

THE CHARACTERISTICS OF AN ISLAMIC GOVERNMENT DURING ITS FORMATIVE PHASE: A COMPARATIVE STUDY OF SUNNI AND SHI'I DOCTRINES

Wahabuddin Ra'ees*

Introduction

This study examines the basic characteristics of an Islamic government. It focuses mainly on the views of Sunni and Shi'i jurists and scholars. It uses the normative phase in the history of Islam as its main source of evidence. According to most writers, the normative phase in building political institutions in Islam begins with the Prophet Muhammad's famous migration from Mecca to Medina and ends with the end of Orthodox Khilafah. It is important to inform the reader that Shi'i political doctrines are influenced by one overriding principle that is the divine nature of government. Therefore, as the aim of this study is to provide a rather original understanding of the notion of an Islamic government, some of the characteristics of government existing in this normative phase identified in this study, naturally may not have been emphasized in Shi'i literature while popularly expressed in Sunni literature.

The Nature of Government during the Formative Phase of the Political History of Islam

A functional system of governance did not exist in the Arabian Peninsula before the advent of Islam. However, the vernacular system of governance in Islam was part of the institution of prophethood of Prophet

* The author is an Assistant Professor and Head Department of Political Science, Kulliyah of Islamic Revealed Knowledge and Human Sciences, International Islamic University, Malaysia.

Muhammad. Hence, the Prophet Muhammad was also entrusted with political authority. The political dimension of the Prophet Muhammad's authority is evident in what came to be known as the Constitution of Medina. However, after his death, the Muslim community was faced with the challenge of forming a system of governance that could obviously be distinct from the prophet in that the leader may not be divine appointee and yet the system of government as such should be based on the prophetic model either in letter or spirit or both. The companions of Prophet Muhammad quickly started the task of creating a system of government what is mostly known in the classical literature as *khilafah - vis-à-vis* as caliphate - a concept mainly attributed to the Sunni sect. However, Shi'i sect developed the doctrine of imamate for *khilafah*.

Prophet Muhammad did not need to institutionalize a specific form of government or political norm due to the reason that his time was a living condition for introduction of political norms and values. When Prophet Muhammad passed away, his immediate successors began to institutionalize the political norms introduced by him. They also introduced political norms which Prophet Muhammad could not introduce. For instance, Prophet Muhammad was a divine appointee; chosen by Allah the Most High. He did not institutionalize the principle of delegated authority, which his successors did, as a political norm. He did not nominate a successor, a principle in which Abu Bakr, his immediate successor, sought much expedience. In a nutshell, the post-prophetic phase was different from the one preceding it in that the political leader could not be chosen by divine nomination and, therefore, the *khilafah* system that substituted the political dimension of prophethood was not a divine institution too.

The generation of Muslims following the formative phase in the history of Islam fell on what could be considered the constitutional principles of Islamic government introduced by Prophet Muhammad and the Orthodox *Khulafa'*. Two major sects - Sunni and Shi'i - dominated the debate. The Sunnis used the term *khilafah* for Shi'i concept of imamate to represent the body of constitutional principles that describe the nature of government in Islam. The discussion below presents a comparative analysis of the constitutional principles of government suggested by Sunni

and Shi'i sects in Islam. This notwithstanding, definition of government precedes the discussion of major constitutional principles of government in Islam.

Definition of Government in Islam

Attempts at defining government mainly fall under two categories; firstly, the exclusionists and secondly, the inclusionists. The exclusionists put emphasis on or identify government with holders of political power. The inclusionists put as equal emphasis on the role of the governed/citizens as that of the governors/holders of political power. However, the concept of power is a key analytical tool common in exclusionist and inclusionist definitions of government. Power being a relational concept implies that the citizens to be divided into those possessing the power of controlling and regulating and those whose affairs need regulation. When the concept of power is used to establish as well as understand the relationship between the holders of public authority and citizens then government refers to that set of institutions concerned with the very nature of relationship between the citizens and the holders of public authority in the state. Therefore, when reference is made to the nature of relationship between the holders of power and the citizens, then the argument to identify the government only with institutions possessing legitimate right to exercise political power over the citizens of the state hardly becomes convincing. Thus, the understanding of the notion of government evidenced in the practices of Prophet Muhammad and his immediate successors falls within the ambit of inclusionist perspective.

Prophet Muhammad's practices and the examples of his immediate successors - the four orthodox khulafa'; Abu Bakr as-Siddique (11-13/632-634), 'Umar al-Khattab (13-23/634-644), 'Uthman bin 'Affan (23-35/644/656), and 'Ali bin Abi Talib (35-41/656-661) - related to the nature of relationship between them and their citizens indicate that the system of government in Islam is a constitutional structure defined as a "political institution/system" (1) that possesses delegated authority, (2) is based on a defined set of power relationships between the people in authority and common people, (3) Shari'ah—Qur'an and Sunnah (Prophet's authentic practices) - defines the set power relationship as such, and (4) it comes

into existence as a result of tacit contract between the former and the latter and the contract is solemnized by the ceremonial institution of *bai'ah*".

