

AN ISLAMIC PERSPECTIVE ON THE RULE OF LAW*

Mohd Hisham Mohd Kamal*

Abstract

The rule of law means the government must operate based on the principles of law. The rule of law is significant for good governance and sustainable development. For this reason, all States need to improve this aspect in their governments. Muslim States may need motivation from the religion itself, and in order to cater to this need, this article discusses the rule of law based on the Islamic sources of reference, including verses of the Qur'ān, the practice and saying of Prophet Muḥammad (s.a.w.), and the practice of his Rightly Guided Caliphs. This article finds that the idea of the rule of law is embedded in Islam, though some of its provisions on fundamental rights may not be universally acceptable.

Keywords: Rule of Law, Islam, Government, Justice, Fundamental Rights.

PERSPEKTIF ISLAM TENTANG KEDAULATAN UNDANG-UNDANG

Abstrak

Kedaulatan undang-undang bererti kerajaan hendaklah beroperasi berdasarkan prinsip undang-undang. Kedaulatan undang-undang sangat penting untuk tadbir urus yang baik dan pembangunan lestari. Atas alasan ini, semua negara perlu memperbaiki aspek ini dalam kerajaan mereka. Negara-negara Muslim mungkin memerlukan

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* Associate Professor at Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia. Email: mkmhisham@iiu.edu.my.

dorongan dari agama sendiri, dan bagi tujuan memenuhi keperluan ini, makalah ini membincangkan kedaulatan undang-undang berdasarkan sumber-sumber rujukan Islam, termasuklah ayat-ayat al-Qur'an, amalan dan hadis Nabi Muhammad (s.a.w.) dan amalan Khulafa al-Rasyidin. Makalah ini mendapati bahawa idea kedaulatan undang-undang wujud dalam Islam, walaupun peraturan Islami tentang hak asasi manusia mungkin tidak dapat diterima oleh semua negara.

Kata kunci: Kedaulatan Undang-Undang, Islam, Kerajaan, Keadilan, Hak Asasi Manusia.

INTRODUCTION

This article looks at the rule of law from an Islamic perspective. It begins by explaining the meaning of the rule of law and its significance, especially with regard to Muslim States and societies. Thereafter, the article briefly explains the Islamic belief system that is relevant to the rule of law. Only then the Islamic perspective on the rule of law is discussed. In order for the discussion to be systematic, the factors of the rule of law as identified by the World Justice Project organisation are used as guidance. In the discussion, reference is made to the Qur'an, the Sunnah, as well as the practice of the Rightly Guided Caliphs. It is to be noted that this article does not do any case study on any Muslim State.

THE MEANING AND SIGNIFICANCE OF THE RULE OF LAW

The rule of law means the law must be observed, in the sense that government must operate based on the principles of law. The law applies equally to everyone, including the head of State, to the rich and the poor, to the privileged and the marginalised, regardless of race or gender. No one is above the law, and anyone who breaks the law must be punished justly.¹

The rule of law is an essential component of good governance and sustainable development. The rule of law will provide accountable and transparent legal regimes, ensure equal opportunity

¹ <https://www.spokesman.com/stories/2020/oct/08/rule-law-vs-rule-law/>, accessed on July 27, 2021.

and equitable access to justice and basic services, and strengthen State institutions. It will protect human rights and the environment. The United Nations' Sustainable Development Goal 16, namely: Peace, Justice and Strong Institutions, has a target to promote the rule of law at the national and international levels and ensure equal access to justice for all.

Looking at the World Justice Project's Rule of Law Index², Muslim States generally do not fare strongly in the rule of law aspect. It is admitted that the Index may not be fully compatible with Islam, such as its fundamental rights factor, but generally the Index does throw some light on the Muslim States' performance. The Muslim States' poor performance may give a wrong impression that Islam and its law do not concern with the rule of law. There is thus a need for enlightenment on the compatibility of the rule of law concept with the religion of Islam, so that Muslim leaders can work towards improving the rule of law as envisaged by the religion.

There are not many literatures on the rule of law from an Islamic perspective. In fact, there is no classical book on the rule of law. In the 21st Century, there are several works. For example, *The Rule of Law, Freedom of Expression and Islamic Law* (2017) by Hossein Esmaeili, Irmgard Marboe and Javaid Rehman³, as well as edited books *The Rule of Law, Islam, and Constitutional Politics in Egypt and Iran* (2013)⁴ and *Islam and the Rule of Law: Between Sharia and Secularization* (2008)⁵. This article refers to some of the verses and *aḥādīth* that the existing literature may have referred to as well, but the elaboration thereof herein may contribute to a better understanding of the topic. This article does not only look from the perspective of law only, but also relates the rule of law to the belief system of Islam which is fundamentally significant for its success.

² <https://worldjusticeproject.org/about-us/overview/what-rule-law>, accessed on July 27, 2021.

³ Hossein Esmaeili, Irmgard Marboe and Javaid Rehman, *The Rule of Law, Freedom of Expression and Islamic Law* (Oxford & Portland, Oregon: Hart Publishing, 2017).

⁴ Said Amir Arjomand & Nathan J. Brown (editors), *The Rule of Law, Islam, and Constitutional Politics in Egypt and Iran* (New York: State University of New York Press, 2013).

⁵ Birgit Krawietz & Helmut Reifeld, *Islam and the Rule of Law: Between Sharia and Secularization* (Berlin: Konrad Adenauer Stiftung, 2008).

In order to make the discussion more systematic, this article uses the factors that the World Justice Project organisation has applied in its rule of law index. Although this paper discusses the rule of law from an Islamic perspective, referring to the efforts by an organisation that is not “Islamic” should not be a problem, as wisdom can come from many sources. Even the Qur’ān narrates in detail the wise acts of Queen Balqīs of Sheba who was at that time a non-Muslim.⁶

ISLAMIC BELIEF SYSTEM RELEVANT TO THE RULE OF LAW

Islamic law is connected to the belief system of Islam, called “*aqīdah*”. No legal system is foolproof, so while the law must be improved, Muslims’ faith in Allah must also be strengthened. The following aspects of *‘aqīdah* must be continuously pursued through education and writings.

