رَبِّ أَوْزِعْنِي أَنْ أَشْكُرَ نِعْمَتَكَ الَّتِي أَنْعَمْتَ عَلَيَّ وَعَلَىٰ وَالِدَيَّ وَأَنْ أَعْمَلَ صَالِحًا
تَرْضَاهُ وَأَدْخِلْنِي بِرَحْمَتِكَ فِي عِبَادِكَ الصَّالِحِينَ.

Emigration and immigration Law- Pakistan.

Citizenship law- Pakistan.

Citizeship (Islamic law)

APPROVAL SHEET

TRANSFORMATION FROM THE NOTION OF *DĀR AL-ISLĀM* TO THE NATION-STATE SYSTEM AND ITS IMPACTS ON THE IMMIGRATION AND CITIZENSHIP LAWS OF ISLAM WITH SPECIAL REFERENCE TO PAKISTAN AND SAUDI ARABIA

By

TAJ MUHAMMAD

Accepted by the Faculty of Shari'ah and Law, International Islamic University, Islamabad (I.I.U.I.) in partial fulfillment of the requirements for the award of the degree of LL.M (International Law)

Master's (LL.M) Committee:

Supervisor

Dr. Muhammad Mushtaq Ahmad

Associate Professor,

Chairman Department of Law

Faculty of Shari'ah and Law

Enternal Examiner

Dr. Attaullah Khan Mahmood Watto

Assistant Professor of Law, IIUI

External Examiner

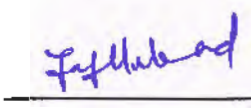
Sami-ur-Rahman

Senior Lecturer of Law, Bahria University, Islamabad

DECLARATION

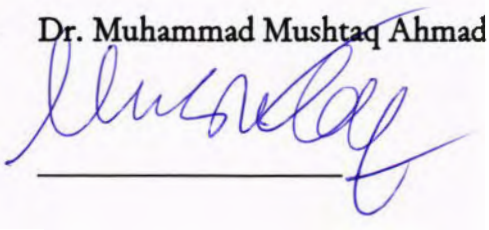
I, Taj Muhammad, hereby declare that this dissertation is original and has never been presented in any other institution. I, moreover, declare that any secondary information used in this dissertation has been duly acknowledged.

Student: Taj Muhammad

Signature: 

Date: 10-08-2017

Supervisor: Dr. Muhammad Mushtaq Ahmad

Signature: 

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ACRONYMS

CEDAW	the Convention on the Elimination of all Forms of Discrimination against Women
FSC	Federal Shariah Court
ICCPR	the International Covenant on Civil and Political Rights
IHRL	International Human Rights Law
ILO	International Labor Organization
OIC	the Organization of Islamic Cooperation
PIL	Private International Law
PIL	Public International Law
PILC	the Private International Law Committee
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCLOS	United Nations Convention on the Law of Sea
UNESCO	the United Nations Educational, Scientific and Cultural Organization
USA	the United States of America

DEDICATION

To my mother, under whose feet lies my heaven, to my father whose arms have always been my asylum and to my daughter who is the little angel of our life, this work is humbly dedicated.

ACKNOWLEDGMENTS

"He has not thanked Allah who has not thanked people". [*Tarmidhī*]

After thanking Allah Almighty for bestowing upon myself the countless blessings of Him, I am taking this opportunity to express my gratitude and thank all those people have contributed in nurturing my personality with the good qualities that I posses. This is important as the Holy Prophet of Allah Almighty has enlightened us by what has been narrated from him by al-Imām al-Tarmidhī that *"[H]e has not thanked Allah who has not thanked people"*.

The first and foremost is my mother for the prayers which she made for my success in the sleepless nights after performing *Ṣalah al-Tahajjud*. I am greatly indebted to whatever she has done for me. My father's *prima facie* dictatorial and secretly kind hearted behavior has played a significant role in shaping my life. Without his control over me, my vagabond soul would have deviated me from the place where I am standing now. My uncle Dr. Khursheed deserves a heartedly gratitude for being supportive and encouraging throughout my academic journey. My cousin Dr. Aftab Ahmad has always been a pushing force behind me. My wife has always been a strong support during my life in general and this research in particular and for her support she deserves much love and gratitude.

My LLB class-mate Zishan Ashraf Qureshi has always reminded me to complete the work in earliest possible time. Thank you Zishan! The work is done now. I am much grateful too to my friend

and classmate in LLM Zahid Jalaly who produced some material which guided my in formatting this work. My senior in LLM International Law, Mariam Sherwani has been cooperative during this work. Apart from giving some fruitful advices she also catered some useful material which helped me in this work. Thank you, Mariam. My friend Muhammad Sadiq Kakar has always been there to get me out of work pressure which balanced by life during this work. Thank you, Sadiq. My teacher and friend Ahmad Khalid Hatam was always there to clear confusions before and during this work for which I must pay gratitude.

Dr. Muhammad Munir, the voice president International Islamic University, Islamabad provided some brilliant ideas about the concept of *Dār* during various conversations with him regarding this study, for which I owe a warm gratitude to him. Despite being in a high position and a busy person he was always available for academic discussions. My eternal examiner Dr. Attaullah Khan Mahmood Wattoo pointed out some brilliant aspects of the study which, of course, increased the worth of the study for which I am very grateful to him. My external examiner Mr. Sami -ur-Rahman also identified some significant points to make the work much clearer. I am indebted to him for that. The last, but certainly not the least, and above all, my supervisor Dr. Muhammad Mushtaq Ahmad -who is an inspiration for me – has a great contribution in my legal education. *Thank you*, *gratitude* and *Shukriya* are very small words which cannot in any reflect my feelings for Mushtaq Sahib. The only words which can pay tribute to his contribution in my life are "*Jazahu Allah Khair*". In fact Dr. Mushtaq's scholarship has seeded in myself the interest in public international law and persuaded me to get enrolled the LLM International Law program. May Allah grant him a long life and may He give us *taufiq* to get maximum benefits from his scholarship. *Āmīn*!

ABSTRACT

The immigration and citizenship laws are among the most important laws which play a vital role in the protection of an individual's fundamental rights. Like any other legal system, the shari'ah of Islam has also provided a detailed system of principles which govern the issues related to the immigration and citizenship. These laws were in operation before the fall of Muslim empires and colonization of Muslim world. The Muslim jurists have divided the world into two broad categories of Dār al-Islām and Dār al-Ḥarb or Dār al-Kufr. The bifurcation of the world played a significant role in, inter alia, the issues related to immigration and citizenship. The same scenario remained for various centuries until the black shadows of colonization covered the Muslim world after the establishment of nation-state. After the end of colonization various –small and big – Muslim states came into existence on the model of nation-states. All of these states developed their own citizenship laws which suited their national interests. This led to a compromise on the generous principles of Islamic law related to the issues of citizenship and immigration and resultantly the laws of the modern Muslim states became inconsistent in multiples aspects with Islamic law. This study has, first of all, explored the immigration and citizenship laws of Dār al-Islām and then examined the citizenship laws of Pakistan and Saudi Arabia in which multiple –both general and specific – inconsistencies with Islamic law has been identified. In order to rectify the inconsistencies, this study has humbly presented some valuable recommendations which, if adopted, would certainly help Muslim Ummah in numerous modern day crises.

Introduction

1. Introduction

1.1. Thesis Statement

The transformation of the political system in Muslim world from the notion of *Dār al-Islām* to the nation state system has resulted numerous inconsistencies, in various aspects, with the principles of Islamic law particularly the immigration and nationality laws of current Muslim countries is in contradiction with Islamic law which should be addressed.

1.2. Introduction

The land over which Muslims gained dominance would be called, in the earlier era of Muslim history, *Dār al-Islām*[1] which had its own detailed system of immigration and citizenship. This system continued to operate even after the emergence of more than one Muslim governments i.e. Abbasid caliphate in Iraq and Umayyad government in Muslim Spain. With the inception of the nation state system, after the peace of Westphalia in 1648, and downfall of Muslim

[1] The term *Dār al-Islām* can be found in classical compilation of the traditions of Holy Prophet -peace and blessings of Allah Almighty be upon him- and books of Islamic law. The term *Dār al-Muslimīn*, which is similar to *Dār al-Islām*, can be traced in the very sayings of the Prophet peace and blessings of Allah Almighty be upon him. See, Abu Ya'la Ahmad b. 'Alī al-Mawsilī, Masnad Abī Ya'la (Damascus: Dār al-Ma'mūn li'l-Turāth, 1984) 3:6 Hadith number 1413 (ثم ادعوهم إلى التحول من دارهم إلى دار المسلمين).

caliphate, the Muslim world shattered into small pieces of land across the Asia and Africa and adopted the nation state system.[2]

This transformation gave rise to various problems particularly pertaining to the Islamic international law. One such problem is that pertaining to the immigration and citizenship. Islamic Law, for the purpose of immigration and citizenship, divides people existing in the *Dār al-Islām* into three broad categories i.e. Muslim, *Dhimmī* and *Musta'min*. Muslim is the *de jure* citizen of *Dār al-Islām*. *Dhimmī*[3], after concluding the covenant of *Dhimma* with the Muslim ruler, becomes the non Muslim citizen of *Dār al-Islām* whereby he joins rights –as a Muslim citizen does– and owes certain responsibilities, such as paying *Jizyah* (tax) to the Muslim government. *Musta'min*[4] is the non Muslim citizen of *Dār al-Kufr* who enters *Dār al-Islām* with the permission of Muslims.[5] Further, a *Musta'min* can avail the status of *Dhimmī*

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[2] The majority of today's Muslim countries had faced colonization in one form or the other. Indian sub-continent was colonized by Great Britain and African countries were occupied by other European countries. After the end of Turkish Caliphate after the World War I, the Arab territories of Ottoman Empire were divided into small pieces. The colonial era –which started with the rise of European Empires–, came to end after the World War II and various Muslim countries of today, such as Pakistan, Indonesia and Bangladesh, came into existence. See, S.V.R Nasr, "European Colonialism and the Emergence of Modern Muslim States" John L. Esposito, ed. *The Oxford History of Islam* (New York: Oxford University Press, 1999), P. 549

[3] A *Dhimmī* is the non Muslim citizen in *Dār al-Islām*, who has concluded a contract with the Muslim government according to which he pays a certain amount of tax and in return enjoys protection and certain rights and immunities. See Wazārah al- Awqāf wa 'l- Shu'ūn al-Islāmiyyah, Mawsū'ah al-Fiqhiyyah al-Kuwaytiyyah, (Kuwait: Dār al Salāsil, 1990), 7:121

[4] Ibid

[5] As a matter of Principle every Muslim citizen of *Dār al-Islām* can give *Amān* (permission) to a non Muslim in order ro enable him enter into *Dār al-Islām* with surety of safety. However, the

by either application to the government or overstaying in *Dār al-Islām* if the government had stipulated any such period afterwards he would be made *Dhimmī*.[6] The nation state, on the other hand, theoretically has a different approach. Here, on the one hand, a Muslim –merely being Muslim– is not a *de jure* citizen of every Muslim state thus, he has to go through all the formalities for availing citizenship. On the other hand, all the citizens of the nation state – irrespective of their religion– are equal as they share the commonalities which form the basis for any state.[7] This contradiction needs assessment and calls for a reasonable solution which, on the one hand, would be acceptable according to the teachings of Islam and, on the other hand, would not disturb the current political set up. Apart from this, there are other problems as well, which are the result of this transformation and need thorough assessment so that acceptable solutions to them could be found.

2. Literature Review

Muslim government can prohibit general Muslim population from granting such permission and exercise this authority exclusively or delegate it to a specific department in the government. See Abdul Karīm Zīdān, *Aḥkām al Dhimmīyyīn wa al-Musta'minīn fi Dār al-Islām*, (Beirut: Mu'assassah al Risālah, 1982) P. 30

[6] Shams al-Dīn Abū Bakr Muḥammad b. Abū Sahl al-Sarakhsi, *Al Mabsūt*, (Beirut: Dar al Fikr, 2000), 23: 212

[7] These commonalities have been discussed by Islmā'īl al-Rāji al-Fārūqī in his discussion on the foundations on which the nation state is based. According to his research, the nation state is based on the biological, geographical, psychological, historical and political foundations. See, Islmā'īl al-Rāji al-Fārūqī, "The Nation-State and Social Order in the Perspective of Islam" in Islmā'īl al-Rāji al-Fārūqī, ed. *Trialogue of the Abrahamic Faiths* (Riyadh: International Islamic Publishing House, 1995), P. 56

Here some books, journal article and chapters in edited books authored by scholars and experts on public international law and *Siyar,* on the issue of the notion of *Dār al-Islām* and the nation-state system, would be reviewed by this the scope for the current research would be identified.

Islmā'īl al-Rāji al-Fārūqī[8] in his scholarly article "The Nation-State and Social Order in the Perspective of Islam" which is included in his edited work Trialogue of Abrahamic the Faiths has discussed the concept of nation-state system in the perspective of Islam. The elaborated the foundations in which the nation-state is claimed to be based and negated these foundations one by one. Although he does not compare the immigration and citizenship in Islamic law and nation-state however, he criticizes the nation-states for the strict immigration laws in the words *"[N]ationalism seeks to shut itself from humanity by setting for itself a temple, or holy ground, out of a piece of real estate it cuts off from the earth, and girds itself against human kind by restrictive citizenship and immigration laws."*[9]

[8] Islmā'īl al-Rāji al-Fārūqī (1921-1986) was a Palestinian American professor in the Department of Religion in Temple University, Philadelphia, USA. He was the founder of the Islamic Studies program in the University. Educated from the University of Indiana and McGill, Professor al-Fārūqī was co-founder of International Institute of Islamic Thought (IIIT) and Association of Muslim Social Scientists (AMSS). His notable works include *the Cultural Atlas of Islam, Trialogue of the Abrahamic Faiths and Christian Ethics.* Professor al-Fārūqī, along with his wife Lamya al-Fārūqī was assassinated in 1986 in Philadelphia. See, http://www.iiit.org/ismail-al-faruqi.html Last accessed on October 10, 2016

[9] Al-Raji, *Trialogue*, P. 56

Sayyid Abu 'l-A'lā Mawdūdī[10] has also discussed the notions of *Dār al-Islām*, *Dār al-Kufr* and *Dār al-Ḥarb* in the third appendix to his renowned book *Sūd.*[11] Mawdūdi discussed these notions in three different dimensions of the Islamic legal system. He, first of all, elaborated the division of people into two nations on the bases of belief and held that all Muslims belong to one civilization and the people belonging to other faiths belong to other civilization. In this perspective, Islamic laws are same for all Muslims irrespective of their territories. What is prohibited is prohibited for all and what is made permissible is allowed for all. Then he, secondly, elaborated the division of the land into two broad categories of *Dār al-Islām* and *Dār al-Kufr* with the perspective of constitutional law. In this perspective the jurisdiction of the Muslim ruler and his responsibilities thereof may be different to different categories of people. In this regard, as the actions committed in *Dār al-Kufr* are out of the jurisdiction of Muslim government, some actions committed by a Muslim in *Dār al-Kufr* –such are contracts of *Ribā*, adultery and even murder– might be *Ḥarām* under the laws of belief but under the territorial division of the land the Muslim ruler cannot take cognizance of such actions. In the third dimension, Mawdūdī discusses the international relations of *Dār al-Islām* in which he

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[10] Sayyid Abu 'l-A'lā Mawdūdī (1903-79) was a great scholar of the 20th century. He was also the founder of Jama'at Islami, the renowned Islamic politico-religious organization. He has many scholarly books in his credit including *Tafhīm al-Qur'ān*, *Al-Jihād fi 'l-Islām* and *Sūd*. See, https://jamaat.org/en/bani_intro.php Last accessed on October 10, 2016

[11] The book was primarily written on *Ribā*, which apparently has nothing to do with international law. However, some people held that since India –before independence– was *Dar al-Ḥarb* and according to Muslim jurists *Riba* is permissible in *Dar al-Ḥarb* therefore the Muslims of India were allowed to conclude the contracts of *Ribā* in India. Mawlāna Munāzir Aḥsan Gīlanī wrote an article on the issue and claimed the permissibility of *Riba* under the said principle. The same issue had come under discussion in the historical debate which had taken place between Hanafi jurists and *Imam al-Awza'ī* in the 2nd century of Islamic history. In order to counter the arguments and present the actual position of Islamic law Mawdūdi added the 3rd appendix to his book on *Ribā*. See, Mawdūdī, Sayyid Abu 'l-A'lā, *Sūd*, (Lahore: Islamic Publications Private Limited n.d), Pp 228-350

discusses the variable rules regarding the property and people according to the various situations and statuses of them.

