

العنوان:	Constitutional Framework of Good Governance Under the Islamic Legal System
المصدر:	دراسات - علوم الشريعة والقانون
الناشر:	الجامعة الأردنية - عمادة البحث العلمي
المؤلف الرئيسي:	العمران، نائل موسى شاكر
المجلد/العدد:	مج46, ع2
محكمة:	نعم
التاريخ الميلادي:	2019
الشهر:	أيار
الصفحات:	537 - 553
رقم MD:	971665
نوع المحتوى:	بحوث ومقالات
اللغة:	English
قواعد المعلومات:	IslamicInfo
مواضيع:	الحكم الرشيد، الشريعة الإسلامية، السياسة الشرعية، النظم السياسية
رابط:	<a href="http://search.mandumah.com/Record/971665">http://search.mandumah.com/Record/971665</a>

## Constitutional Framework of Good Governance under the Islamic Legal System

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### ABSTRACT

Some states have been criticised in a number of ways for their perceived lack of good governance, political injustice and the dictatorial system of the government. This article is an attempt to discover theories and principles of good governance in the Islamic legal system. It is also an attempt to cover some of the important principles which are relevant to discourse on Islamic politics and how these principles can be used to establish good governance in Islamic states. This article also attempts to observe the incorporation of constitutional framework of good governance under Islamic law. To argue this case, the author employs the historical and descriptive analytical method to search within the Islamic heritage for illustrative examples from history and the Islamic civilization.

**Keywords:** Good governance, accountability, transparency, consultation, justice, rule of law, and equality.

### Introduction

Many politicians and researchers agree that the most essential foundations of good governance comprise eight pillars: the rule of law, transparency, responsibility, building consensus according to the different interests of society, equality among all members of society, effectiveness and efficiency, and accountability. These are all related to peoples' exercise of public freedoms. The importance of good governance practices lies in their role in promoting human development and their ability to strengthen democratic practices and improve the effectiveness of the rule of law and justice. Good governance targets the realisation of public interests, and its principles are common to the Islamic legal system. Therefore, the authority in Islam must follow principles that are the pre-requisites for the establishment of a just government. It is believed that good governance as propounded by the West and in Islam have more similarities than differences. Although the sources, origin and jurisprudence of the principles in Islam and the West may not be entirely the same in most respects, the theory and principles of good governance from both perspectives are mostly mutually compatible. According to the United Nations Development Program of 1997, there are five good governance principles, which are: Legitimacy, Performance, Accountability, Transparency and Fairness.<sup>1</sup>

In an article by Abdul Rashid Moten (2017),<sup>2</sup> the writer explains the Islamic principles and values underpinning the field of governance and elucidates a "good governance" framework through a value-shaped dynamic model as found in *al-siyasah al-shar'iyah*. He analyses the attempts made in Malaysia and Turkey to construct their respective societies ordered by religious based moral precepts, and explains that they have taken steps to remove barriers for those willing to embrace Islamic customs, as opposed to the codification of Islamic practices.

Abdu Dauda Gidado and Abubakar Sabo (2017),<sup>3</sup> in their article, identify the difference between conventional view of accountability and accountability in Islam. Their study revealed that Islam operates dual accountability. They pointed out that Islam lays emphasis on transparency in all transactions by citing relevant verses of the Holy Qur'an and the traditions of the Prophet (S.A.W). Their article stated that good governance is achievable through the application of Islamic view of accountability and transparency.

However, the selection of the Islamic legal system in this study is due to the fact that many Western and some Arab writers deny that the Islamic system recognizes the principles of *good governance* in its present form. In addition to

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that, they allege that the principles of *good governance* are simply contrary to Islam and its statehood. Therefore, the main question is that "Does the Islamic legal system recognize the exercise of the principles of *good governance*, especially when it comes to issues relating to constitutional matters, in their present form? Further, if this question is answered in the affirmative, what is the nature of the principles of *good governance*?" And, what are the unique features of the principles of *good governance* within the Islamic legal system?

The author intends to study the availability and applicability of the principles of *good governance* in the Islamic legal system and civilization, and try to investigate its most important applications, which have taken place in history. Furthermore, the author discusses the principles of *good governance* in their capacity as representing an important role in protecting rights and freedoms as they contribute in spreading democratic notions through its application in the world.

Therefore, the author resorts to the historical method in studying the historical and political backgrounds for the principles of good governance. The author also uses an analytical descriptive method to analyze the principles of good governance in the Islamic legal system. This article is also partly based on the *Qur'an* and *Sunnah*. Therefore, the author relies on the thematic interpretation, which basically focuses on understanding the Qur'an as thematic units that can be gathered and understood by examining the studied theme throughout the Qur'an. The Qur'an has a comprehensive view that cannot be grasped through partial readings but rather through thorough investigation of the whole verses related to a certain subject or theme. To achieve this goal, the study is divided into the following sections: The first Section includes the definition of good governance in general and good governance in Islam in particular; the second Section discusses the major principles of good governance in the Islamic legal system.

## 2 Definition of Good Governance

There is no single definition of good governance.<sup>4</sup> However principles such as accountability, transparency, participation and equality are to some degree common in the literature and writings on the subject.<sup>5</sup> According to the World Bank, the term Good governance is defined as "exercising that authority in ways that respect the integrity, rights, and needs of everyone within the state".<sup>6</sup> Whereas, the United Nations Economic and Social Commission for Asia and the Pacific defined the term Good Governance as "the process of decision-making and the process by which decisions are implemented or not implemented".<sup>7</sup>

A suggested definition of Good governance by the author is: a system of government based on serving the interests of the nation. It considers power and leadership to be a function of public service, a platform for proving competence and ability to meet people's needs through a policy of justice and equality. It enjoys popular legitimacy based on fair and public elections.