(a) Sovereignty of Allah

The religion of Islam is based on the most fundamental foundation that Allah is sovereign. He is the only one God and the Law-Giver. He prescribes His law to be implemented and enforced in this world, and will also enforce His law in the hereafter, by rewarding good doers with paradise and punishing evil doers in the hellfire. Paradise is very rewarding, while Allah’s punishments are very painful. In verses 6:162-163 of the Qur’ān, Allah commands that we dedicate our prayer and other acts of worship, life and death only for Him Who has no partner.⁷ While in verse 21:23, Allah reminds us that He cannot be questioned for His acts and that includes His prescription of the law,

⁶ See Qur’ān, 27:32-35.

⁷ Qur’ān, 6:162-163:

Say: “Truly, my prayer and my service of sacrifice, my life and my death, are (all) for Allah, the Cherisher of the worlds; (162)

No partner has He: This am I commanded, and I am the first of those who bow to His will.” (163)

but humans will be questioned for their acts.⁸ Any act in defiance of the law of Allah will be punished.

As Allah is the most sovereign, any caliph, sultan, ruler, president or prime minister does not have absolute power. Leaders must act according to the wishes of Allah. If a leader enacts law that is contrary to the law of Allah, that law should be withdrawn. Once Caliph ‘Umar ibn al-Khaṭṭāb wished to impose a ceiling upon the amount of dower. He sought advice in a consultation. Faṭīmah bint Qays, another Companion, opposed the idea, reciting verse 4:20⁹. As a result, the Caliph gave up the idea.¹⁰

(b) Just Law

Allah is the Creator of the whole universe, so He knows what is the best law for His creatures.¹¹ Allah has no interests and His power does not depend on how many human beings believe in Him and observe His commandments and prohibitions. So, His law is only for the best interest of His servants.

Allah has prescribed His law in His book, namely: the Qur’ān, and in the Sunnah of Prophet Muḥammad (s.a.w.). Deduction of the law from its sources should be done only by competent *mujtahidūn* (Muslim jurists), taking into account the causes of the revelation of the verses or the causes of the utterances of the *ḥadīth*, and the contexts. The whole revelation should be read and

⁸ Qur’ān, 21:23:

He (Allah) cannot be questioned for His acts, but they will be questioned (for theirs).

⁹ Qur’ān, 4:20:

But if you decide to take one wife in place of another, even if you have given one of them a talent of gold for dower, take not the least bit of it back. Would you take it by slander and a manifest wrong? (Emphasis added)

¹⁰ See Shaikh Shaukat Hussain, *Human Rights in Islam*, 3rd Edition (New Delhi: Kitab Bhavan, 2001), 50 & 75; Mohammad Hashim Kamali, *Freedom of Expression in Islam*, Revised Edition (Kuala Lumpur: Ilmiah Publishers, 1998), 51.

¹¹ Qur’ān, 67:14:

Should He not know – He that created? And He is the One that understands the finest mysteries (and) is well-acquainted (with them).

not only partially. If there are two or more verses or *aḥādīth* on the same matter and they seem to be conflicting with one another, the jurists should try to harmonise all the verses and *aḥādīth*, and take into account the sequence of revelation and events.¹² All these are significant in order to arrive at a correct understanding of the verses and *aḥādīth* and agreeable deduced laws.

(c) Reward and Punishment in the Hereafter

Allah Sees, Hears and Knows every single thing that human beings did, said and intended in this world. In the hereafter, Allah will reward every good deed, and punish every bad one. The life in the hereafter is eternal. A leader who practises good governance will enjoy his/her reward in the paradise forever. On the other hand, a leader who abuses his/her power will dwell in the hellfire infinitely.¹³ Belief in these promises strengthens the rule of law.

THE RULE OF LAW IN THE SOURCES OF ISLAMIC LAW

The Arabic term for the rule of law is: “*siyādah al-qānūn*”. The term cannot be found in the Qur’ān and may not have been used by the Messenger (s.a.w.), but this article identifies many aspects of the rule of law in verses of the Book and the Sunnah of the Messenger (s.a.w.).

In order to make the discussion systematic, this article is going to use the same eight factors used by the World Justice Project. Nevertheless, this article uses the Islamic standard. The eight factors

¹² Mohd Hisham Mohd Kamal, “Meaning and Method of Interpretation of *Sunnah* in the Field of *Siyar*: A Reappraisal” in Marie-Luisa Frick & Andreas Th. Muller (editors), *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives* (Leiden & Boston: Martinus Nijhoff Publishers, 2013), 64-80, at 76-78.

¹³ See, for example, Qur’an, 99:7-8:
 So whoever does an atom’s weight of good will see it. (7)
 And whoever does an atom’s weight of evil will see it. (8)

These verses show that every single deed and utterance, however small, is recorded, and the record will be shown to the doer in the hereafter before the person is rewarded for the good deed or punished for the evil deed.

are: (1) Constraints on Government Powers, (2) Absence of Corruption, (3) Open Government, (4) Fundamental Rights, (5) Order and Security, (6) Regulatory Enforcement, (7) Civil Justice, and (8) Criminal Justice.¹⁴ Each of the factors can be discussed in detail, but this article introduces the Islamic perspective on each briefly.

(1) Constraints on Government Powers

This factor means that the government should not have absolute power. The power should be effectively limited by the legislative authority and judiciary. Provisions for these should be prescribed by law. Any misconduct by any person of authority must be investigated and punished. The subjects should be free to report misconduct and comment on government policies without fear of retaliation.