In order to make the above definition operational, four key concepts – (1) delegated authority, (2) the institution of *bai'ah*, (3) contractual relationship, and (4) a defined set of power relationships - need deliberation. However, the above four concepts are closely inter-related. They cannot be understood in isolation. Understanding of one concept requires understanding the other three. Notwithstanding this, the above definition is mainly attributed to the Sunni sect of the Muslim society. The Shi'i sect has developed disagreement over a number of fundamental aspects of the definition discussed below.

The term "delegated authority" means that the power in the khilafah system is given and not inherited like in dynasties or monarchies. The khalifah does not inherit political power. Citizens constitute the locus of political sovereignty. Khalifah is an elected functionary to whom powers were delegated not directly by Allah the Most High, but by the electors and, therefore, subject to certain legal and constitutional restrictions. Orthodox *Khulafa'* invented the institution of *bai'ah*, discussed below, that underpins the principle of delegated authority as a political norm in Islam.

Bai'ah means expression of support by the citizens to the holders of power. *Bai'ah* is an instrument of delegation of power from citizens to khalifah. It has two aspects; methodical and ceremonial. *Bai'ah* as a method of choosing the khalifah, according to some academics, is divided into two categories: *bai'ah khassah* and *bai'ah 'ammah*.¹ *Bai'ah Khassah* refers to selection of the khalifah by specific category of representative(s) of the Ummah for Muslim community such as nomination of khalifah-designate by the ruling khalifah, the 'Leadership Council' appointed by 'Umar or consultation of *ahl al-ray'* (wise few) suggested by some jurists. However, *bai'ah 'ammah* refers to confirmation of the khalifah, selected through the

1. Abdul Rashid Moten, *Political Science: An Islamic Perspective*, Britain: MacMillan Press, 1996, pg. 91.

method of *bai'ah khassa*, by the general public. Once the khalifah chosen by a given method - nomination, leadership council, electoral college or the principle of majority - the person designated to the office of khalifah is then confirmed by the public's general acclamation in political terminology of Islam known as ceremonial *bai'ah*.

Through ceremonial *bai'ah*, the khalifah and citizens mutually confer on one another certain rights and duties. The citizens express their support and pledge loyalty to khalifah. The khalifah in return undertakes that he would abide by the deeds of the office of khalifah. Hence, the contractual relationship between the khalifah and citizens is complete. A noble feature of contractual relation between the khalifah and the citizens is that it subjects as well as entitles both - the khalifah and citizens - to certain duties and rights towards one another. These rights and duties provide legitimacy for actions of both - the khalifah and citizens - in the Islamic State and this notion of rights and duties sets parameters for the khilafah system and delineates its characteristics, discussed in next section of this paper. Moreover, the contractual feature of the khilafah system puts its definition within the ambit of inclusionists.

Closely related to contractual relationship is the principle of power relationship. Power relationship implies that in khilafah system two equally powerful categories of people co-exist - people in power and citizens. Both categories constitutionally possess certain degree of exclusive powers. In the event the khalifah or citizens violated the basic tenets of the contract and took the laws into his hands; the other is constitutionally empowered to correct the transgressor. Jurists have discussed the numerous methods available to the khalifah as well as citizens in the event violation of the laws by either category occurs. However, Shari'ah defines and constitutes the basis of the powers, rights and duties, possessed by each category. Moreover, it also sets parameters for and imposes restrictions or limits on the powers conferred on each group. Hence, the power of each category could be viewed in terms of rights and duties possessed by one category towards the other and Shari'ah, Qur'an and Sunnah, governing the definition of the rights and duties as such.

In post-prophetic phase, the khilafah system introduced by the Orthodox Khulafa' substituted the institution of prophethood in political realm only, as neither the khilafah system like its predecessor (prophethood) was not a divine institution nor the Prophet's successor (khalifah) was chosen by divine nomination. Shi'i sect in Muslim thought, it is recalled, used Imamate System for khilafah system.

Constitutional Principles of Government in Sunni and Shi'i Political Thought

1. Tawhid or Unity of Allah the Most High

The first constitutional principle of government in Islam is Tawhid, Unity of Allah the Most High. Sunnis and Shi'is alike uphold unto the doctrine of Tawhid. The system of government in Islam, therefore, is unique in that it upholds and simultaneously attributes to the One Being the powers of Ulluhiyyah and Rububiyyah. While this only One Being is the Creator of everything, He is also the only physical sustainer as well as provider of moral laws for establishment of a moral community and order. The doctrine of Tawhid, therefore, upholds that government in Islam is neither secular nor theocracy nor a divine institution administered or run by divinely chosen individuals. Rather it is an instrument of realization of the Will of Allah the Most High on earth in which the leadership struggles to materialize His will.