### 2.1 Good Governance in Islam

Muslim political scientists classify political behaviour into just and unjust conduct. Just conduct is intended to put things in their correct place such as the correct use of funds and the respect for rights and rules. Unjust conduct, on the other hand, reflects the indiscriminate abuse of responsibility. Ibn Farhoun comments: "Politics are of two types; oppressive politics which are prohibited in Islam; and just politics which secure the rights from the oppressors, remedies many injustices, and combats oppression and strives towards achieving the purposes of Islamic law. It is necessary to refer to the *Shari'ah* as a standard for securing rights".<sup>8</sup>

The Islamic *Shari'ah* covers wide issues such as ritual, social interaction, politics, civil and criminal law.<sup>9</sup> In Islam, there is no separation between religion and the state. Islam is a religion and a state (*din wa dawlah*).<sup>10</sup> From the Islamic perspective, the principles of administration and qualities of an administrator suggest that a man's personal character is the key to good governance. Therefore, leaders must be just, energetic and must possess qualities of head and heart. In addition, they should have the qualities of refinement, experience, alertness, the power of comprehending problems, secrecy, freedom from greed and lust.<sup>11</sup>

Muslim politicians should be aware of the pillars, rules and foundations of good governance as described by the Quran. These pillars are indispensable for mankind if they seek to achieve happiness and a decent standard of living. The following sub-section provides the major Quranic pillars of good governance.

### **3.2.1 Major Principles of Good Governance in the Islamic legal System**

The *Qur'an* and *Sunnah* have given some major principles in the field of constitutional affairs which cannot be omitted from any sound system of government. The *Qur'an* does not mention details and particulars; they have been rather left for the Muslim *Ummah* to formulate according to the needs of time and place.<sup>12</sup> With respect to the application of these constitutional principles or Islamic guidelines concerning the political system, these general rules or basic principles are considered to be the Supreme Values and have a great effect upon the formulation of the Islamic concept of the state, its functions and characteristics of its system of government. The basic principles, concepts and rules are discussed below.

#### **3.1.2.1 The Rule of Law in the Islamic System**

In the Islamic legal system, the sovereignty belongs to Allah (s.w.t). According to the *Qur'an*, Allah (s.w.t) is the Creator and Lord of the whole world including human race and all that is associated with them. Thus, Allah (s.w.t) possesses all the powers and attributes of sovereignty and none other than Him possesses any of these. Therefore, the sovereignty of the whole world only belongs to Allah (s.w.t) alone and no one else has a share in it.<sup>13</sup>

The Command is for Allah only. He has commanded you not to surrender to anyone save Him. "...that is the right religion, but most men understand not..."<sup>14</sup>

The principle of the rule of law in the Islamic legal system is considered as the basis or cornerstone on which Islam was founded as Creed and *Shari'ah*, because Islam came to remove injustice and fighting tyranny and to demolish the pillars of absolutist authority. Therefore, that principle found its basis in the *Qur'an*, *Sunnah* and the consensus (*ijma'*) even during the centuries that people grappled with despotism.<sup>15</sup>

Allah (s.w.t) says: "*O ye who believe! Obey Allah, and obey the Messenger, and those charged with authority among you. If ye differ in anything among yourselves, refer to Allah and His Messenger, if ye do believe in Allah and the last Day: that is best, and most suitable for final determination.*"<sup>16</sup>

In another verse Allah (s.w.t.) says: "*O ye who believe! Obey Allah. And obey the Messenger, and make not vain your deeds!*"<sup>17</sup>

Therefore, the Muslim judge must implement the *Qur'an* and *Sunnah* in every dispute brought before him, but if he does not implement that, his conduct would be lacking.

The *Sunnah* came to support, emphasise and clarify these *Qur'anic* Verses.

Prophet (p.b.u.h.) said: "Obedience of a human being is disallowed if it is considered disobedience to the creator (Allah)."

Prophet (p.b.u.h.) also said: "Every act that does not conform to our order is rejected."<sup>18</sup>

In the Islamic system, everyone, including the head of state, government and the masses, is subject to the law. The Prophet (p.b.u.h.) himself was subject to it, and was the most obedient person to the *Qur'an*. He was '*Abd Allah wa rasuluh*,' the servant of God and his messenger. The head of state and the head of government cannot invoke any immunity from impeachment. The principle, 'Be you ever so high, the law is above you' has always been there in Islamic law, to include the Prophet (p.b.u.h.) himself.

Just before he died, the Prophet (p.b.u.h.) made the following short speech:

"I swear by God that I have made lawful only those things that the *Qur'an* made lawful and I have made unlawful

only those things that the *Qur'an* made unlawful. If I have taken the money of any of you, here is my money, let him come and take it, and if I have lashed the body of any, here is my body, let him take back his right".<sup>19</sup>

In the same way, Abu Bakr, the first successor and caliph of the Muslim state, in his acceptance speech said:

'O people! I have been appointed over you, but I am not the best of you. Support me if I did good and remove me if I did badly ... a weak person of you is strong before me as long as I maintain his right for him. And a strong one of you is weak before me until I take back a right from him ... Obey me as long as I obeyed Allah and his Messenger. If I disobeyed them there is no obedience of me upon you.'<sup>20</sup>

The above verses supported with the *hadiths* indicate that every dispute that happens in the Islamic society between individuals, groups of people, or between people and the government, or among parts of the government and its people, must be judged by the fundamental law which we received from Allah (s.w.t) and His Messenger. According to this principle, the country must have an institution that judges among people by the *Qur'an* and *Sunnah*, and that institution is the judicial authority.<sup>21</sup>

In the application of the principle of legality, which is one of the basis that the Islamic system of rule is based on. It is seen that Muslim rulers, after the first Islamic century, were confined to implement the same principles of *Shari'ah* that were applied by their predecessors. So, the ruler submitted to the rules of the judiciary as ordinary individuals. Also, they always, in their conduct and in deeds, try to implement the Islamic legal system. This matter states that the principle of legality was not a mere personal method but it is a principle that stabilised in the conscience of people, and it existed since the establishment of the Islamic government.<sup>22</sup>

It becomes clear that the principle of the rule of law in the Islamic legal system was the cornerstone which the independence of the judicial authority was based on. So, Muslim judges rejected the application of any law, order or decision which is passed by the caliph or his officers, if that law, decision or order contradicted the general principles of the *Qur'an* and *Sunnah*.