At the beginning of the Islamic State, namely the city of Madīnah, all the executive, legislative and judicial powers were in the hands of the Messenger (s.a.w.). He (s.a.w.) was the head of the State and the head of the government. For example, he (s.a.w.) drafted the Constitution, led the Muslim army, entered into treaties with foreign nations, appointed governors and judges, and sent and received diplomats. In addition to the laws being revealed in the Qur’ān, the Messenger (s.a.w.) also issued legal decrees, acting as the sole legislator in the State. For example, he (s.a.w.) issued a ruling prohibiting *nikāḥ mut’ah* (temporary marriages). The Messenger (s.a.w.) also headed the judiciary and heard appeals from the other judges whom he (s.a.w.) appointed. In addition, he (s.a.w.) also exercised the *mazālim* authority.¹⁵

The Messenger (s.a.w.) acted in all those capacities so that he would be an example to every Muslim who holds power either as a member of the executive or as a *mufīī*/legislator or a judge. A Muslim head of State or head of government has to follow the Messenger’s conduct in governing and administering the State. A *mufīī* or legislator has to follow the way showed by the Messenger (s.a.w.) in issuing *fatāwā* or enacting statutes. A Muslim judge has to

¹⁴ <https://worldjusticeproject.org/about-us/overview/what-rule-law>, accessed on July 27, 2021.

¹⁵ The equivalent institution in the modern legal system today to the *mazālim* authority is ombudsman.

follow the precedent of the Messenger (s.a.w.) in conducting proceedings in court. These examples are based on the understanding of verse 33:21:

You have indeed in the Messenger of Allah a beautiful pattern (of conduct) for any one whose hope is in Allah and the Final Day, and who engages much in the Praise of Allah.

The early Caliphs also had all the powers. For example, Caliph ‘Umar ibn al-Khaṭṭāb sent Muslim armies to Rome and Persia, entered into the Treaty of Īliyā’ with the non-Muslims of Jerusalem, and enforced the prohibition of temporary marriages. He suspended the *ḥadd* punishment for theft during the famine, and determined that triple *ṭalāq* in one sitting had the effect of an irrevocable divorce. In addition, he heard disputes between individuals and tried criminal cases.

It was difficult for the Caliphs at that time to depart from the precedent of the Messenger (s.a.w.), resulting in them having all the powers, but they did not want the office of the Caliph to continue holding all the powers. Gradually, Umayyad Caliph ‘Abd al-Malik ibn Marwān separated the *mazālim* authority from caliphate by appointing Abū Idrīs al-Awdī to lead the institution¹⁶. The *mazālim* had the power to take action against wrongdoings committed by top government officers, including the Caliph, and their family members. The judiciary was separated from the caliph during the time of Abbasid Caliph Hārūn al-Rashīd with the appointment of the *Qāḍī al-Quḍāh* (Chief Justice). The legislative function was vested in the hands of the *muftī*, and the post of *Shaykh al-Islām* was created during the era of the Ottoman.

¹⁶ Aḥmad Abū al-Wafā, *Kitāb al-I’lām bi-Qawā’id al-Qānūn al-Duwalī wa-al-‘Alāqāt al-Dawliyyah fī Sharī’at al-Islām*, 2nd Ed. (Cairo: Dār al-Nahḍah al-‘Arabiyyah, 2006, Vol. 6, Ḥuqūq al-Insān fī al-Sharī’ah al-Islāmiyyah), 149; Mahmud Saedon A. Othman, *Institusi Pentadbiran Undang-undang & Kehakiman Islam* (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1996), 207.

The Messenger (s.a.w.) drafted a constitution for Madīnah.¹⁷ A constitution can be a tool to prescribe the constraints on government powers. The constitution can determine the functions, powers and limitations of the executive, the legislative, the judiciary and the *mazālim*, so that there will be a good check and balance between all the four organs of the State.

Caliph ‘Umar ibn al-Khaṭṭāb sanctioned government officials for misconduct. He removed a Companion, Zayd ibn Thābit, from judgeship for favouring him over the other party in a litigation¹⁸, and he carried out punishment against his officials for misconduct in open *mazālim* trials during *hajj* (pilgrimage) seasons.¹⁹

Once some Muslim fighters, especially the Anṣār, were puzzled to witness the Messenger (s.a.w.) divided spoils of war to new converts of Makkah, from where the Messenger (s.a.w.) originated, more than the amount given to others. One of them rudely accused the Messenger (s.a.w.) of being unjust. The Messenger (s.a.w.) angrily denied the accusation²⁰, but did not retaliate. ‘Umar ibn al-Khaṭṭāb asked for the Messenger’s permission to kill the man, but the Messenger (s.a.w.) ordered that the man should be left unharmed.²¹ When ‘Umar himself became the caliph, once an individual demanded an explanation in the public from him how did the Caliph seem to get double the cloth than ordinary Muslim from the public treasury, Caliph ‘Umar allowed the checking.²²

(2) Absence of Corruption

¹⁷ Muhammad Hamidullah, *The Prophet’s Establishing a State and His Succession* (New Delhi: Adam Publishers & Distributors, 2006), 47-49; Mohamed S. el-Awa, *On the Political System of the Islamic State* (Indianapolis: American Trust Publications, 1978), 15-23.

¹⁸ Hussain, *Human Rights in Islam*, 64.

¹⁹ *Ibid.*, 63-64.

²⁰ al-Bukhari, *Summarized Sahih al-Bukhari*, Riyadh: Darussalam, 1996/1417H, *ḥadīth* no. 1328 & *ḥadīth* no. 1335.

²¹ Abu Mazaya al-Hafiz, *Sirah dan Riwayat Hidup Nabi Muhammad*, Mohd Puzhi Usop (editor) (Selangor: Al-Hidayah Publication, 2018), 676-677.

²² See the narration under sub-title “Accountability” below.

This factor means that officials in the executive, judicial and legislative branches as well as members of the police and armed forces must not abuse their public office for private gain. The Messenger (s.a.w.) has warned against *ghulūl* which includes embezzlement, misappropriation and defrauding:

The Messenger (s.a.w.) said, “If any of you is put in an administrative post on our behalf and conceals from us a needle or more, he is defrauding, and will bring it on the Day of Resurrection”. A man from the Anṣār stood and said, “O Messenger of Allah, take back from me my post”. He (s.a.w.) asked, “What is with you?”. He replied, “I heard you say such and such”. He (s.a.w.) said, “And I say it now, if we appoint anyone to an office, he must bring what is connected with it, both little and much. What he is given, he may take, and he must refrain from what is kept away from him”.²³

Even if it is just a needle that a public officer misappropriates, Allah knows and will punish the person for the crime.

