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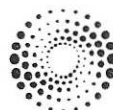
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Towards a Need for the Code of Professional Governance in Policies Making and Management for Public Sector: The Malaysian Experience

Mohamad Ismail Mohamad Yunus*

Abstract

Codes of professional conduct have to be viewed positively as a guide in developing relationships with clients. While it is expedient to have an Act of Parliament that regulates the particular professional discipline, that same regulatory board cannot replace the need for a professional body that can represent completely the interests of its members. The regulatory board may fall short of developing advances in research and development, in marketing and promotion, and in motivating young and passionate entrants into the professions. In the face of globalisation, liberalisation and competition, the professional as a body must be able to respond in the best interests of its clients, and the larger national interests. This can only succeed if the professional body has good governance structures in place that would allow for continuing dialogue with the government and civil society and further enrichment of its members through the concept of *Maqasid al-Shariah* (objectives of Islamic law) and the observance of the principles of *Wasatiyyah* (moderation). The constitution of the professional body must embody provisions that promote good governance and embrace values of integrity and accountability, and seek support from the public and the government of the day to provide an independent view on all matters. The universal truth is that everything should be done in the public good. Professionals form the backbone of human infrastructure in any economy, politics, social and legal growth. Their contributions through professional performance enhances the good delivery system that facilitates in policies making and management for public sector. They provide the skills and talent in balancing the pursuits of maximisation of services. The expression "good governance" has been constantly used lately in both the public sector and private sector in Malaysia. In the context of a private body it should be within the framework of the statute, which governs the body and also its constitution. In the public sector, it means that the administrators should act professionally and not abuse or misuse the power or authority given to them. They are regarded as the trustees of the public at large. The scope of this article is on good public governance in the

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Governance in Public Sector:

public sector or to be exact, good governmental administration as interpreted by the judiciary especially through its judicial review power.

Keywords: Good governance, code of professional conduct, objectives of Islamic law (*Maqasid al-Shariah*), moderation (*Wasatiyyah*), Islamic perspective.

Objectives

The objectives of this article are to:

- a. present the need for the Code of Good Governance in the Public Sector as professional and effective governance can enhance management, leading to more effective implementation of the chosen interventions, better service delivery and ultimately, better expected results;
- b. consider public perception on the need to introduce the Code of Good Governance in the Public Sector;
- c. promote professional practices of transparency in the public sector inculcating the high spirit of integrity and accountability;
- d. introduce Islamic points of view in the subject, and
- e. comply the principles of good governance in Malaysia as "Islamic Compliance".

Introduction

The definition of a "professional" is that the person is a learned and competent person with up-to-date knowledge and skill in the chosen field and who offer his services with competency, integrity, accountability and transparency working in either the public or private sectors. The professional maintains membership in a recognised professional body with strict observance of a code of ethics. For the public interest, the professional working in the private sector should charge a reasonable fee, and those in the public sector should be paid a reasonable wage.¹

The word "governance" comes from the word "govern" and has several meanings. First, it means rule by authority; conduct policy and affairs of state; and secondly, the activity or manner of governing; action, manner, power of governing. Technically, governance means the process of decision-making and the process by which decisions are implemented (commission) or not implemented (omission). Legally, it means the management and administration of a body should be within the boundary of legal frameworks.²

1 Balai Ikhtisas Malaysia, *The Book of Professionals* (Kuala Lumpur: Malaysian Professional Centre, 2014), p 11.

2 Ibrahim Ismail, *The Law & You: Elections* (Kuala Lumpur: Sweet & Maxwell Asia, 2013), p 101.

Another word, which has an intimate connection with the word "governance", is "government", which means form of polity; persons governing state; state as agent; or administration or ministry. A government is presumed to be the representative or trustee of the people or public. The term "public" commonly refers to the government. So the term public body simply means a body where the government is directly involved in the administration.

Therefore, the term "good public governance" may be defined as the process of decision-making of public authority and the process by which decisions are implemented (commission) or not implemented (omission) and which must be made within the boundary of legal framework. Any decision or action that the public authority makes outside legal framework is classified as bad governance, which can be struck off by the court of law.

I. Definition of public sector/authority

As stated in the earlier, the focus of this chapter is on good public governance in the public sector or to be exact, good governmental administration. The term "public" commonly refers to the government. So the term public body simply means a body where the government is directly involved in the administration.

The main actor of good public governance in a country which adopts wholly or partially the separation of power principles is the executive branch of government, which is dominated by the public servants who occupy positions in the public authorities or bodies.³

In Malaysia, the first definition of the words "public sector/authority" can be found in Article 160(2) of the Federal Constitution, which defines public authority to mean the Yang di-Pertuan Agong, the Ruler or the Yang di-Pertua Negeri of a State, the Federal Government, the Government of a State, a local authority, a statutory authority exercising powers vested in it by federal or state law, any court or tribunal other than the Federal Court, the Court of Appeal and High Court, or any officer or authority appointed by or acting on behalf of any of those persons, courts, tribunals or authorities.

The second meaning is a wider one, which can be inferred from the judicial decisions. In *Merdeka University Bhd v Government of Malaysia*,⁴ the court includes "public element" in the test to determine whether a body is a public authority or not. The public element here includes public control, public appointment to office, public interest and public funds. In *Tang Kwor Ham & 2 Ors v Pengurusan Danaharta Nasional Bhd & 5 Ors*,⁵ the court held that the defendant/respondent, a company limited by shares established under

³ Jowell, Jeffrey et al, *De Smith, Woolf, and Jowell's Principles of Judicial Review* (ed Takis Tridimas) (United Kingdom: Sweet & Maxwell, 1999), p 395.

⁴ [1981] 2 MLJ 243, FC.

⁵ [2006] 4 AMR 89.

the Companies Act 1965, held by the Minister of Finance (public fund) but regulated under the Pengurusan Danaharta Nasional Berhad Act 1998 is a public body that is subject to judicial review.

II. Types of powers

Every public authority has its own powers. The powers may be styled as administrative/executive, quasi-legislative and quasi-judicial. The quasi-legislative power refers to power making of subsidiary legislation, as defined under s 3 of the Interpretation Acts 1948 and 1967. The quasi-judicial power refers to adjudicating on disputes, which is normally exercised by tribunals. The crux of administrative power is a discretionary power, which can be defined as power of the authority to choose between more than one possible decision, upon which there is room for a reasonable person to hold different opinions. Quasi-legislative and quasi-judicial are both within the purview of discretionary power. All the powers are subject to scrutiny by the judiciary in order to uphold the rule of law, which has become the cornerstone of good governance.⁶

III. Discretionary power by the public authorities

This part examines the judicial approaches to the exercise of administrative/executive powers and especially the discretionary power by the public authorities. The guidance and legal principles enunciated by the judiciary are of high value, which directly contributes to good public governance. Discretionary power has a close and intimate relation with good public governance.

If discretionary power is correctly exercised it will lead to good governance, if not it will lead to disaster. In exercising this power, the public authority has to observe several legal principles in which the dos and don'ts must always be borne in mind of it. The action must be based on legality, rationality and propriety.

Each public authority has its own reference/guidance, which is provided in the statute or written law. In exercising its powers the public authority must act within the ambit of the law. The court has laid down several principles that must be adhered to by the public authority in this regard. The following are some of the pronouncements of good public governance advanced by the judiciary.

IV. Jurisdiction of the authority

The public authorities must have jurisdiction conferred by the statutes. This principle goes to the root of very power of the authority. The authority cannot

6 Ibrahim Ismail, *The Law & You: Elections*, supra, n 2, p 103.

exercise a power which it does not have. In *Fadzil bin Mohammad Noor v Universiti Teknologi Malaysia*,⁷ the power to dismiss was given to the Disciplinary Board/Committee not the University Council. The University Council was the appellate body. It was held that the exercise of power dismissing the plaintiff by the University Council was invalid. In *Rohana bte Ariffin & Anor v Universiti Sains Malaysia*,⁸ the court held that the University Council had no power to reduce the salary below the grade of the aggrieved lecturer.