### 3.1.2.2 The principle of the Separation of Powers

Having separate powers of government exercising different functions is not an idea which is against the *Shari'ah*. The *Qur'an* does not prescribe a certain form of government. What is obvious is the objectives of the state and the principles that must be followed by the government. Thus, the idea to promote good governance, which is enjoined by the *Shari'ah*, is compatible with Islam. In Islam, moreover, the principle of check and balance as practiced under the doctrine of the separation of powers could be implemented. Furthermore, it has been claimed that the doctrine of separation of powers was applied during the Prophet's time in the city state.<sup>23</sup>

In Islam, there are a few recognised institutions which may have similarities to the democratic form of government. For instance, the *amir* could be equated with the Prime Minister or the President which is the office of the head of government or executive body; the legislative assembly, which is recognised both in Islam and modern democracy and last but not least, the judiciary.

The predominant opinion of Islamic jurists also hold that the Islamic legal system knew the principle of separation of powers in the country's legislative, executive and judicial branches, but all these powers were governed by the Prophet (p.b.u.h.) and his four orthodox caliphs.<sup>24</sup>

The Prophet (p.b.u.h.) used to invest judicial powers in a provincial government, but later on he used to appoint a judge independently of any political or administrative consideration.<sup>25</sup> After the conversion of Arabia, when a large number of people came under the sway of Islam, the Prophet (p.b.u.h.) appointed various functionaries for the different parts of the peninsula. Whenever the Prophet (p.b.u.h.) appointed a governor and a military commander, the caliph usually took good care to appoint a judge as well over whom these officials had no jurisdiction.<sup>26</sup>

It is reported that the Prophet (p.b.u.h.) asked Mu'adh ibn Jabal questions upon the latter's appointment as judge to Yemen, in answer to which Mu'adh told the Prophet that he would resort to his own *ijtihad* in the event that he failed to find guidance in the *Qur'an* and *Sunnah*, and the Prophet was pleased with this reply, and patted him on the chest

and said: "Praised be God, who has caused the messenger of God's Messenger to please the latter!"<sup>27</sup>

Therefore, there is a relationship between the judicial and executive authorities with respect to appointment and dismissal, without any interference with the judiciary's primary function and that is hearing and deciding cases and disputes.

Also, the first caliph, Abu Bakr, after being chosen as caliph, invested 'Umar with judicial powers. 'Umar ibn al-Khattab' was the first caliph to directly charge other persons for the exercise of the judge's functions. He appointed Abu Darda' as a judge with him in Medina, *Shurih* as a judge in Basrah and Abu Musa al-Ash'ar' as a judge in Kufah.<sup>28</sup>

There are many events which happened in Islamic history in which the principle of separation of powers was applied. Yet, the author will mention only some of them as examples: in the story of Mu'awiyah, the governor of Sham, with 'Ubadah ibn al-Samit, the judge of Palestine and Jordan, as narrated by al-Awza'i, who said "the first to take the position of judge in Palestine was 'Ubadah ibn al-Samit, and Mu'awiyah had then refused to execute a ruling by 'Ubadah, but 'Ubadah stood by his decision, so Mu'awiyah spoke aggressively to him, thus 'Ubadah said: "I would never again live with you in one area," and left for Medina. So the caliph 'Umar said to him: "what brought you here?" 'Ubadah told him what had happened, and 'Umar replied: "go back to your position, repugnant is a land in which you and your likes are not." Then 'Umar wrote to Mu'awiyah: "you have no authority over 'Ubadah."<sup>29</sup>

If we look at this story we will find that 'Umar ibn al-Khattab emphasised on the separation between the judicial authority and the executive authority, and made a direct relationship between the caliph and the judge. As a result, there appeared the features of independence of the judiciary in the Islamic country. Thus, it can be said that Islam had known the principle of separation of powers since the seventh century C.E.

#### **3.1.2.4 The Doctrine of Judicial Independence in the Islamic legal system**

The doctrine of Judicial Independence is a constitutional principle in the Islamic legal system. Judges are independent and subject to law only. No person in an Islamic State, not even the elected Head, can be above the law, and he is as such subject to the *Hudud* "punishments for major crimes" as anyone else. The *Qur'an* repeatedly enjoins the administration of justice in an impartial manner, even though the decision may go against a judge's own kinsmen or his own community.<sup>30</sup>

It appears that during the period of the pious caliphs, the judicial system was independent and integral. The judge had no register in which his judgments were recorded, because those judgments were carried out by the judge himself.