Wahbah Muṣṭafā al-Zuḥaylī[12] in his doctorial thesis *Āthār al-Ḥarb Fī 'l-Fiqh al-Islāmī* has adopted an altogether different approach towards the notions of *Dār al-Islām* and *Dār al-Ḥarb*. He, on the one hand, shows his inclinations to reject the position of *Ḥanafi* jurists about jurisdiction of Muslim ruler on the actions committed in *Dār al-Ḥarb*. He, right after quoting a precedent[13] from a *Ḥanafi* manual of Islamic law says;

> *"In our opinion this is breach of trust which must be insured in dealings even with non Muslims. Therefore, the judge is under obligation issue decree of loan if that is proved so that the Muslims could always be in the ideal way before their enemies."*[14]

[12] Wahbah Muṣṭafā al-Zuḥailī (1932-2015) was a renowned Muslim scholar of Islamic law and jurisprudence from Syria and was a professor of Islamic law in the University of Damascus. Born in Syrian town Dair Atiah to a businessman father, Zuḥaylī has got his doctorate from Cairo University in 1963. Zuḥaylī has a number of well acclaimed books in his credit. His notable works include *al-Fiqh al-Islāmī Wa 'adillatuhū*, *'Uṣul al-Fiqh al-Islāmī* and *'Āthār al-Ḥarb Fī 'l-Fiqh al-Islāmī*. See for details, http://shamela.ws/index.php/author/1052 Last accessed on October 10, 2016

[13] The precedent reads "If a Muslim enter *Dār al-Ḥarb* with *Amān* and there be gets loan from, or gives loan to, a non Muslim or any of them (the Muslim and non Muslim) usurps the property of other and the Muslim returns to *Dār al-Islām* and the non Muslim also enters to *Dār al-Islām* with *Amān*, here the Muslim judge will not take up the case because neither we do have jurisdiction over their territory nor they have jurisdiction over our territory. See, 'Alā 'uddīn, Abū Bakr b. Mas'ūd al-Kāsānī, *Badā'i' al-Ṣanā'i' Fī Tartīb al-Sharā'i'*, (Beirut: Dār al-Kitāb al-Arabī, 1982), 7:133

[14] Al-Zuḥaylī, Wahbah Muṣṭafā, *Āthār al-Ḥarb Fī 'l-Fiqh al-Islāmī*, (Damascus: Dār al-Fikr, 1998), P. 183

Zuḥaylī on the other hand claims that the division of the land into two –or three– categories is not the ruling of the *Qur'ān* and *Sunnah*. According to Zuḥaylī, this division was done by Muslim jurists as an acknowledgment of the situation and relations between the Muslim and non-Muslim governments.

Professor Muhammad Munir[15] in his paper *Sharia'ah and Nation-State: The Transformation of Maqasid al-Shari'ah Theory*[16] discusses the possibility of more than one states or governments in the Muslim world and whether or not the existence of multiple Muslim states violate the cardinal principle of 'One Caliph Rule'. He, first of all, argues that it is allowed; rather inevitable to have more than one Muslim state and then discusses the responsibility of Muslim ruler with respect to the protection of faith, the most important objective of the objectives of Islamic Shari'ah. He also discussed the nation-state system and the negative and positive impacts of globalization on it. He concluded that Muslim ruler in the modern nation-states are under obligation to take measure to implement the objective of Islamic Shari'ah.

Muhammad Mushtaq Ahmad[17] in hi research paper "The Notion of *Dār al-Ḥarb* and *Dār al-Islām* in Islamic Jurisprudence with Special Reference to the Ḥanafī School"[18] argues that the bifurcation of the world into two broad domain i.e. *Dār al-Islām* and *Dār al-Ḥarb* is, on the

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[15] Muhammad Munir is professor of law the Faculty of Shari'ah and Law in International Islamic University, Islamabad. He is also the Voice President Higher Studies and Research in IIUI and Director General of Shari'ah Academy, IIUI.

[16] Muhammad Munir, *Sharia'ah and Nation-State: The Transformation of Maqasid al-Shari'ah Theory*, (Jakarta: International Conference on "The Practice of Islamic Law in the Modern World", 2014)

[17] Associate Professor of Law in the Department of Law, Faculty of Sharia and Law, International Islamic University, Islamabad

[18] Muhammad Mushtaq Ahmad, "The Notion of Dār al-Ḥarb and Dār al-Islām in Islamic Jurisprudence with Special Reference to the Ḥanafī School", *Islamic Studies*, Vol. 47, no. 1, (2008), pp. 5-37

one hand, an affirmation of the principle of the territorial jurisdiction bases of which are well established in a number of verses of Qur'ān and many Aḥādith of the holy prophet peace and blessing of Allah almighty be upon him and, on the other hand, he argues that the bifurcation does not necessitates a perpetual hostilities between Muslims and non-Muslims. Muhammad Mushtaq Ahmad has also discussed the bifurcation of world into *Dār al-Islām* and *Dār al-Ḥarb* in his book *Jihād, Muzaḥamat Awr Baghāwat Islāmi Sharī'at awr Bayn al-Aqwāmī Qawānīn kī Roshnī Maiṇ* where he discusses conceptual link between perpetual war and this bifurcation. He discusses the two extreme opinions about bifurcation and perpetual war. According to him, some Muslim scholar believe that the nature of relations between Muslims and non-Muslims is hostile thus as long as all non-Muslims are not subdued the bifurcation will remain and entire world out of *Dār al-Islām* will be regarded *Dār al-Ḥarb.* Some other scholars, on the other, are of the opinion that the nature of relation between Muslims and non-Muslims is peaceful and the bifurcation was the acknowledgment of the fact of the time of classical jurists. Mushtaq concludes that according to both of the opinions the bifurcation is linked with perpetual war. Thus, who believes in perpetual war also believes in the bifurcation and who does not believe in perpetual war also rejects the bifurcation of the world. Mushtaq afterwards, holds that the bifurcation has nothing to do with the concept of perpetual war. The bifurcation was actually due to the principle of territorial jurisdiction. Thus, the division of the world into two *Dārs* was not mere interpretation of factual position. It is based on the

Qur'ānic verses and traditions of the Holy Prophet, peace and blessings of Allah Almighty be upon him.[19]

All of the above scholarly work has discussed the notion of *Dār al-Ḥarb* and *Dār al-Islām* and the concept of nation-states in multiple dimensions but very less has been discussed about the impacts of the nation-state system on the immigration and citizenship laws that were prevailing in the classical Muslim Caliphates and governments and that were well established in the work of prolific jurists of Islamic law. This research intends to make an attempt to fill that gap.

3. Framing of Issues

The following issues have been, therefore, framed to for analysis in this dissertation.

1. How and when a piece of land can be called *Dār al-Islām* or *Dār al-Ḥarb*?
2. Can nation-state system be compatible with that of *Dār al-Islām*?
3. Is the concept of suspension of citizenship in Pakistani and Saudi Arabian laws consistent with the principles of Islamic law?

[19] Mushtaq, *Jihād, Muzaḥamat awr Baghāwat Islāmi Shari'at awr Bayn al-Aqwāmī Qawānīn kī Roshnī Mayn*, (Gujranwala: al-Shari'ah Academy, 2012) pp. 83-103

4. Is granting right to citizenship to only female spouse of nationals in Pakistan and Saudi Arabia consistent with Islamic and international human rights law (IHRL)?
5. If no, are these states are under obligation to bring these laws in conformity with Islamic law and IHRL?
6. If yes, how this conformity can be achieved?

4. Outline

The study shall comprise on three chapters. In the first chapter the basic concepts relating to the study, such as immigration, refuge, domicile, citizenship and nationality, shall be elaborated and compared. The second chapter will discuss the notion of *Dār al-Ḥarb* and *Dār al-Islām*. In this chapter the definition of of *Dārs* will be given and then the modes by which any territory could be attributed to any of the *Dārs* shall be discussed. Afterwards, the notion of nation-state shall be discussed. The third chapter shall be devoted to discuss the citizenship laws of *Dār al-Islām* and then the citizenship laws of Pakistan and Saudi Arabia shall be discussed. Afterwards, the inconsistencies of the laws in these two countries with the citizenship laws of Islam which were operative in *Dār al-Islām* shall be identified. Apart from that, certain inconsistencies in the laws of these countries with international human rights law shall also be identified. The conclusions and recommendations shall follow the chapter three.

CHAPTER ONE

(Basic Concepts)

1. CHAPTER ONE

1.1. Introduction

Immigration, refuge, citizenship, nationality and domicile are some of the most used terms in international law. The former two terms deal with a person who leaves his own territory to another one while the latter three terms are concerned with a person whose personal law is in question.[1] These terms carry much importance and connections with various areas of international law. For instance, the refuge is related to international human rights law (IHRL) while nationality and immigration have connections with public International law (PIL) and domicile is discussed purely in the conflict of laws which is also known as private international law. As far as the significance of these terms is concerned, all of them play importance role in multiple ways. Citizenship and nationality play vital role when it comes to the jurisdiction of the courts in any civil and criminal matter. Domicile plays significant role in civil disputes of persons belonging to different jurisdictions. Likewise, the immigration

[1] For quite a long period -almost five centuries – only domicile was regarded to be the factor in ascertaining one's personal law but in the beginning of 19th century the nationality appeared to be rival of domicile in this regard. Afterwards, generally speaking, there is debate among the experts of private international law about the criterion for determining one's personal law. Some experts are of the opinion that the domicile should be the base for the determination of personal law because on the one hand one person can have only one domicile and on the other hand no person can be domicile less. On the contrary, a person can have more nationalities and he can also be a stateless person i.e. he can lack any nationality. Other experts opine that personal law should depend on nationality because it is the easiest thing to ascertain while ascertaining one's domicile can at times be confusing. This is the case in most of the western countries. In Islamic countries, for instance Tunisia, Syria, Algeria and Pakistan the personal law of a person is determined by taking his religion into consideration. In some other countries like India and China one's race can also determine his personal law. See for details, G.C Cheshire, *Private International Law*, (London: Oxford University Press, 1961) 194-99

and refuge deal with certain rights available to certain group of people which are discussed in international law.

In the following we shall, first of all define these five terms and elaborate their essentials. Afterwards we shall try to identify the differentiating factors due to which these apparently similar terms differ from each other. Thus, we will differentiate between immigrant and refugee and find out the differences between domicile, nationality and citizenship.

1.2. Immigration and Refuge

According to the popular belief, humanity began its journey on the earth from Sri Lanka[2] but now the specie, known as human being, is inhabitant of six continents with all diversities in color, race, ethnicity, language, custom and religion. All this happened because of massive migrations which human being made across the history.[3] There had been various factors –a detailed discussion of which is not our concern for this research– which encouraged people to move from one territory to the other so that they would be able to lead a prosperous life, improve their living standard and/or find safety from the persecution, violation of fundamental rights and effects of wars in their native countries.[4] The technological advancement in the means of transportation has made it easier for mankind to change their territories. This, on the one hand, led the number of immigrants across the globe to increase,

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[2] Ronit Ricci, *Islam Translated: Literature, Conversion and the Arabic Cosmopolis of South and Southeast Asia*, (Chicago: The University of Chicago Press, 2011) P. 136

[3] Ismā'īl al-Rājī, *Trialogue of the Abrahamic faiths*, 49

[4] Teichmann, Iris, *Immigration and the Law* (Mankato: Black Rabbit Books, 2006) P. 8

and, on the other hand, called for comprehensive legal system which would govern the affairs related to this movement. To respond this need there are different legal mechanisms which deal with immigration, refuge and other sort of movement across the borders. In order to indentify the governing laws to a certain movement the kind of movement needs to be identified as different kinds of legal scheme governs different sorts of movement. Therefore, in the following the immigration and refuge will be defined and the distinguishing factors between these would be identified.

1.2.1. Immigration

Black's law dictionary defines immigration as "*The coming into a country of foreigner for purposes of permanent residence*". The same dictionary differentiates immigration from emigration as the former denotes the coming into other country while the later refers to the act of leaving one's own country.[5] John bouver defines immigration as "*The removing into one place from the other*".[6] Oxford Dictionary of Law defines the term as "*The act of entering a country other than one's native with the intention of living there permanently*".[7] The Merriam-

[5] Henry Campbell Black, M.A., *Black's Law Dictionary*, (St Paul: West Publishing Co, 1979) 676

[6] John Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of the United States of America and of the Several States of the American Union*, (Philadelphia: George W. Childs, 1862) 1:606

[7] Elizabeth A. Martin MA ed., *Oxford Dictionary of Law*, (London: Oxford University Press, 2001) 241

Webster Dictionary of Law defines the term as *"[T]o come into a country of which one is not a native for permanent residence".*[8]

Looking into these different definitions, one can reach to the conclusion that 'immigration' has some essentials which distinguish this kind of movement from others. The first essential is entering in a country to which the person is not native. Thus, moving within one's own country or moving to another country to which the person is citizen – as the case of a person who has dual citizenship when he moves from one country of his citizenship to the other– will not be regarded to be immigration. The second character of this movement is the intention of the person that he will settle in the new country permanently. He might get naturalized[9] there or find some work as an immigrant worker.[10] This distinctive feature distinguishes immigration from ordinary tourist or other visitors as the former does not have any intention to return to his own country while the latter is for a temporary period of time to a certain work and he intends to go back to his own country.

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[8] "Definition Of IMMIGRATION". 2017. *Merriam-Webster.Com.* https://www.merriam-webster.com/dictionary/immigration.

[9] Naturalization is one of the modes of acquiring citizenship as it is the process by which any country grants citizenship to any foreigner. See, PH Collin, *Dictionary of Law*, (London: Bloomsbury Publishing Plc, 2004) 198. Being the same concept, the application of naturalization varies from one jurisdiction to the other and the conditions for naturalization are also different in different countries. Some most common conditions for naturalization include residence for a certain period, education, good character and fluency in the official language of the country.

[10] Dudley L, Poston Jr., and Leon F. Bouvier, *Population and society: An introduction to demography*, (Cambridge University Press, 2010) p. 197

1.2.2. Refuge/Refugee

An apparently similar term to immigration is refuge which means shelter or a state of being safe from threat and danger[11]. The person who is in need of refuge is called refugee. Merriam Webster defines refugee as *"[a] person who flees to a foreign country or power to escape danger or persecution."*[12] *The United Nations' (UN) Convention Relating to the Status of Refugees* –also known as *the Refugee Convention* – 1951, which is the core international instrument regarding refugees, in its article 1.A.2 defines refugee as follows;

> "As a result of events occurring before 1 January 1951 and owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it".[13]

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[11] Dictionary, refuge. 2017. "Refuge Meaning In The Cambridge English Dictionary". *Dictionary.Cambridge.Org*. http://dictionary.cambridge.org/dictionary/english/refuge

[12] "Definition Of REFUGEE". 2017. *Merriam-Webster.Com*. https://www.merriam-webster.com/dictionary/refugee.

[13] Art. 1. A.2, *UN Convention relating to the Status of Refugees, 1951*. The text of the convention can be read at http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf (last accessed on 12 June, 2017)

According to this definition only those persons could fall in the definition of refugee who faced threat and danger in result of the events taking place before January 1st, 195. In order to bring the persons having threat after the said date, the UN adopted the protocol to the convention in 1967 which amended the said article and brought any person having threat and well founded fear irrespective of the date. The protocol, for this purposes, omitted the words "*As a result of events occurring before 1 January 1951*" and "*as a result of such events*" from the article 1.A.2 of the convention.[14]

According to the definition given by the convention and protocol, a person can qualify to be called refugee only if he fulfils certain requirements. These requirements are (a) the person must be out of the country to which he is national. (b) He is out of the country due to well founded fear of persecution on the bases of his religion, race, nationality, social affiliation and political opinion. (c) Due to the fear of persecution the person is not able –or not willing – to avail the protection of the country to which he is national. And (d) he is not able –or not willing –to go back to his country. In the light of the above a refugee is different from internally displaced persons (IDPs) even if they flee their homes due to the '*well founded fear*

[14] Art. 1, *Protocol relating to the Status of Refugees*, 1967. The text of the protocol can he read at http://www.ohchr.org/Documents/ProfessionalInterest/protocolrefugees.pdf (Last accessed on 12 June, 2017)

of persecution'. This is because the IDPs do not cross the border in order to seek shelter instead of that they stay within their own country under the protection of the government.[15]

1.2.3. Difference between Immigration and Refuge

Nonetheless these two terms are, at times, used interchangeably by lay men; these two are different from each other. Refugees are the persons who are forced to leave their country in order to escape from threat of persecution or death. These people are generally dealt with under the refugee convention, 1951. Immigrants, on the other hand, are the group of people, who move to other country not because of fear of persecution. Instead, they migrate to the other country to raise standard of their lives by finding good work, or education or, sometimes, family reunion. Unlike refugees, immigrants –though they intend to settle there permanently – can return to their country whenever they want to do so because they do not face any threat back in their countries. Further, the immigrants are dealt with under the domestic law of the country to which they migrate.[16]

1.3. Domicile, Citizenship and Nationality

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[15] Refugees, United. 2017. "Internally Displaced People". *UNHCR*. Accessed June 12. http://www.unhcr.org/internally-displaced-people.html.

[16] Refugees, United. 2016. "UNHCR Viewpoint: 'Refugee' Or 'Migrant' – Which Is Right?". *UNHCR*. http://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html (Last accessed on June 12, 2017).

