definition because such a thing does not exist and has been all over a positivistic bias. If we combine in our approach to the concept of just war that of prudence as Coll suggests, we may end up with a surprising international agreement. In any case, lawyers have nothing to lose except their vanity.

A prudential calculus would lead us to a universal interpretative process conscious of the fact that ours is not the era of certainty but that of moderation. This in turn, should increase our communicative receptivity and encourage us to meet our partner half the way. Coll's fear of rivalry and opportunism will fade away once he accedes to the reality of otherness and its right to a decent and honourable existence. When he, in threatening tune, asserts firmly that his society will only support international law in so far as it will answer his society's need for

security and self-determination, he should realise that the same is true for all members of the international community and that unless our appetite is prudentially tempered we run the risk either of having an indigestion or a ~~starve~~ (stroke)

What is so typical to American thought in general is that credulous provincialism with which they tend to interpret social phenomenon. It is true that theirs is an open society and constitutes an ideal platform for the construction of an everlasting pluralism. Yet, to remain trapped within your own frontiers way hinders your vision of universal values and makes receptivity of otherness somehow deficient in some respects. This is the repro^ach that one can ad^dress to that overlapping consensus which Rawls^o has been trying so hardly to forge for his society. He has come now to realize that his consensus is more tied to serve the international community⁽⁴¹⁾. Yet Rawls^e still holds to political liberalism as a platform on which he attempts to construct his plan though he warns that his theory of justice does not aim at the cultivation of those values dear to liberalism such as individual autonomy or any other exhaustive doctrine. What really Rawls^e seems to be pursuing is an idealised form of sociability ^hich will ensures priority to justice and promotes values such as moderation, civility and tolerance. Exactly the same idealised form of the Islamic tradition. Rawls maintains open its flowing imagination and wait for times to be favorable⁽⁴²⁾. In the same way, we maintain hope in the future. The international order capable of reducing our divergences to a minimum is certainly something not very far away. It will bear the mark of every unit composing it and command their adhesion and support.

Notes

- (1) Austin for instance, see (chapter I , Infra).
- (2) Carty.A, the decay of International law, Melland Schill Monographs, Manchester 1986.
- (3) Franck. T.M, "The Case of the Vanishing Treatises"
AJIL 1987/81 (p. 771).
- (4) De Lepus.I.D, "The Concept of Law" Stockholm 1987..
- (5) Ibid (p. 17)
- (6) Ajil, 1988, Review by Ch. Osakwe.
- (7) Nguyen, Ruoe D, Patrick Daillier, Alain Pellet, Droit International public. 3 ed.
LGDJ, 1987.
- (8) Ibid, (p. 100)
- (9) A. Cassesse, "International Law in a divided World" Clarendon press, oxford,
1986.
- * That title was used before by R.Higgins and Jenking.
- (10) Ibid, (p.32)
- (11) Ibid, (p. 120).
- (12) Schachter. O, "International Law in theory and practice",
RCADI 1982, Vol n° 178
- (13) Bedjaoui.M, " Droit International (bilan et perspectives)". ed A pëdane,
UNESCO, 1991. 2vol.
- (14) Opcit, (Avant propos).
- (15) Opcit, (p. 1317).
- (16) M.T. AlGhunaimi, " Kanoun Essalam fi Al-islam ", Dar elmaarif, 1988.
- (17) Oppenheim.L, " a treatise of international law" ed . lauterpacht, Longman
green , 8 ed, 1955, (p.15).
- (18) Puffendorf.S, " De jure nature and gentium" Book III, chap IV , (p. 12).
- (19) Hans Webberg, "Pacta Sunt Servanda" AJIL: 1953, Vol. 53 (p. 782).

- (20) Ting Young Huang, "The Doctrine of Rebus Sic Stantibus in International Law", Shanghai, 1935. See also A. Rubin, AJIL 1987 . 81 (p.774) .
- (21) Bederman.D.J, "The 1971 London Declaration Rebus Sic Stantibus and a Primitivist View of the Law of Nations". AJIL, January 1988, Vol.82,(pp.1-47).
- (22) Opcit, (p.28)
- (23) Opcit, (p.40)
- (24) See, For instance, S. Sh. Pirzada, "Islam and International Law", in "The Gallenge of Islam" ed. A. Gouhar, ICE, 1978 (p. 196).
- (25) Franck, T.M, Who Killed Article 2 (4)? AJIL 1970 - 64.
- (26) Opcit, (.836)
- (27) Henkin. L, "The Reports of the Death of Article 2 (4) are greatly exaggerated. AJIL 1972-65 (p. 544) .
- (28) Reisman.H.M, "Construing Article 2 (4), Coercion and Self Determination", AJIL, 1984/78 (p. 643).
- (29) Opcit, 644.
- (30) Schachter. O, AJIL 1984-78 (p. 647)
- (31) Y. Dinstein, "International Law as a primitive system" Journal of Int. Law and Politics: No.1 Vol.19, Fall 1986.
- (32) Carty, opcit.
- (33) Carty stresses that nations are in a state of nature.
- (34) Carty, opcit. (p. 128).
- (35) Franck, AJIL 1970
- (36) Kenan.G.F, "Morality and Foreign Policy". Foreign affairs Review, Winter 85/86 (p. 207).
- (37) Opcit, (p. 217)
- (38) Buzan.B, "People States and Fear". Harvester Press, 1983. (p. 252).
- (39) Coll.A.R, "The Limit of Global Consciousness and Legal Absolutism: Protecting International Law from its best friends". Harvard Law Review, Spring 1986, Vol. 27, No. 2.
- (40) Opcit, (p. 599)
- (41) Rawles. T, "L'idée d'un consensus par recoupement", Revue De Metaphysique et

de Morale, 1988,(p. 3).

(42) Rawles . T, "La priorité du juste et les conceptions du bien".

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Section three: The Gulf War

Here is one of the most impressive outbreaks of peace never witnessed since world war two. It is the worst "natural" catastrophe ever planned and coldly executed by the big occidental powers with ^{the} open aim of consolidating and reasserting their stronghold on Arab oil.

Such a cataclysmic conclusion of the twentieth century has coincided with the international conference held in "Rio" as that utmost chance to rescue a suffocating planet.