During his life, Prophet (p.b.u.h.) was the leader and Chief of the judicial authority in the Islamic State. However, he also appointed several close companions to assist him in the administration of the law.<sup>31</sup>

During the reign of the *Rashidan* caliphs, the judicial authority took a form similar to that in the period of the prophet (p.b.u.h.). There was no demarcation of judicial authority with that of other powers. The *Rashidan* caliphs upheld and respected the independence of the judiciary, especially both caliphs 'Umar and 'Ali who had had occasions to appear and plead their cases before the *qadi* like any other parties to litigation, and both had exhibited sensitivity and concern not to be given preferential treatment in court. So, the *qadi* would accept a suit against the person of the head of state and would try him in an open court; this feature of the Islamic judiciary is an indication of its independent status.<sup>32</sup>

However, there was a significant change in the period of the *Umayyad* and the 'Abbassi caliphate. The judges enjoyed freedom especially in the exercise of independent *ijtihad*. Moreover, Caliph Mu'awiyah was the first to abdicate all his judicial powers to appointed judges. The judiciary was completely independent from the executive authority without any exceptions.<sup>33</sup>

In the 'Abbassi period, there was a special appointed person who was called *qadi al-qudah* (chief judge). Harun al-Rashid was the first caliph to be instituted in the office of *qadi al-qudah*; Abu Yusuf was the first (*qadi al-qudah*) appointed by the caliph Harun al-Rashid. In addition, Harun al-Rashid did not appoint any judge without consulting

Abu Yusuf (the delegated head of judiciary); also the *qadi* exercised judicial authority in the capacity of a *Hakim* (ruler), not a *muwaddaff* (task of *al-qudah* officer).<sup>34</sup>

Through the abovementioned example, it is obvious that two basic rules are confirmed:

First: written law, as the Muslim judge neither gives his judgment according to custom and usage nor on the basis of an order given to him by the caliph or the ruler, he rather gives his judgment according to the *Qur'an* and *Sunnah*, and if he does not find any rule in them, he gives his opinion on the basis of his own *ijtihad*.

Second: that judiciary in Islam is an independent authority that is not subordinate to any particular person. The judge rather follows the texts before him that comprise the *Qur'an* and then the *Sunnah* and by the inspiration of his conscience, understanding and discernment in order to arrive at justice.

Indeed, judicial independence is considered a healthy development to certain contemporary demands and needs. It made the role of the judicial authority more prominent and effective in the state. Although judicial authority had changed hands, the caliph was still highly responsible in regard to the judiciary institution.

It should be noted that many eminent judges stood against the interference of the executive, rejecting, in firm determination, such interferences. They refused all kinds of direct and indirect influence. Marvellous was their courage, dignity and readiness to resign as soon as exposed to pressure from the rulers, their relatives, friends, or assistants.

### 3.1.2.5 *Al Shura* (Consultation)

*Al Shura* is one of the most important constitutional principles in the Islamic legal system. The evidence to the importance of *Shura* is to be found in the *Qur'an* and *Sunnah*. In one of the three clear verses on it in the *Qur'an*, *Shura* is mentioned as mandatory, it is mentioned that those who practice it are praised.<sup>35</sup> The whole system of the Islamic state, including the election of the head of the state, and all those in positions of power, as well as its dealings must be conducted by *Shura*, whether it is carried out directly or indirectly through selected or elected representatives.

**Consultation as a foundation for political and constitutional activity:** Consultation has been mentioned in several places in the Quran as follows: “*It is part of the Mercy of Allah that thou dost deal gently with them Wert thou severe or harsh-hearted, they would have broken away from about thee: so pass over (Their faults), and ask for (Allah’s) forgiveness for them; and consult them in affairs (of moment). Then, when thou hast Taken a decision put thy trust in Allah*” (Al-Imran: 159).

This is the Lord’s treatment of what happened with the believers in the Battle of Uhud. The lack of consultation was the cause for the Muslims defeat in this battle. This is what the Quran sought to correct by encouraging the practice of consultation as a principle and a method of life and behaviour that should be followed by every politician, especially if he is a Muslim. It is as if the Quran wants to teach us that any result of consultation, whatever its consequences, remains the least prone to the tyranny of opinion and the marginalisation of ideas and the role of society. This is because consultation is consistent with the nature of human beings whom God created with freedom. Consultation is a sign of trusting God, “If you decide (on a matter), then place your trust in Allah”. It necessarily means not relying on the mental ability of a single person but relying on God to guide the collective conscience of the group, “Allah loves those who depend on Him”. Even if the outcome is contrary to the ideas of the official, it is nevertheless binding. It is difficult to adopt an opinion and defend it and work to implement it when it is contrary to one’s thought.

Another benefit of consultation is mentioned in the verse, “*Those who hearken to their Lord, and establish regular Prayer; who (conduct) their affairs by mutual Consultation; who spend out of what We bestow on them for Sustenance*”<sup>36</sup>. The verse comes in the context of determining the attributes of the believers. The first is trust in God. It emphasises the importance of consultation which is a characteristic of the believers who observe regular prayer and spend for the sake of God. Consultation is supposed to be a permanent approach in the life of the ordinary Muslim and responsibility of politicians and elected officials. The verse raises the status of consultation to the rank of the pillars of Islam, where it placed between the establishment of prayer and spending for the sake of God, as if the verse taught us

that the worship of prayer and zakat are not complete without the practising of consultation. If prayer and zakat form the pillars of Islam, then consultation is the pillar of good policy for the state and society.

Even the Prophet, although he was the recipient of direct guidance from Allah (s.w.t), was commanded: “*Consult them in affairs (of moment). Then, when thou hast taken a decision put thy trust in Allah. For Allah loves those who put their trust (in Him).*”<sup>37</sup>

Following this advice and lead, Caliph ‘Umar admonished that: “There is no *khilafah* without consultation.”<sup>38</sup>

Thus, the practice of *Shura* was the mechanism followed at all levels in the selection of political leadership by Muhammad and his followers. It was the Islamic society that selected the first four *Rashidan* caliphs, although the method of selection and the process of approval differed. The essential principle was consent and confidence of the community and the accountability of those selected before the community. Even afterwards, when the heredity rule crept in, in violation of this community right, a facade of *bay'ah*, or community's acceptance of rulers was still maintained.

*The official must have strong thinking and argumentation:* This is implied by the previous two verses concerning consultation. The one who adopts the principle of consultation naturally possesses a forceful argument. The objective is to form a view after due consideration, and this necessitates an ability to weigh and deduce reasoning.