1.3.1 Domicile

Domicile plays a vital role in private international law as it is the thing on which usually the determination of one's personal law depends in matters related to marriage succession and some civil matters.[17] William J. Stewart defines domicile as "*the country that a person treats as his permanent home and to which he has the closest legal attachment*".[18] The Private International Law Committee (PILC)[19] in its first report proposed the definition of domicile as follows;

> "A person's domicile may be defined as meaning the country (in the sense of a territorial unit possessing its own system of law) in which he has his home and intends to live permanently. The law regards every person as having a domicile, whether it be the *domicile of origin* which the law confers on him at birth, or the *domicile of choice* which he may subsequently acquire. The two requisites for the acquisition of a fresh domicile are: (1) residence; and (2) intention to remain permanently, and both these elements must be present before a new domicile can be acquired. If a person, having acquired a

[17] Jason Chuah, *Q & A Series Conflict of Laws*, (London: Cavendish Publishing Limited, 2000) 35

[18] *Collins Dictionary of Law*. S.v. "domicile." Retrieved June 12 2017 from http://legal-dictionary.thefreedictionary.com/domicile

[19] The committee, which was headed by Justice Wynn Parry, was formed in 1952 to propose amendments and reforms are desirable to be made to the rules of private international law relating to the concept of domicile in the United Kingdom of Great Britain. The committee presented its first report, consisting of 15 pages, in 1954 in which various alterations were proposed with respect to the rules of domicile. See, Great Britain, First Report of the Private International Law Committee 9068 of Cmd, (London: H.M Stationery Office, 1954) 3

> domicile of choice, abandons it without acquiring a fresh one, the law regards his domicile of origin as having revived until a fresh domicile of choice is acquired, even though he may never in fact have returned to his domicile of origin".[20]

This, however, looks more a brief rules about domicile instead of a definition. Based on this statement, Abla Mayss defines domicile as "*the legal system within which whose jurisdiction an individual makes his or her home, intending to remain there permanently*".[21] He further asserts that the underlying cornerstone of the concept of domicile and decisive factor in this is '*permanent residence*'.[22] There are certain rules about the domicile and the most important and the foremost rule is that no person can be without a domicile and no person can have more than one domicile.[23] Further, an existing domicile would be deemed to endure until other domicile is not acquired and the burden of proof of such other domicile will be upon the person who is claiming it.[24] Domicile is of three kinds. The first one is the domicile of origin which is given to a person right after his birth for this every child acquire upon his birth the domicile of his father if he or she is legitimate and of mother if illegitimate. The second type of domicile is the domicile of dependence in which is granted to the persons who are legally

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[20] Ibid, 4

[21] Abla Mayss, *Principles of Conflict of Laws*, (London: Cavendish Publishing Limited, 1996) 193

[22] Ibid

[23] C.M.V Clarkson and Jonathan Hill, *The conflict of Laws*, (Oxford: Oxford University Press, 2011) 306

[24] John O'Brien, *Conflict of Laws*, (London: Cavendish Publishing Limited, 1999) 67

dependant on any other person.[25] Thus, the wife will have the domicile of her husband[26], the legitimate child will be given the domicile of his father and illegitimate child will acquire the domicile of his mother. The third type of domicile is the domicile of choice which a person acquires by his own choice at any time. For the domicile of choice there are two basic requirements i.e. the permanent residence and intention to remain there permanently. Since the domicile of choice is adopted by the will of the person he can leave that domicile by leaving the place with intention to not to return there again. In such a situation the domicile of origin will revive unless he acquires a new domicile of choice.[27]

1.3.2 Citizenship

Black's law dictionary defines citizenship as "*the status of being a citizen*".[28] This definition does not provide a clear understanding of the term.[29] Bouvier, whose law dictionary has been adapted to the laws and constitution of the United States of America, did not even define the

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[25] Ibid

[26] This was the case until the introduction of *the Domicile and Matrimonial Proceedings Act 1973*. The section 1 of the act abolished the domicile of dependence for the married women and regarded her as any other individual capable of having domicile of her choice. With respect to the women who were married before the act, the section provided that their domicile of dependence would be regarded as the domicile of choice and until they acquire any other domicile of choice. Section 1, *the Domicile and Matrimonial Proceedings Act 1973*, UK

[27] John J. Collier, *Conflict of Laws*, (Cambridge: Cambridge University Press, 2001) 40

[28] Black, *Black's Law Dictionary*, 222

[29] The understanding of this term depends on the understanding of the term 'citizen'. To fill the gap the dictionary provides quite a clear definition of citizen. It says "*One whom, under the Constitution and laws of the United States, or of a particular state, is a member of the political community, owing allegiance and being entitled to the enjoyment of full civil rights*". See, Black, *Black's Law Dictionary*, 221

term citizenship. Instead, he defines the term citizen which gives idea of citizenship as it is the status of the person who is 'citizen'. In his words citizen is "*one who, under the constitution and laws of the United States, has a right to vote for representatives in congress, and other public officers, and who is qualified to fill offices in the gift of the people*".[30] After a considerable search in different dictionaries I could find the most comprehensive definition of citizenship in Collins Dictionary of Law. It is defined as "*the legal link between an individual and a state or territory as a result of which the individual is entitled to certain protections, rights and privileges, and subject to certain obligations and allegiance*".[31] Looking what has been written about the definition of 'citizen' and 'citizenship, one can easily arrive at the same and single conclusion of the different wordings. That is, the citizenship is a status, available to all citizens, comprising of two basic essentials. First of all, the citizens have all the political rights i.e. that have right to vote for public offices. Further, they are entitled to certain protections from their respective states. Secondly, they owe allegiance and loyalty to the state or territory to which they are citizens. John Mathiason summed up these two essentials as he describes the citizen to be the person belonging to a nation or state who pledges his allegiance to the government and in return is entitled to protection which would provided by the state. In a

[30] Bouvier, *A Law Dictionary*, 231

[31] *Collins Dictionary of Law*. S.v. "citizenship." Retrieved June 16 2017 from http://legal-dictionary.thefreedictionary.com/citizenship

nutshell, citizenship is a barter in which one party extends his loyalty to the other in return of certain rights and protections.[32]

1.3.2.1 Historical background of Citizenship

The roots of the notion of citizenship can be traced back in the ancient Greek City States. Influenced by the ideas of Aristotle, the Greeks believed that the true citizen is the person who actively participates in public life and consequently develops a full personality. Aristotle's views about citizenship were quite a perfectionist and idealist since his held that, being a political animal, man can reach to the bighest potential of his life only by active participation in public affairs. His views about citizenship, thus, troubled him in distinguishing about the persons actively participating in politics and those who were busy in other tasks of the life. The distinguishing line between the true citizens and others was thus quite blur, if there was any.[33]

Before Greek City States individuals had bonds with their tribes or extended family and bond or relationship with a political entity beyond kinship had not had existence. The Greeks

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[32] John, R. Mathiason, *World Citizenship: the individual and international governance*, (New York: New York University, 1997). Available at: http://www.un.org/esa/socdev/egms/docs/2012/WorldCitizenship.pdf last accessed, June 17, 2017

[33] Darek Heater, *Citizenship: The Civic Ideal in World History, Politics and Education*, (Manchester: Manchester University Press, 2004) 4

needed to establish such political entity to which people would have bond beyond blood relations for two major reasons. The foremost reason in this regard was to avoid slavery. This was the reason which made them united to fight collectively to avoid enslavement by the people who could enslave them after defeating them. Apart from warfare, the excessive debt on a person was another factor which could result to his enslavement by the creditor. They established the political institutions so that they could make collective decisions in matters of war and peace and thus, could remain free people. The second factor which unified them was the Oracle of Apollo at Delphi which was highly regarded by the Greeks and they always consulted the Oracle in order to make important decisions and make new laws.[34] The Oracle that is how became some sort of focal point which paved way to the establishment of political institution in Greece.[35]

In the Roman Republic the concept of citizenship was quite similar to that of the Greek one with little differences in some things. In both the cases, the citizenship encompassed the principles of the equality of people before the law, civic participation of people and limited

[34] Greek people believed that the Delphi was situated in the center of the world and Apollo was the God of light and harmony and was being worshiped. This gave a great importance to the Oracle and people would pay a great sum to the sanctuary. People from various parts of the world would make visits to the sanctuary in order to get advice on importance issues. Since the sanctuary would serve only few days in the year, the wealthy and influential people would pay great sums in order to bypass the queue of visitors. Due to this importance of the Oracle, no decision in any major issue was taken without prior consultation with the sanctuary. See, Thomas Sakoulas,. 2017. "Delphi". *Ancient-Greece.Org*. Accessed June 20. http://ancient-greece.org/history/delphi.html.

[35] Geoffrey Hosking, *Epochs of European Civilization: Antiquity to Renaissance*, (Prince Frederick, MD: Recorded Books, 2006) 17

powers of persons. It was, however, much generous and flexible from that of the Greeks as it facilitated the enslaved people too to enjoy the status of citizenship –in which they could have ownership and possession over things, full protection of law and right to marriage with Roman people – without having political rights.[36]

With the establishment of Roman Empire the citizenship was extended to the people living all over the empire. This was because the emperor thought the expansion of citizenship to the entire empire will provide legitimacy to the government of the emperor over the entire empire. In this period, the Roman citizenship was regarded to be a matter of pride. They would proudly say "*Civis Romanus sum* which meant 'I am a Roman Citizen". The citizens were deemed to be the subjects of Roman Empire and they were supposed to render their loyalty to the empire. People had not had much participation in the political affairs and law making.[37]

In the ancient era, the concept of citizenship would revolve around the right and capacity to active participation in the political affairs of the states and/or empires. The current notion of

[36] Ibid, 31

[37] Ivan, Shearer and Brian Opeskin, "Nationality and Statelessness" in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross, eds. *Foundation of International Migration Law* (Cambridge: Cambridge University Press, 2012) 93

citizenship or nationality is an offshoot of the emergence of nation-states[38] and the French Revolution. The modern day concept of citizenship, as we have discussed, denotes the reciprocal bond between an individual and the state in which the individual extends his allegiance to the state and in return becomes entitled to the protection, rights and privileges.[39]

1.3.3. Nationality

Nationality has been defined by Henry C. Black in his famous law dictionary as "*the quality or character which arises from the fact of a person's belonging to a nation or state*".[40] This definition shows the resemblance of nationality with citizenship. Bouvier defines the term as "*the state of a person in relation to the nation in which he was born*".[41] On the face of it, this definition is not inclusive to the kinds[42] of nationality other than the nationality of birth or origin. Bouvier, however, in his other law dictionary provides a much better definition of the term which makes nationality quite similar to citizenship. He defines nationality as "*Character, status, or condition with reference to the rights and duties of a person as a member of*

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[38] A detailed discussion about the emergence of the nation-state would be discussed in chapter two of this study.

[39] Olivier W. Vonk, *Dual Nationality in the European Union: A Study of Changing Norms in Public and Private International Law and in the Municipal Laws of Four EU Member States,* (Boston: Martinus Nijhoff Publishers, 2012) 12

[40] Black, *Black's Law Dictionary*, 925

[41] Bouvier, *A Law Dictionary,* 1357

[42] These kinds include, nationality by marriage and naturalization.

someone state or nation rather than another".[43] W.J. Stewart defines nationality as "*the legal relationship between a person and a state*".[44] This definition is *prima facie* ambiguous because it is not certain to which relation it refers with the words "*the legal relationship*". Further, the definition would have not been exclusive if the article '*the*' –which specifies and particularizes general things - had not been there at the beginning of the definition. This is because in that case the definition could include any sort of legal relationship of any person with any state. The oxford law dictionary provides a definition similar to that of citizenship. It defines the term as "*the state of being a citizen or subject of a particular country*".[45]

The combination of all these diverse definitions of nationality provides one clear picture of the notion of nationality. According to that, the nationality is a legal bond between an individual an a particular state which binds the individual to extend his loyalty to the state and in return enjoy protection, legal rights and privileges. Ivan Shearer and Brian Opeskin summed up the concept of nationality in words as follows;

> "Under domestic law, a national owes a duty of allegiance to the State, and may be obliged to pay taxes and render military services to that State. A national has the right of permanent residence and the right to participate in

[43] John Bouvier, *Bouvier's Law Dictionary A Concise Encyclopedia of The Law*, (St. Paul: West Publishing Company, 1914) 3: 2297

[44] *Collins Dictionary of Law*. S.v. "Nationality." Retrieved June 19 2017 from http://legal-dictionary.thefreedictionary.com/nationality

[45] Elizabeth ed., *Oxford Dictionary of Law*, 325

public life and in most countries enjoys social benefits available only to nationals".[46]

1.3.4 Difference between Domicile and Nationality

Domicile and nationality[47] are, legally and technically, two distinct concepts in multiple aspects. The foremost distinguishing factor is the scope of domicile and nationality. The former is taken in to consideration in order to determine one's personal law in the applications of private international law while the latter is a concept which denotes an individual's affiliation with a particular state. In this regard, nationality depends on the birth of an individual in a particular state or his marriage to a person belonging to that state or his parents' nationality. The domicile, on the other hand, depends only on the permanent residence of an individual. Thus, it is possible that a person may be national of one state and he is domiciled in another state.[48]

[46] Ivan, Shearer and Brian Opeskin, "Nationality and Statelessness" in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross, eds. *Foundation of International Migration Law* (Cambridge: Cambridge University Press, 2012) 93

[47] For the sake of clarity, in this part the terms citizenship and nationality are deemed to be synonym. This is because the factors which distinguish domicile from these two terms are the same and thus, the difference between domicile and nationality and domicile and citizenship are the same. That is why, in order to avoid repetition we are going to put nationality and citizenship as one thing opposed to domicile. The difference between citizenship and nationality, however, will be identified in the next part.

[48] Cheshire, G.C, *Private International Law*, 194

The other difference between domicile and nationality is that, since domicile depends on residence while nationality represents an individual's political belonging to any state, no person can be without domicile and there are rules to ascribe on form of domicile or the other to the individual in different cases. Further, no person can have more than one domicile because one person can, practically, have only one permanent residence. As far as nationality is concerned, it is, on the one hand, possible that a person may -and people do -have multiple nationalities because an individual can have affiliation with two or more state and, on the other hand, some persons may be without any nationality: a group of people known as stateless persons in public international law.

The third distinction between the two concepts can be elaborated as a person can change his domicile of origin after attaining the age of majority and this change of domicile does not depend on the permission of his government. As far as nationality is concerned, a person's change of the nationality of origin, according to the laws of the nation in which he was born, may depend on the permission of the government. This is, perhaps, because in the domicile a person only changes his residence, which does not affect -at least legally - his allegiance to the nation to which he belongs while in the change of nationality he, in certain cases[49], renounces his allegiance or at least his allegiance is shared with other national as well. And for

[49] This is the case in the countries which do not allow dual nationality. In such a situation the person is legally compelled to renounce his allegiance towards his previous nation.

renouncement of the allegiance a person may be asked to seek permission from the government.[50]

1.3.5. Difference between Domicile and Citizenship

Since citizenship and nationality have the same characteristics as compared to domicile the distinguishing factor between domicile and citizenship are the same as these are between the domicile and nationality. However, there are certain differences between citizenship and nationality which are discussed below.

1.3.6. Difference between Citizenship and Nationality

The terms citizenship and nationality are very often used interchangeably and mostly common people take them as synonym.[51] There are, therefore, some countries where nationality and citizenship are taken as a same concept. These countries include, Canada, the United States of America (USA), Australia and Turkey.[52] However, in technical and legal sense these two are quite different terms having different meanings and implications in other parts of the world.[53] There are two major differences between the citizenship and nationality. The first and foremost distinction between the two terms is that, the nationality is usually a

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[50] Bouvier, *A Law Dictionary,* 1358

[51] Ivan, Shearer and Brian Opeskin, *Foundation of International Migration Law*, 95

[52] Thomas Faist ed, *Dual citizenship in Europe: From nationhood to societal integration*, (Hampshire: Ashgate Publishing, Ltd., 2012) 8-9

[53] Stefan Kadelbach, "Citizenship Rights in Europe" in Dirk Ehlers ed, *European Fundamental Rights and Freedoms,* (Berlin: De Gruyter Recht, 2007) 547

subject of public international law as under the public international law this is an affiliation of an individual with a particular state by virtue of which the state may impose certain responsibilities on the individual and can exercise its jurisdiction over him. The individual has right against the state to be protected by providing consular advice abroad and diplomatic help where possible. Citizenship, on the contrary, is a notion which is used in domestic law of the country whereby the citizens have political and civil rights: they can vote and be elected for the public offices.[54]

The other difference between the two terms is that citizenship is the legal connection between person and state where by a citizens enjoys full civil and social rights against his affiliation with the state. In this context, the citizenship of any state is beyond the color, religion, ethnicity and race of the person. Nationality, on the other hand, is the social, historical and ethnic bond of a person with other people of the same background. In this context, the term nationality is more similar to the term ethnicity and a state may, thus, comprise multiple nationalities and some nationalities could not have their own state. In this perspective the citizenship is the creation of the state as the state grants, and at times snatches, citizenship to the individuals while the nationality is the bases for the nation-state.[55] In this context, citizenship is created by operation of law and a person can acquire any sort of

[54] Kim Rubenstien, "Globalization and Citizenship and Nationality" in Catherine Dauvergne ed, *Jurisprudence for an Interconnected Globe*, (Farnham: Ashgate Publishing Ltd, 2003)

[55] Olivier W. Vonk, *Dual Nationality in the European Union*, 21

citizenship given under the law of any state while nationality, as that is membership of an individual in a community with shared history, culture and tradition, is beyond the need of any legal operation in its existence.[56]

1.4. Conclusion

From what we have discussed it is observed that the concepts of immigration, refuge are similar up to some extent that both denote to the movement of individuals from their native territory to other but these two differ from each other in the nature of movement –as the former denotes to the movement for a better life style while the later movement is to seek protection from the threat in the individual's own country. Likewise, the notions of domicile is similar to the concepts of citizenship and nationality in a sense that all refer to a community and place to where an individual has some sort of bond but in technical and legal sense these are altogether different concepts. The latter two notions are even confusing as they carry many similarities that they are used interchangeably and many scholars and jurisdictions do not differentiate between the citizenship and nationality. Other scholars and jurisdictions, however, take them differently.