V. Element of intention

The element of good (*bona fide*), honest, correct intention is the basis of good public governance, and the element of bad or evil intention (*mala fide*) is contrary to good public governance. The public authority must exercise its power based on *bona fide*. *Mala fide* such as grudge, revenge must be avoided. *Mala fide* may exist in various situations, be it in political, economic, social or personal interests. Some of the Indian cases are quite helpful in order to understand the application of *mala fide*.

In *Singh v State of Pratap Punjab*,⁹ the plaintiff, a civil surgeon was suspended due to a disciplinary action against him on a charge of accepting a small bribe. He had refused to perform what the Chief Minister had asked him to do, and it was proven that there was *mala fide* that resulted in the charges. Similarly, the court in *Rowjee v State of Andhra Pradesh*¹⁰ quashed the decision to nationalise the plaintiff's bus companies on the ground of *mala fide* because the nationalisation was made over an opposing political party.

To the same effect, in *Sadanandan v State of Kerala*,¹¹ the court held that *mala fide* extends to economic activities. The detainee was served with a detention order made by the Secretary of Home Affairs.

The detention order was issued based on the report prepared by one Deputy Superintendent of Police ("DSP"). The detainee had a licence to operate a kerosene business. He challenged the order based on *mala fide*, namely, that the DSP wanted the kerosene business to be given to his relative instead. The DSP did not deny the allegation. The court set aside the detention order because it was made *mala fide*.

In a Malaysian case of *Wong Chee Kong v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Anor*,¹² the court held that the second detention order was held unlawful because of *mala fide* due to the very brief period between release and re-arrest of the applicant at the entrance gate of the detention centre, when

7 [1981] 2 MLJ 196.

8 [1989] 1 MLJ 487.

9 AIR 1964 SC 72.

10 AIR 1964 SC 962.

11 AIR 1966 SC 1925.

12 [2000] 1 AMR 698; [2000] 5 MLJ 226.

the arresting officer was clearly not at all in a position to acquire any new belief that the detainee had acted in a manner which would justify his detention.

Likewise, in a landmark case of *Abdul Ghani Haroon v Ketua Polls Negara (and Another Application) (No 3)*,¹³ the court in granting *habeas corpus*, highlighted three situations, which amounted to *mala fide*. First, the joint letter of the respondent IGP and the Special Branch Director showed that they had prematurely made up their minds to further detain the two applicants. Second, the respondent's deliberate and unreasonable access denied to family members of the applicants. And, last, the applicants had been deliberately and unreasonably denied access to their counsel.

VI. Purpose as intended by the statute

The power must be exercised by the public authority for the purpose as intended by the statute. It becomes improper if the power given for one purpose but it was used for another purpose. The decision of the Privy Council in *Sydney Municipal Council v Campbell*¹⁴ illustrates the situation.

The power was given to the council to acquire land, and the purpose of this acquisition was for human utility. In this case the council acquired the land not for the purpose of improving the city and widening the street but to keep the land to ensure that the value of the adjoining land, which belonged to the council, would increase. The council's decision was declared invalid.

The same effect has been considered by the Federal Court held in *Pengarah Tanah & Galian, Wilayah Persekutuan v Sri Lempah Enterprises Sdn Bhd*,¹⁵ that the changing of the land status from a freehold to a leasehold for the purpose that the developed land be in line with the newly alienated land to which since the Second World War only leases, not title in perpetuity, applies, amounted to improper purpose and was invalid.

What if the statute states several purposes? For example, s 3 of the Land Acquisition Act 1960 states that the State Authority can acquire land for:

- (i) public purposes;
- (ii) any corporation undertaking work which in the opinion of State Authority is for public utility; and
- (iii) industrial, building, mining purposes etc.

An issue would arise as to whether the purposes mentioned can be cumulated or separated, i.e. conjunctively or disjunctively? In *Yew Lean Finance Development*

13 [2001] 3 AMR 2573.

14 [1925] AC 338, PC.

15 [1979] 1 MLJ 135.

(M) Sdn Bhd v Director of Lands & Mines, Penang,¹⁶ the court held that s 3 of the Land Acquisition Act 1960 leaves discretion with the State Authority to choose an area of land for whatever purpose it needs to acquire. The State Authority need not confine the acquisition of land for purposes which come under one head only, that is, the State Authority may either use disjunctively or conjunctively.

VII. Relevancy of facts

The authority has a duty to take into account only relevant matters in exercising its power. Irrelevant materials must not be used as the basis of its decision. Sometimes, the statute lays down specific considerations such as age, family background and education of the affected person. At other times, it is left to the official or authority to make an assessment. A decision which is made, based on irrelevant consideration or leaving out relevant consideration, will be held invalid.

In *Re Haji Sazali*,¹⁷ the court held that the magistrate's order was invalid because the magistrate failed to consider the facts before he signed the order that the drug dependant be sent to a drug rehabilitation centre. The facts that the magistrate has to take into account are stated under s 6(4) of the Drug Dependants (Treatment and Rehabilitation) Act 1983, which includes the character, antecedents, age, health, education, employment and family of the dependant. In *Sugumar Balakrishnan v Pengarah Imigresen Sabah & Pihak Berkuasa Sabah*,¹⁸ the Court of Appeal quashed the cancellation order which revoked the entry pass of the applicant because of his bad personal morality. Under the Immigration Act 1963, the power of cancellation may be used based on public morality. However, on further appeal, the Federal Court in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan*,¹⁹ reversed the Court of Appeal's decision based on different grounds.

Again, the court in *Dr Rayanold Pereira v Minister of Labour, Malaysia & Anor*,²⁰ quashed the Minister's refusal to refer a dispute to the Industrial Court. The Minister in exercising his power under the Industrial Act failed to consider the relevant materials such as:

- (1) the breach of employment contract through the salary cut and the non-payment of salary;
- (2) the breach of mutual respect by placing of another doctor in the applicant's room and the attitude of the nurse towards the applicant.

16 [1977] 2 MLJ 45.

17 [1992] 2 MLJ 864.

18 [1998] 3 AMR 2373; [1998] 3 MLJ 289.

19 [2002] 3 AMR 2817; [2002] 3 MLJ 72.

20 [1997] 5 MLJ 366.

Similarly, in *Pengarah Tanah & Galian, Wilayah Persekutuan v Sri Lempah Enterprises Sdn Bhd*,²¹ it was held that there was no relevancy of facts between the development and the tenure of the land.

VIII. Act without any interference

This means that the deciding authority should not exercise its discretion based on dictation or instruction by somebody else. In other words it cannot exercise discretion upon dictation. The authority, on which the law confers discretion, must perform the function by itself and exercise its power according to his own judgment and wisdom without any interference or dictation from any higher authority. If he does not act by himself then he abdicates its responsibility.

In *P Potto v Chief Police Officer, Perak & Ors*,²² the court considered s 27 of the Police Act 1967 which gives the Officer-in-charge of Police District ("OCPD") of the district power to grant or to reject a licence to hold a public gathering in a public place. The application was made to the OCPD, but the OCPD referred the matter to the police headquarters instead for consideration. The application was refused. It was found that the OCPD had abdicated his power by transmitting the application for consideration and determination by the State Chief Police Officer ("CPO").

Also, the Federal Court in *Chong Cheong Wah & Anor v Sivasubramanian*²³ discusses the police power of seizure of books under the Control of Imported Publications Ordinance 1958. The Ordinance empowered the police to seize any publications which seem to be prejudicial. In this case the seizure was made because of a circular issued by the Inspector General of Police whereas the defendant (the seizing police officer) had not read the book so as to ascertain whether it contained prejudicial elements or not. The court held that the defendant's action was not based on his personal satisfaction but was dictated by the circular.

IX. Rational and reasonable decision

This occurs when the authority simply makes a decision based on a standard form or standard norm without applying its mind or rational/reasonable according to individual cases. This means that decision is not made based on the merits or individual circumstances since the authority in making the decision did not consider the facts and circumstances of each and every particular case.