Some will tend to dampen their discomfort vis-a-vis this war by alleging that it has promoted international legality and has allowed the security council to recover all its "punch" which in turn has prompted the United Nations machinery to recover its rigor and play an active role in international life. Idle is all that, brutal force and destructive power has never cured nor solved any problem and will never do. The U.S.A may have a short historical memory but not Europe with all its records of bloody wars. Only talks and negotiations are able to overcome human misery.

A. Juridical Aspects of the Crisis

To try and decipher the juridical puzzle woven around the Gulf crisis is no doubt an interesting exercise which helps to sharpen the jurist's technic. So, we have judged opportune to go over that "colloque" held on the Gulf crisis at Nanterre University during the Summer 91⁽¹⁾. Note-worthy is the presence at the "colloque" of the Algerian eminent jurist Bedjaoui whom we have quoted heavily in

our work and towards whom we are certainly in debt for his tremendous contribution to the promotion of a truly well balanced and multicultural international order. Bedjaoui was the single Arab scholar to attend the gathering which reassembled Occidental scholars. The debate was quiet tense and polemical and reached its climax between Gendrau and Eismann.

The masterpiece of the "colloque" was that "**exposé**" presented brilliantly by Ralph Zaklin⁽²⁾ on the role of the United Nations organization in the Gulf crisis. Zacklin divided the crisis into three phases : the prelude, the heart of the crisis and the post-crisis period. Commenting on the first phase, Zacklin noted that at the beginning the security council strictly conformed with the dispositions of the charter in its interpretation of chapter II.

It followed the gradual sequence from (article 39 : the ascertainment of aggression) to (article: 40 the provisory measures) then to (article 41 : Economic embargo).

The juridical confusion starts with (article 42 : use of military force). When by August 25th. 1990, resolution 665 was adopted, It indicated clearly that the security ^{or}council intended to use chapter VII only as a framework for its action rather than as a rigid guideline.⁽³⁾ Zacklin concludes as a result, that Resolution 665 is from a juridical and constitutional point of view ambiguous. It shows clearly the intent of the security council and its willingness to combine in an innovative manner the different dispositions of chapter VII. The innovation, asserts Zacklin is clear in the case of resolution 678 which definitely cuts the links ⁱⁿwith the security council and transfer^s the whole issue within the hands of the five super powers. From then on, it was convenient for them to abandon the collective security basis for that of legitime defense.

Zacklin defines that operation as a contractual "renoncement" by the security council ~~for his~~ prerogatives. During the late phase. Resolution 687 was adopted and that also, according to Zacklin is an ambiguous resolution which constitutes a historical instrument without precedent in the history of the United Nations.⁽⁴⁾

In concluding his "exposé", Jacklin openly admits that if the Gulf crisis is a victory for collective security it is also and unfortunately a defeat in regard to the principle of peaceful settlement of disputes. The principles of the U.N charter should be scrupulously and uniformly applied. It should not be the object of political manipulation.

The debate which followed Zacklin's intervention was tense between Gendrau, who denounced the intent of the security council to seize the opportunity of the gulf crisis and proceed to a global revision of the U.N charter, in order to set the ground for a new international order. The era following 1945, asserts Gendrau, was meant to be that of peaceful coexistence and sought, through restructuring of the international community to prohibit the use of force and promote negotiations as the mean for the settlement of disputes. The so called "subtle" interpretation of article 42, has done away with that generous hope and has left the international community facing an insolvent and explosive situation in the Middle-East⁽⁵⁾.

It was up to Eismann to try and balance somehow the juridical "mess" in favor of the promoters of the new international order. Eismann not without some "brio", mocked the tendency of some jurists to turn to the spectrum of legitimacy every time law is not in their favor⁽⁶⁾. He may be right in asserting that the charter does

not impose on regional organization to settle disputes peacefully. Thought it certainly does recommend that to them and solicitate their help for such an endeavour. It is all obvious that in the gulf crisis, the members of the S.C have followed the U.S in cutting short all local and regional initiatives for the peaceful settlement of the crisis. The one-sidedness of the security council in this crisis has been so obvious that the Irakis labeled it " the bunker of imperialism", it is true that the Americans wanted to settle the issue in their own way. Bedjaoui presiding the debate could not prevent to express his fear that the leonine treaty imposed on Irak (Res: 687) is a prelude to the next conflict in the region. He denounced the indiscriminated use of law. Why are the security council resolutions zealously applied only in ^{that} particular case? What has the security council done to stop that bloody war which for eight long years has consumed no less than a million victims between Irak and Iran ? I leave every one of you free with his own conscious to answer the question⁽⁷⁾.

Pellet concluded flatly the " colloque" stating openly that the jurist should resignate to the fact that law is but the arm of the strong⁽⁸⁾. Further on, he bluntly goes on to affirm that there is no antinomy between law and force while it is all too obvious that one is the negation of the other. I wonder why some occidental jurists, not to say the majority of them believe that whatever they say is sound and scientific and deny to others "all others" what they unilaterally and exclusively attribut to themselves. I would like those jurists to try and seek to know what Arab jurists think on the issue involved. My colleagues, Algerian fellows, have all written plenty on the gulf crisis⁽⁹⁾. They may diverge on some details here and there, but on the whole, they are unanimous to

condemn the use of such an outrageous violence and mediatic tools as coat^s of arms for international legality. They denounce, the manipulation of international ~~organs~~ ^{organs} by the super powers and the discriminated use of law. Why are international lawyers so divided? Is it as Cassesse has just reminded us because we live in a divided world. Even if that is so and even if everybody else is divided, We international jurists, are the last to be suspected of division. How can we seek to promote international law if we remain prisoners to territorial and local modes of thought? We must inevitably move fast to strenghten our ties, we need to meet and know each other, we need to exchange experiences, views and theories. Most importantly, we need to learn respect for each others~~s~~ and why not admiration and love. We must seek by all means and every where to put pressure on politicians to confirm to law. Without that necessary bond unifying us, we will remain divided as we are and in total ignorance of each other. The most pious among us will console their consciousness with home prayers begging God to save us from our misfortunes and divisions.

B. The Falls ^{outs} downs of the crisis.

Arab intellectuals have lived the gulf crisis as one more Arab setback, another "Naksa". They have grown used to defeats and humiliation. They are sad and they have every reason to be.