Hamid Enayat notes that the Sunni-Shi'i controversy is on matters decidedly marginal to religious issues. He says that:

'in its original form the Sunni-Shi'i dispute is not concerned with the fundamentals of religion.... It does not relate to the nature of God, or the function of his Emissary, or the manner of achieving human salvation. Rather, it involves issues which ... are decidedly marginal to these matters, and in any case have no bearing on the duties of a Muslim (praying, fasting, pilgrimage, alms-tax, and the holy war). But over time, it has degenerated from a quarrel about the

Prophet's successorship into rituals, theological and legal rift which can, at least obliquely, affect certain basic beliefs and attitudes'.²

This notwithstanding, the Sunni and Shi'i sects believe that government is the medium of Allah's perpetual interference in politics and history. According to Sunnis, however, divine intervention is indirect while according to Shi'i it is direct. Disagreement over the nature of government, as Hamid Enayat rightly pointed out, ontologically generated differences of opinion over issues of theological and legal nature. However, subscribing to the original essence of the Sunni-Shi'i dispute, a preferred opinion is that the concept of God and the principle of Tawhid do not fall within the realm of issues considered controversial among the Sunni and Shi'i scholars. Hence, the controversy between Sunnis and Shi'is, as will be shown, significantly zero-in on the nature of government and political leadership.

2. Citizens as the Locus of Political Sovereignty

Sunni and Shi'i political doctrines in the main revolve around the question of political sovereignty. Hamid Enayat argues the Sunni and Shi'i debate was essentially about who could possess legitimate right to succeed Prophet Muhammad in leading the Community of believers. While both Sunni and Shi'i uphold the principle of Tawhid, yet Shi'i sect could not agree with Sunni view that government in Islam was not a divine institution and its political leader a divine appointee. The Shi'i's emphasis on divine nature of political leadership alerted Sunni ideologues. Major currents of thought shaping this debate ensued. However, one needs to note that the debate over the locus of political sovereignty between the Sunni and Shi'i jurists and scholars culminated into theological debate when the latter began to present theological argument in support of their views. Though Hamid Enayat believes that such a historically long debate seems to have come of age 'from confrontation to cross-sectarian

2. Hamid Enayat, *Modern Islamic Political Thought*, Kuala Lumpur: Islamic Book Trust, 2001, pg. 43.

fertilization',³ the process fertilization, however, is incomplete. Hence, if the process of cross-sectarian fertilization is to be fruitful, in the process of reformulation and reinterpretation of the traditional heritage and historical set of doctrinal ideas related to politics, identical fallacies must not be repeated.

Sunni political doctrine has held that political sovereignty originally belongs to citizens. The Shi'i jurists argue that sovereignty in its all forms belong to Allah the Most High. Therefore, in the writings of Sunni jurists and scholars, sovereignty, the state of being the highest, the last, source/origin of law, power, etc., is categorized into two kinds; political sovereignty and legal sovereignty. When sovereignty is political, reference is to the locus, source and origin of political power in the Muslim Community. When sovereignty is legal, reference is to the ultimate lawgiver and legislator. Sunnis and Shi'is alike believe in Allah the Most High as the Ultimate Lawgiver as He is both Rabb and 'Ilah. Hence, the debate came to focus on the question of locus of political sovereignty. Sunni jurists responded to their Shi'i colleagues by posing two simple propositions. They argued that attributing political sovereignty to Allah requires His physical presence or presence of someone appointed by Him. It is impossible to think of God's physical presence to hold political leadership of the Muslim community. However, to think of khalifah as divine appointee is to believe in political leadership by divine nomination. While the Shi'i jurist could not think of God's physical present, they readily accepted the second proposition. Hence, Shi'is accepted imam, Shi'i term for khalifah, as divine appointee and imamate system, Shi'i term for khilafah system, as divine institution.

Both Sunni and Shi'i scholars looked to the formative phase of Islamic history for evidences to support their views. Sunnis argued Prophet Muhammad's silence on the issue of succession and behavior and practices of the Orthodox Khulafa' do not indicate divine nature of the khilafah system. They argue that the main reason for his silence on the issue of succession was that his followers should not view political

3. Ibid., pg. xiv.

leadership or succession in terms of divine sanction/nomination. The fact that Prophet Muhammad neither nominated his successor nor provided a specific method according to which his followers could choose their leader provides sufficient prove that neither khilafah system is divine institution nor khalifah a divine appointee. The people chose Abu Bakr, the first Orthodox Khalifah. Moreover, Abu Bakr in his inaugural speech referred to his authority as a "trust" entrusted to him not God by but citizens.⁴

In addition, Abu Bakr's designation of 'Umar to succeed him 'was made in the form of recommendation, subject to the approval of the community. Indeed, there was nothing at all binding about it and the community could have rejected it had they wanted to do so'.⁵ Moreover, the verdict of the Leadership Council appointed by 'Umar, in recommending his successor could not be binding, as its decision also needed bai'ah or approval of citizens. In similar vein when 'Ali persuaded by the circumstances to accept the mandate of the political authority in order to prevent the Muslims from plunging into further chaos, he stipulated that he could assume power only after the approval of citizens, as, according to him, the khalifah cannot be elected secretly.⁶ Shi'is did not agree with Sunnis. They argue that Prophet Muhammad was never silent on the issue of succession. He nominated 'Ali, his cousin and son-in-law, to succeed him. Shi'is' response is discussed later in this section.

Kurdi highlights this hypothesis further when he reviewed the Qur'anic verses in which the word khalifah occurs. Kurdi bases his analysis on the lexical interpretation of Qur'anic verses in question. Kurdi's interpretation is rational and attracts attention and it fits any given circumstances. According to Kurdi, the word khalifah occurs in two Qur'anic verses: (al-Baqarah 2:30 and Sad 38:26).