For instance, in the case of *Emperor v Sibnath Banerjee*,²⁴ the Privy Council held that the detention order signed by the Home Secretary was not valid. It

21 [1979] 1 MLJ 135.

22 [1986] 2 MLJ 204.

23 [1974] 1 MLJ 38.

24 AIR 1945 PC 156.

was found that the Home Secretary followed a standard practice of issuing a detention order automatically when the police recommended it and the Home Secretary did not personally satisfy himself, whether such order was justified or not in a case. The court also held that the Home Secretary's personal satisfaction in each case was a condition precedent to the issue of the order.

Again, the Federal Court in *Morgan a/l Perumal v K/l Hussein bin Abdul Majid & Ors*,²⁵ echoed the same sentiment as to the existence of facts leading to a preventive detention order.

The applicant was arrested under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ("EPOPCO") and then ordered to be detained for two years by the Deputy Minister for Home Affairs under s 4(1). One of the contentions put forward by the applicant in applying for *habeas corpus* was that there was a long delay or large gap between the dates of the alleged criminal activities and the date of the detention order, namely, the alleged criminal activities occurred from August 1993 to April 1994 but the detention order was only issued in March 1996. There was no proper explanation of the delay of two years. Mere past criminal activities should not be used for automatic or robotic issuance of detention orders. These past activities should ordinarily be proximate in point of time to justify the detention order.²⁶ Thus, the court granted *habeas corpus* in the case.

X. Exercising discretionary power

The authority must not, by adoption of a fixed rule of policy, disable itself from exercising its discretion in individual cases. By failing to keep its mind by "shutting its ears" to an application, the body in question effectively forecloses participation in the decision-making process.²⁷

The court in *MUI Finance Bhd v Menteri Kewangan Malaysia*,²⁸ held that the exercise of discretionary power made by the Minister amounted to a fetter of discretion by the rigid administrative circular. In this case, under s 129 of the Customs Act 1967, the Minister of Finance has power to deliver to the owner, any goods seized and forfeited under the Act. The plaintiff's lorry was seized by the customs and the magistrate ordered that the defendant should forfeit the lorry. The plaintiff applied to the defendant to return the lorry but was refused. There was a policy adopted by the Minister that he would reject all applications for the return of any forfeited goods if financial institutions made the applications.

25 [1998] 3 AMR 2483; [1998] 3 MLJ 335.

26 [1988] 2 MLJ 638.

27 Jowell et al, *De Smith, Woolf, and Jowell's Principles of Judicial Review*, supra, n 3, p 395.

28 [1994] 2 AMR 1175; [1994] 2 CLJ 630.

In *H Lavender & Sons Ltd v Ministry of Housing & Local Government*,²⁹ the Privy Council clearly elaborated on the meaning of fetter that restricts the exercise of power by the public authority. Under the statute, the Minister of Housing had power to grant permission for a licence to extract minerals from agricultural land. There was a policy adopted by the ministry to reserve high quality agricultural land for agriculture in preference to other land developments. Under the policy, if the Minister of Agriculture had raised an objection, which was not withdrawn, the Minister of Housing had to refuse permission in any case. It was held that the Minister of Housing in effect, had left the making of decision to the Minister of Agriculture, whereas the law gave the power to him and not the Minister of Agriculture. The discretion of the Minister of Housing cannot be bound by the directive made by the Minister of Agriculture. If the policy is a rigid one, so that so long there is objection, no licence been given, this discretion is not valid. If the policy is of consultative nature, it is valid because it does not bind the Minister of Housing.

XI. The essence of time

The power should be exercised within the prescribed limit if the law provides so. If the law is silent as to time limit, it must be exercised within a reasonable period. The common expressions used by the statute indicating the time such as "as soon as may be" or "as soon as practically possible" mean that the time when the power should be exercised is a question of fact depending on the circumstance of each particular case. In *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Galk Kee*,³⁰ the Federal Court, in a land acquisition case, quashed the acquisition proceedings because of the collector's delay of seven years in holding the inquiry under s 10 of the Land Acquisition Act 1960 after the declaration of acquisition.

In order to solve the problem of delay, Parliament, in 1984, amended the Land Acquisition Act 1960 by inserting a new subsection (4) to s 8. The effect of the amendment is that a declaration of acquisition shall lapse and cease to have any effect on the expiry of two years of its publication in the *Gazette* if the collector has not made any award. This is recognition by the legislature that long delays in making awards in land acquisition cases, cause injustice to landowners and infringe on Article 13 of the Federal Constitution.

For instance, in the case of *Pengarah Tanah dan Galian Negeri Kedah & Anor v Emico Development Sdn Bhd*,³¹ the Court of Appeal, in affirming the High Court's decision quashing the acquisition proceedings, stated that the new subsection (4) of s 8 was intended to place a definite time limit within which the State Authority must act to effect acquisition of land.

²⁹ [1970] 3 All ER 871.

³⁰ [1983] 2 MLJ 35.

³¹ [2000] 1 AMR 121; [2000] 1 MLJ 257.

XII. Neutralisation

Article 8 of the Federal Constitution, subject to exceptions, guarantees equality before the law for all. Equality means equal justice. In *PP v Su Lian Yu*,³² the court held that the decision of the Attorney General ("AG") to transfer the case from the Sessions Court to the High Court was unconstitutional for being a violation of Article 8 and because the transfer had been made without valid reason. Merely being a Member of Parliament did not justify the AG to exercise his power to transfer the case. However, discrimination or exception can be made in situations that are not alike. The maxim "like situation should be treated alike" applies. Rational classification is permitted.³³

XIII. The concept of reasonableness

The authority's decisions must be rational, logical and reasonable. If not, the decision can be challenged on ground of irrationality or unreasonableness. The House of Lords in *Council of Civil Service Union v Minister for the Civil Service*,³⁴ (better known as the GCHQ case) preferred to use the term "irrational", which it described as applying to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

Another meaning of unreasonableness was proffered in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*,³⁵ where the court held that "unreasonable" denotes conduct which no sensible authority acting with due appreciation of its responsibilities would have adopted. The House of Lords had made the famous formulation of unreasonableness in *Associated Provincial Picture Houses Ltd v Wednesbury Corp*,³⁶ (better known as the *Wednesbury* case) under which the courts can interfere if a decision is so unreasonable that no reasonable authority could ever come to that decision.

The following cases may help the authority before exercising its power to decide whether its decision would be reasonable or not. In *Chai Choon Hon v Ketua Polis Daerah, Kampar & Government of Malaysia*,³⁷ the Officer-in-charge of Police District ("OCPD") had imposed several conditions on the public gathering licence/permit which was scheduled to be held from 5 p.m. to 11.30 p.m. One of the conditions was that only seven speakers were allowed to participate in the speech. The Supreme Court held that there was no valid reason for the restriction imposed on the number of speakers within the time limit granted in the licence; and the condition was unreasonable in the

32 [1976] 2 MLJ 128.

33 [1977] 2 MLJ 155.

34 [1985] AC 374, HL.

35 [1977] AC 1014, HL.

36 [1948] 1 KB 223.

37 [1986] 2 MLJ 203.

circumstances as the police had the means to deal with any infringement of the time frame specified in the licence.

Similarly, in *Tropiland Sdn Bhd v Majlis Perbandaran Seberang Prai*,³⁸ the decision made by the local authority was invalidated because the decision was impossible to perform and entailed a new plan, which was not part of the original plan. In this case, the applicant had already completed construction of a five-storey building on the land and the architect had already issued a certificate of practical completion. The defendant in rejecting the application of the applicant for the certificate of fitness argued that the applicant did not complete the construction of the monsoon drain and concrete perimeter drain. The court quashed the defendant's decision because it was unreasonable. The court found that the monsoon drain could not be constructed because the illegal occupiers were still there. It was impossible to carry out the work until and unless the defendant had cleared out all the illegal occupiers from the land, which was the duty of the defendant. In addition, the concrete perimeter drain was not part of the approved plan, and thus, a new condition.