The gulf crisis has demonstrated to even the most suspicious among them, that international legality is invoked and to say the least efficiently applied only when "they" are incriminated. As if they were the only devils living on the planet.

Occidental powers give that impression that, were they able to do so, they would not hesitate to send all Arabs to the farthest

planet; Pluton, not to hear of them again and this they will do just because Arabs happen to live in an Island of oil.

Why are Arabs denied almost every thing in this world? freedom, unity, religion and what they cherish most above all their "dignity"? they have no right to claim and should be happy with whatever Occident grant them. A poet of ours has resumed the state in which we live today as follow :

"If you want to live long and be well fed.
if you want peace of mind, wealth and comfort.
never seek to be a free thinker, nor a patriot.
never ask questions nor seek to know.
live easy, lazy and crazy." (10)

What the occidental powers are seeking is "the barbarisation of the third world" asserts B. Ghalioun.⁽¹¹⁾ that will allow them to go back to that civilized law of theirs, the colonial legacy and so forth. The real aim of the actual confrontation is the definition of the substance of international law. Warns Ghalioun, indeed, following the Euphoria of the Gulf war; France launched a vast campaign calling for the consecration of the duty of intervention for humanitarian reasons, taking pretext on the massacres of the Kurds by Saddam's regime . It succeeded in convincing the security council to adopt on april 1991. Resolution 688 which stipulates that humanitarian assistance should be provided to the Kurds in North Iraq under the supervision of the United Nations. Arab jurists denounced henceforth what they perceived as the return of colonial legacy : "resolution 688 is incompatible with the norms of international law. It is a translation of power in action and constitutes the early signs announcing the return of "l'ideologie de la canonnière".⁽¹²⁾

Times have changed. The era of colonization has gone for ever. Ours is the era of science, technology and emancipation. Arabs asserts the author of "Le Malaise Arabe" are like every body not irrational in their solidarity. They attempt to defend their own interests, they are not moved by any hatred against neither Occidentals nor Israelites. Yet, they oppose all hegemonical and irrationnal policies in their region. Ghalioun defines what are Arab interests, they can be resumed into three categories :

- I - Interests linked to Arab Economic integration .
- II- Interests linked to the Palestine question.
- III- Interests linked to Arab development and the control of their natural ressources.

Drawing conclusions from the Gulf Crisis, Ghalioun wonders if Arabs are so insensible to legality? They, who have been crying so long for justice. He wonders also, why Occidentals seem so indifferent to Arab misfortunes, they who do not miss an opportunity to claim leadership for freedom and democracy? Arabs will never submit to an international order which promotes Israel's military supremacy in the region. They will seek endlessly to acquire technology and overcome their undevelopment. Their dream is to be an effective culture in the world, a shining civilisation cultivating values such as brotherhood, generosity, moderation and courage. They want to make due contribution in the struggle against hunger and malnutrition. They are eager to promote peace and cooperation, they have valuable jokers to play not only oil but also their inspiring poetry and fertile imagination. For as long as the world accept them as they are; they are ready to forgive and show their gratitude.

Why is the world so afraid of a united Arab empire? Have the Chinese or the Indians threatened the world once united? Why the Occidental mind is so afraid of an Arab state stretching from the Atlantic to the Gulf? Europeans have been offered unity and some of them have turned it down through referendums. Why Arabs are denied referendums on this issue? Why nobody has ever dared to suggest it? The answer is simple, those who like Nasser have envisaged it have been dissuaded abruptly. Ghalioun reports the champion of European unity, the French J. Delors saying shortly after the Gulf crisis : "We should help certain Arab states in order to prevent Arab unity". How can we humans be so arrogant? "The Arabs, affirms Djait, will probably never be able to duplicate the second century "Hijra" but they will certainly be able to create a major alternative form of modernity"(13).

The majority of Arab intellectuals today are in favor of democracy. Yet, they know democracy to be a difficult target for a society which refuses to learn values such as work, creativity and solidarity. They know also that democracy is not easy for elites and leaders who ignore the sense of responsibility. Nor is it for a population devastated by illiteracy and fanaticism. They want their society to free itself from trivial quarrels and division between tradition and modernity, religion and science, etc... They want their culture to step over that nihilistic dialectic of mutual negation vis-a-vis otherness. But they also want that otherness to sympathise with them and meet them half the road. Democracy can only triumph when exclusivism is banned and when democracy itself becomes a common patrimony of all mankind instead of that ornament which occidentals want to keep jealously for themselves.

The dilemma as Ghalioun has resumed it, is that we do not dispose of an efficient measure of national interest. We lack the moral capacity to step over egocentrism and that reveals to us our tragedy and the need for a universal civism which remains to be invented⁽¹⁴⁾.

It is our opinion, that unless real and living communities instead of artificial expedients are given a chance and a place in the international stratum, order and international peace will remain illusions. The ^{out}fall^{out} of the Gulf war may ^{well}steel require some times to come. Yet, it is already all too obvious that nothing is going to escape the long run effect.

At the local level, the oily rich Arab Emirates governing the region seem condemned to fade away and give birth to a more viable form of government in order to meet the people demands and ensure regional equilibrium. At the international level also, changes are inevitable. As Verhoeven has put it : "It has become clear after the Gulf war that a revision of the united nations charter is inevitable particularly in regard to key issues such as the composition of the security concil and its attributes.

First : the composition of security council should be reviewed in a manner that enhances its "upto-date" representativity of the international community.

Second : the action of the security council should obey to the control of the general assembly in the same manner that government obey in their action to the control of parliaments"⁽¹⁵⁾.

A simplification of the international political map is as unavoidable as the recognition of the Arabo-Islamic nation as that

cultural entity which is^a closely integrated, indissoluble, quasi mythical fellowship profoundly conscious of having a single and common destiny.