In addition, the Qur’ān prohibits bribing rulers and judges:

And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that you may eat up wrongfully and knowingly a little of (other) people's property.²⁴

Taking another person’s property illegally is sinful, and if the taking of the other person’s property is done through a decision of a judge who is bribed, the sin is even greater.

The prohibition of bribery is not limited to cases of rulers and judges. In a *ḥadīth* that is more general, the Messenger (s.a.w.) has

²³ Muslim, *Ṣaḥīḥ Muslim*, Vol. 5 (Riyadh: Darussalam, 2007), *ḥadīth* no. 4743.

Another *ḥadīth* reads:

When we appoint someone to an administrative post and provide him with an allowance, anything he takes beyond that is *ghulūl*.

See Abū Dāwud, *Sunan Abū Dāwud*, Vol. 3 (Riyadh: Darussalam, 2008), *ḥadīth* no. 2943.

²⁴ Qur’ān, 2:188.

cursed the one who bribes and the one who takes bribes.²⁵ As the offender is cursed, this shows that bribery is a major sin.

(3) Open Government

This factor means that the laws and government data must be publicly available and accessible. The subjects should have the right to request for information from the government, the freedom of opinion and expression, and the ability to bring complaints. This factor involves the principles of accountability and transparency.

Two verses of the Qur'ān explain that the Law Giver does not impose punishment for non-compliance of His law until He has sent a messenger with the law to the people.²⁶ In other words, the law should have been made public before it can be enforced. In a situation where the subjects are not aware of the law, the government should publicise the law again before the government can enforce it. Once the Messenger (s.a.w.) permitted temporary marriages, but he subsequently prohibited them. Some Muslims knew its permissibility but did not know its subsequent prohibition. During his era, Caliph 'Umar ibn al-Khaṭṭāb realised some practice of temporary marriage, so he publicised its prohibition before enforcing the law.²⁷

²⁵ Abū Dāwud, *Sunan Abū Dāwud*, Vol. 4, *ḥadīth* no. 3580; al-Tirmidhī, *Jāmi' al-Tirmidhī*, Vol. 3 (Riyadh: Darussalam, 2007), *ḥadīth* no. 1423.

²⁶ Qur'ān, 17:15-16 in part:

... We would not visit with Our wrath until We had sent a messenger (to give warning). (15)

When We decide to destroy a population, We (first) send a definite order to those among them who are given the good things of this life and yet transgress; so that the word is proved true against them: then We destroy them utterly. (16)

Your Lord was not the one to destroy a population until He had sent to its center a messenger, rehearsing to them Our signs: nor are We going to destroy a population except when its members practice iniquity. (Qur'ān, 28:59)

²⁷ Abu Ameenah Bilal Philips, *The Evolution of Fiqh: Islamic Law & the Madh-habs* (Kuala Lumpur: A.S. Noordeen, 2002/1422), 40; Mohamad Akram Laldin, *Introduction to Shariah and Islamic Jurisprudence* (Kuala Lumpur: CERT Publications, 2006), 185-186.

(i) Accountability

Accountability means the quality or state of being responsible for what one does and being able to give satisfactory reason for the act. Accountability is one of the steps that must be taken to maintain and increase public confidence in government performance.

Every adult of sound mind will be responsible²⁸ and will be accountable. The Messenger (s.a.w.) said:

No doubt, every one of you is a shepherd and is responsible for his flock. The leader of people is a guardian and is responsible for his subjects. A man is the guardian of his family and he is responsible for them. A woman is the guardian of her husband's home and his children and she is responsible for them. The servant of a man is a guardian of the property of his master and he is responsible for it. No doubt, every one of you is a shepherd and is responsible for his flock.²⁹

Based on this *ḥadīth*, every person is responsible for everyone and everything under his/her care. It follows that everyone will be asked and be made accountable. The *ḥadīth* is general in the sense that accountability happens in this world and the hereafter.³⁰ such person can also be made accountable in this world.

Government officials are subject to their higher authorities' as well as the general public's and other stakeholders' oversight, direction or request that they provide information or justification for their action. The following *ḥadīth* shows how the Messenger (s.a.w.) oversaw the conduct of his officer:

²⁸ A minor and a person of unsound mind are not responsible, based on the following *ḥadīth*:

The pen is lifted from three people: a sleeping person until he awakens, a child until he becomes an adult, and an insane person until he regains his sanity.

See al-Tirmidhī, *Jāmi' al-Tirmidhī*, Vol. 3, *ḥadīth* no. 1423.

²⁹ al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, Vol. 9 (Riyadh: Darussalam, 1997), *ḥadīth* no. 7138; Muslim, *Ṣaḥīḥ Muslim*, Vol. 5, *ḥadīth* no. 4724.

³⁰ Qur'ān, 21:23:

He (Allah) cannot be questioned for His acts, but they will be questioned (for theirs).

The Messenger (ﷺ) employed a man from the tribe of Al-Azad named Ibn Lutbiyyah as collector of *zakāt*. When the employee returned (with the collections), he said: “This is for you (the Muslims), and this was presented to me as gift”. The Messenger of Allah (ﷺ) rose to the pulpit and praised Allah and extolled Him. Then he said, “I employ a man from among you to do a job, and he comes to me and says: ‘This is for you (the Muslims), and this is a gift that has been presented to me’. If he remained in the house of his father or of his mother, would the gifts be given to him if he is true? By Allah, if anyone of you took anything wrongfully, he will bring it on the Day of Resurrection, carrying it on (his back). I will not recognise anyone of you, on the Day of Resurrection with a grunting camel, or a bellowing cow, or a bleating ewe”. Then he raised his hands till the whiteness of his armpits could be seen, and he said thrice, “O Allah! Have I not conveyed (Your Commandments)?”³¹

It can be observed in the *ḥadīth*, after hearing Ibn Lutbiyyah’s claim that certain part of the collection was given to him as a gift, the Messenger (s.a.w.) rose to the pulpit and explained the rationale of the law to the audience who were present in the mosque. Among other things, the Messenger (s.a.w.) asked, “If he (Ibn Lutbiyyah) remained in the house of his father or of his mother, would the gifts be given to him if he is true?”, showing an example of a question that the subjects can ask to governmental officials.