-
4. Majid Ali Khan, *The Pious Caliphs*, Kuala Lumpur: Islamic Book Trust, 1998, pg. 17.
 5. M. A. Shaban, *Islamic History: A New Interpretation*, Britain: Cambridge University Press, 1971, pp. 16, 28.
 6. Abu Ala Maudoodi, *Political Thought in Early Islam*, in M. M. Sharif (ed.), *A History of Muslim Philosophy*, Wiebanden: Otto Harrossowitz, Vol. 1, 1963, pp. 660-661.

Kurdi concludes that the word khalifah means a substitute to someone else as his deputy but according to his request. The clue to this conclusion, he says, is the preposition used after the word khalifah in both verses. The verses, he says, have used the preposition 'in' (*khalifah fi al-ardh*) and not 'on' (*khalifah 'ala al-ardh*). According to Kurdi, therefore, if the two verses had used the preposition on, i.e khalifah on the earth instead of khalifah in the earth, it would indicate that the khalifah in question has taken over the responsibility of management of public affairs without the permission of citizens (those whom he rules). The use, however, of preposition 'in' indicates that the khalifah is one who is deputized by his people with their obvious or implicit consent to carry out or enforce the law.

In support of his argument above, Kurdi cites Prophet Harun's inability to command the same degree of obedience and confidence of Bani Israel, followers of Prophet Musa a.s, as his brother Prophet Musa could. When Musa went to fulfill the appointment of Allah, he deputized his brother Harun to manage the daily affairs of Bani Israel. Yet most of the people deviated and began to worship the Golden Calf, the reason being that Musa and not the people deputized Harun. Therefore, his succession was not completely valid. Notwithstanding that, Kurdi concludes, the term khalifah as used in the Islamic Holy Constitution (i.e Qur'an) denotes a deputy who takes care of and manages the affairs of the originals. The originals, accordingly, are the group of people ruled and who have authorized the deputy to carry the law and keep order.⁷ Thus, Kurdi's argument implies that political sovereignty belongs to the ruled and election of the khalifah must be constituted by the procedure of popular suffrage. However, the techniques used to elect the khalifah may differ in degree and form in accordance with the exigencies of life and circumstances, as the issue of election of khalifah has been left to human reason to decide. Had it not been the case, Kurdi maintains, Allah Almighty would have chosen a successor to His Prophet Muhammad or Prophet Muhammad himself would have nominated his successor. Kurdi held that

7. Abdul Rahman A. Kurdi, *The Islamic State: A Study Based on the Holy Constitution*, New York & London: Manshell Publishing Limited, 1984, pg. 24.

Qur'anic verses in surah al-Baqarah (2) verses 246-247 support this argument.⁸ The argument advanced by Kurdi seems to be in harmony with the practice of the Orthodox Khulafa'. This is the position held by most of Sunni jurists and scholars. Rashid Rida makes similar observation when he wrote that;

'Once the proper electors [citizens eligible to vote] are identified, their choice of a caliph is authoritative and recognizable; the electors serve as an agency competent to determine whether a given candidate is or is not qualified'.⁹

Rida upheld authoritative determination of citizens in choosing the khalifah and hence, according to him, no obedience at all is due to the khalifah if duly installed by force and it is the duty of citizens to overthrow the ruler at the first opportunity, as political sovereignty belongs to citizens.¹⁰ Moreover, A. Rashid Moten wrote that prominent Muslim thinkers in their writings tenaciously, though only realized in the practice of Orthodox Khulafa', held on to two interrelated fundamental principles of governance; legality and legitimacy. In Moten's analysis legality indicates constitutionally prescribed method or process of succession and legitimacy signifies the source of consent or approval of power. Moten, referring to the practice of Orthodox Khulafa', wrote that legal method of succession in the Khilafah System is election reinforced by bai'ah i.e peoples' consent. According to Moten, in the enormous expositions written by Muslims about the chief executive (i.e. khalifah) the elective nature of this institution is stressed. Thus, constitutionally, he wrote, the khalifah derives his authority from one source, the will of the governed.¹¹ However, Abu Hanifah in reference to the question of succes-

8. For details, see *ibid.*, pp.16-17.

9. Malcolm H. Kerr, *Islamic Reform: The Political and Legal Theories of Muhammad 'Abduh and Rashid Rida*, London & California: University of California Press & Cambridge University Press, 1996, pg. 167.

10. *Ibid.*, pp.168-169.