Notes

- (1) Les aspects juridiques de la crise et de la guerre du Golfe. colloque de Nanterre (Paris X) Juin 1991. ed : Monchretien 1991.
- (2) The head of the legal bureau at the United Nations , advisor of the secretary general. See, his talk (p. 57).
- (3) Opcit, (p. 59)
- (4) Opcit, (p. 70)
- (5) Opcit, (pp. 139-140)
- (6) Opcit, (pp. 140-143)
- (7) Opcit, (p. 88)
- (8) Opcit, (p. 488)
- (9) See in that respect, prof Belkheroubi, the Newspaper(El-Mujahid of 10/02/1991.or Prof. N.Terki in El-Watan 29/01/91 etc...) .
- (10) The poem is from the diwan of Al-khalifa, an Algerian poet.
- (11) Ghalioun.B, Le malaise Arabe : etat contre nation ENAG ed: 1991 (p. 139).
- (12) N.E.Ghozali,heurs et malheurs du devoir d'ingérence humanitaire (p. 94) in, relations internationales et strategiques n°3 , 1991 , ed : stock. IRIS.
- (13) H. Djait, Europe and Islam , translation : Peter Heineg Univ of California press Berkeley 1985 (p. 131) .
- (14) Ghalioun, opcit (p. 151) .
- (15) J . Verhoeven, etats alliés ou nations Unies : L'ONU face au conflit entre l'Irak et le Koweït . AFDI , ed CNRS, 1990 (p. 193)

Section Four : Dialogue The Way out.

During the 1970's, that glorious era which has given birth to a worldwide consciousness about the need for a new International order, ~~A~~ new rethoric in the "Parelsmanian sense", burst^{ed} ~~at~~ the international level setting the ground for a rich and promising literature on vital international issues such as, interdependency, international solidarity, common patrimony of mankind, etc A particular emphasis was given to dialogue and negociation as the most efficient means for the settlement of disputes. Hence, a whole ser^y of dialogical actions were launched vertically as well as horizontally. We talked then of a North/South dialogue. An Euro/Arab one etc In fact we all realise that there is only one dialogue and that it is a universal one . The aim is to allow the international community to step out from egocentrism, racism and discrimination and to promote humanitarian values, justice and friendship. Therefore, no matter how we may lable it, the dialogical action remains the only viable escape from brutal confrontation.

Many have expressed doubts about the feasibility of such an idealist communicative action. Some have pointed out to the tremendous ~~a~~bstacles which such action is required to surmount; antagonistic national interests, divergent ethical values etc these ~~a~~bvious difficulties should not cut adrift our willingness to seek our mutual interests in the offshore of peace and talks, nor should it temper our eagerness to sustain a communication mood

and increase our eagerness. We have in reality no choice and we ought to listen to each other.

A. Habermas Legal Theory.⁽¹⁾

Law asserts Habermas makes sense only when it is intersubjectively recognised and adopted by the citizen through socio-cultural interaction. It is the task of culture to mediate between the structural forms of the lifeworld : society and personality. What has happened with the secularization of bourgeois culture is the dismantling of everyday consciousness and its fragmentation, opening hence the fence for the colonization of the lifeworld. This phenomenon which Habermas has labeled "juridification" has taken the form of a four-stages process:⁽²⁾

- I- The bourgeois state.
- II- The constitutional state.
- III- The democratic state.
- IV- The welfare state.

Within the later stage, the substance of basic convictions that were culturally sanctioned begins to evaporate and legitimation becomes a matter of procedures.

Habermas locates the distortion in Weber's misuse of the selective process of rationalization which has led in turn Luhmann to elaborate a sociology of law based on formal rationality.⁽³⁾ Hence, law was confined as a technic to reproduce legality and ensure order and stability without consideration for the moral and cultural implications. The

rationality of law has been sought in the procedural norms that control the production as well as the application and revision of legal norms. Habermas argues that the functional (positivness) of law must be combined with a reconstruction of the rationality structure guaranteeing the legitimacy of law.

We need to distinguish between law as an institution and law as a medium. The former refers to function of law as a mean for social integration through normative ordering while the later refers to law as a medium for the distribution of power and money. As Eder has put it : "Habermas presents a conception of law that defends a moralistic law while simultaneously criticizing the overmoralization of law in present day practice.(4) Law thus, in Habermasian terms, becomes a mediator between the system and the lifeworld. Law presupposes a lifeworld in order to function; at the same time, it must restrict its regulative function to the sphere of systems. As soon as it crosses this border, it destroys its own communicative basis and begins to colonize the lifeworld. This colonization takes the form of an expansion of law whereby emerges a trend toward the juristic containment of social conflict. Here, we are reminded of that Weberian scheme where the occurrence of every social problem is met by a bureaucratic resolution, i.e. the setting of a committee or the establishment of a rule.

As Habermas has observed, legislative regulation ought not to favor far reaching judicial intervention, on the contrary, it must first and foremost do every thing possible to "dejudicialize" the conflict and let the lifeworld absorb it through cultural communicative action.(5)

If, as Habermas has pointed out, one studies the paradoxical structure of juridification in such areas as the family, the school, social welfare policy and the like, the meaning is to protect areas of life that are functionally dependent on social integration through values, norms and consensus formation; to preserve them from falling prey to systemic imperatives of economic and administrative subsystems and to defend them from becoming converted to dysfunctional sociations. It is the task of critical theory asserts Habermas, to reorient the reality of the developed societies toward the learning potential culturally available to them and to prevent their further submission to the uncontrolled growth of complexity. To do that, Habermas proposes his theory of communicative action and the construction of a consensus based on universal pragmatism.

In his latest work, Habermas distinguishes four "modes" of competing action : (6)

(1) technological action : an action through which an actor seeks to implement objectives by choosing means appropriate to his goal. This is instrumental action or purposive rational action.

(2) Norm regulated action : which refers to consensual activity among the members of a social group.

(3) Dramaturgical action : uncovers the domain of subjectivity where there is a self- disclosure of agents in front of each other or

of an audience.

(4) Communicative action : which resides in the ability to correct the one-sidedness of alternative approaches through reliance on language and discourse and leads to mutual comprehensibility and thus, grants intersubjective recognition to reciprocally raised validity claims.

The question is : how to develop such a communicative action? Habermas answers through universal pragmatism which consists in the elaboration of a theory of communicative competence which will allow the construction of universal conditions of possible understanding. In other terms, Universal pragmatism investigates the validity basis of speech through the four following tests: comprehensibility - truth- correctness-sincerity.(7)

Through this investigation of speech, universal pragmatism directs attention to the infrastructure of speech situation in general which is held to involve a form of life in which truthfulness, freedom and social justice are possible. Critical theory within such a frame is granted therefore on a normative standard that is not arbitrary but inherent in the very structure of social action and language.