A head of State is also subject to the general public’s and other stakeholders’ oversight, direction or request that he provides information or justification for his action. One Friday noon, Caliph ‘Umar was to deliver the sermon in a mosque. He began by reciting some verses from the Qur’ān, then, addressing the congregation, he said “Now listen”. A young man from the congregation stood up and said, “We will not listen to you, until you give us the explanation that you owe to us”. Caliph ‘Umar asked, “Explanation for what?” The young man said, “The other day each one of us obtained a piece of cloth from the *bayt al-māl* (public treasury). Today I find two pieces of cloth on the person of the Caliph. I want to know what right had the Caliph to get a share twice the share of an ordinary Muslim?” Before Caliph ‘Umar could explain, his son, ‘Abd Allāh, rose and

³¹ al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, Vol. 9, *ḥadīth* no. 6979; Muslim, *Ṣaḥīḥ Muslim*, Vol. 5, *ḥadīth* no. 4738.

explained, “Friends, the truth of the matter is that like every other person, my father and I obtained a piece of cloth each from the *bayt al-māl*. My father is so tall that the piece of cloth that he got from the *bayt al-māl* did not suffice him. So, I gave him my piece of the cloth”. The young man said, “We are satisfied. You can now proceed with your address. We will listen to you and obey your commands”.³²

Accountability is important for evaluating the effectiveness of public officials or public bodies, in order to ensure that they are performing to their full potentials in instilling confidence in the government and that the government will be responsible to the community they are meant to serve.

(ii) Transparency

Transparency is an important principle so that those affected by administrative decisions will be allowed to know about the resulting facts and figures (for example, the budget) and about the process that resulted in those decisions. Decisions taken and their enforcement are done in a manner that follows rules and regulations.

There is a *fiqh* axiom that if an obligation cannot be fulfilled except by performing another related act, then that act also becomes obligatory.³³ Accountability is an obligation, so it follows that as accountability cannot be fulfilled except by having transparency, then transparency also becomes obligatory.

(4) Fundamental Rights

Fundamental rights relevant to the notion of the rule of law includes equal treatment, non-discrimination, the right to life and security of the person, the rights of criminal suspects and the accused, freedom of opinion and expression, freedom of religion, freedom from arbitrary interference with privacy, and freedom of assembly and association.

³² <https://www.ummah.com/forum/forum/islam/general-islamic-topics/65828-khalifa-umar-bin-al-khattab/page2>, accessed on Sept 24, 2021.

³³ Muḥammad ibn Ṣāliḥ al-‘Uthaymīn, *al-Sharḥ al-Mumtī‘ ‘alā Zād al-Mustaqni‘*, Dammām: Dār Ibn al-Jawzī, Vol. 2, 94.

This factor means that the fundamental rights must be effectively guaranteed.

Certain rights under the international human rights treaties are compatible with the Islamic teaching, but there are fundamental differences between the two with regard to some other fundamental rights.

In Islam, human beings are given special honours above the other creatures³⁴, because Adam, the forefather, was a recipient of the Divine Spirit³⁵ so that even the angels were ordered to bow to him. Verse 15:29 reads:

(Allah commanded,) “When I have fashioned him (Adam) (in due proportion) and breathed into him of My spirit, fall you (the angels) down in obeisance unto him.”³⁶

In addition, Adam was taught knowledge that even the angels were not taught. Verses 2:31-33 narrate:

And He taught Adam the nature of all things; then He placed them before the angels and said: “Tell Me the nature of these if you are right.” (31)

They said: “Glory to You of knowledge we have none save that You have taught us: in truth it is You who are perfect in knowledge and wisdom.” (32)

He said: “O Adam! Tell them their natures.” When he had told them the God said: “Did I not tell you that I know the secrets of

³⁴ Qur’ān, 17:70:

We have honoured the sons of Adam; provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favours, above a great part of Our creation.

³⁵ Shamrahayu A Aziz, “Islamic Concept of Human Rights” in Abdul Ghafur Hamid @ Khin Maung Sein (editor), *Human Rights Law: International, Malaysian and Islamic Perspectives* (Selangor, Malaysia: Sweet & Maxwell Asia, 2012), 321-331, at 324.

³⁶ See also Qur’ān, 38:72 and 32:9.

heaven and earth and I know what you reveal and what you conceal?" (33)

The knowledge makes human being capable of transporting by land, sea and air, finding sustenance, and developing this world. However, they are also capable of becoming the lowest of the low.³⁷

As children of Adam and Eve, human beings are equal and should not be discriminated against on the basis of caste, creed, colour, region or gender³⁸; but the Qur'ān recognises male and female as the only genders³⁹, and describes the homosexual people of Prophet Lūṭ as criminals.⁴⁰ In this aspect, the Islamic norm is

³⁷ Qur'ān, 95:4-6 in part:

We have indeed created man in the best of moulds, (4)
Then do We abase him (to be) the lowest of the low – (5)
Except such as believe and do righteous deeds ... (6)

³⁸ Qur'ān, 49:13 in part:

O humankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that you may know each other. Verily the most honoured of you in the sight of Allah is (he who is) the most righteous of you ...

In his sermon at the Farewell Pilgrimage, the Messenger (s.a.w.) said:
... O People! Your God is one, your ancestor is also one and you are all progeny of Adam who was created from clay. The most respected before God amongst you is one who is most God fearing. An Arab has no superiority over a non-Arab nor a non-Arab over an Arab – neither does a white man possess any superiority over a black man, nor a black man over a white one, except by virtue of piety. ...

See Hussain, *Human Rights in Islam*, 107.

³⁹ Qur'ān, 53:45-46:

That He (Allah) did create in pairs – male and female, (45)
From a seed when lodged (in its place). (46)

Was he (human) not a drop of sperm emitted (in lowly form)? (37)
Then did he become a clinging clot; then did (Allah) make and fashion (him) in due proportion. (38)
And of him He made two sexes, male and female. (39)
(Qur'ān, 75:37-39)

⁴⁰ Qur'ān, 15:51-77 & 11:69-83 describe the visit of angels to Prophet Ibrāhīm (a.s.) and what happened to the people of Prophet Lūṭ subsequently. In verse 15:58, the angel described the people of Lūṭ as

fundamentally different from the norm of some societies that recognise a third gender and legalise same-sex relationship.