[56] Faist, Thomas, ed, *Dual citizenship in Europe*, 9

Chapter Two

(*Dār al-Islām* and Nation-State)

2. Chapter Two

2.1. Introduction

Man is social animal. He cannot survive in isolation. He is always in need of other men in his daily life. In his engagement with other human being he concludes civil contracts, makes friendships, marries, builds disputes which need to be resolved by intervention some other and at times commits crimes as well. Further, he is always in need of protection from a mighty entity which could save him from atrocities and violation of his rights from a powerful man or group. In order to resolve disputes between men, punish the criminals and protect individuals from others, comes the government forward to play its role. There perhaps, at times, has been only one government which would dispose of the disputes and administer justice. But with the expansion of human population, people formed different governments in different parts of the world. Now there arose the question as to which government would be responsible to look after the affairs of any particular individual. Here came the territory to play the most significant role of establishing jurisdiction of the government on the people living inside its territory as the territory, along with other factors plays vital role in establishing sovereignty of the government.[1] In modern day public international law, no state can exist without a defined territory which is the found.[2] The form

[1] Malcolm N. Shaw QC, *International Law, (Cambridge: Cambridge University Press, 2008) 487*

[2] There are some essentials which are necessary for the existence of the state. These are (a) permanent population and by permanent population it is not meant that there should not be any migration across the borders instead it is meant by population that there should be a number of

of government and treatment towards the treaty has varied in the different periods of the history be it the ancient Greek City States, big Empires, the notion of *Dār al-Islām* and *Dār al-Harb* in Islamic law, kingdom or the modern day nation states. In the following we shall discuss the notion of *Dār al-Islām* and *Dār al-Harb* under Islamic law and the nation states followed by the citizenship and immigration law in the *Dār al-Islām* under Islamic law.

2.2. *Dār al-Islām*

The term *Dār al-Islām* is a combination of two Arabic nouns i.e. *Dār* and *Islam.*[3] In the following we, first of all, explain what these two nouns mean and then defines what is meant by *Dār al-Islām* as term. According to Ibn-E-Manẓūr, *dār* is what is consisting of constructed and not construction places and the word is derived from *Dāra Yadūru* and it is called *dār* because people come, and go from, there. Apart from the constructed and non-constructed places the word dār applies to the locality in which many houses exist.[4] According to Al-Fayroz Abādī, the word *dār* is includes the places consisting of constructed and not

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people who could be regarded to be the inhabitants of that state. (b) A defined territory, this too, does not mean that there must he complete certainty about the territory and there should be no dispute over the territory. Instead it means that there some definite territory which could be attributed to the state. (c) A government which could enable the state to have an identity in international community and (d) a capacity to enter into relations with other states. Without these essentials no state can existence as a legal person which could be subject of modern day international law. See for details, Martin Dixon, *Textbook on International Law*, (Oxford: Oxford University Press, 2013) 117-20

[3] This type of combination is called *al-Murakkab al-Idafi* in Arabic grammar in which, usually, the second noun is attributed towards the first one. The first one is called *al-Mudāf* and the second is known as *al-Mudāf Ilayh*. See, Abbas Hassan, *al-Naḥw al-Wāfi*, (Cairo: Dār al-Ma'arif, n.d) 1:300

[4] Muḥammad b. Mukarram b. 'Alī Jamal al-Dīn b. Manẓūr al-Afrīqī, *Lisān al-'Arab*, (Beirut: Dār Ṣādir, n.d) 4: 298

constructed area, the city and the tribe.[5] According to al-Zabīdi, every place where any nation resides is their *dār*.[6] In this context the *Dār al-Islām* will denote to the place where Muslims reside. Abū Manṣūr al-Azharī says that every locality where one tribe collectively resides is called the *dār* of that tribe.[7]

The word *Islām* is derived from the combination of *Sīn, Lām* and *Mīm* which has multiple meanings that include peace, antonym of war and purification. And *Islām* literally means to surrender. It is in technical sense, acceptance of whatever has been given by the Holy Prophet –peace and blessings of Allah Almighty upon him – as *dīn* by which the person makes his blood in peace and other people become safe from him.[8] Al-Fārābī says that *Silm* is peace and the word in the verse of Qur'an "*Udkhulū fissilmi Kāffah*" means Islam. Islam means to surrender and acceptance.[9] Al-Zabīdī, after dissecting the root word for Islām, concludes that

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[5] See, Majd al-Dīn Abū Ṭāhir Muḥammad b. Ya'qūb al-Fayroz Abādī, *Al-Qamūs al-Muḥīṭ*, (Beirut: Mu'assasah al-Risālah Li 'l-Ṭabā'ah wa al-Nashr wa al-Tawzī') 1:394

[6] Muḥammad b. Muḥammad b. 'Abd al-Razzāq al-Husaynī al-Zabīdī, *Tāj al-'Urūs Min Jawāhir al-Qāmūs*, (Alexandria: Dār al-Hidayah, n.d) 11: 318

[7] He quotes a *Ḥadith* in which the Holy Prophet says "ألا أنبئكم بخير دور الأنصار: دور بنى النجار ثم دور بنى عبد الأشهل وفى كل دور الأنصار خير" which means "[S]hould I not inform you about the best tribes of *Anṣār*? The tribe of *Banī al-najjār* than *Banī 'Abd al-Ashhal* and in every tribe of *Anṣār khayr* exists". In this *Ḥadith*, the word *duwar* which is plural of *dār*, means the tribe. See, Muāḥammad b. Aḥmad b. al-Azharī Abū Manṣūr, *Tahdhīb al-Lughah* (Beirut: Dār Iḥyāal-Turāth al-'Arabī, n.d) 14:110

[8] Ibid, 12: 314

[9] Abū Naṣr Ismā'īl b. Ḥammād al-Jawharī al-Fārābī, *Al-Ṣiḥāḥ Tāj al-Lughah wa Ṣiḥāḥ al-'Arabiyyah*, (Beirut: Dār al-'Ilm Li 'lmalāyīn, n.d) 5: 1952

Islam is acceptance and surrender to whatever has been brought by the Holy Prophet Peace and blessings of Allah Almighty upon him.[10]

The term *Dār al-Islām*, as the name from the land on which Muslims have established their rule, is thus, literally the land in which Muslim reside. In the technical and legal sense the terms has been defined as follows;

"هى كل بلد بناها المسلمون كبغداد والبصرة، أو أسلم أهلها عليها كالمدينة واليمن، أو فتحت عنوة كخيبر ومصر وسواد العراق، أو فتحت صلحا والارض لنا والكفار فيها ويدفعون الجزية."[11]

"*Dār al-Islām* is any city which has been constructed by Muslim, like Baghdad and Basra, or the [the majority] of the inhabitants of the city embrace Islam, like Madīna and Yemen, or the city has been forcefully conquered by Muslims, like *Khayber*, Egypt and countryside of Iraq or the city has been conquered and annexed by Muslims peacefully and the non-Muslims living there pay *Jizyah* to the Muslim government".

Imam al-Sarakhsī, a great Ḥanafī jurist, instead of giving a definition of *Dār al-Islām*, sets a test on which nature of any land can be determined. He concludes that any land can be attributed

[10] Al-Zabīdī, *Tāj al-'Urūs*, 32: 385

[11] This definition, according to the author is given by the Shafi'ischool of law. See, Sa'dī Abū Ḥabīb, *Al-Qāmūs al-Fiqhī Lughatan wa Iṣṭilāḥan*, (Damascus: Dār al-Fikr, 1988) 181

either to us [Muslims] or to them [non-Muslims] on the basis of dominance. Thus, if Muslims establish dominance on any territory and annex that to the territory of Islam, that piece of land will be regarded as *Dar al-Islam*.[12] Likewise, on the absence of Muslim dominance the land would not be *Dar al-Islam*; rather that would be either *Dar al-Ḥarb* or *Dar al-'Ahd*.[13] Ibn al-Qayyim, a renowned Ḥanbalī jurist defines defines Dār al-Islām as follows;

"دار الإسلام هى التى نزلها المسلمون، وجرت عليها أحكام الإسلام، وما لم تجر عليه أحكام الإسلام لم يكن دار إسلام، وإن لاصقها".

> *Dār al-Islām* is the land in which Muslims reside and they enforce Islamic laws there, and if Islamic laws are not enforced the land would not be *Dar al-Islām* even if that is adjacent to *Dār al-Islam*".[14]

This definition, contrary to the opinion of *Imam Abū Ḥanīfah*, stipulates the condition of actual enforcement of Islamic laws instead of capacity to do so. The apparent wording of

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[12] The words of Imam al-Sarakhsī read; "لأن البقعة إنما تنسب إلينا أو إليهم باعتبار القوة والشوكة" that means "the territory is attributed to us of them on the basis of power and dominance". See, Muḥammad b. Aḥmad b. Abī Sahl Shams al-A'immah al-Sarakhī, *Al-Mabsūṭ*, (Beirut: Dār al-Ma'rifah, 1993) 10: 33. This shows that, according to Imam al-Sarakhsī, the mere capacity to enforce Islamic law is enough to make any territory *Dār al-Islām* and actual enforcement of Islamic law, though is an obligation on the Muslim government, is not necessary for the making any territory *Dār al-Islam*.

[13] Generally speaking, Muslim jurists divide the earth into two broad categories i.e. *Dār al-Islām* and *Dār al-Ḥarb*. But some scholars also define a third category of land which is called *Dār al-'Ahd*, *Dār al-Muwada'ah*, *Dār al-Ṣulḥ*, or *Dār al-Mu'ahadah*. The difference between *Dār al-Ḥarb* and *Dār al-'Ahd* is that the Muslim government does not have any peace treaty with the former while it is in a peace treaty with the latter. It should be noted here, that not having a peace treaty with *Dār al-Ḥarb* does not place Muslims in the state of perpetual war with non-Muslims of *Dār al-Ḥarb*.

[14] Ibn-E-Qayyim claims the definition to be from the majority of Muslim jurists. See, Muḥammad b. Abī Bakr b. Ayyub b. Sa'd Shamsuddin Ibn-E-Qayyim al-Jawziyyah, *Aḥkām Ahl al-Dhimmah*, (Dammam: Ramādī Li'l Nashr, 1997) 2:728

Imam al-Kasānī also suggests the same. He says; *"[T]here is no disagreement among our jurists that the Dār al-Kufr converts into Dār al-Islam by enforcement of Islamic laws there"*.[15] But this is a misunderstanding of the text. The true sense of the text is that mere conquest of any land does not convert into *Dār al-Islām* until Muslim ruler converts it and enforcement of Islamic laws is an indicator of the conversion which is more or less similar to the modern day notion of annexation on territory in the discussion of acquisition of territory in public international law.[16] Abū Zahra defines *Dār al-Islam* in a more flexible way as he says; *"[D]ār al-Islām is the country which is ruled by the government of Muslims and the dominance and power there belongs to Muslims"*.[17]

2.2.1. Background of the Term

The term *Dār al-Islām* has been adopted by Muslim jurists to refer to the territory over which Muslims establish their dominance. The term has been used frequently by the classical Muslim jurists and *Muḥaddithīn* in the *fiqh* manuals and compilations of *Aḥādīth*. After a considerable research in the compilations of *Aḥādīth*, we have succeeded to find the term used by the Holy Prophet -peace and blessing of Allah Almighty upon him – in a tradition which

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[15] The words of al-Kāsānī read; "لا خلاف بين أصحابنا فى أن دار الكفر تصير دار إسلام بظهور أحكام الإسلام فيها". See, 'Ala Uddin, Abī Bakr b. Mas'ūd b. Aḥmad al-Kāsānī al-Ḥanafī, *Badā'i' al-Ṣanā'i' Fī Tartīb al-Sharā'i'*, (Beirut: Dār al-Kutub al-'Imiyyah, 1986) 7:131

[16] For details see, Mushtaq, *Jihad Muzaḥamat Awr Baghāwat*, 122- 25

[17] The words of Abū Zahrah read; "دار الإسلام هى الدولة التى تحكم بسلطان المسلمين، و تكون المنعة و القوة فيها للمسلمين". See, Muḥammad Abū Zahrah, *Al-'Ilaqāt al-Duwaliyyah Fi'l Islām*, (Nasr: Dār al-Fikr al-'Arabī, 1995) 56

has been narrated by numerous *Muḥaddithīn* including al-Ṭabrānī in his *Mu'jam al-Kabīr.*[18] Apart from that, an alternative term for *Dār al-Islām* i.e. *Dār al-Muslimīn* can also be traced in the sayings of Holy Prophet –peace and blessings of Allah Almighty be upon him – which has been narrated by numerous *Muḥaddithīn.* One such *Ḥadīth* has been narrated by al-Imam al-Ṭaḥāwī which reads; "ثم ادعهم إلى التحول من دارهم إلى دار المسلمين" which means "*[A]and then invite them to migrate from their land to the land of Muslims*".[19] The term *Dār al-Islām* was first used in *Makkah* by the Muslims to the place which was devoted for Muslims. The place was

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[18] The tradition reads "عقر دار الإسلام بالشام" which means "the center of *Dār al-Islām* is in Syria". See, Sulaymīn b. Aḥmad b. Ayyūb b. Muṭayr Abu'l-Qāsim al-Ṭabrānī, *Al-Mu'jam al-Kabīr*, Salamah b. Nufayl Assakūnī, (Cairo: Maktabah Ibn-E-Taymiyyah) 7:53. In some other narrations of the same *Ḥadīth*, the word "دار المومنين" has been used instead of *Dār al-Islām.* See for example, Muḥammad b. Ḥibbān b. Aḥmad b. Ḥibbān b. Ma'ādh b. Ma'bad al-Tamīmī, *Ṣaḥīḥ Ibn-E-Ḥibbān bi Tartībi Ibn-E-Balbān,* Bab Dhikr al-Bayān Bi'anna al-Shām Hiya 'Uqru Dār al-Mu'minīna fī Ākhir al-Zamān, (Beirut: Mu'assasah al-Risālah, 1993) 16:296

[19] The complete version of the *Ḥadīth* reads as follows "كان رسول الله صلى الله عليه وسلم ، إذا أمر رجلا على سرية قال له إذا لقيت عدوك من المشركين ، فادعهم إلى إحدى ثلاث خصال أو خلال فأيتهن أجابوك إليها ، فاقبل منهم ، وكف عنهم ، ادعهم إلى الإسلام ، فإن أجابوك ، فاقبل منهم وكف عنهم ، ثم ادعهم إلى التحول من دارهم إلى دار المسلمين ، وأخبرهم أنهم إن فعلوا ذلك ، أن عليهم ما على المهاجرين ، ولهم ما لهم ، فإن هم أبوا ، فأخبرهم أنهم كأعراب المسلمين ، يجرى عليهم حكم الله الذى يجرى على شيء ، إلا أن يجاهدوا مع المسلمين ، فإن هم أبوا أن يدخلوا فى الإسلام ، فسلهم إعطاء الجزية المؤمنين ، ولا يكون لهم فى الفيء والغنيمة شيء ، فإن أجابوا فاقبل منهم ، وكف عنهم ، فإن أبوا فاستعن بالله وقاتلهم". This means "*[T]he Holy Prophet –peace and blessings of Allah Almighty be upon him –when appointed any person commander of the Muslim army would command him that when you confront your enemy from polytheists, call him for one of the three options and approve whichever is accepted by him and refrain from harming them. Invite them to embrace Islam and accept if they respond to the call positively, and refrain from harming them and invite them to migrate from their territory to the land of Muslims and inform them that, if they migrate, they will have rights and duties as other Muhājirūn do. And if they deny migrating, tell them that they would be like other Muslim villagers and they will not have share in the Fay' and Ghanīmah unless they fight with other Muslims. And if they reject the call for Islam, invite them to pay Jizyah and approve that if they accept it and refrain from harming them. And if they deny even paying Jizyah, ask help from Allah and fight against them*". See, Abū Ja'far Aḥmad b. Muḥammad b. Salāmah b. 'Abd al-Malik al-Ṭaḥāwī, *Sharḥu Ma'ānī al-Āthār*, Kitāb al-Siyar, Bāb al-Imām Yurīdu Qitāla Ahl al-Ḥarb Hal 'Alayhi Qabla Dhālika An Yad'ūhum Am Lā?, (Beirut: Ālam al-Kutub, 1994) 3:206

initially called *Dār al-Arqam* and after 'Umar b. al-Khattāb embarced Islam and Muslims perfomd *Ṭawāf* in *Baytullah*, they called the *Dār al-Arqam Dār al-Islām* for being the official place of Muslim gatherings.[20]

The term *Dār al-Islām* had started to be used referring to the territory over which Muslims are dominance in the period of companions. Al-Imām Abū Yūsuf quotes a letter from Khālid b. al-Walīd al-Makhzūmī, who was titled as *Sayfullah* i.e. the Sword of Allah by the Holy Prophet -peace and blessings of Allah Almighty be upon him -, in his well known treatise *al-Khirāj* as follows;

"أيما شيخ ضعف عن العمل أو أصابته آفة من الآفات أو كان غنياً فافتقر وصار أهل دينه يتصدقون عليه طرحت جزيته وعيل من بيت مال المسلمين وعياله ما أقاموا بدار الهجرة ودار الإسلام فإن خرجوا إلى غير دار الهجرة ودار الإسلام فليس على المسلمين النفقة على عيالهم".[21]

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[20] The compound, which was located on the Ṣafā in Makka, belonged to Abū 'l-Arqam who was the 7th person to embrace Islam. The Holy Prophet -peace and blessings of Allah Almighty be upon him - used live there in the beginning of Islam and called people for Islam and many people came to the fold of Islam. One day the Prophet prayed to Allah that Islam be honored by either of the best of 'Umarayn' (i.e. 'Umar b. al-Khattāb and 'Amr b. al-Hishām [Abū Jahl). The following day 'Umar b. al-Khattab showed up in *Dār al-Arqam* and embraced Islam. Muslims came out of the compound, praised Allah and made Ṭawaf of Baytullah and the compound began to be called *Dār al-Islam*. Arqam made charity of the compound. See, Jamāluddin Abū 'l-Faraj 'Abdurraḥmān b. 'Alī b. Muḥammad al-Jawzī, *al-Muntaẓim fi Tārīkh al-Umam Wa 'l-Mulūk*, (Beirut: Dār al-Kutub al-'Ilmiyyah, 1992) 5:279. The Arabic text reads; "عثمان بن الأرقم قال: أنا ابن سبعة فى الإسلام أسلم أبى سابع سبعة وكانت داره بمكة على الصفا وهى الدار التى كان رسول الله صلى الله عليه وسلم يكون فيها فى أول الإسلام وفيها دعى الناس إلى الإسلام وأسلم فيها خلق كثير وقال ليلة الاثنين فيها: «اللهم أعز الإسلام بأحب الرجلين إليك: عمر بن الخطاب أو عمرو بن هشام» فجاء عمر بن الخطاب من الغد بكرة فأسلم فى دار الأرقم وخوجوا منها وكبروا وطافوا بالبيت طاهرين فدعيت دار الأرقم دار الإسلام وتصدق بها الأرقم على ولده"

> "Whoever old man weakens from work or any calamity disables him from working or he was wealthy and turned poor and people of his religion start making charity on him his *Jizyah* will be withdrawn and he and his dependents will be supported by *Bayt al-Māl* as long as they reside in the *Dār al-Hijrah* and *Dār al-Islām*. If they leave for a land other than *Dār al-Hijrah* and *Dār al-Islām*, Muslims will not be responsible for the maintenance of him and his dependents".