Habermas pursuing his project hopes that : "the pursuit of happiness might one day mean something quite different ... for example, from the accumulation of material objects of which one disposes privately. It may consist in bringing about social relations in which mutuality predominates and satisfaction does not mean triumph of one over the repressed need of the other."(8)

Habermas's dream will see the light only if we agree to restore

legitimacy and abide by its logic or in Franck's terms by its "pull power".(9)

This index of legitimacy exerts its pull power on states and pushes them to obey the law even when it is not in favor of their crude national interest.

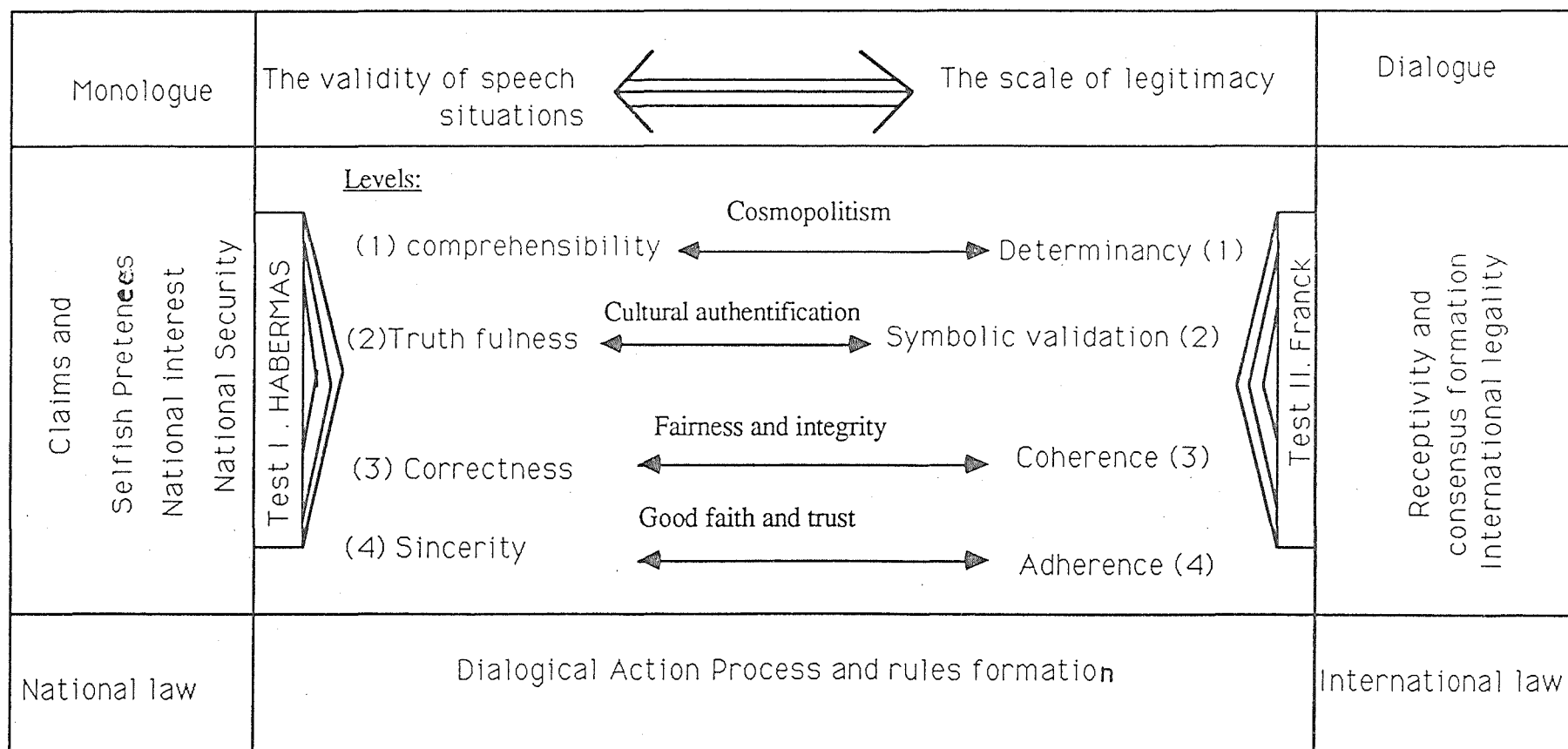
What according to Franck makes legitimate rules distinguishable from "dead letters or scraps of papers" is that teleological substance on which rests the formation of communities. It is that substance which commands the communities adherence to rules.(10)

Habermas's test, on the validity of speech situation^s combined with Franck's test on legitimacy could well produce a viable theoretical frame-work for communicative international action. Such a frame has for long been lacking to sustain practical efforts towards the promotion of international solidarity and cooperation. All that it requires is faith in the human potential for goodness. (fig.1)

"Universalism, as Wallerstein has put it, is dear to the western heart, it finds its roots in the three great monotheist religions ... we may therefore pursue our desired goals : the fulfillment of human potential as we can imagine it, a dialogue of civilizations provided that we are in the spirit of Senghor's "rendez-vous du donner et du recevoir" .(11)

Arkoun agrees with Wallerstein's appeal^P for a universal communicative action. He believes the integration of the Arabo-Islamic society to the universal consensus^{building} requires three procedural reajustments:(12)

« Fig I »



I- a recognition of the religious perspective and its place in human existence.

II- the rise of a historical perspective on the cultural domain specific to the societies of the book.

III-International cooperation for the promotion of a new cultural, political and economic order and a new theory and practice of authority.

To make such readjustments possible, "what is required in today's climate is not just a restructuring of the Sharià to fit western standards but some restructuring of those standards in order to meet the sharià half way."(13)

The view that most occidental scholars have^{DF} the Arabo-islamic culture remains trapped within the confines of that orientalist legacy. Binder, for instance, recognises the actual islamic upsurge taking place all over the world. Yet, he doubts its willingness to meet liberalism half the road.(14)

The option of the formation of a larger community is possible only if one admits the probability of a global conversation leading to the emergence of a new cultural and ideological consensus and giving rise to a new international consciousness. Binder(15) does not hide his scepticism toward the Habermasian scheme before even testing in the field of international affairs. It is noteworthy in order to stress the necessity for scholars and academicians to overcome that overwhelming wave of despair and scepticism which paralyses before hand all efforts aiming to consolidate co-existence, trans-cultural interaction and international cooperation. The reign of terror and mutual destruction leaves us with no other choice.