Again, in the case of *Dr Benjamin George & Ors v Majlis Perbandaran Ampang Jaya and other applications*,³⁹ (known as the Highland Towers case) the court held that an order is unreasonable if it gives inadequate time for compliance, leads to criminal acts, is against the law (subject to civil action), or is inconsistent with the Federal Constitution.

This case involved the collapse of Block I of the Highland Towers Condominium some time in 1992. The applicants were the developers and several residents and purchasers of blocks 2 and 3. The defendant was the local authority of the area where the Highland Towers were situated.

The defendant exercised its power under s 83 of the Street, Drainage and Building Act 1974 by issuing notices to the applicants ordering them to either repair or demolish blocks 2 and 3 and also the walls on the nearby hill slopes within three months from the dates of the notices because they were in dangerous condition. The court, in quashing the defendant's decision, found that:

- (1) it was impossible to comply with the s 83 notices because it was irrational to expect the applicants to do repairs on the hill slopes which they did not own, and which would have amounted to committing a trespass;
- (2) the three month period was a wholly inadequate time period within which to carry out repair or demolition; and

38 [1996] 3 AMR 3101; [1996] 4 MLJ 16.

39 [1995] 3 MLJ 665.

- (3) the repair or demolition of the buildings would deprive them of their property and this would be contrary to Article 13 of the Federal Constitution.

In *Pengarah Tanah & Galian, Wilayah Persekutuan v Sri Lempah Enterprises Sdn Bhd*,⁴⁰ the court held that a change of land status from a freehold to a leasehold amounts to deprivation of property, which violates Article 13 of the Federal Constitution.

XIV. Procedural fairness and justice

The authority should observe and comply with the procedural requirements mandated by the statute. The authority's decision can be declared invalid due to procedural impropriety. The procedural requirement may exist in various forms, among others, such as prior notice, inquiry, communication, endorsement, publication, consultation, hearing and reasoned decision. Whether the procedural compliance is mandatory or merely directory depends on the construction of the statutory provision and the effect of the decision upon the aggrieved person. If the court interprets it as mandatory, then non-compliance by the authority renders the decision invalid. If it is interpreted as directory, then non-compliance does not invalidate the decision. In other words, the validity of an authority's decision depends on the status of the procedural requirement when it exercises its discretionary power.

In *Barat Estates Sdn Bhd & Anor v Parawakan & 365 Ors*,⁴¹ the court held that the word "may" which appears in ss 12 and 13 of the Employment Act 1955 is mandatory. The parties (employer and employee) must give notice to each other before the employment contract can be terminated or renewed. The notice was necessary to avoid the employment becoming forced labour, which is prohibited by Article 6(2) of the Federal Constitution.

Usually, the court will hold that if the exercise of the discretion affects fundamental rights of a person such as the right to personal liberty, the right to employment or the right to property, then procedural requirements would be mandatory. For example, the right to personal liberty is guaranteed under Article 5 of the Federal Constitution.⁴² A writ of *habeas corpus* will be granted by the court if a person is deprived of liberty without compliance with procedural requirements.⁴³ The court has adopted a liberal approach in interpreting the word "law" as to include procedural law as well, and by holding that law is not confined to "*lex*" but extends to "*jus*" as well.⁴⁴

40 [1979] 1 MLJ 135

41 [2000] 3 AMR 3030.

42 Article 5(1) of the Federal Constitution provides "No person shall be deprived of his life or personal liberty save in accordance with law".

43 Article 5(2) of the Federal Constitution. Habeas corpus is a writ or an order issued by a judge of the High Court ordering the detaining authority to produce a detainee before the High Court and to release him from further detention.

44 *Ong Ah Chuan v PP* [1981] 1 MLJ 64.

In *Puvaneswaran v Menteri Hal Ehwal Dalam Negeri, Malaysia*,⁴⁵ the applicant was detained under the EPOPCO. The regulation under which it was made requires the authority to supply two copies of Form I to the detainee but only one copy was given. The court held that it was mandatory to give two copies and because of that, ordered the applicant's release from detention.

Similarly, the court also adopted a liberal approach in interpreting the word "life" under Article 5 to include right to employment.⁴⁶ Any infringement committed by the authority of this right without complying with procedural requirements would be held invalid. In *Aria Kumar @ Omar bin Abdullah & Anor v Ketua Pengarah, Jabatan Hasil Dalam Negeri Malaysia & Anor*,⁴⁷ the court decided that the dismissal of civil servants without taking reasonable effort to trace them when the AR registered letters were returned undelivered, was invalid.

However, after this case the government amended the law by mandating the authority to make advertisement in a national newspaper such as the *New Straits Times*, *Berita Harian* or *Utusan Malaysia* in such cases. This reasoning also extends to the right to property protected under Article 13 of the Federal Constitution.⁴⁸ In *Pow Hing v Registrar of Titles*,⁴⁹ the court held that the decision of the authority to put up the property on public auction was invalid because of failure on the part of the Collector of Land Revenue to make an endorsement of the service of the notice as required by s 97(2) of the National Land Code.

XV. Right to be heard (*audi alteram partem*)

This maxim means, "hear the other side" The affected party must be given an opportunity to present his case in order to enable him to rebut the allegation made against him. The rationale behind this right is as follows:

- (1) To give advantage to the affected person and also the decision-maker, namely, so that the affected person can present the data and correct information to the decision-maker who, based on the information supplied, can make a right decision; and
- (2) Hearing is part and parcel of the democratic principle, which stresses on public participation leading towards good public governance.

The application of this right depends on several conditions. There is no problem if the relevant law expressly guarantees the right. For example, Article 135 of the Federal Constitution provides that a civil servant must be given a right of hearing before he is dismissed or reduced in rank. If the law is silent about

45 [1991] 3 MLJ 28.

46 For detailed discussion on judicial approach on right to life under the Federal Constitution, Article 5(1), see *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261.

47 [1994] 3 AMR 2572; [1994] 4 CLJ 515.

48 Article 13 of the Federal Constitution says "No person shall be deprived of property save in accordance with law".

49 [1981] 1 MLJ 155.

the hearing, the court has adopted several principles that should be followed by the authority. A hearing must be given when the authority exercises what amounts to a quasi-judicial function. This liberal approach was made by the Federal Court in *Ketua Pengarah Kastam v Ho Kwong Seng*.⁵⁰

Second, whether the decision of the authority has an adverse effect on the aggrieved person's rights as decided by the Court of Appeal in *Sugumar Balakrishnan v Pengarah Imigresen Sabah & Pihak Berkuasa Sabah*,⁵¹ Third, as decided by the Supreme Court in *John Peter Berthelsen Director-General of Immigration, Malaysia*,⁵² where the aggrieved person has a legitimate expectation over the decision made by the authority.

XVI. Rule against bias (*nemo iudex in causa sua*)

This concept means that a man should not be a judge in his own cause. Bias disqualifies an individual from acting as an adjudicator/judge. The rule against bias derives from two fundamental maxims:

- (1) a judge should not be a judge in his own cause; and
- (2) justice must not only be done but be seen to be done. There are three basic reasons why bias is prohibited:
 - (a) requirement of accuracy in public decision-making;
 - (b) requirement of absence of prejudice or partiality on the part of the decision-maker; and
 - (c) requirement of public confidence in the decision-making process.

Bias which disqualifies a person from being an adjudicator can be seen from several situations, among others: firstly, pecuniary or monetary interest. This ground refers to a situation where the judge or adjudicator has a financial interest over the dispute. The House of Lords held in *Dimes v Grand Junction Canal Co Proprietors*,⁵³ that the decision of the dispute was invalid because the adjudicator had been a shareholder of the company which was involved in the dispute.

The second reason is family ties. In *PP v Mohd Ghazali*,⁵⁴ it was found that the magistrate who heard the case was the brother of the defendant. Therefore, the magistrate's decision was quashed because of the element of bias.⁵⁵ The third

50 [1977] 2 MLJ 152.