11. Abdul Rashid Moten, *op. cit.*, pp. 110-116.

sion, basing his opinion on the practices of the Orthodox Khulafa', held that;

'To seize power by force and later regularize it by exacting allegiance under duress was no lawful way of being chosen for it. A Caliph should be chosen after consultation and in conference with the wise men entitled to give opinion (*ahl al-ra'y*)'.¹²

Moreover, Abu Hanifah told Mansur, the second Abbasid Caliph, when the latter summoned him to comment on the legitimacy of his political authority that 'you have become a Caliph without even couple of men from amongst *ahl al-fatwa* (those whose opinion is respected and authoritative) agreeing to it, whereas a Caliph should be chosen with the conference and concurrence of Muslims. You know, Abu Bakr refrained from making decisions for six months until the news of Yemenites' allegiance arrived'.¹³

When Shi'is political doctrine held that Imam is divine appointee and Imamate a divine institution, they presented the arguments below in support of their view. They held that Imamate is a necessity imposed by Allah the Most High. Imam cannot be subject to election or designation by a group of persons. The imam is the legatee (*wasi*) of the prophet and he is infallible (*ma'sum*) in all his acts and words. The only difference between the prophet (*rasul*) and the imam is that the latter does not transmit a divine scripture. Shi'i scholars also argue that Prophet Muhammad appointed 'Ali as his legatee (*wasi*) and successor (*khalifah*) by designation (*nass*). The imamate therefore is to be transmitted among the descendants of 'Ali and Fatima until the day of resurrection and each imam designating his successor.¹⁴ Therefore, in Shi'i political legacy Prophet Muhammad, as argued by Sunnis, was not silent on the issue of succession.

12. Abu Ala Maudoodi, "Abu Hanifah and Abu Yusuf", in M. M. Sharif, op. cit., pg. 682.

13. Ibid., p. 683.

14. Ann K. S. Lambton., *State and Government in Medieval Islam*, London & New York: Oxford University Press, 1981, pg. 229.

Maudoodi in his writings on Shi'i political thought wrote that in Shi'i political doctrine, the imam's office was not a public office subject to the choice of citizens. Imam being a pillar of faith in Shi'i thought had become one of the main duties of the Prophet to institute somebody as imam which he did. The Prophet conferred the Imamate on 'Ali and nominated him as his successor. Thus 'Ali was the first imam by ordinance. As the appointment of the imam is not left to be made by public choice, every new imam will be appointed by an ordinance from his predecessor.¹⁵ Shi'i jurists based their view on Prophet Muhammad's tradition of Ghadir al-Khumm on the 10/632 according to which he allegedly has made a pronouncement in favor of 'Ali bin Abi Talib as his successor. It was considered that 'he ('Ali) had been ordained by Providence to succeed Prophet and that the Prophet himself had placed the question of succession beyond any doubt by his testament, as it were, at Ghadir al-Khumm'.¹⁶

It is narrated that in Ghadir al-Khumm, Prophet Muhammad to have pronounced that 'whomsoever I am lord of, his lord is Ali also'.¹⁷ Sunnis have rebutted Shi'i's claim on even stronger historical evidences. Had there been, Sunnis would argue, Prophet's ordinance, the whole Muslim community would have adhered to it. Moreover, it contradicts the Arab tradition that such an important issue would not have been debated or discussed among the people so that every member of the community would know about Prophet Muhammad's instruction. Then the whole episode of convention of *Saqifa-e-Bani Sa'eedah* would not have occurred.

3. Office of the Khalifah is Meritorious

According to Sunni scholars, a nominee for the office of the Khalifah must possess certain qualities whose absence would automatically disqualify him. One of the duties and perhaps the most important duty of the voting

15. Abu Ala Maudoodi, *Political Thought in Early Islam*, op. cit., pp. 666-667.

16. Syed Abid Ali Abid, *Political Theory of the Shi'ites*, in M. M. Sharif, op. cit., p. 732.

17. Ibn Sa'd, Vol. V. 235, *Mas'udi*, *Tanbih*, pp. 255-256; and Philip K. Hitti., *History of the Arabs*, pg. 471, Note 1., cited in *ibid*.

citizens is to choose a better qualified person, a person who could show invaluable qualities that he could lead and manage the daily affairs of the people based on sound policies. Political thinkers like al-Ghazali, al-Farabi, al-Mawardi, Nizam al-Mulk, Maudoodi, etc., have discussed the conditions of the candidacy to the post of chief executive (khalifah).¹⁸ Nevertheless, having faith in Allah the Most High, sense of justice, sanity, sound health, knowledge of political reality surrounding the community of Muslim inside the land under the control of the Muslims and the land outside their control, sense of what is really important or ability to prioritize his policies in terms of importance, and uncompromising or firm on essentials to the interests of the Muslim Community, coming to power through *bai'ah* are few qualities a citizen must look in the person contesting the post of chief executive.¹⁹ Moreover, the nominee for the post of chief executive must be known to be a man of meticulous justice and piety, of sound mind and body, free from impeding weaknesses like blindness and deafness. He must have sufficiently wide intellectual knowledge so as to be able to face complex and subtle problems, and he must be courageous and have good knowledge of military tactics so that he can efficiently oversee defense operations. He should be a man of wisdom and great administrative ability. Whether or not he should be from the clan of Quraysh, the tribe of the Prophet however was a controversial issue.²⁰

Al-Mawardi and al-Ghazali have maintained Qurayshite descent as an important qualifying condition for the office of the khalifah.²¹ However, Abu Hanifah also alluded to Qurayshite descent.

18. For details on qualifications of Khalifah see, Muhammad Saghir Hasan al-Ma'simi, 'Al-Farabi', in M. M. Sharif, op. cit., pp. 712-713; Muhammad Qamaruddin Khan, 'Al-Mawardi', in M. M. Sharif, op. cit., pp. 728-731; and Leonard Binder, 'Al-Ghazali' in M. M. Sharif, op. cit., pp. 782-783.