The term later in the era of *Tabi'īn*[22] became prevalent in the scholarship of Islam and all the Muslim jurists and *Muḥaddithūn* referred to the land over which Muslims established their dominance as *Dār al-Islām*. The reason for the term is, perhaps, based on the supposition that the laws of Islam are enforced in that territory whereby the land becomes the home for Islam.

2.2.3. How a Land Becomes *Dār al-Islām*?

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[21] See, Abū Yūsuf, Ya'qūb b. Ibrāhīm b. Ḥabīb al-Anṣārī, *al-Khirāj*, (Cairo: al Matba'ah al Salafiyyah, 1382 AH) 157

[22] For example 'Umar b. 'Abd al-'Azīz –who was born in 61 A.H – has been reported to say about the descendents of polytheists in 'Arab; "يستتابوا فإن تابوا، وإلا نفوا من دار الإسلام" which means "*[T]hey will be demanded from to repent and they will be sent out of Dār al-Islām if they do not repent*". See, Abū Bakr Ja'far h. Muḥammad b. al-Hasan al-Firyābī, *Kitāb al-Qadr*, (Saudi Arabia: Adwā' al-Salaf, 1997) 285

As we have quoted from has been discussed in the definition of *Dār al-Islām* we can find the modes by which any land can be turned in to *Dār al-Islam.* These modes are as follows;

1. **City is constructed by Muslims**: The first and foremost mode by which any land becomes *Dār al-Islām* is that Muslims construct any city at the beginning. The example of this mode is Baghdād[23] and Basra[24].
2. **People accept Islam**: The second mode for any land to become *Dār al-Islām* is that the majority of people residing there embrace Islam and by virtue of which the land comes under the dominance of Muslims. This was the case of Madīnah al-Nabi.[25] A considerable number of the people of Madīnah embraced Islam and later the Prophet – peace and blessings of Allah Almighty upon him – migrated from Makkah to there and established the first Muslim government there.

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[23] The city of Baghdād was constructed by 'Abbasside caliph Abū Ja'far al-Manṣūr –who was the second caliph of the 'Abbasside caliphate as he succeeded from his brother Abū al-'Abbās al-Saffaḥ – and declared it to be the capital of the caliphate. The city was constructed during 136-168 AH. See for details, Aḥmad b. Yaḥyā b. Jābir b. Dāwūd al-Balādhurī, *Futūḥ al-Buldān,* (Beirut: Dār Wa Maktabah al-Hilāl, 1988) 281

[24] The site of the city of al-Baṣrah was selected by the companion of the Holy Prophet 'Utbah b. Ghazwān for his camp while fighting against Sassanid during the caliphate of 'Umar b. al-Khattab. Later Abū Mūsā al-Ash'arīconstructed the city and named it al-Baṣrah. See for details, Al-Muṭahhir b. Ṭāhir al-Maqdisī, *al-Bad' Wa al- Tarīkh,* (Port Seed: Maktabah al-Thaqfah al-Islāmiyyah, n.d) 5:175

[25] The previous name of Madīnah al-Nabi (PBUH) was Yathrib. Tbe Prophet –peace and blessings of Allah Almighty be upon him – changed the name as Ṭabah and later with the reference to the Holy Prophet (PBUH) the city used to be known as Madīnah al-Nabī i.e. the City of Messenger. See for details, Muḥammad b. 'Afīfī al-Bajūrī, *Nūr al-Yaqīn fi Sīrah Sayyid al-Mursalīn,* (Damascus: Dār al-Fayḥā', 1425 A.H) 66-70

3. **Conquest by Use of Force**: The third mode for any land to become *Dār al-Islām* is conquest and annexation. Khyber[26] and Egypt[27] are the example of this mode. It should be noted that mere conquest of the land is not enough to make it *Dār al-Islām*, annexation -or as indication of annexation, the enforcement of Islamic laws – are necessary.[28]

4. **Peaceful Conquest/Cession**: The fourth mode of acquiring territory is peaceful conquest of any territory whereby any territory is transferred to the Muslim government and non-Muslims of the territory live there as *Dhimmiyūn*. Palestine is the example of this mode when it was given to Muslims during the period of 'Umar b. al-Khatāb -may Allah be pleased with him -after a peace treaty between him and

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[26] Khaybar was a place where -in some strong and secure castles -Jews used to reside. Khaybar was conquered in the 7th year of Hijra. The historical event is known as *Ghazwah Khaybar*. See, Aḥmad b. 'Alī b. Ḥajar Abū'l Fadal al-'Asqalānī, *Fatḥ al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī*, (Beirut: Dār al-Ma'rifah, 1379 AH) 7:464

[27] Egypt was conquered in the 19th year of Hijrah during the caliphate of 'Umar b. al-Khattab – May Allah be pleased with him – under the command of 'Amr b. al- 'Āṣ. See for details, Muḥammad b. 'Umar b. Wāqid Abū 'Abdullah al-Wāqidī, *Futūḥ al-Shām*, (Beirut: Dār al-Kutub al-'Ilmiyyah, 1997) 2:32-40

[28] Conquest used to be a valid and recognized mode of acquiring territory under modern public international law with one of the two conditions. One, the war ended and the defeated county ceded the conquered territory. Thus, if the war does not end the conquerors would be deemed occupant belligerents as Germany was deemed so when it occupied Poland in WWII. Secondly if the defeated country does not cede the territory then the conqueror has to intend to annex the territory. This was general principle before the establishment of the League of Nations. The League of Nations paved way to illegalization of conquest in public international law and finally the General Assembly of the UN in 1970 passed a resolution by which the conquest was declared to be an illegal and invalid mode of acquiring territory. See for details, Michael Akehurst, *Modern Introduction to International Law*, (New York: Routledge, 1997) 151-4. Despite the fact the conquest is illegal in public international law; it is, generally speaking, still a valid mode of acquiring territory under Islamic law. A thorough research is, thus, needed to discuss whether or not Muslim states can become party to any convention prohibiting conquest.

Christians of Palestine[29]. This is more or less similar to the modern day concept of cession under public international law.[30]

2.3. *Dār al-Harb*

Keeping in the view the test of dominance, Muslim jurists have defined *Dār al-Ḥarb* in different words. Dr. Wahba al-Zuhaylī defines it as *"[I]t is the land where Islamic political and religious laws are not implemented because the land is located outside the Muslim rule"*[31] Abū Zahrah defines it as *"Dār al-Ḥarb is the land where Muslims do not have dominance and power and there is no peace treaty between them and Muslims which could connect them and bind Muslims"*[32] The Kuwaiti Encyclopedia of Fiqh provides a brief definition of *Dār al-Ḥarb* as *"It is the piece of land where laws of Kufr are prevailing"*[33] Combining all these different definitions, one can draw a complete picture of the notion and identify the essentials of *Dār al-Ḥarb* as follows;

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[29] See, Muḥammad b. Jarīr b. Yazīd b. Kathīr b. Ghālib Abū Ja'far al-Ṭabarī, *Tārīkh al-Ṭabarī Tārīkh al-Rusul Wa'l Mulūk*, (Beirut: Dār al-Turāth, 1387 AH) 3:607-9

[30] For the discussion on cession please read, Akehurst, *Modern Introduction to International Law*, 148

[31] The words of al-Zuhaylī read; "هى الدار التى لا تطبق فيها أحكام الإسلام الدينية والسياسية لوجودها خارج نطاق السيادة الإسلامية" See, al-Zuhaylī, *Āthār al-āḥarb Fi'l Fiqh al-Islāmī*, 172

[32] The words of Abū Zahrah read; "دار الحرب هى الدار التى لا يكون فيها السلطان و المنعة للحاكم المسلم، و لا يكون عهد بينهم و بين المسلمين يرتبط به المسلمون و يقيدهم" See, Abī Zahra, *al-'Ilaqāt al-Duwaliyyah*, 56

[33] The definition reads; "دار الحرب هى: كل بقعة تكون فيها أحكام الكفر ظاهرة" See, Wāzarah al- Awqāf wa 'l- Shu'ūn al-Islāmiyyah, *Mausū'ah al Fiqhiyyah al Kuwaytiyyah*, (Kuwait: Dār al Salāsil, 1990) 20:201

1. **Non-Muslim Dominance:** It is the land where dominance belongs to non-Muslims. In other words, the dominance is crucial and decisive factor. Thus, a country where Muslims are in majority but the dominance is with non-Muslims and the ruler is a non-Muslim would be regarded as *Dār al-Kufr.*
2. **Lack of Peace Treaty:** The government of this land does not have any sort of peace treaty with Muslim government whereby Muslims and they would not be in a state of war. This distinguishes *Dar al-Ḥarb* from *Dār al-'Ahd.* The latter is the piece of land where dominance belongs to non-Muslims who have peace treaty with Muslims.[34]

2.3.1. How a Land becomes *Dār al-Harb*?

The great jurists of Ḥanafī School of Islamic law have discussed when and how any part of *Dār al-Islām* becomes part of *Dār al-Ḥarb.* According to Imam Muḥammad b. al-Hasan al-Shaybānī and Imam Abū Yūsuf, there is only one condition to exclude any territory from *Dār al-Islām* and that is enforcement of laws repugnant to Islam. Imam Abū Ḥanīfah, however, stipulates three conditions for this purpose. These conditions are as follows;

1. ***Aḥkām al-Kufr***: The first and foremost condition is that the laws of *Kufr*, instead of Islamic laws, are enforced in that territory. In this condition, Imam Abū Ḥanīfa and his two disciples are of the same opinion. The only difference is that the former two hold that this condition is sufficient to constitute the territory as part of *Dār al-Ḥarb.*

[34] For the detailed principles of peace treaty under Islamic law see, al-Sarakhsī, al-Mabsūṭ, 10:86-9

2. **Isolation from *Dār al-Islām*:** That the territory loses its physical connection with *Dār al-Islām* i.e. the territory is locked from all of its sides by territories none of which is *Dār al-Islām*.
3. **Unprotected Muslims and *Dhimmiyyūn*:** That the protection previously available to Muslims –due to their faith – and *Dhimmiyūn* –due to their contract with Muslim state – in the *Dār al-Islām* is no longer available for them.[35]

Imam Muḥammad Amīn Ibn. ʻĀbidīn categorically asserts that without these conditions the territory will never convert into *Dār al-Ḥarb* even if the territory is ceases to be under the control of Muslims. He says;

"قوله لا تصير دار الإسلام دار حرب إلخ: أى بأن يغلب أهل الحرب على دار من دورنا أو ارتد أهل مصر وغلبوا وأجروا أحكام الكفر أو نقض أهل الذمة العهد، وتغلبوا على دارهم، ففى كل من هذه الصور لا تصير دار حرب، إلا بهذه الشروط الثلاثة ".[36]

"That means that if the *Ḥarbi* people occupy any land of ours, or people of any ours land become apostates and occupy the territory and enforce the

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[35] Al-Ḥaṣkafī elaborated these three conditions in very brief text which reads; "لا تصير دار الإسلام دار حرب إلا بأمور ثلاثة بإجراء أحكام أهل الشرك، وباتصالها بدار الحرب، وبأن لا يبقى فيها مسلم أو ذمى آمنا بالأمان الأول على نفسه". This means "*Dār al-Islām* will never convert in *Dār al-Ḥarb* except with three conditions. By enforcement of the laws of polytheists, by being adjacent to *Dār al-Ḥarb* and no Muslim and *Dhimmi* remains protected and safe with his previous protection". See, Muḥammad b. ʻAlī b. Muḥammad b. ʻAbdurraḥmān al-Ḥaṣkafī, *al-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār Wa Jami' al-Biḥār*, (Beirut: Dār al-Fikr, 1992) 4:156-7

[36] Muḥammad Amīn b. ʻUmar b. ʻAbdul'azīz ʻĀbidīn al-Ḥanafī, *Radd al-Muḥtār ʻAlā al-Durr al-Mukhtār*, (Beirut: Dār al-Fikr, 1992) 4:156

laws of *Kufr* there or the *Dhimmi* people violate the contract of *Dhimmah* and become dominant on that territory, in each of these situations the territory will not become *Dār al-Ḥarb* without these three conditions".[37]

2.4. Purpose of the Bifurcation

There are two extreme approaches in determining the purpose of the bifurcation of the earth into two broad categories of *Dār al-Kufr* -with its two sub categories of *Dar al-Ḥarb* and *Dār al-'Ahd* – and *Dār al-Islām*. One the one extreme, some scholars hold that this bifurcation is not based on the teachings of Qu'ān and Sunnah. Instead it is the recognition of the ground realities of the world and relations of Muslims with non-Muslims during the early ages of Islam. Whatever, did by the jurists of classical era of Islam is only interpretation of the realities of their time.[38] Now, since the world has changed and after the UN charter, all the members of UN have agreed that the war[39] is prohibited except for the purpose of self defense, this bifurcation is of very less significance, if any.

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[37] For the detailed debate between Imam Abū Ḥanīfah and his disciples please see, al-Sarakhsī, *al-Mabsūṭ*, 10:114-5, 'Abdurraḥmān b. Muḥammad b. Sulaymān Shaykhī Zādah, *Majma' al-Anhur Fī Sharḥ Multaqā al-Abḥur*, (Beirut: Dār Iḥyā al-Turāth al-'Arabī, n.d) 1: 659, al-Kāsānī, *Badā'i'*, 7:130, Muḥammad b. Farāmurz b. 'Alī Mulā Khusrow, *Durar al-Hikām Sharḥ Ghurar al-Aḥkām*, (Beirut: Dār Iḥyā al-Kutub al- 'Arabiyyah, n.d) 1:295

[38] Wahbah al-Zuhaylī was also of the same opinion. See, Al-Zuḥaylī, *Āthār al-Ḥarb Fī 'l-Fiqh al-Islāmī*, 183

[39] Article 2(4) of the UN charter prohibits use, or threat, of force against any state. The article reads; "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations". Article 51 of the same charter, however, creates an exception to the article 2 (4) as it recognizes the inherent right of self defense. It reads; "Nothing in the present Charter shall impair the inherent right of collective or individual self-defense if an armed

On the other extreme, some scholars, perhaps deriving from the literal meaning of the term *Dār al-Ḥarb*, are of the opinion that the purpose of the bifurcation is to indicate that the nature of relations between Muslims and non-Muslims is war and they are in the state of war perpetually. The peace treaties are allowed only for the very short period of time so that the Muslims could prepare themselves for the war once again. According to this opinion, Muslims are under obligation to convert the entire earth into *Dār al-Islām* and to achieve this goal they are in the state of war with non-Muslims until the whole world becomes *Dār al-Islam*.