51 [1998] 3 AMR 2373; [1998] 3 MLJ 289.

52 [1987] 1 MLJ 134.

53 (1852) 3 HLC 759.

54 [1995] 2 AMR 1446.

55 [1999] 3 AMR 3529; [1999] 3 MLJ 1.

situation can be seen from direct involvement in the proceeding. In *Govindraj v President MIC*,⁵⁶ the court disqualified the party president from sitting in the panel of appeal because if the party president sat, he would thereby become the accuser, prosecutor and judge in the case. In this case the party president suspended the plaintiff from the party. The appeal lodged by the plaintiff was heard by the Supreme Council, which was composed of the president.

In the case of *Rohana Arifin & Anor v USM*,⁵⁷ the university registrar, who was also the complainant in the case, was present during the disciplinary proceedings. The court held that the presence of the registrar during the proceedings constituted bias even though the registrar did not participate as a member of the board. Therefore, the decision made by the Disciplinary Board was quashed. Another situation, which amounts to bias, is where the judge has a strong commitment to a particular group or belief.

The House of Lords in *Ex p Pinochet Ugarte (No 2)*,⁵⁸ decided that the extradition proceeding was invalid because one of the judges was a director of Amnesty International, which was one of the parties in the proceedings for the extradition order.

XVII. Reasonable grounds for judgment

This means that the authority should give its reasons for the decision made. There are some advantages and disadvantages of the requirement of reasoned decision. The advantages are, among others:

- (1) giving reasons can assist the court in performing its supervisory function and ascertaining whether the decision made by the authority was based on legitimate/valid reasons or not;
- (2) giving reasons can influence the aggrieved party as to whether to bring the case for judicial review or not; and
- (3) giving reasons can create an element of transparency of the public authority showing that there was no hidden agenda behind the decision.

Meanwhile its disadvantages are, among others:

- (a) the need to give reasons can delay the administration in making decision; and
- (b) reasons can overburden the administration.

56 [1984] 1 MLJ 190.

57 [1989] 1 MLJ 487.

58 [1999] 1 All ER 577; [2000] 1 AC 119, HL.

Legally, there is no general duty on the part of the authority to give reasons for its decision.⁵⁹ However, this general rule is subject to several exceptions, when reason becomes mandatory. Failing to give reason for the authority's decision can lead to the decision being questioned and declared invalid. Among the situations where giving reasons becomes mandatory are:

- (i) when the relevant statutes require reasons for the decision. For example, s 117 of the Criminal Procedure Code mandates the magistrate to give reasons for allowing the arresting authority to make further remand after the expiry of 24 hour period;⁶⁰
- (ii) when the decision may affect the right of appeal or put the livelihood of the affected person at stake;⁶¹
- (iii) when the authority refuse to follow the recommendation made by the other party which has authority to make the recommendation;⁶² and
- (iv) when a fundamental liberty is adversely affected by a decision taken by a public decision-maker.⁶³

XVIII. Good governance according to Islamic perspective

The Holy Qur'an describes good governance as the law of justice, a just and principled order and compliance with rights and responsibilities in a society.⁶⁴ The Holy Qur'an declares:

[And they are] those who, if We give them authority in the land, establish prayer and give *zakah* and enjoin what is right and forbid what is wrong.⁶⁵

It further says:

O you who have believed, be persistently standing firm for Allah, witnesses in justice, and do not let the hatred of a people prevent you from being just. Be just; that is nearer to righteousness.⁶⁶

The Islamic perspective of good governance is qualitative and not mechanical. Major features of good governance can be précised under seven fundamentals:

59 The leading case on reasoned decision in Malaysia is *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487.

60 Another example is the Malaysian Timber Industry Board (Incorporation) Act 1975, s 17(5A)(b).

61 *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487.

62 *Rajasegaran v Pusat Pemulihan Serenti Raub & Anor* [2000] 1 MLJ 529.

63 *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996] 1 MLJ 493.

64 "What Is Islam?", *What Is Islam About?*, n.d., <http://www.whatisislamabout.com/islam/what-is-islam> (accessed on January 5, 2017).

65 Al-Hajj, 22:41.

66 Al-Maidah, 5:8.

- a. Mutual Consultation (*As-Shura*);
- b. Leadership (*Khilafah*);
- c. Accountability (*Hisab*);
- d. Transparency;
- e. Justice (*Adl*);
- f. Equality; and
- g. Promote good and prevent evil (*Al-Amr Bil Maruf wa Nahi al-Munkar*).

a. The concept of mutual consultation (*As-Shura*)

As-shura is one of the most important constitutional principles in the Islamic Law. As it is very important that is why it has been mentioned in Qur'an. Moreover, a *sura* (chapter) in the holy Qur'an was named after that principle. It is called "*Shura*". This shows the importance of this principle in all the affairs of Muslims. The whole system of the Islamic state from its beginning to the selection of the *Khalifa* of the state and all those in key positions as well as its communications must be led by *Shura*, so it should be carried out directly or indirectly over selected or nominated councils.

There is mentioned in the Holy Qur'an:

O you, who believe, be custodians of justice (and) witness for Allah, even though against yourselves or your parents or your relatives. Whether a man is rich or poor, Allah is the greatest well-wisher than you. So follow nor the behests of lust, lest you swerve from justice.⁶⁷

Even the Prophet, although he was the receiver of direct guidance from the Almighty Allah, was commanded. Allah says:

Consult (*shura*) them in affairs (of moment). Then, when you have to take a decision put the trust in Allah. For Allah loves those who put their trust (in Him).⁶⁸

Following this advice and lead, *Khalifa* Umar admonished that: There is no *khilafah* without consultation. Thus, the same mechanism was followed by the followers of Prophet Muhammad (pbuh) for the selection of *Khalifa* and it was the first consultation (*shura*) guidance, although the selection and approval process varies, the important principle is the truth, accountability and public confidence in those selected by the community.

⁶⁷ An-Nisa, 4:135.

⁶⁸ Al-Imran, 3:159.

The importance of *Shura*

The basic fundamental of Islamic political system is called *Shura*. It is responsible for all the affairs of Muslims. Thus, the Islamic state might have preceded the modern democratic systems with regard to the necessity of agreement over choosing the one who runs its affairs and cares for its interests, something which stresses the value and effectiveness of unanimity among Muslims.⁶⁹

Decision of *Shura*

A group of Muslim people who have the power to make decisions are all called *Shura*. And those who are members of *Shura* must have some qualities like education, wisdom and justice so it can be said that the *Shura* people are scholars and leaders. For applying the rulers it is important and necessary to have a *Shura*. It can be said that it is one of the most important manifestations of civilisation that Muslims contributed to its creation and consolidation in the Muslim community. So, *Shura* was a kind of expression of the divine will on the basis of what the Prophet (peace be upon him) said: "My nation shall not agree upon an error."⁷⁰ It is noted that *Khalifa* in Islam can't give the right to express the divine will, i.e. he is not authorised to pass legislation, because the power of legislation is entitled to the Muslim community or the whole nation,⁷¹ and this, of course, happens in the absence of clear evidence from the Qur'an and the Prophet's traditions.

Difference between *Shura* and democracy

The Islamic *Shura* is much different from the modern democracy system. Democracy is a system where the people make rules and it is assumed by people that people should make their own constitution and law. In order for people to assume lawmaking authority, set laws and distinguish between authorities, general elections are held to select a group of individuals who are able to monitor all authorities, and those persons have the rights to remove or bring in ministers or the head of a state. Islamic *Shura* have a different view. *Shura* in Islam is based on the rule of Allah and practice of the Prophet Muhammad (pbuh) [*Sunnah*] and loyalty to those rules on the basis of faith. Scholars are the people of power and decision. They come at the top of the people of *Shura*. Given Allah's rules, scholars don't have their own consultation laws they just have to prove the text is from *Quran* and *Sunnah*. The truth is that the democratic system can be easily controlled by some powerful parties over political actions in a country. However the Islamic *Shura* is supremacy for

69 Fathiyah Nabarawi, *Tarikh Al-Nuzum Wa Al-Hadarah Al-Islamiyah* (History of Islamic Systems and Civilization) (United States: Dar Al-Ma'arif, 1981), pp 24–25.