The Messenger (s.a.w.) has considered life and property as sacred⁴¹, and has recognised the right of a person detained arbitrarily to immediate release.⁴² The recognition shows that the religion prohibits arbitrary arrest and detention.

Islam also recognises freedom of opinion and expression. *Shūrā* or consultation is a principle of government in Islam.⁴³ Even

“*qawmin mujrimīn*” or “criminals”.

⁴¹ In his sermon at the Farewell Pilgrimage, the Messenger (s.a.w.) said: O People! Your blood and your properties are upon you holy, until you meet your God, just as this day (the day of pilgrimage), this month (the sacred month of Dhu al-Hijjah) and this city (the sacred land of Makkah) of yours are holy; and you will meet your God and He will ask you on your deeds.

See Hussain, *Human Rights in Islam*, 106.

⁴² Several individuals were arrested. The Messenger (s.a.w.) was delivering a sermon in the mosque when a man rose and asked, “O Messenger of Allah! For what crime have my neighbours been arrested?” The Messenger (s.a.w.) heard the question but did not respond, because he (s.a.w.) expected the arresting officer who was also present in the mosque to give an explanation. The man repeated his question until the third time. As there was no explanation from the arresting officer, the Messenger (s.a.w.) ordered the arrested men to be released.

See Abul A‘la Mawdudi, *Human Rights in Islam*, 2nd Edition (United Kingdom: The Islamic Foundation, 1980), 26; Hussain, *Human Rights in Islam*, 47-48.

⁴³ Qur’ān, 42:38:

And those who answer the call of their Lord, and perform regular prayer, and who (conduct) their affairs by mutual consultation, and spend out from what We have given to them.

Qur’ān, 3:159:

It is part of the Mercy of Allah that you deal gently with them; were you severe or harsh-hearted, they would have broken away from about you; so pass over (their faults) and ask for (Allah’s) forgiveness for them, and consult them in affairs (of moment). Then, when you have taken a decision put your trust in Allah. Verily Allah loves those who put their trust (in Him). (Emphasis added)

though the Messenger (s.a.w.) was divinely inspired⁴⁴, he (s.a.w.) still consulted his Companions on numerous matters and in various occasions. There were instances where the Messenger (s.a.w.) left his initial views and accepted suggestions from others.⁴⁵

Non-Muslims cannot hold certain government posts such as the Head of State. The government may impose on non-Muslim adult male citizens a tax called “*jizyah*”⁴⁶ which is a less heavy levy if compared with *zakāt* that a Muslim must pay⁴⁷ and the amount depends on their financial ability.⁴⁸ Nevertheless, these Islamic

⁴⁴ Qur’ān, 53:3-4:

Nor does he (Messenger (s.a.w.)) say (anything) of (his own) desire. (3)
It is no less than inspiration sent down to him. (4)

⁴⁵ For example, before the Battle of Uhud, the Messenger (s.a.w.) discussed with the Companions on how to defend Madīnah from the Quraysh’s attack. Majority wanted to go out of Madīnah and defend Madīnah in an open battle field. Although the Messenger (s.a.w.) was of the view that the Muslims should stay and defend Madīnah from inside, he (s.a.w.) followed the majority view.

See Abu Mazaya al-Hafiz, *Sirah dan Riwayat Hidup Nabi Muhammad*, 414-416; Safi-ur-Rahman al-Mubarakpuri, *al-Rahiq al-Makhtum/Cahaya Abadi*, Revised Ed., Mohd Nor Long (trans.), Mohd. Puzhi bin Usop (reviewer) (Selangor: al-Hidayah Publication, 1399H/1979, reprint 2016), 242-243; Ahmad Hatta, *The Great Story of Muhammad s.a.w.: Referensi Lengkap Hidup Rasulullah s.a.w. dari Sebelum Kelahiran hingga Detik-detik Terakhir*, Erwyn Kurniawan (editor) (Jakarta: Maghfirah Pustaka, 2011), 316-317; Akbar Shah Najeebabadi, *The History of Islam*, Safi-ur-Rahman Mubarakpuri (reviser), Abdul Rahman Abdullah & Muhammad Tahir Salafi (editors) (Riyadh, Houston, New York, Lahore & Dhaka: Darussalam, 2000, Vol. 1), 170-171.

⁴⁶ Qur’ān, 9:29:

Fight those who believe not in Allah nor the Last Day, nor hold that forbidden which has been forbidden by Allah and His Messenger, nor acknowledge the religion of truth, from among the People of the Book, until they pay *jizyah* with willing submission, and feel themselves subdued.

⁴⁷ Mohammad Talaat al-Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (The Hague: Martinus Nijhoff, 1968), 187.

⁴⁸ Muhammad Hamidullah, *Muslim Conduct of State*, Revised Ed. (Lahore: Kashmiri Bazar, 1945), 99; al-Ghunaimi, *The Muslim Conception of International Law*, 186.

rulings on the non-Muslims may be considered to be discriminatory against the non-Muslims and contrary to the concept of equality before the law under the international human rights law.

The Qur'ān recognises the freedom of non-Muslims to have, to change and to practise, their religions.⁴⁹ However, the Messenger (s.a.w.) criminalised apostasy from Islam.⁵⁰ The criminalisation of

⁴⁹ Qur'ān, 2:256:

Let there be no compulsion in religion: truth stands out clear from error: whoever rejects evil and believes in Allah has grasped the most trustworthy handhold, that never breaks. And Allah hears and knows all things.

If it had been the Lord's will, they would all have believed – all who are on earth! Will you then compel mankind, against their will, to believe! (99)

No soul can believe, except by the will of Allah, and He will place doubt (or obscurity) on those who will not understand. (100)
(Qur'ān, 10:99-100)

⁵⁰ The Messenger (s.a.w.) said:

Whoever changes his religion (from Islam), kill him.