B. The Euro-Arab dialogue.

" L'incomprehension, conséquence malheureuse
d'une réserve excessive n'aura eu qu'un temps"

A. Laroui.

The Euro-Arab dialogue examined at the light of Habermas and Franc's dialogical process would appear to be an illusion. Such a dialogue is defective in all levels:

-Level one: there is enough evidence around the controversial debate on soft 'vs' hard rules in regard to such vital issues as the right to development, the legal value of UNGAR's etc...to show that very little indeed has come out at the level of comprehensibility thus, altering the determinancy of legal rules.

-Level two: is totally inoperative because of the stronghold of positivism on rules formation.

-Level three: impartial treatment of international disputes such as the Palestinian question and the Gulf crisis have rendered this level obsolete.

-Level four: because of the precedent defective attitudes, good faith and trust are cruelly lacking between both parties.

So is there such a thing as an Euro-Arab dialogue?

Yes, such a dialogue does exist and has a concrete historical backing . Alongside the everlasting hostile relationship between the two worlds, There have been some short periods of peaceful coexistence and perhaps even some glimpses of a fructuous

cooperation

Do we need to recall Harun Rachid's gift to Charlemagne Or that of Al-Idrissi to Roger of Palermo, or that generosity which pedro of Seville showed to Ibn Khaldun? or yet, that relaxed mood which allowed muslims, Jewish and spanish scholars to meet and talk under the moonlights of "Al-Hambra" and Cordou? Yes, there exist undoubtedly in both camps a persistent peaceful intention waiting for favorable circumstances.

There exists also a certain complementarity between the Arab world and Europ^e and Even if we are to concede with Laroui that it is rather a negative one, there is hope that times has come to turn it to a more positive one . B. Etienne, has openly asserted that the Arab world is an integral part of the Occidental world. This is so , not only geographically but also spiritually and culturally⁽¹⁶⁾.

No, there is not such a dialogue, since hostility and lack of trust have always characterised the relationship between the two worlds. From the crusades to the colonialist Legacy, it is continuously a history of hatred and bloodsheed. The recent call for such a dialogue amounts to no more than a "show-biz" which observers have remarked has a curious smell of oil and will fade away as quickly as it has burst~~ed~~ out⁽¹⁷⁾.

Flory, under an extravagant title⁽¹⁸⁾, typical to the French mind, has provided us with a juristic appraisal of the Euro-Arab

dialogue. The first and obvious fact which he points out is the "meta-legal" nature of the concept. The jurist, he notes, is simply lost in the midst of extra legal terminology. Instead of the usual treaty, we have a dialogue and instead of the cherished notion of states, we have worlds or communities. "Faisant contre mauvaise fortune, bonne mine" Flory decides that it is better this way, since the absence of reference to states will perhaps make communication easier and enhance interaction⁽¹⁹⁾. Flory notes interestingly that the Arabo-Islamic Community seems to enjoy a better position on the dialogical frame and believe that such a dialogue could well become an inspiring school for unity to both communities if it succeeds in preserving its opennesses and fresh outlook.

As Flory stresses it, the aim of such a dialogue is not so much to achieve grand objectives and treaties as it is to create a good atmosphere of trust and friendship which will be conducive to cooperation and understanding. To accept dialogue is to step out from old prejudices and express the desire for a genuine partnership between equals who believe in mutual respect.

Of course, the implementation of such a communicative action between the two worlds is not an easy task. In fact the notion of a Europe itself is still like that of the Arabo-Islamic Community an "Utopia". This was clearly demonstrated by the Gentlemen's Agreement concluded by Kissinger with the Europeans in regard to

such vital issues as the Palestinian question and the energy issue⁽²⁰⁾. Now, if Europe is declared incompetent in regard to those vital issues, one has the right to wonder, what is left to talk about?

Fruitful dialogue between the Arabo-Islamic world and Europe is not a matter which few meetings and refined rhetorics will bring about⁽²¹⁾. It is a long term project which requires the deconstruction of past records charged with heavy prejudices on both sides. B. Lewis may invoke El Messoudi as Arab scholars have done with Orientalists but that will not allow us to go far. What for sure is going to help us build a new relationship is the belief in the future and the common benefit that we derive from our understanding for our next generations .

Now that the communist bloc has vanished, Europe avoiding the Mediteranean sphere after the Gulf crisis, turns over its attention toward East Europe; there, surprisingly, she found herself once more trapped with the spectre of Islam besieged in "Sarajevo". One cannot escape his fate, the only sound thing we can do is to learn ^{to} live together as neighbours are required to. It is high time, to turn the page of history and by the same token to turn also that negative complementarity between us into some constructive and civilized achievements.

Laroui invokes Gibbon's famous utterance: "what would have happened if the Arabs were not stopped at "Poitiers" and how

would Europe be today if the Hadith is taught at Oxford"(22)? By Gibbon's times, the invocation sounded outrageous, I hope that today, postmodern Europe will find it less so. Hadith can be taught today at Oxford and Harvard in the same way that Shakespeare and Twain are taught ⁱⁿ at Arab universities.

It is about time, to replace that selfish negation of otherness by a sense of constructive altruism. That economic complementarity between North and South which is often boastfully praised during summits and international meetings should find its way to concrete projects.

In order that such complementarity may burst into real life, economic monopoly and exclusivism should be banned. Arabs like every other people, succumb to hedonistic impulses and strive fiercely in order to protect and safeguard their interests. Yet, unlike others, they have learned from the desert self control, abstinence and even ascetism. This makes of them daring gamblers and for as long as the western world accept to hold them out a hand, they unequivocally will seize it.