*Good choice of advisors and consultants:* Contemplating verses 36-39 from Surah Al-Shura reveals the qualities of those who qualify as good consultants. They should possess faith, trust in God, avoiding the major sins and infidelities, observe regular prayer, and practice consultation in their affairs.

### 3.1.2.6 Justice

Justice is the foundation of governance, and the rule of justice is considered one of the foundations of Islamic belief. It is the basis of the messages of the Prophets. It is also a valuable part of human cultural history. Nations are proud to be able to achieve justice in the government and the judiciary. Justice should be exercised in all areas including the provision of basic services such as education and health, in foreign relations, and in managing resources. It is the cornerstone of a sustainable society. Islam urges establishing justice between people, regardless of their political leanings. The Quran states, “*We sent aforetime our messengers with Clear Signs and sent down with them the Book and the Balance (of Right and Wrong), that men may stand forth in justice*” (Al-Hadid: 25). The Messengers were sent, and the Books revealed in order that justice is established and that the rights of God and mankind are made clear and observed. Allah says: “*O ye who believe! stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor: for Allah can best protect both*” (Al-Nisaa’: 135). Allah also says: “*O ye who believe! stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to piety: and fear Allah. For Allah is well-acquainted with all that ye do*” (Al-Maida: 8), and “*Allah doth command you to render back your Trusts to those to whom they are due; And when ye judge between man and man, that ye judge with justice: Verily how excellent is the teaching which He giveth you! For Allah is He Who heareth and seeth all things*” (Al-Nisaa’: 68).

Islam has placed justice in a position so eminent in its legislation, a position perhaps not given in any previous system of law, old or new.<sup>39</sup> There are many verses of the *Qur'an* which argue that enjoying justice is a general and universal order encompassing all human affairs.

In one of the verses of the *Qur'an* in which enjoying justice has been generally and unqualifiedly ordered, Allah says: “*Allah commands justice, the doing of good, and liberality to kith and kin, and He forbids all shameful deeds, and injustice and rebellion: He instructs you, that ye may receive admonition*”.<sup>40</sup> In another verse of the *Qur'an*, it is stated that: “*Allah doth command you to render back your Trusts to those to whom they are due; And when ye judge between man and man, that ye judge with justice: Verily how excellent is the teaching which He giveth you! For Allah is He Who heareth and seeth all things*”.<sup>41</sup>

These verses concern those in positions of governance and their duty to secure the rights of people and govern



justly. Here, it is clear that the verse refers to the responsibility of ensuring that people are given their due and that those who are fit for government are those who can perform this duty. The imams agree that it is necessary for a governor and public official to be fair and trustworthy.<sup>42</sup>

According to Islam, the principle of Justice means that the government must manage to meet and fulfil the needs and requirements of all citizens because they have a rightful share in state resources. This includes the provision of jobs, means of subsistence and economic justice. This further implies that it is the responsibility of the State to provide food, shelter and clothing to all the citizens of the State. Economic justice provides for the equitable distribution of means of living and prohibits the concentration of wealth in a few hands. That is why the second Caliph ‘Umar refused to divide land among the Muslim soldiers and commanders in areas conquered by Muslims in Iraq, Iran and Syria.

Only justice can create discipline in life of the people. Also essential is the administrative justice, which means that all State functionaries are subject to accountability, and that people are not to be treated as ‘slaves’ or personal servants. People should not be insulted in any manner. State functionaries should be honest and should efficiently administer public affairs. It should be ensured that the concentration of wealth in one class or in few hands does not occur. There is absolutely no doubt that the principles of administration in Islam are by far the most scientific and comprehensive set of principles for efficient administration.

### 3.1.2.7 Equality

Equality in society is based on the fact that citizenship is the basis for the life of society and national unity. It establishes a stable social environment and stable social and political thinking. Equality creates many economic, political and cultural opportunities. It does not give the opportunity to impede the progress of society in the fields of development and civilisation. Equality helps optimise energies and investment by maximising the available potential. It helps eliminate marginalisation, exclusion, and injustice. Equality between people is one of the bases of Islamic and divine religious belief. “There is no preference for an Arab over a foreigner except for piety,” “the people are like the teeth of a comb”. Equality eliminates all differences related to colour, gender, origin, clan, and class. It ensures accountability between the governors and the governed in the performance of their rights and obligations.

The principle of equality is one of the most important constitutional principles upon which the modern system rests. This principle of equality means that individuals comprised in a society are equal in rights, responsibilities and public duties which are to be enjoyed by all without discriminations of race, origin, language or creed. The principle of equality was founded by the *Qur’an* and *Sunnah* as a precedent which constituted a fundamental revolution in the conceptual bases of Arabs’ notion of pride as held by some tribes. Islamic law based on the *Qur’an* and *Sunnah* is equally accessible to all and equally applicable to members of the society from the lowest to the highest ranked, without any distinction or discrimination.

The Prophet was asked to declare that: “I have been commanded to maintain justice between you”.<sup>43</sup>

The Prophet admonished that: “The nations before you were destroyed because they would punish the lower class criminals according to the law but would let go those from the higher class.” Then laying further emphasis, He continued by stating that: “I swear by the Authority in whose control is Mohammad's life, if Mohammad's daughter is guilty of stealing, I would cut her hand off”<sup>44</sup>

Therefore, all the personal, civil, political, social, cultural and economic rights of an individual are guaranteed under the Islamic legal system. Everyone has equal rights and is equally responsible before the law. It is the obligation of the rulers to ensure that each member of the society particularly the weak, is given his or her due rights.