19. Abu Ala Maudoodi, Economic and Political Teachings of the Qur'an, in M. M. Sharif, op. cit., pg. 194.

20. Muhammad Abd. Rauf, Ummah: the Muslim Nation, Kuala Lumpur, Malaysia: Dewan Bahasa dan Pustaka & Kementerian Pendidikan Malaysia, 1991, p. 12.

21. Muhammad Qamaruddin Khan, 'Al-Mawardi', in M. M. Sharif, op. cit., pg. 721. See also, Leonard Binder, 'Al-Ghazali', in M. M. Sharif, op. cit., pg. 782.

But he based his argument on the doctrine of exigencies of time and political expediency. Abu Hanifah held that in the particular circumstances of those days only a Quraishite caliph could hold all Muslims together. Therefore, unlike others, Abu Hanifah did not maintain that the khilafah was exclusively the constitutional right of Quraysh Arab Tribe in Arabia.²² Abu Hanifah's view has become almost the agreed view of all the Sunnis. Abu Hanifah's view implies that the principle of effective leadership and not tribal descent constitute the vital core of political leadership in Islam. Rashid Rida joined Abu Hanifah when he advocated Qurayshite lineage due to the moral prestige in addition to effective leadership attached to the Qurayshite lineage.²³

Ibn Khaldun made a similar observation. However, unlike Rida, Ibn Khaldun maintained that *asabiyyah*—translated as clan partisanship, group spirit or social solidarity, constituted the vital core of effective leadership. However, Ibn Khaldun like Abu Hanifah concluded that Qurayshite descent may no longer be considered as one of the prerequisite of candidature for the post of khalifah, but Rida concludes that Qurayshite origin is still a condition for becoming Khalifah. While Rida by insisting on the Qurayshite origin does not nullify to make the principle of effective leadership as one of the qualities of the khalifah, the view held by Abu Hanifah and Ibn Khaldun seems conclusive on the matter.

However, the discussion of qualities of the khalifah presented by Sunni jurists and scholars have no place in Shi'i writings. This is not to suggest that Shi'is do not stipulate qualifying conditions for the post of imam. The single qualifying condition in Shi'i thought is that imam must belong to the family of Prophet Muhammad through 'Ali and Fatimah. All the Shi'i sects assume that imam has been chosen by Prophet Muhammad's pronouncement on such succession. On this assumption, Shi'is built a number of inter-related propositions. The Shi'is therefore also assumed that imam's office is exclusive rights of the descendant of 'Ali

22. Abu Ala Maudoodi, Abu Hanifah and Abu Yusuf, in M. M. Sharif, op. cit., pg. 684.

23. Malcom H. Kerr, op. cit., pp. 166-167.

and Prophet's daughter Fatimah. They also assumed that the imam is divinely inspired personality and he is infallible, i.e free from all sin, great or small. He is immune from error. Everything he says or does is inviolable. He is infallible, sinless and the final authoritative interpreter of God's will as formulated in Islamic law.²⁴ By virtue of being divine appointee to rule his human creatures, he is incapable to commit sin. Moreover, it is impossible for him to commit sin. Citizens should declare their unconditional allegiance to him.

The assumption that imam being divine nominee for government of men on earth and appointed by God had far-reaching repercussions on later developments of Shi'i political thought. It impeded for instance Shi'i scholars to advocate political institutions and norms as well as constitutional measures restricting abuse of power by the highest circle of elite class in society. One natural consequence of such a development was that unlike Sunni jurists, Shi'i scholars did not contemplate on a number of essential characteristics, discussed below, of system of governance in Islam. If at all such a discourse existed, it lacked coherence and was subservient to the above overriding assumption. Therefore, the discussion below mainly draws upon Sunni sources.

4. Social Justice and legal Equality

The Khilafah System treats its citizens with legal equality and social justice. Though concepts of justice and equality are closely related, Muslim political thinkers and philosophers have interpreted the two concepts differently. On the whole, justice and equality are not identical as under certain circumstances justice can only be achieved through inequality or unequal distribution of wealth or opportunity.²⁵ Literally justice means to give one his due rights. However, Muhammad Hashim

24. Abu Ala Maudoodi, *Political Thought in Early Islam*, op. cit., pp.666-667. See also John L. Esposito, *Islam: The Straight Path*, Oxford University Press, pg. 49.

25. Mohammad Hashim Kamali, *Freedom, Equality and Justice in Islam*, Malaysia: Ilmiah Publishers, 1999, pg. 140.

Kamali defined justice as 'placing something in its rightful place where it belongs'.²⁶ However, equality means to give one the same right or thing given to the other. Therefore, justice is different from equality in that one may deserve to get more while the other may not get at all. But, both justice and equality are relational/social concepts in the sense that their proper meaning could be understood in social context. Justice and equality would become meaningless if applied to individual in isolation from the society or social relations vis-à-vis political, economic, legal, affairs. It is due to their social character that Islam considers both justice and equality as moral virtues. Given the definition of justice and equality above, the former values differentials in capabilities without discrimination on the basis of religion, tribe, and class or gender and the latter signifies application of laws to all regardless of social status and social class.