A third opinion, -which in our humble view, is the realistic one – is that this bifurcation neither to indicates to the perpetual war between Muslims and non-Muslims nor it was a mere recognition of the reality of the era of classical jurists. The purpose of this bifurcation was related to the concept of the jurisdiction of the Muslim and non-Muslim governments. According to this opinion, the Muslim ruler would have jurisdiction on *Dār al-Islām* and

attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. For detail about the use of force and in international law please read, Akehurst, *Modern Introduction to International Law*, 306-9. The detailed discussion on the scope of the right of self defense can be read at, Muhammad Mushtaq Ahmad, "The Scope of Self-Defence: A Comparative Study of Islamic and Modern International Law", *Islamic Studies*, vol. 49 no. 2 (2010) 155-194

conversely, the non-Muslim government would exercise her jurisdiction in *Dār al-Ḥarb*. This bifurcation –which is based on the verses of Qur'ān and sayings of the Holy Prophet PBUH – thus, has very less to do with the nature of relations between Muslims and non-Muslims.[40]

2.5. Nation-State

Normally the notion of nation-state nowadays has become more or less similar to country, state or nation however in its true and technical sense it is defined as "*a sovereign state of which most of the citizens or subjects are united also by factors which define a nation such as language or common descent*".[41] The Concise Oxford University Dictionary has defined the notion of nation as "*Distinct race or people having common descent, language, history or political institutions*".[42] In its true sense, nation-state is supposed to be composed of a population which shares some basic elements which make the population one single nation. Isma'īl al-Fārūqī has identified five foundations for a nation state. He says, the foundation of nation state is based on biological, geographical, psychological –which also includes language –, historical and political commonalities which in a combination constitute an identification of all the members of one nationality having these five aspects in common.[43]

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[40] See for details, Mushtaq, *Jihād, Muzaḥamat awr Baghāwat*, 84-5 and Mushtaq, "The Notion of Dār al-Ḥarb and Dār al-Islām in Islamic Jurisprudence with Special Reference to the Ḥanafī School", *Islamic Studies*, Vol. 47, no. 1, (2008), 5-37

[41] Prabhakaran Paleri, *Integrated Maritime Security: Governing the Ghost Protocol*, (New Delhi: Vij Books India Pvt Ltd, 2014) 88

[42] H.W Fowler and FG Fowler, *The Concise Oxford Dictionary of Current English*, (Oxford: Clarendon Press, 1919), 538

[43] Isma 'īl al-Fārūqī, *Trialogue of the Abrahamic Faiths*, 48-50

It is evident from what we have discussed in this part that ideally the nation- state is supposed to be composed of a population with common language, culture, descent and shared history and for quite a long time this was the case. But, with the passage of time this nature of nation-state has diminished and today there are very few state with single nation. All this happened because of huge immigration taking place whereby people moved from one territory to the other and refugee movement where people fled the internal disturbance, armed conflicts and persecutions in their native states. Apart from that, globalization has also played significant role in compromising the ideal nature of nation-state. Many countries in Europe lack the characteristics of an ideal nation-state as these countries have multiple languages –and some states have more than one national language too –. Further, some countries are subdivided in regions in a way that people within one country do not understand one another's mother tongues.[44] Now, the world has reached to the position where attempts to reverse towards the classical situation would result in civil wars and genocides which would lead to an unending armed conflicts.[45]

2.5.1. Historical Background of Nation-State

The roots of nation-state are traced back in the 1648 Peace of Westphalia.[46] The peace was influenced by the theory of the territorial sovereignty[47] given by Hugo Grotius.[48] The

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[44] Johan Fornas, *Signifying Europe*, (Bristol: Intellect, 2012)

[45] "Nation-State - New World Encyclopedia". 2017. *Newworldencyclopedia.Org*. Accessed June 26. http://www.newworldencyclopedia.org/entry/Nation-state.

[46] The Peace of Westphalia –also known as the Treaty of Westphalia – was a historical treaty which had a great impact on the world politics for many centuries to come. The treaty put the 80

European nations after a long history of series of wars recognized the sovereignty of each other and the territorial clauses of the peace –which primarily were in favor of France and Sweden – confirmed territorial sovereignty of European countries. This created multiple nation-states in Europe which composed of the population with common heritage. This situation continued for various centuries in Europe with exception of Russia and Switzerland which came to existence without common ethnicity. Out of the Europe, however, numerous nation-states came to existence in result of different circumstances and many of these states could not be called ideal nation-states.[49] India and United States of America are the example of

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years war which was fought between Spain and Dutch to the end. Also, the treaty brought the 30 years war which was fought between different European states due to different reasons. The peace – which was negotiated in the Westphalian Towns of Munster and Osnaburk, Germany from 1644 and took four years to complete – is consisting of two treaties being the one –which was signed on January 30, 1648 – between Spain and Dutch and the other between Ferdinand III, the Holy Roman Emperor, German princes, France and Sweden. In the peace all of the European nations, except Russia, England, Poland and Ottoman Turkey, were given representation. See, "Peace Of Westphalia | European History". 2017. *Encyclopedia Britannica*. Accessed June 26. https://www.britannica.com/event/Peace-of-Westphalia.

[47] The Grotian theory of political sovereignty has made its mention, as territorial integrity and political independence, in the UN charter and other prominent conventions as these notions derive their historical continuity from very Grotian theory. See, Ali Khan, "The Extinction of Nation-States", *American University International Law Review*, vol. 7 no. 2 (1992) 197-234

[48] Hugo Grotius –b. 1583 d. 1645 – was a Dutch jurist who is considered to be the father of modern day international law. His book "De Jure Belli ac Pacis –English: On the law of War and Peace – is considered to be one of the great contributions to modern day international law. See, "Hugo Grotius | Dutch Statesman And Scholar". 2017. *Encyclopedia Britannica*. Accessed June 26. https://www.britannica.com/biography/Hugo-Grotius. His other major contribution toward public international law include Mare Liberum –English: the Free Sea – which suggested that the sea was, for being international territory, free for all nations and it does not belong to any one. This principle was manipulated by Dutch for a long time. After the development of the law of sea after the United Nations Convention on the Law of Sea (UNCLOS) tbe principle of free sea in its true sense has very limited application restricted to the high sea.

[49] Ideal nation-state is the state in which the entire population belongs to one single culture. In the current era there is no single pure nation-state exists on the face of earth however, some states may be very close to the ideal nation-state: Japan and Iceland to name a few. See, "Nation-State - New

the state –which came into existence out of Europe – with diversities including, in language, culture, religion and traditions.

It appears from what we have discussed that the nation-state theory encompasses two basic aspects. First of all, the nation-state is supposed to be composed of the population which would have allegiance to a single nationality or ethnicity. Secondly, the nation state should enjoy complete sovereignty over the territory which is under the jurisdiction of the state. In the current scenario both of these elements have severely been compromised. As far as the unity of ethnicity and identification is concerned, the globalization, immigration and refugee movements have diversified the populations of modern day states. The technological advancement also changed the shape of nation-state from what it had been in past.[50]

As far as the territorial sovereignty of the state is concerned, two major factors played a significant role in mitigating this aspect of nation-state. The first and foremost factor which challenged the territorial sovereignty of nation-state is economic interdependence of the states in the global market. No state, in the modern era, can survive in isolation. First of all, a considerable share of capital in the current era does not belong to any state; instead it is

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World Encyclopedia". 2017. *Newworldencyclopedia.Org*. Accessed June 26. http://www.newworldencyclopedia.org/entry/Nation-state.

[50] For details about how the nation-state has changed in its shape read; "Nation-State is Dead; Long Live Nation-State", The Economist (Dec, 23rd 1995, January 5th 1996) available at: http://intlmgt.cipa.cornell.edu/readings/nationstatedead.PDF

owned by some multi-national corporations. Apart from this, the poor and economically weak countries are always in need of the help of rich countries for which these countries always compromise on their sovereignty. Even the rich countries are also dependent on other countries in terms of raw material, labor force and human recourses. The world today is in a shape in which the countries out-source from abroad a great number of things which they consume. This was not the case in the era when the theory of territorial sovereignty was being incorporated in world politics.[51]

The second factor which weakened the territorial sovereignty of nation-state is the recognition of international human right law (IHRL). The universal recognition of fundamental human rights has reshaped the relationship between states and individuals and their respective states. Today, the human rights regime successfully challenges to sovereignty of the states in law making and policy drawing. This regime excluded many a things -which were previously under the domestic jurisdiction of the states - from the state jurisdiction to international fora. International Labor Organizations (ILO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), Council of Europe, Organization of American States and Organization of African Unity are the example some international and

[51] Ali Khan, "The Extinction of Nation-States"

regional agencies which cooperate in protecting the fundamental human rights of individuals.[52]

In a nutshell, the nature of nation-states has overwhelmingly changed from what it was back in 17th century. Today, neither ideal nation-state exists nor the theory of territorial sovereignty has remained the same as it was back in that era. We are living in a more globalized era in which some corporations and human rights agencies perhaps enjoy more power than the nation-states.

2.6. Conclusion

The Muslim jurists have divided the world into two broad categories i.e. *Dār al-Islām* and *Dār al-Ḥarb* or *Dār al-Kuf*. The former is the land over which Muslims have dominance and power to establish Islamic legal regime while the latter is the territory which is under the control of non-Muslim power. This bifurcation of the world into two categories was neither to denote the perpetual war between Muslims and non-Muslims nor it was a mere acknowledgement of the reality of the classical era of Islam. Instead, the purpose behind this bifurcation was to acknowledge the territorial jurisdiction of Muslims rulers. Thus, Muslim ruler had jurisdiction over the territoty which was under their dominance and they lacked the same on

[52] Ibid

the territory of non-Muslims. The world –particularly with the perspective of Muslims – remained the same for a period spanning over centuries until the Peace of Westphalia paved way for the establishment of nation-states which later spread to the Muslim world as a result of massive colonization. Now, the notion of *Dār al-Islām* and *Dār al-Ḥarb* do not exist in the same sense as these existed in the era of classical Muslim jurists and there many changes have taken place which affected the laws of the *Dār al-Islām*.

Chapter Three

(Immigration and Citizenship)

3. CHAPTER THREE

3.1. Introduction

Immigration and citizenship laws are one of the most important laws of any country because these laws determine who can enter inside the country as a foreigner and who can enjoy full protection and civil and political rights of the state. Believing in universal brotherhood,[1] the *Shari'ah* of Islam –as we shall discuss –has formulated its immigration and citizenship laws a quite flexible and more humane foundations. As far as the modern nations are concerned, every country on the face of earth have promulgated some sort of laws to govern the human movement towards, and the nature of people's stay inside, the country.[2] Like other countries, Islamic Republic of Pakistan and Kingdom of Saudi Arabia also, as we shall discuss, have comprehensive laws regarding citizenship and immigration. Since both the countries recognize Islam to be the state religion and the *Shari'ah* shall be complied in making laws,[3] the

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[1] Ismā'īl al-Rājī traces the concept of universal brotherhood in the teachings of Jesus Christ. He, further claims that it was promoted by his followers and Islam also believes in it. See: *Trialogue of the Abrahamic Faiths*, 57

[2] Iris Teichmann, *Immigration and the Law*, 8

[3] Article 2 of *the Constitution of Pakistan 1973* acknowledges Islam to be state religion. It reads "*Islam shall be the state religion of Pakistan*" further, the article 227 of the constitution promises that all laws shall be brought in conformity with the principles of Islam and no new law shall be made inconsistent with Shari'ah. The article reads; "*[A]ll existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Quran and Sunnah, in this part referred to as in Injunctions of Islam, and no law shall be enacted which is repugnant to such injunctions*" As far as the Kingdom of Saudi Arabia is concerned, the article 1 of the Saudi Arabian *Basic Law of Governance 1992*, –which is quite similar to constitutions elsewhere– affirms the Qur'an and the Sunnah to be the constitution of the Kingdom. The article read; "المملكة العربية السعودية دولة عربية إسلامية ذات سيادة تامة دينها الإسلام ودستورها كتاب الله تعالى وسنة رسوله صلى الله عليه وسلم. ولغتها هى اللغة العربية وعاصمتها مدينة الرياض" The official translation of the article reads "*The kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion;*

immigration laws of these countries, as a legal and constitutional obligation, should be in accordance with *Shari'ah*.

Despite the fact that Islamic law of immigration and citizenship is quite generous and flexible, these two countries –particularly Saudi Arabia– are generally known for the immigration and citizenship laws. To evaluate whether or not this general perception is valid, in the following we shall try to find out how far the immigration laws of these countries are consistent with the principles of Islamic law. While doing so, we shall point out certain contradiction of these laws with international human rights law as well.

3.2. Citizenship and Immigration in *Dār al-Islām*

Before going into the detailed discussion of Islamic law of immigration and nationality, it seems appropriate to discuss the various kinds of people residing in an Islamic state. This is because the law varies from one kind of persons to the others. According to the classification made by Islamic law, there are three classes of people living in *Dār al-Islām*, a term used for Islamic state.

1. **Muslims**: The Muslim citizens of *Dār al-Islām*, are those who, by virtue of being Muslim, have the right of citizenship.

God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its constitution, Arabic is its language and Riyadh is its capital".

2. ***Dhimmī***: A *Dhimmī* is the non Muslim citizen in *Dār al-Islām*, who has contract with the government according to which he pays a certain amount of tax and in return enjoys protection and certain rights and immunities.[4]

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[4] The term *Dhimmī* has been defined in different words, for example, the Kuwayti Incyclopedia of Fiqh defined it in words that read; "والذمى فى الاصطلاح هو المعاهد من الكفار لأنه أومن على ماله ودمه ودينه بالجزية" "*Dhimmī is the contracting person from non-Muslims who got protection of his life, property and religion by Jizyah*" See, *Mausū'ah al-Fiqhiyyah al-Kuwaitiyyah*, 37:168. Dr. Sa'dī Abū Ḥabīb defined it as "الذمى: هو المعاهد الذى أعطى عهدا يأمن به على ماله وعرضه ودينه" "*Dhimmī is the person who concluded a contract [with Muslim government] by virtue of which he secures his property, honor and religion*". See, *al-Qāmūs al-Fiqhī*, 138. The basic essentials, from all the definitions, appear to be a contract between Muslim government and non-Muslim individual according to which the non-Muslim pays *Jizyah* (tax) and becomes permanent citizen of *Dār al-Islām*. The basic purpose of the contract of *Dhimmah* is firstly to facilitate the non-Muslims to observe the Islamic way of life and realize the beauty of Islam and secondly to bring the war with the non-Muslims to an end as the *Dhimmah* contract binds them to abbey the laws of Islam and be a peaceful person in the Islamic society. See, Al-Kāsanī, *Badai'*, 7:111. As far as the non-Muslism eligible for the contract of *Dhimmah* are concerned the people of book (*Ahl al-Kitāb*) i.e. Christians and Jews are allowed to be brought under the *Dhimmah* contract by the verse of Quran that reads; "قَاتِلُوا الَّذِينَ لَا يُؤْمِنُونَ بِاللَّهِ وَلَا بِالْيَوْمِ الْآخِرِ وَلَا يُحَرِّمُونَ مَا حَرَّمَ اللَّهُ وَرَسُولُهُ وَلَا يَدِينُونَ دِينَ الْحَقِّ مِنَ الَّذِينَ أُوتُوا الْكِتَابَ حَتَّى يُعْطُوا الْجِزْيَةَ عَنْ يَدٍ وَهُمْ صَاغِرُونَ" [9:29] "*Fight those people of the book who do not believe in Allah, nor in the Last Day, and do not take as unlawful what Allah and His Messenger have declared unlawful, and do not profess the Faith of Truth; (fight them) until they pay Jizyah with their hands while they are subdued* [Translation by Mufti Taqi Usmani]". Apart from them, the Zoroastrians are made eligible for the *Dhimmah* contract by the *Ḥadith* of the Holy Prophet -Peace and blessings of Allah Almighty be upon him – which reads; "سنوا بهم سنة أهل الكتاب". "*Do with them [Zoroastrians] the way you do with the people of book*" See, Mālik b. Anas b. Mālik al-Aṣbaḥī, *Muwaṭṭā al-Imām Mālik*, Bāb Mā Jā'a Fī Jizyati Ahl al-Kitāb (Beirut: Mu'assasah al-Risālah, 1412AH). In some other versions of the *Ḥadith* the marriage with Zoroastrians and legality of their *Zabīḥah* are specifically excluded and Muslims are prohibited from these by the words "غير ناكحى نسائهم و لا آكلى ذبائحهم". See, Abū Bakr b. Abī Shībah 'Abdullah b. Muḥammad b. Ibrāhīm al- 'Abasī, *al-Muṣannaf fī'l Aḥādīth Wa'l Āthār*, (Riyadh: Maktabah al-Rushd, 1409AH), 3:488. The polytheists of Arabia and apostate are not eligible for *Dhimmah*. The former because of the verse of Qur'an "You will have to fight them until they submit [48:16]" and the latter for the reason that apostate is supposed to be killed, if he does not repent, and *Dhimmah* is meant to protect that is why he is not eligible for *Dhimma*. See, Abū Muḥammad Mawfaq al-Dīn 'Abdullah b. Aḥmad b. Qudāmah al- Maqdisī, *al-Mughnī*, (Cairo: Maktabah al-Qāhirah, n.d) 9:3. There is no disagreement among the jurists about the abovementioned rules. The jurists differ whether or not the polytheists of *'Ajam* are eligible for the *Dhimmah* contract. According to *Ḥanafī* School of law they are eligible for *Dhimmah* on the basis of analogy with Zoroastrians.

3. ***Must'amin***: A *Must'amin* is a person who enters into the territory of Muslims with permission for specific purpose –such as trade– and has intention to return to his country of citizenship.[5] The concept of *Amān* by acquiring which a person becomes *must'amin* is quite similar to what we now know as visa.

Islamic law is quite generous with respect to the immigration and citizenship. *Dār al-Islām* is, according to the teachings of the *Qur'ān* and the *Sunnah*, is bound to open its doors for the immigrants irrespective of religion. There are dozens of verses of *Qur'ān* and the traditions of the Holy Prophet –peace and blessings of Allah Almighty be upon him– which show the liberal and generous nature of Islam in this regard. In the following we shall explore some precedents from the teachings of *Qur'ān* and the *Sunnah* with respect to all of the above classes of people from which the immigration and nationality laws relating to these people are derived.