The second Caliph ‘Umar sought to apply this principle unconditionally in order to ensure that all rights are given their dues, encourage justice, and realise a strong Islamic state free of tyranny, injustice, and corruption. An example of this includes what was narrated by Ibn Jawzi: “There was a man among Abu Musa’s troops who had a loud voice and was very stern with the enemy. After one of the battles, Abu Musa divided the booty among the troops, this man

however insisted on receiving all of his share rather than part of it. Abu Musa shaved the man's hair and lashed him twenty times. The man gathered up his hair and left to meet 'Umar. When he entered upon 'Umar, the man took out his hair and threw it at 'Umar saying, "Were it not for the Hellfire?" 'Umar replied, "Indeed you are correct, were it not for the Hellfire?" The man complained, "O Commander of the Faithful, I had a loud voice and I was stern with the enemy in battle..." and he informed 'Umar of his story. The man continued saying, "Abu Musa then gave me twenty lashes and shaved my head and he believes none can settle the score with him." 'Umar replied, "By Allah, it would be dearer to me if all the Muslims were as stern as this man than all the treasures which Allah has granted us." 'Umar then summoned his scribe to write to Abu Musa saying: "From Commander of the Faithful: 'Umar ibn Al-Khattab to the Governor of Basra: Abu Musa al-Ashari, Peace be upon you, so and so has informed me of the incident that had occurred. If you did that before a group of people, then I urge you to summon them so that he may settle the score with you. If you committed this incident in private, then I urge you to sit where no one shall see you and let him settle the score with you." The man returned to Basra carrying the letter and the people said to him, "Let him off." Lest their governor be humiliated, but the man refused saying, "No, I would not let him off for the sake of any man." When Abu Musa read the letter, he sat before the people so that the man may settle the score with him, the man raised his head and looked towards the Heavens and said, "O Allah, I have forgiven him."<sup>45</sup>

'Umar's habit was to investigate then set penalties based on the laws of equality among the governors and citizens without discrimination. Whosoever would assault, would be assaulted; he who usurped would return what he took, and he who transgressed the rights of others would be punished with equal or greater severity.<sup>46</sup>

### **3.1.2.8 The principle of integrity, accountability and transparency**

The theory of responsibility and accountability is one of the controls for the protection of good governance in caring for the affairs of the people. The process of electing the governor through the ballot boxes and with absolute transparency can provide a legitimate basis for the application of this rule.

Principle of transparency is supposed to be present in the behaviour of the ruler and the reasons for his decisions and administration of the affairs of the country. It helps judge and sustain his or her abilities. Transparency helps to reduce the chances of corruption spreading. It provides checks for the security organs of the ruler while providing citizens with the ability to scrutinise the behaviour of the ruler.

In modern democratic constitutions, it is permissible of calling the head of state and prime minister to account responsible for their deeds and this accountability is different from state to state. According to the Islamic constitution, there is no distinction between the ruler and the ruled in relation to accountability for breaching the law. Whereas, some contemporary constitutions provide that the head of state is not subject to blame for his actions and behaviour even when he breaches the law.<sup>47</sup>

The second Caliph 'Umar applied integrity in all its forms throughout his leadership by emphasising that leading a nation is a heavy responsibility and an important trust for which one is accountable in front of Allah. He must therefore perform his responsibility to the fullest including distancing oneself from all acts that may undermine this position. He transparently disclosed his approach to the management of the Muslim nation in his speeches all of which he applied in reality. If 'Umar wanted to prohibit the people from certain acts, he would gather the people and say, "I have forbidden the people to do such and such, and the people are watching you as a bird watches a piece of meat. If you break the rules, then so will they, but if you refrain then so will they. By Allah, if a man is brought to me who has done that which I forbade the people to do, I will punish him double, because of his relationship to me. So whoever among you wants (to do that), let him go ahead, and whoever wants to refrain, let him do so."<sup>48</sup>

This statement is the concise conclusion of thousands of studies. 'Umar first applied these three principles on his family before applying them on others. He vowed to each member of his family that he would punish them double if they transgressed a prohibition, as he and his family constitute an example for the rest of the nation. If the Caliph and

his family abided by the laws, then the rest of the nation would also abide by them. In contrast, if they broke the laws, this would justify breaking the laws by the rest of the nation. ‘Umar was very strict with his family to ensure against their transgression and to avoid it constituting a justification for the transgression of the nation.<sup>49</sup>

‘Umar applied the principle of transparency and integrity in their finest forms, especially in dealing with money to avoid the suspicion of corruption. He distanced himself and his family from all wealth that may be subject to suspicion. He worked to earn the pleasure of Allah in all his actions. All constitutional, legal and administrative principles were applied in practice during his reign as leader of the Islamic state.<sup>50</sup>

**3.1.2.9 The ability to change:** It is an important basis for achieving justice, equality and freedom. It is a constant reminder for the governor to satisfy the needs of the people and achieve their interests. This equality empowers people by giving them the right of election. This helps ensure the governor performs true to his mandate. It is a strong social contract between the two parties that prevents tyranny, monopoly and domination. It supports adherence to the rule of law. Accordingly, the ability of the people to change their rulers is a strong device for achieving good governance.

The ability to elect public officials leads to the establishment of the state and its various political institutions, the structure of the legislative authority and its implementation. It helps shape the constitution and the modern governing law. It is a characteristic of good governance that guarantees continuity. The beginning of the road to achieving good governance is building the Constitution and the laws that achieve freedom, equality and justice. Ensuring responsibility and accountability, transparency, and the ability to change are essential components of good governance.

#### 3.1.2.10 Freedom

**Freedom:** Public liberties are part of the natural human rights. It is encouraged by many laws, including divine laws, primarily Islam. The administration of public freedoms is reflected in transparent political development. It preserves the state and society from collapse. At the same time, it is a major corrective pathway that directs competencies and resolves grievances.