70 Majah, SI (n.d.), *Sunan Ibn Majah: Book on trials* (3950), *Al-Tirmizi* (2167), *Abu Dawud* (4253), *Ahmad* (27267), *Musnad Abd ibn Hamid* (1224), and *Al-Hakim* (8664).

71 'Abd al-Razzaq Al-Sanhuri, *Fiqh Al-Khilafah Wa Tatawwuruh* (Rules of Governance) (ed Nadia al-Sanhuri and Tawfiq Muhammad al-Shawi) (Cairo: Al-Hay'at al-Misriyya li'l-Kitab, 1989), pp 122–123.

Allah only and give the priority to Allah's rule, which leads to the emergence of men living in the company of Allah and fearing Him honestly.⁷²

b. *Khilafah*

Khalifa is an Arabic word meaning successor. The word caliph is simply an Anglicised version of *khalifa*. The terms *khilafat* and caliphate, though derived from *khalifa* and caliph individually, have different meanings. *Khilafat* refers to the Islamic institution of spiritual successorship, whereas caliphate indicates a politico-religious Muslim state governed by a caliph. When the Prophet Muhammad (pbuh) passed away (in 632 CE), Hazrat Abu Bakr succeeded to his spiritual, administrative purposes as successor of the messenger of God (*khalifa* rasul Allah). Bernard Lewis, the preeminent historian of Islam, observes:

Abu Bakr was given the title of *Khalifa* or "Deputy" (of the prophet) ... and his election marks the appointment of the great historic institution of the Caliphate. His voters can have no idea of later purposes and growth of the office. At the time, they made no effort to define his duties or powers. The only state of his selection was the maintenance of the inheritance of the Prophet.⁷³

Allah has promised to those among you who believe and act rightly, that He will surely make them successors (*khalifas*) in the earth, as He made successors from among those who were before them; and that He will surely establish for them their religion, which He has chosen for them; and that He will surely grant them security and peace in place of their fear.⁷⁴

In this verse, the Holy Qur'an presents the institution of *khilafat* as a reward for collective virtue. It is often understood to provide a basis for an Islamic organisation founded upon the democratic lines headed by a *khalifa* whose office is, in principle, elective and bound by the *Quran* and the *Sunnah*. In a well-known hadith, the Prophet Muhammad (pbuh) is reported to have observed:

Prophet hood shall remain among you as long as God wills. Then *khilafat* on the pattern of prophet hood will commence and remain as long as He wills. A corrupt monarchy shall then follow and it shall remain as long as God wills. There shall then be a oppressive despotism which shall remain as long as God wills. Then once again *khilafat* will arise on the principle of Prophet hood.⁷⁵

This hadith not only reassures us about the repetition of well guided *khilafat* but it also permits a historical judgment on what was to follow the early

72 Ahmad Ahmad Ghalush, *Al-Nizam Al-Siyasi Fi Al-Islam (Political System In Islam)*, n.d., pp 61-64.

73 Lewis, Bernard, *The Arabs In History* (New York: Oxford University Press, 1993), p 93.

74 Holy Quran Al Nur, 24:54.

75 Ahmad Ibn Hanbal, "Al-Anzar Wal Tahzir", in *Mishkat*, n.d., p 4.

Khilafat. The famous historian of Islam, Muhammad (pbuh) Ibn Jarir Al Tabari, narrates the following incident. Umar said to Salman: "Am I a king or a *khalifa*?" and Salman answered: "If you have levied from the lands of the Muslims one dirham, or more, or less, and applied it unlawfully, you are a king not a *Khalifa*". And Umar wept. Here Hazrat Umar, the second *Khalifa*, whose goodness, sense of justice, and puritanical strictness were well-known, came to tears by the mere mention of the possibility of misusing a single coin from the public exchequer. This incidence underscores the characteristic of the rightly-guided *khilafat*.⁷⁶

As Allah's sovereignty extends over the universe, the final ideal of a public in Islam is a universal federation or association of independent states, related together for maintenance of freedom of integrity, for the maintenance of peace, and for cooperation in promoting human welfare throughout the world.⁷⁷

A *khalifa* has the promise of divine support so long as it remains firmly based on the precept of prophet hood — that is, the principles and prototypes demonstrated by prophets. He is bound by the rules of great law. He decides questions of rule after discussion with the chosen representatives of the people. In governing the corporation, man is seen as the essential element for the system to be effectively working in the right way. As man is the shareholder, creditor, examiner, regulator, manager as well as the director; thus it is manifest that man plays the principal roles in managing and leads to the accomplishment of the company's vision and mission. The issues of man in terms of values, ethics and moral conduct therefore need to be well defined in the first place to ensure the concerns of society could be taken care of. The concerns among other things are maintenance of trust, maintaining honesty, exercising transparency and accountability, being traditional in managing resources, caring and concern for the environment. The failure to impress these values may pose serious problem to the public at large.

c. Accountability (*Hisab*)

In the Holy Qur'an, the word "*hisab*" is repeated more than eight times in different verses.⁷⁸ *Hisab* or "account" is the root of accounting, and the references in the Holy Qur'an are to "account" in its generic sense, relating to one's responsibility to "account" to God on all matters relating to human effort for which every Muslim is "accountable".

76 Abu Ja'far Muhammad b Jarir al-Tabari, *History of Tabari: Tarikh Al-Rusul Wal Muluk* (New York: State University of New York, 2007).

77 Muhammad Zafrulla Khan, "Islamic Concept of the State", Reviewofreligions.org, 1993, <http://www.reviewofreligions.org/wp-content/pdf-downloads/RR200706.pdf#page=40>.

78 Saeed Askary and Clarke F, "Accounting in the Koranic Verses", in *Proceedings of International Conference, The Vehicle for Exploring and Implementing Shariah Islami 'Iah in Accounting, Commerce and Finance* (Macarthur: University of Western Sydney, 1997), p 79.

The Muslims believe in the terms of accountability that they will be judged for whatever they do in this world in the hereafter (life after death). In Islam, it is the duty of each Muslim to fulfil the will of Allah in order to seek his pleasure and the promised prizes in the life after death. Thus, it requires every action and word in this world to be in line with the Islamic teachings. It does not matter what action the Muslims do either *ibadah* (*solah*) or purchasing shares in the stock market, eating, sleeping like daily jobs they must follow the Islamic teaching framework carefully. The importance of accountability to the man's life also has been mentioned by Holy Qur'an:

... Lo the hearing and the sight and the heart — of each of these will be asked.⁷⁹

Abdullah reported that Allah's Messenger Muhammad (pbuh) said:

Every one of you is a guardian and accountable (*mas'ul*) for his charge. Thus the Khalifa is a custodian of the people and He is responsible for them. And a man is a guardian of his household and he is accountable for them; and a woman is in charge of the household and her children and she is accountable for them; and a servant is guardian of his master's property, every one of you is accountable for his subjects.⁸⁰

In the view of corporate governance practices, as far as Islam is concerned, the country directors, management as well as the auditor should perform their professional duties with the objective of satisfying the needs of the public and Allah as well. Supposing there should be no such disease (i.e. fraud; material misstatement) existing in the country if this concept could be affected and could be reflected in their conduct. Unfortunately, most of them have been followed by the physical experienced life which has led to the bad behaviours that cause the owners (community) of the country to suffer the penalties.

d. Transparency

Allah has divulged the concept of transparency in the following verse:

O you who believe! When you deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing. Let a scribe write-down faithfully as between the parties ...⁸¹

This verse states that every transaction must be written to avoid justice. Applying the concept of transparency, corporation should also disclose information regarding its strategy, actions, contribution to the community and the use of resources and protection of environment.⁸²

⁷⁹ Holy Quran, Surah Bani Israil, 17:36.