Ricoeur admits that so far western civilization has met other civilizations with the shocks of conquest and domination. "We have to admit that this encounter has not yet taken place at the level of an authentic dialogue and that is why we are in a kind of lull or inter-regnum in which we can no longer practice the dogmatism of a single truth and in which we are not yet capable of conquering the scepticism into which we have stepped.(23)

We, muslims, submit to religion within which we find salute^{value} and that which is good for all. As Pope Paul VI has argued: **"Common consent among Unequals does not guarantee justice, equity in international activity is a long term project. Yet, it requires already a real equality in negotiations and talks".**(24)

We believe in dialogue and look upon religion as an inspiring source for all humans. The receuil of the Hague academy encloses an important contribution of religion to the development of international law. We believe it is worthwhile to deepen that contribution and carry on the task of deriving ~~there from~~ a communicative action between all the people on earth.(25)

Notes

- (1) Koen Raes, Habermas's approach To Law , Journal Of Society and Law, Vol 13, II. Summer 1986. See also H. Rottleuthner, "The Contribution Of The Critical theory to the sociology Of law". in C.J. Weaton and Podgorecki.A, "Sociological Approaches To Law", Croom Helm, London 1981. See also, R. Alexy, "Theorie Der Juristischen Argumentation", Suhrkamp, Frankfurt an Main, 1978.
- (2) Habermas. J, " the theory of communicative action" . Vol II. trans: Mearthy, polity press , 1987 (p . 360) .
- (3) Eder.K, "Critique of Habermas contribution to the sociology of law". law and society review volume 22, n° 5, 1988 , (p.938).
- (4) Opcit, 939

- (5) Opcit.
- (6) Habermas, opcit , Vol I , (1984).
- (7) Habermas, 1979 (p.194) .
- (8) Opcit (p.198)
- (9) Franck. T .M, "Legitimacy in the international system". A.J.I.L october 1988 (p.708) Vol.82 n°4 .
- (10) Franck , opcit, (p.708) .
- (11) I. Wallerstein, Geopolities and Geoculture. Cambridge Univ Press. 1991 (p.233 et s...)
- (12) Arkoun . M, " The concept of authority in islamic thought ". In , Islam : State and society Klaus.F, and M.Mahdi Curzon Press. London. 1988 (p.72) .
- (13) Ballantyne.M.W, " Back to Sharia". Arab law Quarterly review Vol3, Part4, November 1988 (p. 327) .
- (14) Binder.L, Islam, Liberalism; a critique of development ideologies.Univ of CHicago 1988.
- (15) Opcit (p.7)
- (16) Bruno .E, in colloque de Nanterre. Opcit(p.35) .
- (17) See Arkoun's view in J. Bourinet, " Le Dialogue Euro-Arab" . Economica Paris 1979 .
- (18) Flory. M, "Radioscopie Juridique Du Dialogue Euro-Arab" in Bourinet, opcit, (p. 147).
- (19) Opcit (p. 155)
- (20) Waterbury. J, les implications politiques et diplomatiques du dialogue international in Bourinet, opcit (p.26)
- (21) See for instance,
 - Mustapha. B, Pour un dialogue Euro-arabe ed: berger levrault. 1983
 - Symposium de Hambourg (11-15 avril 1983) edisud Aix en provence 1986
- (22) Laroui. A, (1987) opcit. (p. 164).
- (23) Ricoeur.P, "Universal Civilization and national cultures, history and truth". trans : Ch. Kelby Northweste Univ. Press. 1965 (p. 283)
- (24) Encyclique Popularum Progressio of the 26th marsh 1967 (p. 59)
- (25) see Among others:
 - I) S. Mahmassani, " Islam et D.i.p" RCADI 1966 I (pp. 200-328)
 - II) R. Ahmed, "Islam et Dip" RCADI 1937 II(pp. 441-506)
 - III) K.R. Sastry, Hinduism et Dip. RCADI 1966 I (p. 503)
 - IV) Iriye. K, Confusism et Dip. RCADI 1967 I (pp. 441-567)
 - v) K.N. Kayatilleke, Budhism et Dip. RCADI 1967 I (pp. 1-59)
 - vi) Riedmaden. H, Catholicisme et Dip. RCADI 1976 III(pp. 115-160)
 - vii) W. Prosper, Judaism et Dip. RCADI 1976 III (pp. 253-336)

General Conclusions

Our work comes to its end. What about our thesis? ^Qdid we succeed in conveying a sound and coherent analysis of what the Arabo-Islamic community is? What are its international claims and the conditions under which this community will convert and becomes a producer not of international tension and terrorism, but of international solidarity and humanitarianism. A promoter not of religious fanaticism and fundamentalism but of tolerance, moderation and universalism.

We have deliberately chosen to focus on the cultural dimension not only because this dimension has been neglected and excluded by dogmatic positivism but also because we firmly consider such a dimension a key-issue leading to a new international consciousness. The cultural awakening which characterises this last two decades is an opportunity for the modern theory of international law to review its classical colonial roots. It ought to be as that African wiseman has put it "un rendez-vous du donner et du recevoir." It is also a chance for post modern thought to recover from nihilism and perceive the future under some fresh and promising headlines.

It has been ascertained that modern essays do not conclude, probably because gone are the times of certainty. We nevertheless feel the need to draw some general conclusions from our study. It is not our intention to make a deal out of these

conclusions. We simply hope to sensibillize the reader toward a cultural potential which so far has been distorted and falsified to him.

What the Arabo-islamic community expects from the international society may be resumed in the following items :

1) An official recognition of the legitimacy of Arabo-islamic Unity and the need to facilitate its implementation through regional organization.

2) The promotion of Arabo- islamic culture as a cultural constituent of the international society through the integration of Arabic and Islam as parts of the international patrimony of mankind.

3) The resolution of the Palestinian dilemma and the restitution to the Palestinians of their land as well as the official international recognition of their right to self-determination.

Needless to mention, such an agenda if it is to be implemented will require changes at the international level, a more equitable distribution of wealth and power among nations requires a more balanced international system, where every cultural and civilizationnal unit will have a say. Nations should abide to the principle of leadership alternation.

Nothing is ever to last but goods deeds. Nations should always stand ready to serve the international community in the best way

they can. The newer international order which every camp tends to mirror as that everlasting and stable haven of peace, will come about only when nations realize their own limits and modestly and diligently recognize in that "otherness" a friendly partnership and a common destiny. The Arab-Islamic community has a lovely culture with which it could profusely enrich the international community. It is an oral culture which through words will make life sound better for the lot of mankind. "Give me the words and I will conquer the world" used to claim J. Conrad the British novelist.