Freedom reflects the human spirit, creativity, struggle, and defence of society. It is a critical part of self-expression and participation in public life. As such, freedom is an essential value and cornerstone for individuality, family, society, organisations and trade unions. It is a necessary component for achieving the collective interests of society. Freedom of expression, freedom of assembly, the freedom to form parties and unions, freedom of the press, media and academic freedoms must be protected and should not infringe the freedoms of others unless they undermine security. All the calls of the Prophets and Messengers had emphasised this value when they called for unification under God. It led to the rejection of slavery and the freedom to choose one’s faith based on the verse that there is, “*Let there be no compulsion in religion*”<sup>51</sup>.

There is a linear relationship between public freedoms and good governance, particularly in the area of good governance, and its governance-related programs including legislative bodies, judiciary, electoral bodies, decentralisation and local governance, private and public-sector management, economy and financial management, and civil society organisations.

This relationship is a fundamental starting point for achieving stability. It is the framework for democracy and good governance in the modern period. The revolutions and reform movements in the Arab world are a step towards democracy and a step away from tyranny, injustice and corruption.

**Freedom of expression:** Consultation should characterise the approach and culture of the entire society and guide the activities of the ruler and officials. However, there can be no consultation without freedom of expression. This freedom means the possibility for approving or rejecting the opinion of the official. Imam al-Baydawi said in the commentary of the verse, “Their guide is consultation” that this group does not have a unique opinion but consults, and this consultation is evidence of deliberation and vigilance in matters.<sup>52</sup>

In the Quranic verses of the Madinian period, many of them find answers to the views, ideas, beliefs and

behaviours of constituent parts of the Muslim state. This is evidence of the nature of diverse opinions and the need to deal with them calmly with wisdom and exhortation. Allah says: “*Invite (all) to the Way of thy Lord with wisdom and beautiful preaching; and argue with them in ways that are best and most gracious*” (Al-Nahl: 125).

It is worth mentioning here that many people are unaware that good dialogue with others who are different from us intellectually and ideologically is one of the methods for advocating Islam. It means that the Muslim preacher must argue with kindness and observe good behaviour without exception.

Freedom has been divided by Jurists of modern constitutions into several branches: freedom of thought and belief, right to education and property and personal freedom.<sup>53</sup> Without doubt that the Islamic constitution gives so great a consideration and respect to this freedom as has seldom been accorded to it in any other political doctrine in modern democratic constitutions. Man has continued to use the right of choice ever since he has been on earth.

The *Qur'an* states:

*Seest thou not that to Allah bow down in worship all things that are in the heavens and on earth, the sun, the moon, the stars; the hills, the trees, the animals; and a great number among mankind? But a great number are (also) such as are fit for Punishment: and such as Allah shall disgrace — None can raise to honour: for Allah carries out all that He wills.*<sup>54</sup>

### **3.1.2.11 *Al-Amr bil Maruf wa Nahi an al-Munkar* “commanding what is right and forbidding what is wrong”**

This literally means ‘commanding what is right and forbidding what is wrong and encompasses a whole gambit of duties and responsibilities’.

The *Qur'an* makes it the mission of its believers: “*You are the best of Peoples evolved for humankind, enjoining what is right and forbidding what is wrong and believing in Allah*”.<sup>55</sup>

This means that every person in the Islamic state has the right, and the duty, to tell the truth and to stand for it, to further all that is good and virtuous and do his or her utmost to remove the wrongs and vices wherever he or she finds them.

The Prophet (p.b.u.h.) tells us that: “Whoever among you sees a vice (or wrong), he should change it with his hands; if he is not able to do that, then he should check it with his tongue; and if he cannot do that, then he should consider it bad in his heart (and wish for its removal) and this is the sign of weakest in faith”.<sup>56</sup> A famous *hadith* states as follows: “The best Jihad is to say what is just (or truth) in the face of a tyrant”<sup>57</sup>. Yet another *hadith* states that: “When people see a tyrant and do not hold his hands, it is not far that Allah (s.w.t) sends a common punishment on them”<sup>58</sup> Thus above *hadith* categorically emphasizing its importance.

## **4 Conclusion.**

It is noticeable that the main objectives of good governance are understood by the Islamic legal system. The idea of justice, equality, consultation, transparency, accountability and freedom are parallels that could be found in the Islamic legal system. The main principles of good governance as declared by the United Nation are embedded in Islam and therefore an integral part of the governance framework of the Islamic political institutions. The sources of the *Shari'ah* provide the main principles of good governance that are flexible and democratic divine rules. The author of this article further reached the following conclusions:

- The principle of the rule of law forms the cornerstone of the Islamic legal system, as Islam upholds justice and the fight against tyranny. The rule of law found has its basis in the Qur'an, Sunnah and the consensus (ijma’).
- The doctrine of the separation of powers is also implemented in Islam, for the promotion of good governance.
- The doctrine of judicial independence is a main constitutional principle in the Islamic legal system; it implies that the judiciary is independent of any other body.
- Furthermore, the principle of Shura was followed by the Islamic society, based on the consent and confidence of the community and the accountability of those selected before the community.

- Islam further adopts the principle of Justice, which means that the government must meet and fulfil the needs of all citizens.
- The principle of equality is founded in the Qur'an and Sunnah, it constitutes a fundamental revolution against the Arabs' notion of pride as held by some tribes.
- According to the Islamic constitution, there is no distinction between ruler and ruled in the matter of accountability for breaching the law.
- The Islamic constitution gives great consideration to the freedom of thought and belief, the right to education and property, personal freedoms, and several other rights and freedoms compared to those accorded to by modern democratic constitutions.

Finally, the Islamic legal system and principles of state and government, founded in the *Qur'an* and *Sunnah*, need to be developed in accordance with the dictates of contemporary time, customs and needs.

Therefore, the author calls Muslim jurists to restudy the structure of the Islamic state and the objectives of the Islamic state and government, so that the modern theoretical framework and form of Islamic state and government is not out of touch with reality.