However, moving away from philosophical discourse on equality and justice, justice and equality practiced by the Khilafah System as stated in Abu Bakr's post-election speech subsumed social context. Moreover, in his speech Abu Bakr indicated that justice and equality are not identical. In his speech he referred to equality as legal equality or equality before law in the sense of distribution of rights and duties.²⁷ All citizens, Muslims and non-Muslims, are equally guaranteed protection as well as punishment by the legal system of the Islamic State. Protection of life, property, and welfare of every subjects of the Islamic State is the duty of the Khalifah. It is also the duty of every citizen to abide by the law of the land. Violators of law, therefore, would not be left unpunished. Here Abu Bakr emphasized equality before law as constitutional principle of his administration.

However, social justice in his same speech indicated abolition of all kinds of discriminations - racial, political, tribal, and even religious. Abu Bakr as the khalifah cum head of the Islamic State considered it as his mandate that he would support the victim, Muslim and non-Muslim,

26. Ibid., p. 141.

27. For details of Abu Bakr's post-election in which he spoke of social justice and legal equality, see Majid Ali Khan, *The Pious Caliphs*, Kuala Lumpur: Islamic Book Trust, 1998, pg. 17.

against transgressor, who had violated the law of the land and would not spare any effort to make transgressors, Muslim and non-Muslim, provide with necessary compensation due to the victim. The entire state machinery would support the victim against the violators of the law regardless of socio-political background and status of both parties, the victim and transgressor. Abu Bakr here emphasized justice as constitutional principle in his administration.

5. Independence of Judicial System

The principle of legal equality and social justice presupposes independence of judiciary. Judiciary must adjudicate impartially without being carried away by the pressure and influence from the citizens or the people in authority. It must make sure that justice and equity should be established in all human affairs. 'Its foremost duty is to give verdict strictly in accordance with the law and requirement of justice without being swayed either by the passions or prejudices of its own members or those of others'.²⁸ It is narrated that khalifah 'Umar (the second Orthodox Khalifah) for the first time in history separated the judiciary from the office of khalifah, the executive branch of the Khilafah System.²⁹

Jurists have quoted the Qur'anic verse from surah al-Nisa', verse 58, which means "Allah doth command you to render back your Trust to those to whom they are due; And when ye judge between man and man, that ye judge with justice: Verily how excellent is the teaching which He giveth you! For Allah is He who heareth and seeth all things". This verse indicates necessity of independence of judiciary in the Islamic State. This verse envisages dispute in the Muslim community. However, Kamali concludes that a dispute can also be between the rulers and the ruled. Therefore, the verse explicitly requires adjudication of a dispute between

28. Abu Ala Maudoodi, *Economic and Political Teachings of the Qur'an*, op. cit., pg. 195.

29. Majid Ali Khan, *The Pious Caliphs*, Kuala Lumpur: Islamic Book Trust, 1998, pp. 94-5. See also Mohammad Hashim Kamali, op. cit., pg. 1160.

the rulers and the ruled in accordance to ordinances of Shari'ah, ruling of Allah and His Messenger. Only 'an independent judiciary with full powers to adjudicate between the citizens and the state' can serve as an impartial tribunal to settle dispute between them.³⁰

However, constitutionally khalifah can retain the powers of appointment and dismissal of judges, though the removal, as some jurists argue, should be on the grounds of public interests. Not this alone; the khalifah can also have the right to act as a judge himself,³¹ provided he is competent. Kamali wrote that the powers of appointment and removal of judges constitutionally fall within discretionary powers of the khalifah in Islamic legal theory due to two factors; the judge represents the authority of the khalifah and exercises power in the capacity of his wakil (representative), and the administration of justice is one of the basic obligations of the khalifah.³²

However, khalifah 'Umar's practice of appointing judges for life would imply that he deprived himself of the power of dismissing the judges. 'Umar's practice therefore indicates that constitutionally khalifah may not have the power of removal or replacement of judges unless a judge resigns or becomes incompetent. Therefore, when a judge becomes incompetent, for example, he succumbed to gross violation of law and irregularity or impropriety in administering litigation; he should relinquish his judicial functions and stand the test of law. If he refused to submit to the course of law then legal action against him would suffice to remove him and not the khalifah. Khalidi's view in his *Qawa'id*, which is quoted by Kamali, confirms this view. Khalidi held that 'it is essential that head of state should have no power to replace or dismiss the leading judges in the land'.³³

30. Mohammad Hashim Kamali, *op. cit.*, pg. 158.

31. *Ibid.*, pg. 164.

32. *Ibid.*, pg. 158.

33. *Ibid.*, pp.164-165.