Imam al-Shafi'ī is however, of the other opinion that these people are not eligible for *Dhimmah*. See, Kamāluddīn Muḥammad b. 'Abdul Wāḥid al-Sīwāsī, *Fatḥ al-Qadīr*, (Beirut: Dār al-Fikr, n.d) 6:48

[5] *Musta'min* is derived from the root word of "*aman*" which means peace. The word *Musta'min* literally means the one who seeks peace or protection it is said "*Ista'mana*" "*he sought protection*" See, Aḥmad b. Muḥammad b. 'Alī al-Fuyūmī, *al-Miṣbāḥ al-Munīr fi Gharīb al-Sharḥ al-Kabīr*, (Beirut: al-Maktabah al-'Arabiyyah, n.d) 1:24. Al-Qawnawī defined *Musta'min* legally as "المُستأمِن: من الاستيمان وهو طلب الأمان من العدو حربيا كان أو مسلما" which means "*Musta'min is derived from al-Istīmān and that is to seek protection from enemy whether that is Ḥarbi [when he seeks protection from Muslims]or a Muslim [when he seeks protection from non-Muslims]*". See, Qāsim b. 'Alī, b. Amīr 'Alī al-Qawnawī al-Rūmī al-Ḥanafi, *Anīs al-Fuqahā' fi Ta'rīfāt al-Alfāẓ al-Mutadāwalah Bayn al-Fuqahā'*, (Beirut: Dār al-Kutub al-'Ilmiyyah, 2004) 66.

As for as Muslims are concerned, Islamic law encourages them to migrate to *Dār al-Islām* so that they will be able to order their lives in accordance with Islamic teachings without any hindrance and all their affairs will be administered in an atmosphere of Islam. But, if Muslim citizens of a non-Muslim state do not migrate to the territory of Islam and wish to live there, they, on the one hand, shall be excluded from the jurisdiction of Muslim government and, on the other hand, the Muslim government shall not be responsible to protect their rights and they will not have any rights in the *Bait al-Māl*. The Holy Prophet –peace and blessings of Allah be upon him– has been reported to command;

> *"When you confront your enemy from polytheists, offer them three options and approve if they accept any of these and hold your hand from them. Then invite them to embrace Islam and if they accept it refrain from them and encourage them to migrate from their territory to the land of Muslims by informing them that they shall enjoy all the rights of the Muslim citizens and they will be responsible for all such duties. If they denied migrating, inform them that they shall be like Muslim villagers and the rules of Allah regarding other Muslims shall apply to them and they shall not be entitled for financial benefits from Bait al-Māl."*[6]

Muslim jurists on the base of this, and other, verses of Qur'ān has established that Muslim is by birth citizen of *Dār al-Islām*. As far as the current legal and political situation is concerned,

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[6] Muslim b. al Hujjaj al Qushayrī, (d. 875), *Sahīh Muslim*, (Riyadh: Bait al Afkar al Duwaliyyah, 1998), 720

based on the Ḥanafī definition of *Dār al-Islām* all the Muslim majority states –where Muslims are in government – are *Dār al-Islam*. Muslim scholars of modern era differ on the issue whether or not more than one *de jure Dār al-Islām* are allowed under Islamic law. Some scholars opine that it is permissible to have more than one *Imām*[7] while others hold that it is not permissible to have more than one *Imām.*[8] Even after the *de facto* establishment of numerous Muslim states Muslim jurist did not consider the Muslims of Muslim Spain to be non-citizens in Abbasside caliphate.[9] The Kuwaiti Encyclopedia of Fiqh concludes;

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[7] See, Muhammad Munir, *Sharia'ah and Nation-State: The Transformation of Maqasid al-Shari'ah Theory,* (Jakarta: International Conference on "The Practice of Islamic Law in the Modern World", 2014)

[8] These scholars base their opinion primarily on the Ḥadīth which has been narrated by Imam Muslim which reads; "إذا بويع لخليفتين فاقتلوا الآخر منهما". This means "*When bay'ah is concluded for two Khalifah kill the second one*". See, Muslim, *Saḥiḥ Muslim*, Bāb Idha Buyi'a Li Khalīfatayn, 3:1480. The *Ḥadīth* has also been narrated by many other *Muḥaddithūn* including Imam Aḥmad b. Ḥanbal, See Abū 'Abdullah Aḥmad b. Muḥammad b. Ḥanbal al-Shaybābī, *Musnad al-Imām Aḥmad b. Ḥanbal,* (Cairo: Dār al-Ḥadīth, 1995), Imam Abū Dāwūd, see, Abū Dawūd Sulaymān b. al-Ash'ath b. Isḥāq al-Sijistānī, *Sunan Abī Dāwūd,* Bāb Dhikr al-Fitan Wa Dalā'iluhā, (Beirut: Dār al-Risālah al- 'Ālamiyyah, 2009) 6:302 and Imām al-Bayhaqī. See, Aḥmad b. al-Husayn b. 'Alī b. Mūsā al-Khurāsānī al-Bayhaqī, *al-Sunan al-Kubrā,* Bāb Lā Yaṣliḥu Imāmāni fī 'Aṣrin Wāḥid, (Beirut: Dār al-Kutub al-'Ilmiyyah, 2003) 8:248

[9] Muslim jurists did not apply the rules applicable to Muslims –particularly in Muslim personal law and conflict of laws – on the Muslims of Spain in Baghdad and vise versa. For details see, Mushtaq, *Jihad Muzaḥamat Awr Baghāwat,* 126-133.

"ومن المتفق عليه بين الفقهاء أن المسلمين يتوارثون فيما بينهم مهما اختلفت ديارهم ودولهم وجنسياتهم لأن ديار الإسلام كلها دار واحدة لقوله تعالى {إنما المؤمنون إخوة} وقوله صلى الله عليه وسلم: المسلم أخو المسلم ولأن ولاية كل مسلم هى للإسلام وتناصرهم يكون به وله".[10]

"Among what have been unanimously decided by jurists is that the Muslims inherit each other no matter how their residences, countries and citizenship differ because all the lands of Islam *(Diyār al-Islām)* are –based on the Allah's word *"[A]ll Believers are but brothers"*[11] and the Ḥadīth *"Muslim is brother of Muslim"*[12] –one single land because *wilāyah* of every Muslim is for Islam and their mutual support of for –and based on –Islam".

Thus, a Muslim –irrespective of his birthplace or nationality – is by birth citizen of *Dār al-Islām* whenever he enters into the territory of Muslims or when any non-Muslim embraces

[10] Wazārah al-Awqāf, *al-Mawsū'ah*, 3:28. Professor Muḥammad Salām Madkūr has also given the same opinion in his book on Islamic law on wills. See, Muḥammad Salām Madkūr, *al-Waṣayā fi 'l-Fiqh al-Islāmī*, (Cairo: Dār al-Nahḍah al-'Arabiyyah, 1962) 54.

[11] *Al-Qur'ān*, 49:10

[12] The *Ḥadīth* has been narrated by many *Muḥadithūn* including al-Ḥākim, see, Abū 'Abdullah al-Ḥākim Muḥammad b. 'Abdillah b. Muḥammad al-ṭamhānī al-Nīsābūrī, *al-Mustadrak 'Ala 'l-Ṣaḥīḥayn*, (Beirut: Dār al-Kutub al-'Ilmiyyah, 1990) 2:10, Imam Ibn. Mājah, see, Ibn. Mājah Abū 'Abdillah Muḥammad b. Yazīd al-Qazwīnī, *Sunan Ibn. Mājah*, Bāb Man Warā fī Yamīnihī, (Beirut: Dār Iḥyā' al-Kutub al-'Arabiyyah, n.d) 1:685 and al-Bazzār, see, al-Bazzār Abū Bakr Aḥmad b. 'Amr b. 'Abdilkhāliq b. Khallād al- 'Atakī, *Masnad al-Bazzār al-Baḥr al-Zakhkhār*, Masnad Abī Ḥamzah Anas b. Mālik, (Madīnah: Maktabah al- 'Ulūm Wa 'l-Hikam, 2009) 15:255.

Islam in *Dār al-Islām,* he becomes citizen and cease to remain *Dhimmī* or *Musta'min* whatever he may be previously.[13]

As far as the *Dhimmī* is concerned, Islam binds the government to accept the application of *Dhimmah* contract made by any non Muslim.[14] The rationale behind this obligation is that, Islam does not want to be in the state of war with non Muslims and the contract of *Dhimmah* is a clear indication of the end of war from the end of a non-Muslim and as an obligation the Muslim government is mad bound to accept such application. Furthermore, as the *Dhimmah* contract is binding on the Muslim government, the government does not have right to renounce the citizenship of a non-Muslim however, certain acts from the *Dhimmī* –such as the *Dhimmī* flees to *Dār al-Ḥarb*– lead to the termination of the contract.[15] The contract is not only binding as normal contracts, it also bears some sort of sacredness which is why the 'Umer b. al-Khattāb, the second caliph of Islam –may Allah be pleased with him– said, when he was ask to give some advice, "*I advise you to fulfill Allah's convention –which He made with the Dhimmiyyūn– because that is the convention of your Prophet and the source of the food for your dependents (referring to the taxes collected from them).*"[16]

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[13] Ibid

[14] Abdul Karīm Zīdān, *Ahkām al Dhimmiyyīn wa al Must'aminīn fī Dār al Islām,* (Beirut: Mu'assassah al Risālah, 1982) P. 30

[15] Muḥammad Amīn b. 'Ābidīn (d. 1836), *Radd al Muḥtār 'alā al Durr al Mukhtār,* (Beriut: Dār al Fikr, 2000) V. 4 P. 212

[16] Muḥammad b. Ismā'īl al Bukhārī (d. 870), *Sahīh al Bukhārī* (Beirut: Dār Tuq al Najāt, 1422 AH), V. 4 P. 98 Number 3162

Lastly, Islam allows the government to give *Amān* to non Muslims to enter to the territory of Islam. Qur'ān says *"And if any one of the Mushrikīn seeks your protection, give him protection until he listens to the Word of Allah, and then let him reach his place of safety. That is because they are a people who do not know."*[17] The basic purpose of the *Amān* is to facilitate Muslims of *Dār al-Islām* and non-Muslims of *Dār al-Kufr* in the international trade. The rules of *Amān*, under the *Shari'ah*, are quite flexible. According to Islamic law –as a matter of general principle–, every competent Muslim citizen can provide *Amān* (issue visa) for an alien national[18] however under the concept of public interest the ruler can restrict general public from issuing *Amān* and delegate this authority to particular department.[19]

The *Musta'min* who is not citizen of *Dār al-Islam* can avail the status of *Dhimmī*. There are certain procedures by which a *Musta'min* can avail the status of *Dhimmī*. These procedures include, the application extended by the *Musta'min* and overstay[20] from the prescribed time

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[17] Al Qur'ān, 9:6. The verse of Qurān reads; "وَإِنْ أَحَدٌ مِنَ الْمُشْرِكِينَ اسْتَجَارَكَ فَأَجِرْهُ حَتَّى يَسْمَعَ كَلَامَ اللَّهِ ثُمَّ أَبْلِغْهُ مَأْمَنَهُ ذَلِكَ بِأَنَّهُمْ قَوْمٌ لَا يَعْلَمُونَ".

[18] Abū Yūsuf Ya'qūb b. Ibrahīm (d. 798), *al Khirāj* (Cairo: al Matba'ah al Salafiyyah, 1382 AH) P. 205

[19] Zīdān, *Ahkām al Dhimmiyyīn wa al Must'aminīn fī Dār al Islām*, P. 30

[20] This is when, while granting amān to the individual, if the Muslim ruler stipulates that if the *Musta'min* stays more than a certain period –generally one year – the *Jizyah* will be imposed on him and he will be *Dhimmī* in the *Dār al-Islām*. Overstaying by *Musta'min* in that case will be an implied contract of *Dhimmah* on his behalf and he will become *Dhimmī*. Imam al-Zayla'ī says; "إذا دخل الحربي دار الإسلام بأمان لا يمكن أن يقيم فيها سنة ويقول له الإمام إن أقمت سنة كاملة وضعت عليك الجزية" which means *"[W]hen a Ḥarbī enters into the territory of Islam with protection, it would not be allowed to him to stay more than one year and the Muslim ruler will stipulate that if he stays one year he would impose Jizyah on him"*. See,

period fixed by the government. Thus, a *Musta'min* can become citizen of *Dār al-Islām* by application at any time and by continuous stay there for a period, generally, more than one year.[21]

3.3. Citizenship in Pakistan

Before independence from colonial rule of United Kingdom of Great Britain people living in Pakistan were subjects of British as the territory was part of British India. After independence from the colonial rule, in order to provide provision for Pakistani citizenship Pakistan has codified its citizenship law in the *Pakistan Citizenship Act 1951* (hereinafter the act) which was adopted on April 13, 1951 and it came into effect on the same date. The act has been amended several times being last one in 2000.

Pakistani citizenship law, as provided by the act, grants citizenship on the different bases which are as follows.

1. **Citizenship at the time of the act:** The section 3 of the act says that any person, whose parents or grandparents were born in Pakistan -provided that the person has not

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'Uthmān b. 'Alī b. Miḥjan Fakhruddīn al-Zayla'ī, *Tabyīn al-Ḥaqa'iq Sharḥ Kanz al-Daqā'iq*, (Cairo: al-Maṭba'ah al-Kubrā al-Amīriyyah, 1313AH) 3:268

[21] Shams al Dīn Abū Bakr Muḥammad b. Abī Sahl al Sarakhsī (d. 1096), *Al Mabsūt Lil Sarakhsī* (Beirut: Dar al Fikr, 2000) V. 23 P. 212

become permanent resident of any other country than Pakistan before enactment of the act –, or any person who –or any of his parents and grandparents –was born in India on or before 21st March, 1971 and who had domicile within the meaning of part II of the Succession Act, 1925[22] in an aria which is now included in Pakistan[23], or any person who was naturalized as British subject in Pakistan –and he has not acquired any foreign citizenship and/or renounced any such citizenship before commencement of the act –, or any person who migrated to Pakistan before commencement of the act, is regarded to be Pakistani citizen.[24]

2. **Citizenship by birth:** According to the section 4 of the act, any person born in Pakistan after the commencement of the act, provided that his father is not an enemy of Pakistan and/or not enjoys immunity from Pakistani laws, is Pakistani citizen by birth.[25]
3. **Citizenship by Descent:** According to the section 5, if one of the parents of the person is Pakistani citizen then the person has the right to get Pakistani citizenship. The section further explains that if the parent of the person is Pakistani citizen by descent only, in that case –if the parent at the time of birth was in service of the Government of Pakistan – has to get registered in the Pakistani Consulate or Mission in the country

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[22] The details about domicile are almost similar to what we have discussed in Chapter One in the part of domicile. The part II of the Succession Act, 1925 however does not apply to Muslims, Hindus, Jaina, Buddist and Sikhs. See, S 4, *The Succession Act, 1925.*

[23] People who were in service of the government of Pakistan are excluded from this condition. See, S 3, *the Pakistan Citizenship Act, 1951*

[24] Ibid

[25] S 4, *the Pakistan Citizenship Act, 1951*

where he is born or the Pakistani Consulate or Mission in the nearest country if there is no such consulate of mission in the country where he is born.[26]

4. **Citizenship by migration:** The section 6 of the act provides that any person migrated from any territory of Indo-Pak subcontinent before January 1st, 1952, if he has acquired certificate domicile under the act,[27] can be granted citizenship by migration. The section, however, authorizes the Federal Government to exclude any person of class of persons from obtaining the certificate of domicile required for citizenship by migration.[28] Further, the citizenship by migration granted to any person will automatically apply to his wife –if the marriage has not been dissolved –, his minor children and other persons who are completely or partially dependent on him.
5. **Citizenship by marriage:** The section 10 of the act provides to the woman who gets married to a Pakistani citizen the right to acquire Pakistani citizenship on the ground of her marriage. Conversely if a Pakistani woman marries to foreigner, the male spouse of the Pakistani woman will not have the right of citizenship by marriage. The wife, however, has to take oath of allegiance to Pakistan and produce a certificate of domicile if she is an alien. Further, any woman who has been deprived of her

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[26] S 5, *the Pakistan Citizenship Act, 1951*

[27] The section 17 of the act deals with the certificate of domicile. The section reads; "*The Federal Government may upon an application being made to it in the prescribed manner containing the prescribed particulars grant a certificate of domicile to any person in respect of whom it is satisfied that he has ordinarily Resided in-Pakistan for a period of not less than one year immediately before the making of the application and has acquired a domicile therein*". See, S 17, *the Pakistan Citizenship Act, 1951*

[28] S 6, *the Pakistan Citizenship Act, 1951*

citizenship under this act[29] will not be granted citizenship under section 10 of the act except with the previous consent of the Federal Government.