### NOTES

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<sup>13</sup> Riaz Ul-Hasan Gilani, *the Reconstruction of Legal Thought in Islam*, (2000) Markazi Maktaba Islam, Delhi. Pp 204–2–6. See also Muhammad S El-Awa', (1980), *On the Political System of the Islamic State*, American Trust Publications Indiana, p 85.

<sup>14</sup> (Yusuf, 12:40).

<sup>15</sup> Yasin 'Umar Yusuf. (1995). *Istiqlal al-Sultah al-Qada'iyyah* at p 298. See also Al-Ma'had al-'Alami li al-Fikr al-Islami, (1981). *Al-Dawlah: Al-Fikrah wa al-Arkan wa al-Mu'assasat*. USA: Grove Street Herndon. pp 66–67. See also 'Liy' al-Din Muhammad al-Rayyis, (1976). *Al-Nadariyyit al-Siyisiyyah al-Islamiyyah*. Cairo: Maktabat Dar al-Turath. pp 365–375.

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<sup>18</sup> Muhammad Muhsin Khan. (trans), (1970), *Sahih al-Bukhari*. Vol. 3, pp 535–536.

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<sup>21</sup> Waki', Muhammad ibn Khalaf' ibn Hayyin (2001) *Akhbar al-Qudat*. (1<sup>st</sup> ed). Beirut: 'Alam al-Kutub, p 357. See also, Yasin 'Umar Yusuf, (1995), *Istiqlal al-Sultah al-Qada'iyyah, fi al-Nidamayn al-Wad'i wa al-Islamai*, p 300.

<sup>22</sup> Ahmad Fathi Bahnasi, *Mawqif al-Shari'ah Min Nazariyyat al-Difa' al-Ijtima'i*, (1984), 111.

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<sup>24</sup> Zafir al-Qasimi, *Nizam al-Hukum fi al-Shari'ah wa al-Tarikh al-Islami: Al-Sultah al-Qada'iyyah*. (Beirut: Dar al-Nafa'is, 1974), p 403.

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<sup>26</sup> Anwar Ahmad Qadri, *Justice in Historical Islam*, (Lahore: SH Muhammad Ashraf, 1968), 8. See also Zafir al-Qasimi, *Nizam al-Hukum fi al-Shari'ah wa al-Tarikh al-Islami: Al-Sultah al-Qada'iyyah*. (Beirut: Dar al-Nafa'is, 1974), p 404. See also Hasan al-'Alkim, *Al-Nizam al-Siyasi al-Islami: Hiwar Ma'a al-'Almaniyyah*. (Mu'assasat al-'Ayn li al-Tawzi' wa al-Nashr, 1991), p 178.

<sup>27</sup> *Sunan Abi Dawud*. (Beirut: Dar al-Kutub al-'Ilmiyyah, 2001), *Hadith* no. 3592. See also, Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, (Kuala Lumpur: Ilmiah Publishers, 2<sup>nd</sup> edn., 1998), 45, 217 and 218.

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<sup>29</sup> Ibn 'Abd al-Barr al-Qurtubi, *Al-Istishab fi Ma'rifat al-Ashab*. (Beirut: Dar al-Kutub al-'Ilmiyyah, 2002), 356. See also, Ahmad Fathi Bahnasi., *Mawqif al-Shari'ah Min Nazariyyat al-Difa' al-Ijtima'i*. (Beirut. Dar al-Shuruq, 1984), p 3.

<sup>30</sup> Farooq Hassan, *The Concept of State and Law in Islam*, University Press of America), 65. See also Ahmad Hasan, "The Political Role of *Ijma'*," *Islamic Studies, Journal of the Islamic Research Institute*, (Pakistan, Vol. VIII, No.1, 1969), p 188.

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<sup>33</sup> *Ibid*, p 55.

<sup>34</sup> *Ibid*, pp. 36–37.

<sup>35</sup> Muhammad S. El-Awa', (1980), *On the Political System of the Islamic State*, American Trust Publications Indiana at pp 86–96. See also

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<sup>36</sup> (*Surah al-Shura*: 42:38).

<sup>37</sup> (*Sura ale-Imran*, 3:159).

<sup>38</sup> Ali ibn ‘Abd al-Malik Muttaqi, (1985), *Kanz al Ummal fi Sunan al-aqwal wa al-af’al*, Mu’assat al-Risalah, al-Riyd Vol 5, and Hadith No 2354.

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<sup>40</sup> (*Surah al-Nahl*, 16:90).

<sup>41</sup> (*Surah al-Nis’*, 4: 58).

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## الإطار الدستوري للحكم الرشيد في ظل النظام القانوني الإسلامي

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### ملخص

تعرضت بعض الدول للانتقادات في عدد من أساليب حكمها بسبب انعدام تصورهما للحكم الرشيد والظلم السياسي والنظام الديكتاتوري للحكومة، وعليه فإن هذه الورقة هي محاولة لدراسة بعض مبادئ ونظريات الحكم الرشيد في النظام القانوني الإسلامي، كذلك تعد هذه الدراسة محاولةً لمناقشة بعض المبادئ المهمة ذات الصلة بالخطاب الإسلامي السياسي وكيفية استخدام هذه المبادئ لإقامة حكم رشيد في الدول الإسلامية، كما تحاول هذه الورقة أيضاً مراعاة دمج الإطار الدستوري للحكم الرشيد والقانون الإسلامي، قد استخدم الباحث المنهج التحليلي الوصفي، إضافةً إلى المنهج التاريخي لتدعيم الدراسة ببعض الأمثلة التي من التاريخ والحضارة الإسلامية.

**الكلمات الدالة:** الحكم الرشيد، المساءلة، والشفافية، والعدالة، وسيادة القانون، والمشاركة والمساواة.

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