See Abū 'Abd Allāh Muḥammad ibn Ismā'īl al-Bukhārī, *Ṣaḥīḥ al-Bukhārī* (Riyadh: Dār al-Salām li-al-Nashr wa-al-Tawzi', 1419H/1999), 1193; Abū Dāwūd Sulaymān ibn al-Ash'at al-Sajastal-Sajastannī al-Azadī, *Sunan Abī Dāwūd* (Beirut: Dār Ibn Ḥazm, 1419H/1998), 657; Muḥammad ibn 'Alī ibn Muḥammad al-Shawkanī, *Nayl al-Awṭār* (Beirut: Mu'assasat al-Tārikh al-'Arabī, n.d., Vol. 7), 216; Yūsuf al-Qarḍāwī, *Jarīmah al-Riddah wa 'Uqūbat al-Murtad fī Daw' al-Qur'ān wa-al-Sunnah* (Beirut: Mu'assasat al-Risālah, 2001), 32; Muḥammad Abū Zahrah, *al-'Uqūbah* (Cairo: Dār al-Fikr al-'Arabī, n.d.), 172; Said Ibrahim, *Jinayah Murtad dari Sudut Hukum Syara' dan Perundangan Islam* (Kuala Lumpur: Darul Ma'rifah, 1998), 7.

He (s.a.w.) also instructed his judge, Mu'adh ibn Jabal:

If a man has apostatised from Islam, call him to return to Islam; if he returns, release him; if he refuses, smite his neck. If a woman has apostatised from Islam, persuade her to return to Islam; if she returns, release her; if she refuses, smite her neck.

See al-Shawkanī, *Nayl al-Awṭār*, Vol. 7, 218-219; Said, *Jinayah Murtad*, 9; Hashim Mehat, *Malaysian Law & Islamic Law on Sentencing* (Kuala Lumpur: International Law Book Services, 1991), 207.

apostasy is another aspect in which Islam fundamentally differs from the western perspective on the freedom of religion.

Privacy should be respected.⁵¹ There is a *ḥadīth* that even if a man, upon finding another man peering secretly into his house, blinds the latter's eyes, the former will not be liable for prosecution.⁵² In one incident, Caliph 'Umar heard a man singing inside a house. So, he, suspecting some mischief, started peering into the house where he saw a woman and some intoxicants with the man. He remonstrated against them, but was himself reminded of the fact that he had violated their right to privacy by spying and entering the house without permission. The Caliph accepted that he was at fault, so he did not punish the man after taking an oath from the man that he would live a pious life in the future.⁵³

(5) Order and Security

This factor means that crime must be effectively controlled, civil conflict should be effectively limited, and people do not resort to violence to redress grievances.

During the era of the Messenger (s.a.w.) and the Rightly Guided Caliphs (622-661 CE), crimes such as theft, robbery and homicide still occurred, but the number of these cases in total was very small.

There were three civil wars that the Messenger (s.a.w.) faced in Madīnah, but generally he (s.a.w.) was successful in limiting civil conflicts, especially in preventing conflict between Aws and Khazraj. When he (s.a.w.) first arrived in Madīnah, he built a mosque that would bring the Muslims together. He consulted all the Arab and the Jewish tribes when he was drafting the State constitution⁵⁴ that regulated relations between all the parties thereto. The constitution provided that when a matter was disputed, and that if a dispute or

⁵¹ Qur'ān, 49:12 in part:

O you who believe! ... and spy not each other ...

⁵² Mawdudi, *Human Rights in Islam*, 25; Hussain, *Human Rights in Islam*, 46.

⁵³ Hussain, *Human Rights in Islam*, 47; Abū al-Wafā, *Kitāb al-I'lām*, Vol. 6, 275.

⁵⁴ Hamidullah, *The Prophet's Establishing a State*, 47 & 137-138.

controversy should arise, the matters and disputes must be referred to Allah and the Messenger (s.a.w.).⁵⁵

Knowing that they could get their disputes solved justly by the Messenger (s.a.w.), individuals did not resort to violence to redress their personal grievances. For example, Hilāl ibn Umayyah witnessed his wife committing adultery with Sharīk ibn Saḥmā', but instead of taking the law into his own hands, he made an accusation against both of them in the presence of the Messenger (s.a.w.).⁵⁶

(6) Regulatory Enforcement

This factor means government regulations should be enforced effectively and without improper influence, and administrative proceedings should be efficient and by respecting due process. Government should respect property rights and provide adequate compensation when expropriating private property.

In addition to judiciary, the religion also recognises the institution of *hisbah* which is based on religious obligations to enjoin what is right and forbid what is wrong.⁵⁷ Agencies may be established to ensure observance of obligations and make serious objections to violations, by way of preaching, advising, reprimanding or referring the offender to appropriate authority.⁵⁸ Agencies may be established, for example, to check price, supplies and production of goods; correct excesses of the police and other law enforcement agencies; and inspect public utilities.⁵⁹

⁵⁵ Constitution of Madīnah, articles 23 & 42.

⁵⁶ al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, Vol. 6, *ḥadīth* no. 4747, Bilal Philips, *Evolution of Fiqh*, 6; Mohamad Akram, *Introduction to Shariah*, 166.

⁵⁷ Qur'ān, 3:110 in part:

You are the best of peoples, evolved for humankind, enjoining what is right, forbidding what is wrong, and believing in Allah ...

See also Qur'ān, 3:104 & 9:71.

⁵⁸ Shamrahayu A Aziz & RK Salman, "Mechanisms for Protection and Enforcement of Human Rights in Islam" in Abdul Ghafur Hamid @ Khin Maung Sein (editor), *Human Rights Law: International, Malaysian and Islamic Perspectives* (Selangor, Malaysia: Sweet & Maxwell Asia, 2012), 371-387, at 382.

⁵⁹ *Ibid.*

Once the Messenger (s.a.w.) saw a man selling wheat. He (s.a.w.) then placed his hand unto the interior of the wheat and found moisture in it. He (s.a.w.) asked the merchant, “Why is this wet?” The merchant said, “It was caused by rain”. The Messenger (s.a.w.) then said, “Why did not you put the wet part on top so people can see it. He who defrauds us is not of us”.⁶⁰ Another example is when Caliph ‘Umar poured milk which was mixed with water onto the ground in front of the seller.⁶¹

It can be deduced from the above narrations that action should be taken without unreasonable delay. The Messenger (s.a.w.) also gave the seller an opportunity to explain the poor condition of his merchandise before reprimanding him. For a Muslim, a reprimand by the Messenger was a great sanction, especially when the Messenger (s.a.w.) told the seller that he was not of the nation.