⁸⁰ Muhammad bin Ismail bin Al-Mughirah Al-Bukhari, *Al-Jami' Al-Sahih* (Riyadh: Darussalam, 1997), p 144.

⁸¹ Holy Quran, Al-Baqarah, beginning of the verse, 2:282.

⁸² Rozaini Mohd Haniffa and Cooke, Terry E, "Culture, Corporate Governance and Disclosure in Malaysian Corporations", *Abacus* 38, No 3 (2002): 317-349.

Transparency is the necessity for openness in all public affairs. Transparency allows Committee to gather information that may be unsafe to exposure misuses and defending their benefits. According to Ayee transparency entails that: citizens have a right to available information pertaining to, for example, award of contracts, privatisation of state enterprises, rules against corruption or the funding of political parties. A transparent government is that which offers chance to citizens to find out the true proofs at first hand, without the material being changed or presented through a misrepresenting mirror.⁸³

In core, transparency is basically concerned with an open and established system of government, the extermination of corruption and the institutionalisation of a system that is fair, just and based on the rule of law. Transparency or openness in governance is important in the process of growth. It is serious in the elimination of corruption and the promotion of responsibility in the conduct of government business. Today, the quest for transparent performance has become a world-wide phenomenon with the Transparency International.

e. Justice

In the Islamic worldview, justice means placing things in their rightful place. It also means giving others equal treatment. In Islam, justice is also an honest quality and a feature of human personality, as it is in the Western tradition. Justice is close to equality in the wisdom that it creates a state of equilibrium in the distribution of rights and duties, but they are not equal. Sometimes, justice is accomplished through inequality, like in unequal distribution of wealth.⁸⁴

Justice in the Islamic governmental system, including social justice, means that the government should arrange to meet and please the needs of all the people as they have a valid part of the country and citizens of the country. This encompasses the facility of jobs, the means of existence and financial justice. This in turn suggests that it is the duty of the government to provide food, housing and clothing for all the people in the country. Economic justice aimed at equitable supply of lifestyle and checks the awareness of wealth in a few hands.⁸⁵

The Importance of justice

The Qur'an, the holy scripture of Islam, considers justice to be a highest virtue. It is a basic objective of Islam to the degree that it stands next in order of importance to belief in God's exclusive right to worship (*Tawheed*) and the

83 Ayee, J R, "Making Governments Transparent in Africa: The Ghanaian Case Study" (Tangier, Morocco: African Training and Research Centre in Administration for Development (CAFRAD), 2001), p 89.

84 Shad Saleem Faruqi. *Islam, International Law and The War Against Terrorism: The Concept of Justice*. (Shah Alam: UiTM, 2006) p 47.

85 Ibid, p 55.

truth of Muhammad SWT prophet hood. God declares in the Qur'an: God commands justice and fair dealing.⁸⁶

And in another passage: O you who believe, be upright for God, and (be) bearers of witness with justice.⁸⁷

Therefore, one may achieve that justice is an responsibility of Islam and unfairness is forbidden. The importance of justice to the Quranic value system is showed by the following verse:

We sent Our Messengers with clear signs and sent down with them the Book and the Measure in order to establish justice among the people.⁸⁸

The phrase "Our Messengers" shows that justice has been the goal of all admissions and scriptures sent to humanity. The verse also shows that justice must be measured and applied by the values and rules set by admission. Islam's approach to justice is complete. Any path that leads to justice is believed to be in accord with Islamic law.

Allah has required justice and, although He has not prescribed a definite path, has provided general rules, on how to achieve it. He has neither given a fixed means by which it can be found, nor has He stated unacceptable any specific means or methods that can lead to justice. Therefore, all means, processes, and methods that enable, improve, and advance the cause of justice, and do not interrupt the Islamic Law are valid.⁸⁹

f. Equality

The Quranic standards of justice exceed thoughts of race, religion, colour, and faith, as Muslims are ordered to be just to their friends and enemies similarly, and to be just at all levels, as the Qur'an puts it:

O you who believe! Stand out firmly for justice, as witnesses to Allah, even if it be against yourselves, your parents, and your relatives, or whether it is against the rich or the poor.⁹⁰

According to another Quranic passage:

Let not the hatred of a people swerve you away from justice. Be just, for this is closest to righteousness.⁹¹

86 Holy Quran Al-Nahl, 16:90.

87 Holy Quran Al-Maida, 5:8.

88 Holy Quran Al-Hadeed, 57:25.

89 Yusuf Al-Qaradhawi, *Madkhal Li Dirasat Al-Shari'ah Al-Islamiah* (Cairo: Maktabah Wahbah, 2001), p 97.

90 Holy Quran Al-Nisa, 4:135.

91 Holy Quran Al-Maidah, 5:8.

The scholars of the Qur'an have decided that these decisions apply to all nations, followers of all faiths, as a matter of fact to all humanity.⁹² In the view of the Qur'an, justice is a responsibility. That is why the Prophet was told:

If you judge, judge between them with justice.⁹³

Furthermore, the Prophet was sent as a judge between peoples, and told:

Say: I believe in the Scripture, which God has sent down, and I am commanded to judge justly between you.⁹⁴

The Qur'an wants that justice can be encountered for all, and that it is a characteristic right of all human beings under Islamic law.⁹⁵ To reduce justice is a trust that God has discussed on the human being and, like all other trusts, its attainment must be directed by logic of accountability outside simple traditionalism to set rules. The reference to justice which directly follows a reference to fulfilment of trusts indicates that it is one of the most important of all trusts.⁹⁶

The principle of equality is one of the most important constitutional principles upon which the contemporary system rests. This means that the principle of equality contained in the individual communities is equal in rights, responsibilities and public duties that will be enjoyed by all without discrimination of race, origin, gender, colour or belief. The principle of equality has been initiated by the Qur'an and *Sunnah* and the expansion of Islam during some as a precedent in Islamic law and its own time and place.

This value of equality is not to be mistaken for or confused with similarity or stereotype. Islam teaches that in the view of Allah Almighty, all people are equal, but they are not necessarily indistinguishable. There are variances of capabilities, abilities, determinations, wealth and so on. Yet, none of these differences can by themselves found the status of leader of one man or race over another. The standard of man, his skin colour, the amount of capital he has and the degree of respect he enjoys has no bearing on the personality of the individual as far as Allah is concerned. The only difference which Allah identifies, is the difference in religiousness; the only standard which Allah applies, is the standard of goodness and spiritual excellence. In the Qur'an, Allah Almighty says (what means):

O mankind, indeed we have created you from male and female, and have made you into nations and tribes, that you may know one another. Indeed

⁹² Mohammad Hashim Kamali, *Freedom, Equality, and Justice in Islam* (Cambridge: Islamic Texts Society, 2002), p 104.

⁹³ Holy Quran Al-Maida, 5:42.

⁹⁴ Holy Quran Al-Shura, 42:15.

⁹⁵ Sayyid Qutb, *Fi Zilal Al-Quran*, Vol 2 (The Islamic Foundation, 2001), p 44.

⁹⁶ Fakhr Al-Din Al-Razi, *Al-Tafsir Al-Kabir* (Beirut, 1980), p 89.

the most honoured of you in the sight of Allah is the most righteous. Indeed, Allah is Knowing and Acquainted.⁹⁷

This is to declare that in Islam, no nation is made to be above other nations or to rise above them. Man's value in the eyes of men and in the eyes of Allah is determined by the good he does, and by his respect to Allah. The differences of race, colour or social status are only supplementary. They do not affect the true standing of man in the vision of Allah. Again, the value of equality is not simply a substance of constitutional rights or the agreement of nobles or condescending charity. It is an article of trust, which the Muslim takes seriously and which they must follow honestly. The fundamentals of this Islamic value of equality are extremely deep-rooted in the arrangement of Islam. They stem from basic ideologies such as the following:

- (i) All men are created by One and the Same Eternal God, the Supreme Lord of all.
- (ii) All mankind belong to the human race and share equally in the common parentage of Adam (Adam) and Hawa (Eve).
- (iii) Allah is Just and Kind to all His creatures. He is not partial to any race, age or religion. The whole Universe is His Dominion and all people are His creatures.
- (iv) All people are born equal, in the sense that no one brings any possession with him; and they die equal in the sense that they take back nothing of their worldly belongings.
- (v) Allah judges every person on the basis of his own merits and according to his own deeds.
- (vi) Allah has discussed on man, a title of honour and dignity.