Alongside Oil and natural resources, the Arabo-Islamic community could bring a touch of romanticism to our cynical international society. It could in a more important way rescue the power alienated international structure by injecting within it a glimpse of its natural freedom. What gift indeed could be more valuable to our stressed international life than a deep and intrinsic feeling of freedom which Arabo-muslims nurse up to its most refined expressions. Coolness, contentment, serenity which are typical features of the Arabo-islamic nature could bring some relief to our exhausted international society. Of course, Arabo-muslims are neither naïf nor credulous. Like everybody else, they perceive the international reality and what lies behind it, well aware of the devastating effect which the lust of power exercises on nations. They will continue to seek their own way to glory and leadership and the more so when others deny it to them.

Arabo-muslims have a peculiar notion of time, so, one of these

day^s, some of them will make it through and history thus, will rehabilitate them to their due civilizational rank. That is how history works and no nation, however powerful can veto the road of history. We have raised a hope and alleged that dialogue and peaceful negotiations may pave the way for smooth changes and evolution. R. Khawam has recently edited a manuscript "Le livre des ruses" revealing a consumed art of diplomacy and negotiations among Arabo-muslims. A similar urge for dialogue and communicative action animate scholars and international lawyers from the western world. We, thus, ought to persevere in that direction no matter how tedious and precarious the way may seem. A. Malraux, has once observed that Occident and Orient seem to be heading in divergent directions. The former seeks to conquer the world while the later devoutly offers himself to the world.

Would both worlds meet some where in between these two divergent directions or are they condemned each to his own fate?

The history of ⁱⁿwankind could terminate its course either in despair or with hope. It could be put to end violently as it could finish peacefully. That is for times to tell.

Meanwihle, intenational law can either continue to hide behind power politics or lead nations in their conquest for peace. It can no longer hold to positivistic neutrality.

The Arabo-islamic community stands to day ready to pass whichever test the international community will judge necessary. It is eager to engage in talks and dialogue with whomever is

willing to. It will with generosity make concessions and compromises in order to suit international harmony.

Yet. Arabo-muslim people will support international law only in so far as it will guarantee their right to dignity and freedom.

While visiting Arabia, R. Lacey passed one day near a group of bedouins praying in the open desert. He could not resist wondering what do these Arabs say to the desert? what does this communion with emptiness tell them? do they catch wind of some secrets as the desert breeze blows? these people will never give their friendship except to those who beyond the sand and that which it recovers will discern their dreams.

Glossary

Following are definitions for some of the Arabic terms often used in the text :

Ahl al kitab	The people of the book(primarily Christians and Jews) who are the tolerated respected and protected people allowed to live as minorities within the islamiccommunity.
Allah	God,the creator and sustainer of the universe.
Aman	Safe conduct or pledge of security
Amir al Mu'minin	Commander of the faithful, theCalif
Assabyya	Social solidarity, esprit de corps social belonging etc
Dar al-ahd	called also (Dar al-sulh):non muslim territories involved in treaty agreement with a muslim state
Dar al-harb	Non-muslim territories hostile to muslims. opposite of dar al-islam
Dar al-sulh	see dar al-ahd.
Ahl Dhimma	permanent constitutional agreement between muslim political authorities and non muslim subjects wherby subjects receive protection and peaceful relations in exchange foracceptance of muslim rule and payment of jizya
Dhimmi	non muslim subject of a muslim state.pl, dhimmiyy'un.
Fatwa	legal or religious opinion or judgement.
Fikh	legal rules and injunctions deduced from the shariah (Quran and Sunna)sum of muslim legal ordinances, the corpus of muslim jurisprudence.
Fakih	Muslim doctor,one who exercises fikh.the pl, is Fukaha.
ladith	saying,a tradition of the prophet.pl, a hadith.
lilf	alliance.
lilm	Magnimity and forgiveness.
udna	truce.

Ijma	consensus.third source of islamic law.
Ijtihad	use of human reason (a'ql) in the elaboration and interpretation of the sharia,juristic opinion.
Imam	Caliph,or a muslim leading congregational prayer;or a pious intellectual authority.
Istihsan	juristic preference.
Jihad	Holly war,struggle,a muslim's striving to fulfill his islamic responsibility both in outward and in ward action.
Jizya	Tax paid by non muslim subjects in an islamic state in returnfor state public services
Khalif	or Caliph,head of the islamic community.
Khilafa	orCaliphat;vicegerancy and custodianship of man on earth.the supreme islamic authority.the first four well guided caliphs are called Ra'shiddun.
Kharaj	land tax.
Maslaha	pl,masalih el-mursala:public interest.
Mua'hada	treaty.
Muruw'a	courage and bavery marque of manhood
Muwa'ama	concordance.
Mu'tasilism	Means seccession , seceerders or those who isolate themselves from the community . It is a school which developed during the third century. (9a d) It flourised in Bghdad under the Abassid rule . Among its advocates were : Wasi ibn Atta , Hudell, Nadham etc they were known olso as Ahl al adl wa tawhid.
Maal	objectif,aim.
Qiyas	analogy.
Quran	the holly book of muslims.
Riddah	apostacy.
Shari'a	the will of god for human conduct revealed through the prophet Mohammed(pbuh)the sum of muslim law.
Sira	biography,way of conduct.
Siyar	rules of the islamic international code of conduct.
Sunna	the prophet 's ordinances wether in the for m of oral sayings or of practices.
Sufism	derives from " souf" , wool , gamment which distinguished the suffti . This social phenomenon developed almost at the sametime than Mutawilism. Musticism flourished in Baghdad .

Al-Hallaj is the most prominent figure among the
suffi.sufism teaches the love of God , purification
of the soul, etc

Ta'alif (el kulub) appaisement and kindness shwed
towards eemies in order to gain them over.

Talfiq piecing together.

Taqlid imitation.

Ulama muslim doctors and scientists.

Umma the islamic commuity.

Unwa (bllad) territory taken by cheer force

Urf custom.

Usul al-fikh the sources of islamic law. Quran, Sunna, Ijma ,
Qiyas .etc

Zakat alms tax paid by muslims.

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