The Messenger (s.a.w.) has respected the property rights of the people.⁶² When he (s.a.w.) acquired the land of some persons in Madīnah for the construction of his mosque, he (s.a.w.) paid compensation to the owners according to the prevailing prices then, although the owners did not demand any price.⁶³ Another example happened during the time of Caliph ‘Umar. A Syrian farmer complained that the Muslim armies had trampled down his crops. The righteous Caliph ordered the payment of compensation from the public treasury to the farmer.⁶⁴

(7) Civil Justice

This factor means that civil justice must be accessible, impartial and effective, and so should be alternative dispute resolution mechanisms.

As the judge, the Messenger (s.a.w.) has laid down principles that the burden of proof is on the plaintiff, and if the plaintiff’s claim

⁶⁰ Muslim, *Ṣaḥīḥ Muslim*, Vol. 1, *ḥadīth* no. 283-284; Mahmud Saedon, *Institusi Pentadbiran Undang-undang*, 187-188; Shamrahayu & Salman, “Mechanisms for Protection and Enforcement of Human Rights”, 378.

⁶¹ Mahmud Saedon, *Institusi Pentadbiran Undang-undang*, 189.

⁶² See footnote 41.

⁶³ Hussain, *Human Rights in Islam*, 44.

⁶⁴ *Ibid.*

is weak, the judge may ask for the defendant to take an oath to deny the plaintiff's claim before the judge can dismiss the plaintiff's suit.⁶⁵

Mazālim authority, mentioned above, could hear both civil and criminal cases. A dispute arose between al-Zubayr ibn al-'Awwām and his neighbour from among the Anṣār. Both had gardens; and al-Zubayr controlled the water source and stopped the water from reaching the Anṣār man's garden. The Anṣār man complained to the Messenger (s.a.w.) but was worried because al-Zubayr was the son of the paternal aunt of the Messenger (s.a.w.). Nevertheless, the Messenger (s.a.w.) ordered al-Zubayr to allow the water to reach the Anṣār man's garden.⁶⁶

The Qur'ān also promotes the idea of solving disputes through arbitration⁶⁷ and mediation.⁶⁸ Although the verses refer to marital disputes, by way of analogy, the mechanisms can also be resorted to in order to solve other types of disputes.

Not everyone knows the law or has advocacy skills. During the era of the Rightly Guided Caliphs, the learned Companions acted as attorneys in civil and criminal cases for litigants and the accused.⁶⁹ This addressed the concern on ineloquence raised earlier by the Messenger (s.a.w.):

You bring to me, for (judgment) your disputes, some of you perhaps are more eloquent in his plea than the other, so I give judgment in his favour according to what I hear from him. (Bear in mind, in my judgment) if I sliced off anything for him from the

⁶⁵ The Messenger (s.a.w) said:

Evidence is on the claimant, and the oath is on the person who denies.

⁶⁶ al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, Vol. 3, *ḥadīth* no. 2359-2362; Abū al-Wafā, *Kitāb al-I'lām*, Vol. 6, 149; Mahmud Saedon, *Institusi Pentadbiran Undang-undang*, 205.

⁶⁷ Qur'ān, 4:35 in part:

If you fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers ...

⁶⁸ Qur'ān, 4:128 in part:

If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best ...

⁶⁹ Mahmud Saedon, *Institusi Pentadbiran Undang-undang*, 98-136.

right of his brother, he should not accept it, for I slice off for him a portion from the Hell.⁷⁰ (Emphasis added)

(8) Criminal Justice

This factor means criminal investigation, adjudication and correctional systems should be effective, the criminal system should be impartial, and the rights of suspects should be respected.

Crimes are grave sins and their commission is contrary to the teaching of Islam. Thus, crimes must be investigated, prosecuted and punished. For these purposes, Islamic law recognises several methods of proof including confession, testimony, circumstantial evidence, documentary evidence and expert witness.

The Messenger (s.a.w) has laid down a principle that an accused is presumed innocent until proven guilty. For example, when Hilāl ibn Umayyah accused his wife of committing adultery with Sharīk ibn Saḥmā', the Messenger (s.a.w.) said to Hilāl, "Either you bring forth proof (i.e. 4 witnesses) or *ḥadd* punishment (of 80 lashes) will be inflicted on your back".⁷¹

The criminal system should be impartial. When a woman from a noble family was found guilty of committing theft, a Companion requested for a lesser sentence for her. The Messenger (s.a.w.) was unhappy and said:

Verily, the nations before you were destroyed because when a noble man from among them committed theft, they passed no sentence on him. But when a poor from among them committed theft, they punished him. By Allah, had Faṭimah the daughter of Muḥammad (the Messenger) committed theft, I will cut off her hand.⁷²

⁷⁰ Muslim, *Ṣaḥīḥ Muslim*, Vol. 4, *ḥadīth* no. 4473-4476.

⁷¹ al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, Vol. 6, *ḥadīth* no. 4747; Bilal Philips, *Evolution of Fiqh*, 6; Mohamad Akram, *Introduction to Shariah*, 166.

⁷² al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, Vol. 8, *ḥadīth* no. 6787.

CONCLUSION

From the above discussion, it is clear that the principle that a government must operate based on the principles of law is contained in the Qur'ān. Prophet Muḥammad (s.a.w.) also ruled Madīnah justly and without discrimination. The factors identified by the World Justice Project organisation are used to systematise this article. It is discovered that the idea of the rule of law is embedded in Islam. It is also found that some of the divine texts are not acceptable by some societies, such as the non-recognition of a third gender, the criminality of same-sex relationship and apostasy from Islam, as well as certain rulings for non-Muslims that are different from the laws for Muslims. Nevertheless, it is submitted that the rule of law is part of the objectives of Islamic law and thus Muslim States are obliged to improve this aspect in their respective governments.