6. **Citizenship by Naturalization:** The section 9 of the act authorizes the federal government to naturalize any person to become Pakistani citizen in accordance with *the Naturalization Act, 1926*. The section 3 of *the Naturalization Act, 1926* authorizes the federal government to issue the certificate of naturalization to a foreigner if he (a) is of the age of majority, (b) is neither a Pakistani citizen nor is citizen to any state of which a citizen is according to Pakistani law is prevented from naturalization, (c) has lived in Pakistan for a period of 12 months after his application of naturalization, (d) is of good character and (e) has adequate knowledge of the language which has been

[29] The section 16 of the act deals with the deprivation of Pakistani citizenship. There are certain grounds on which any person may be deprived of his citizenship. These grounds are as follows; (1) the Federal Government can deprive any person of his citizenship if it is satisfied that he has taken the certificate of domicile or the certificate of naturalization under the naturalization act 1926 by fraud, misrepresentation or concealing facts, (2) the Federal Government of Pakistan can deprive any naturalized Pakistani of his citizenship if (a) the government is satisfied that the person has shown his disloyalty to Pakistan or he is not satisfied with the Constitution of Pakistan, or(b) he was engaged in trade of communication which facilitated the enemy of Pakistan during the period in which Pakistan was engaged with war wirh that enemy or (c) he is sentenced –within the period of 5 years of his naturalization –in any country for a term not less than 12 months or (3) the Federal Government may deprive a citizen of his citizenship if the person is resident in any country other than Pakistan for a continuous period –beginning after commencement of the act – of 7 years if (a) the person is not in the service of the Government of Pakistan at any rime or in the employment of any international organization to which Pakistan is, or has been at any rime, member. The said section says that the Federal Government will only deprive the citizen of the citizenship is it is in public interest. Further, the government will serve the individual a notice of such proposed deprivation and ground for such decision and the person will be given opportunity to defend himself show cause why he should not be deprived of his citizenship. Furthermore, the Government will constitute an enquiry commission consisting of a chairman having judicial experience appointed by the Federal Government if it is needed to constitute such committee.

declared by the government to the language spoken by the ordinary Pakistani people.[30]

3.3.1. Inconsistencies with Islamic Law

From what we have discussed about Islamic law of citizenship and Pakistan citizenship act 1951 we can identify certain inconsistencies of the act with the principles of Islamic law. The inconsistencies are both general and specific to some particular issues. In the following we shall elaborate these inconsistencies.

3.3.1.1. General inconsistencies

There are two general aspects of the act in which it is not compatible with the principles of Islamic law. These are as follows;

1. **Citizenship procedure for Muslim:** As we have discussed, a Muslim is citizen of *Dār al-Islām* and being regarded as *Dār al-Islām* and claiming to be a Muslim state by its constitution Pakistan should encourage Muslims to be its citizens. The citizenship procedure is meant to scrutinize the persons desiring to acquire Pakistani citizenship but religion of Islam does not play the role it deserves. According to the principles of Islam, a Muslim should have been granted citizenship of an Islamic state right after his application for it, if any such application is deemed necessary by the state, but the

[30] S 3, *the Naturalization Act 1926*

section 9 of the act coupled with section 3 of the Naturalization Act, 1926 device certain conditions for naturalization in which Islam does not have any mention.

2. **Deprivation of Citizenship:** As we have discussed, even non-Muslim citizens of *Dār al-Islām* cannot be deprived of their citizenship once granted but the Pakistan citizenship act 1951, in its section 16, provides a list of person who can be deprived of their citizenship. This list is also secular. The persons in the list are generally criminals – such as being sentenced, fraudulent and disloyal to the constitution and country – which should be dealt with domestic criminal law and punished for their offenses without their citizenship status being taken away.

3.3.1.2. Specific inconsistencies

The section 10 of Pakistan citizenship act is, apart from violating international human rights, specifically inconsistent with the principles of Islam. The section does not recognize the foreigner spouse of Pakistan women to be entitled for the citizenship by marriage whereas it provides the said right for female foreigner spouses of Pakistani men which is against Islamic law.[31] The federal Shariah Court (FSC) sensed this contradiction and in a *suo motu* judgment

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[31] Here a rule of Islamic law can be misinterpreted that is why it should be explained here and the true application of the rule should also be identified as the jurists did. In the chapter of Ṣalāh, in the discussion of al-Waṭan al-Āṣlī of a person –in the conflict of law this notion is quite close to the notion of domicile –, jurists say that al-Waṭan al-Aṣlī of a wife will be dependent of that of the husband. Maḥmūd b. Māzah says; "إن المرأة إذا استوفت صداقها فهي بمنزلة العبد تصير مقيمة بإقامة الزوج لأنه ليس لها حق حبس النفس كما في العبد" which means "*[W]hen the wife receives his full dower she becomes like slave and becomes Muqīmah with the intention of the husband of being Muqīm because she cannot refuse to submit herself to the husband like a slave [cannot do so to his master]*". See, Abū al-Ma'ālīBurhān al-Dīn Maḥmūd b. Aḥmad b. 'Abdul'azīz b. 'Umar b. Māzah al-Bukhārī, *al-Muḥīṭ al-Burhānī Fī 'l-Fiqh al-Nu'mānī*,

in 2006 declared the section 10 of the act to be in contradiction with Islamic law –for being discriminatory-, the article 2A [32] and 25 [33] of the Constitution of Pakistan 1973 and international human rights law as well.[34]

3.3.2. Inconsistencies with IHRL

(Beirut: Dār al-Kutub al-'Ilmiyyah, 2004) 2:30. Badruddīn al-'Aynīquoted from al-Siyar al-Kabīr that; "واذا دخلت المرأة من أهل الحرب دار الإسلام بأمان وهي كتابية فتزوجها ذمي أو مسلم فقد صارت ذمية لأن لزوجها أن يمنعها عن العود إلى دار الحرب"..... وأما الحربي إذا تزوج ذمية لا يصير ذميًا لأن المرأة ليس لها أن تمنع زوجها من دار الحرب" which means "*[W]hen a lady from Ahl al-Ḥrb enters in Dār al-Islām and with Amān and she is Kitābiyyah and a Muslim or Dhimmī marries her, she becomes Dhimmiyyah because her husband can prevent her from going back to Dār al-Ḥarb..... as far as Ḥarbi is concerned, when he marries a Dhimmiyyah, he will not become Dhimmi because the wife does not have right to prevent him from going back to Dār al-Ḥarb*". See, Abū Muḥammad Maḥmūd b. Aḥmad b. Mūsā b. Aḥmad Badruddīn al-'Aynī, *al-Bināyah Sharḥ al-Hidāyah,* (Beirut: Dār al-Kutub al-'Ilmiyyah, 2000) 5:656. This rule has it application with respect to the ineffectiveness of the intention of the wife in making making any place her *al-Waṭan al-Aṣlī* as her *Tawaṭṭun* is dependent upon that of the husband. This, however, does not prevent the husband from adopting the *Watan* of the wife as his own. Rather, the jurists –based on the *Ḥadīth* "من تأهل فى بلدة فهو من أهلها" which means "*Whoever makes family in a country becomes among them*" which has been narrated by many *Muḥaddithūn* including al-Imām al-Ṭaḥawī, see, Abū Ja'far Aḥmad b. Muḥammad b. Sulāmah al-Azudī al-Ṭaḥāwī, Sharḥ Mushkil al-Āthār, Bāb Bayāni Mushkili mā Ruwiya 'an Rasūlillah fī 'l-Sabab alladhī min Ajlihī Ṣallā 'Uthmān b. 'Affān fī Ḥajjihi Binnāsi bi Minā Arb'an, (Beirut: Mu'assasah al-Risālah, 1994) 10:416 – take the marriage in any area an indication of adopting that area as his *al-Waṭan al-Aṣlī*. Thus, if a person intends to adopt the country of his wife he should have right to do so.

[32] The article –which was the result of 8th amendment to the constitution of Pakistan which took place in 1985 –says that the objective resolution is now operative part of the constitution. It reads; "*The principles and provisions set out in the Objectives Resolution introduced in the Annex are hereby made substantive part of the Constitution and shall have effect accordingly*". The court deemed the section 10 of the Pakistan Citizenship Act, 1951 to be in contradiction with Islam as the objective resolution primarily talks about Islamicity of laws.

[33] This article talks about the equality of citizens before the law and prohibits discrimination on the basis of sex and allows positive discrimination in this regard. The article reads; "*(1) All citizens are equal before law and are entitled to equal protection of law. (2) There shall be no discrimination on the basis of sex. (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children*". Being discriminatory against Pakistani women the section 10 of the act is also in contradiction with the constitution of Pakistan as well.

[34] *FSC (2006) 1/K*

There are several international human rights conventions –to which Pakistan is party– which insure the equal rights of man and woman. These international human rights instruments include the Universal Declaration of Human Rights (UDHR) 1948[35] and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), which was adopted by the United Nations General Assembly in 1979, of the latter is specifically intended to ensure gender equality and eliminate discrimination against women. The article one of CEDAW defines discrimination to be "*any distinction, exclusion or restriction made on the bases of sex which has the effect of purpose of impairing or nullifying the recognition, enjoyment or exercise by women*"[36]. Furthermore the article 2 of the International Covenant on Civil and Political Rights (ICCPR), 1966 is also devoted to ensure the gender equality.[37] Despite the fact

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[35] The article reads "*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty*". See, Article 2, *Universal Declaration of Human Rights, 1948* available at: http://www.un.org/en/universal-declaration-human-rights/ Last accessed June 30, 2017.

[36] Article 1, *Convention on the Elimination of all forms of Discrimination Against Women, 1979*

[37] The article reads; "*1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant. 3. Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted*". See, Article 2, *International Covenant on Civil and Political Rights, 1966*

Pakistan is party to all these international human rights treaties; the citizenship in the country is discriminatory as only female spouse Pakistani citizen can apply for citizenship on the basis of marriage which means that marriage with women citizen of Pakistan does not give rise to any right of citizenship.

3.4. Citizenship in Saudi Arabia

Kingdom of Saudi Arabia has codified its citizenship laws in the *Nizām al-Jinsiyyah al-'Arabiyyah al-Sa'ūdiyyah*, or Saudi Arabian Citizenship System (the system hereinafter), which was adopted on September 23, 1954 and it came into force in the same year. The section 2 of the system says that the system does not have retrospective effect thus all the citizenship granted according to the previous system are valid.[38] There are various modes by which the Saudi citizenship is either determined or granted. These modes are the following;

1. **Original Saudi Arabian:** The section 4 of the system prescribes the original citizens of Saudi Arabia. These are (a) the people who acquired the Ottoman citizenship before, or in, 1332 AH -1914 CE, (b) the Ottoman citizens born inside the Saudi territory, or resided there, between 1332 and 1345 and did not avail any other nationality and (c) the non Ottoman citizens who resided inside Saudi Arabian territory from 1332 AH until 1345 and did not acquire any other nationality.

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available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx Last accessed 30 June, 2017.

[38] S 2, *Saudi Citizenship System*

2. **Saudi Arabian by Birth:** There are a number of people who have, or may have Saudi citizenship by birth. According to the system a person, born –inside or outside Saudi Arabia– to Saudi father or Saudi mother and unknown father or born inside Saudi Arabia to unknown parents is regarded to be Saudi citizen by birth. Further, a foundling in the Saudi territory is considered to be born inside Saudi Arabia unless proven otherwise.[39] Apart from that, any person born inside Saudi Arabia to non Saudi father and Saudi mother can be granted Saudi citizenship if he (a) has permanent residence i.e. *Iqāmah* in Saudi Arabia, (b) is known for good behavior, (c) has command and is fluent in Arabic language and (d) applies for Saudi citizenship after one year of reaching to the age of majority.[40]
3. **Saudi Citizenship by Marriage:** Any foreigner woman marrying to a Saudi man can apply for the Saudi citizenship on the basis of her marriage however, a foreigner man marrying to a Saudi lady does not have this rights. Thus, he cannot apply for Saudi citizenship on the basis of marriage.[41]
4. **Saudi Citizenship by Naturalization:** Legally speaking, any foreigner can apply for Saudi citizenship if he (a) is of legal age, (b) is fluent in Arabic language, (c) is of sound mind, (d) lives in Saudi Arabia for a period of minimum five years with permanent residence i.e. *Iqāmah* (e) does not have any criminal record, (e) has legal income and (f)

[39] S 6, *Saudi Citizenship System*
[40] S 8, *Saudi Citizenship System*
[41] S 16, *Saudi Citizenship System*

is known for good behavior.[42] Further, the wife of naturalized Saudi citizen also has the right to acquire Saudi citizenship and the dependents of that person residing in Saudi will automatically become Saudi citizens.[43]

This was the legal position but in reality Saudi Arabia is known for not granting citizenship for any foreigner. The reasons behind this perception about Saudi Arabia is (a) the very conditions required for the application are quite tough and it is near to impossible for a person to fulfill these (b) and then the Saudi minister of interior has right to reject the application of citizenship without assigning any reason and (c) the common practice which has been observed for a long period is that Saudi Arabia very rarely accepts any citizenship applications and the destiny of the most applications, despite fulfillment of these conditions, is none other than rejection.

3.4.1. Inconsistencies with Islamic Law

The inconsistencies in Saudi Citizenship System with the principles of Islamic law are mutatis mutandis same as the Pakistan citizenship act, 1951. However, Pakistan federal Shariah court made an attempt to rectify a certain contradiction with Islamic law while in Saudi Arabia no such attempt could have been as yet.

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[42] S 9, *Saudi Citizenship System*
[43] S 9, *Saudi Citizenship System*

3.4.2. Inconsistencies with IHRL

The inconsistencies in Saudi Citizenship System with international human rights law are mutatis mutandis same as the Pakistan citizenship act, 1951.

3.5. Conclusion

The laws related to the immigration and citizenship which were operative in the *Dār al-Islām* were more human and liberal which remained generous for the mankind irrespective of their religion. Muslims were by default citizens of *Dār al-Islām* while the non-Muslims could always avail the citizenship of *Dār al-Islām* at their own choice by moving an application for *dhimmah* contract. A non-Muslim could easily enter *Dār al-Islām* without being citizen by seeking protection from the government. As compared to these generous laws, the citizenship laws of Islamic Republic of Pakistan and Kingdom of Saudi Arabia are much rigid and strict and they are, in various aspects, in contradiction with the principles of Islam and inconsistent with international human rights law as well.

4. Conclusions and Recommendations

4. Conclusions and Recommendations

The conclusions of the study are as follows;

1. The laws relating to immigration and citizenship under Islamic law, which were in operation during the era in which the notions of *Dār al-Islām* and *Dār al-Kufr* were prevailing in the world, were quite generous and more humane than the laws effective in the modern day nation states.
2. Availing citizenship status was much easy, quite one sided, in *Dār al-Islām* as compared to the complex and quite rigid citizenship laws of today.
3. Getting permission to travel inter-boundaries, during the classical era, was also much easy than the visa process of modern day international travelling procedures.
4. The transformation for the notion of *Dār al-Islām* and *Dār al-Ḥarb* to the modern nation-states has affected the citizenship laws of almost all Muslim states of today which is in contradiction in Islamic law. The contradiction also exists with the constitutional law as well in the countries, like Pakistan, Saudi Arabi and Iran, where Islam has been declared to be the state religion.
5. Generally speaking the very procedure of citizenship for Muslims in Islamic countries, in which some -rather most – citizenship applications are rejected is in contradiction with the principles of Islamic law which were prevailing in *Dār al-Islām.*
6. The deprivation of citizens of their citizenship status is also in violation of the principles of Islamic law. If some individual commits any act which is incompatible

with the laws of the land of any Muslim nation-state, he can be punished for the act but deprivation of his citizenship is in contradiction with Islamic law.

7. Specifically speaking, not recognizing the marriage as a ground for citizenship for a foreigner male spouse of a Pakistani and Saudi national woman is inconsistent with Islamic law.
8. Apart from that, there are certain inconsistencies in the citizenship laws of Pakistan and Saudi Arabia with international human rights laws as well.
9. Thus, a positive change is needed in the citizenship and immigration laws of Muslim countries.

Based on the research and conclusions the following recommendations are being made for the kind consideration of the authorities in Muslim world in general and Pakistan and Saudi Arabia in particular.

1. The refugee convention should be ratified by Muslim countries. This is because a great number of refugees from various parts of Muslim world are suffering and they need shelter from atrocities. Shutting doors for these Muslims will compel them to seek protection in western countries –as it happened and great number Syrian refugees are seeking asylum in Germany and Canada –. This will be dangerous for the next generation of these refugees with respect to their religious life.
2. The citizenship and immigration laws of *Dār al-Islām* should be incorporated in the Muslim countries. This will facilitate Muslim countries in bartering the natural

resource and human recourses. This is because in the rich countries, like Saudi Arabia and Gulf countries, the skillful labor is in scarcity while the financially poor countries, like Pakistan, Bangladesh etc, are very rich in human resource and skilled labor. The immigration and citizenship laws of *Dār al-Islām* will enable a mutual exchange of skills and natural recourses within the Muslim world.

3. Muslim countries should establish an organization like European Union in which the citizens of these countries will be allowed to travel from one territory to other without visa and they will be preferred for jobs on nationals of other countries. This will bring much positive change in the financial condition of all Muslim countries. The Organization of Islamic Cooperation (OIC) can also be modified in order to achieve this goal by allowing the citizens of all the 57 member states to have free access to every member states.
4. It should be noted that change in major and important Muslim countries is necessary for the better results and outcome. Bringing change only in few countries will only create disturbance for these countries. Therefore it is recommended that all –or at least most –Muslim countries should bring changes and form an organization of Muslim Union.

و صلى الله تعالى على خير خلقه محمد وآله و صحبه أجمعين. آمين يا رب العالمين

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