Those were some of the principles behind the value of equality in Islam. When this concept is fully utilised, it will leave no place for prejudgment or harassment. And when this great rule is fully applied, there will be no room for domination or conquest. Concepts of chosen and gentile peoples, words such as "privileged" and "condemned" races, words such as "social classes" and "citizens" will all become worthless and outdated.

Prophet Muhammad (pbuh) said:

O mankind, your Lord is one and your father is one. You all descended from Adam, and Adam was created from earth. He is most honoured among you in the sight of God who is most upright. No Arab is superior to a non-Arab,

⁹⁷ Holy Quran, Al-Hujurat, 49:13.

no coloured person to a white person, or a white person to a coloured person except by *Taqwa* (piety).⁹⁸

Therefore, it would be improbable to declare the complete equality of human beings, although humans are essentially equal in rights, duties and accountability, and there is some degree of similarity in physical and mental behaviours, which enables them to understand and apply rules and laws. At the same time, it is understandable that there is a natural range among human beings in terms of qualities and abilities; therefore there will be limits in natural, common and political positions. Some of the limits are temporary, some permanent; some are rare, some regular. However, a control is specific to a particular situation. It may not be generalised to inequality in other rights. A person who is morally upright is not equal to a staff in terms of morality, but they may be equal otherwise. Nor is an intelligent person equal to a dull one, but they are equal in other spheres. In the same way, a woman is not indistinguishable from a man in her characters, gifts and skills.

g. Inviting to do good and preventing from doing evil

Amongst the greatest responsibilities are *amr-bil-Ma'ruf* (ordering for acknowledged virtues) and *nahi anil munkar* (forbidding from sin). Allah says:

And there should be a group amongst you who invite towards good, order for acknowledged virtues, forbid from sin and these it is that are the successful ones⁹⁹

The Holy Prophet (pbuh) said:

How will it be for you when your women will commit sins and your youth will transgress and you will not order for acknowledged virtues nor forbid from sin? It was said to him: "Will that happen O messenger of Allah?" Then he Prophet Mohamad (pbuh) said: Yes. Then he said: "How will it be for you when you order for sins and forbid from acknowledged virtues?" Then it was said to him: "O messenger of Allah SWT! Will that happen?" Then he said: "Yes and worse than that how will it be for you when you perceive acknowledged virtue as sin and perceive sin as acknowledged virtue?"

Imam Sadiq said:

Woe to the people who do not support the religion of Allah by enjoining good and forbidding evil.¹⁰⁰

The expression "*amr bi al-ma'ruf wa-nahy an al-munkar*" is a very important one. It is associated to Jihad, that is, doing one's highest to understand an aim. Jihad is not essentially war fought on the battlefield for which the specific Arabic

98 Holy Quran, Al-Tirmizi, 35.

99 Holy Quran, Al-Imran, 3:104.

100 Sadiq, *Mustadrak Al-Wasa'il-Ush-Shi'ah*, Vol 12, n.d., p 18.

and Quranic term is "*qital*". Jihad has a very wide meaning and amounts to striving for the cause of Allah Almighty to promote goodness and eliminate evil. A *mujahid* is a person who carries out Jihad or works hard for the cause of endorsing the values of the Glorious Qur'an.

Thus, *Amr bil ma'ruf wa nahy an al-munkar*, which means ordering good and forbidding evil, is a Jihad related principle. It seeks to intelligently carry the benefits of Islam to the people and to inform them of the meaning of what devil does.

The Qur'an calls Muslims the model community, which requires them to convey the Prophet's (pbuh) message to entire humanity and to live the Qur'an, just as the Prophet did.

"*Amr bil Ma'ruf wa Nahy an al Munkar*" is an important Islamic duty, together believed by all Muslims. The difference is in the understanding of it. Some consider that it is enough to accomplish the duty by the "heart and tongue", which means one should support *al-ma'ruf* and oppose *al-munkar* in his heart and use his tongue to speak out for *al-ma'ruf* and against *al-munkar*. But there are some who justify taking up arms (if necessary) for the sake of fulfilling this duty.

Conclusion

Government, governance and people cannot be separated. The powers, duties, responsibilities are all accountable. They are like tongue and teeth; bamboos and riverbank; body and soul. From the Islamic perspective, they are accountable in this world and in the world-after. Those men in power are highly responsible for the good and the bad management of this world. Allah says:

Mischief has appeared on land and sea because of (the deed) that the hands of men have earned, that (God) may given them a taste of some of their deeds: in order that they may turn back (from evil).¹⁰¹

Every professional body has to be very good in its field of governance. The knowledge of the particular area of expertise and skills sets the professional apart from the members of the public and contributes to society's well-being and the progress of humanity. The standards of professional practice should be benchmarked with the best in the nation and in the world through regular updates and continuing professional development. The professional need not be the best available but has to be competent.

Guided by a body of professionals exercising the same discipline, the profession holds itself out as having members of integrity able to gain the confidence and

101 Holy Quran, Ar-Rum (30); 41.

respect of those who need their services, and includes those who work in the public sector. The professional is expected to provide solutions both temporary and longer-term in nature and the approach taken should follow a process of investigation and analysis following established methods, before arriving at a conclusion and before administering any solutions. The use of any new technology or variation thereof should be the subject of discussions with the client or one's peers. The conduct must be exemplary with behaviour that will command respect even when the clients do not accept one's opinion. One's religious belief or political affiliation should not cloud the recommendations of the professional. There should not be any discrimination on any grounds of race, colour, age or gender in dealings with the clients.

The decisions of the professional must always be based on facts known and available for consideration at the particular time. A recommendation followed by an action based on incorrect analysis of the situation can lead to loss of time and money, and in some cases injury and loss of lives.

There must always be an exercise of care and every professional must be ready to be held accountable for the actions taken that lead to such unsatisfactory situations. To take care of such unfortunate eventuality and provide for compensation, the professional body must insist that every professional is covered by insurance policies for professional negligence, or have a common defence fund in place against either genuine or malicious attacks on its integrity. To guard against the "bad apple", the professional body must have the power to discipline its own members for malpractice and be able to suspend or remove the tainted individual from amongst its fellowship. The same process must also be in place in the public sector to demonstrate accountability to the public at large who use the services of the professional in its employ as part of the services the government provides for the population even if it provided for free. To ensure that malpractices are not hidden or swept under the carpet, and subsequently forgotten, the professional has to follow a process of proper documentation whereby any decision made can be traced back to its cause and effects. The professional must demonstrate that he has taken all possible care before arriving at the conclusions and avoid any misrepresentation to the clients in order to gain any pecuniary advantage or experience in using new technology without informing the clients of the risks or additional costs involved. The "workings" must be clearly available for peer review and filed away for future reference.

Abdullah Yusuf Ali¹⁰² makes the following commentary to the above verse:

God's creation was pure and good in itself. All the mischief or corruption was introduced by evil, viz, arrogance, selfishness, etc. As soon as the mischief

102 Abdullah Yusuf Ali, *The Holy Qur'an: Original Arabic Text with English Translation & Commentary* (Kuala Lumpur: Saba Islamic Media, 2000), p 1063.

has come in, God's mercy and goodness step in to stop it. The consequence of evil must be evil, and this should be shown in such partial punishment as "the hands of men have earned", so that it may be a warning for the future and an invitation to enter the door of repentance.¹⁰³

103 Ibid.