Khalifah as an executive branch of the Khilafah System cannot interfere in administration of justice in any given circumstances. The great jurists such as AbuHanifah, his student Zafar, Ahmad bin Hanble and others refused to accept the post of judge during the Abbasid dynasty due to two reasons; first, executive interference in the affairs of judiciary, and second the khalifah not being elected to the highest political post in the Islamic State. Similarly, all the Orthodox Khulafa' paid close attention to the administration of justice in terms of appointment of judges, impartiality of the judiciary, and so on. Not only that alone, they considered themselves equally subject to the law of the land like every other ordinary citizens. The chief justice had the power to ask the khalifah to appear before the court of law to defend himself. 'Umar's appearance before the court of Zaid bin Thabit in a dispute between 'Umar and Ubayy bi Ka'b illustrates this point.³⁴ Similarly 'Ali (the fourth Orthodox Khalifah) appeared before the court of Shuraih to defend himself against his Christian subject. Khalifah 'Ali lost the case as he could not provide sufficient evidence.³⁵

It is interesting to observe that despite the hereditary nature of the Abbasid dynasty and semi-independent nature of judiciary, a landmark development in the area of independence of administration of justice vis-à-vis the public authority occurred when the Abbasid established special court namely *diwan al-nazar fi al-mazalim* to litigate the impropriety of the public officers including the person of the khalifah. The *diwan al-mazalim* functioned as an appellate court used to hear public grievances against administrators. Not only this alone, it also functioned as the court of first instance where the judge could initiate unilateral action against any officer if he observed or had sufficient evidence of public impropriety. 'The *diwan al-mazalim* had the power to hold public officials, including the chief executive, to strict legal accountability for their acts. Nobody, not even the caliph, could secure or demand any preferential treatment. There were several examples in which the

34. Majid Ali Khan, op. cit., pg. 96.

35. Ibid., pg. 212.

reigning caliph was required to appear in person before the court as a mere defendant'.³⁶

6. Separation of Powers

Given the Shi'i assumption that imam is impeccable and free from committing all kinds of sins, the question of separation of powers hardly could exist in the original Shi'i thought. All powers are combining in the person of imam. He performs the functions of chief executive, legislator as well as chief justice. Therefore, Shi'i scholars did not indulge themselves in advocating institutions with constitutionally designated powers. The imam possesses supreme authority. He serves as the source of all religious ordinances and political legitimacy in exercising *ijtihad* or deduction of juridical rulings from the sources of proof: Qur'an, the traditions of the Prophet and the imams, *ijma'*, and *'aql*. Actions and decrees issued by officials or scholars are legitimate only if delegated or approved by the imam of the age. Notwithstanding this, institutions such as *vilayat-i faqih* (jurists governance or authority), *marja'-i taqlid* (locus of mass following) and council of jurists developed in the light of overriding powers of the imam. They are legitimate only if agreed or consented to by the imam in Occultation or Concealment.

The Twelver sect of Shi'ism believes that the hidden imam is in contact with the *mujtahids* and they are inspired by his guidance. Therefore, the hidden imam rules the Community of Muslims through the *Mujtahids*. All persons, sovereign, rulers and pontiffs, jurists, administrators wherever they may be, are usurpers if they do not derive their right to rule from the commands of the imam.³⁷ The imam's wields authority in theological as well as juridical and political realms. The ordinary masses

36. Abdul Rasid Moten, op. cit., pg. 117.

37. Ibn Sa'd, Vol. V., 235; and Mas'udi, Tanbih, pp. 255-256; and Philip K. Hitti, History of the Arabs, p. 471, note 1., cited in Syed Abid Ali Abid, "Political Theory of the Shi'ites", in M. M. Sharif, op. cit., p. 732. See also, Ahmad Moussavi, "The Theory of Vilayat-i Faqih: Its Origin and Appearance in Shi'ite Juristic Literature", op. cit. pp. 97-99.

therefore should follow in the footsteps of this figurehead *mujtahid*. Initially, the *mujtahid* was to deputize the imam mostly in theological issues. He is considered the rallying point to decide on legitimacy and illegitimacy of political authority and institutions.³⁸

In contrast the Sunnis political legacy is expressive of the doctrine of separation of powers or check and balance. They are credited for introducing the principle of separation of powers in Islam. In the writings of Sunni jurists, constituent elements of the Khilafah System in its initial formative phase were two; the office of khalifah and its affiliated departments - in modern terminology collectively known as executive, and the judiciary. However, during Abu Bakr's tenure, though structurally both were merged under the office of khalifah, the two branches were separate in terms of duties and functions. The khalifah headed both, the executive branch as well as the judicial branch, despite the latter being independent in administration of justice.

A significant development in the Khilafah System particularly in the administration of justice occurred when 'Umar practically declared the judicial branch separate. Constitutionally, an ordinance enacted by 'Umar made the khalifah no longer the head of judicial branch. The judges were held no longer responsible to the khalifah or head of the Islamic State in the sense that a judge could not decide on litigation unless approved by the khalifah. Khalifah's constitutional power in the realm of judiciary was restricted to appointment of judges only. Neither khalifah nor the judge was answerable to one another. Yet, both - the khalifah and judge - were subject to deeds of duty enshrined in the constitution.

The third constituent element, as known in modern times - the law making body - neither existed nor was attempts made to establish one. The Orthodox Khulafa' almost lived a living condition similar to the age of revelation. In other words the conditions and exigencies of the Orthodox Khulafa' were not much different from the conditions in which

38. For details on development and evolution of the institution and both theological and political and juridical powers of in Shi'i thought, see Ahmad Moussavi, op. cit. pp. 105-108.

Prophet Muhammad (s.a.w.) lived and received revelation. In the event there appeared an outstanding legal issue that required juristic opinion, the institution of muftis or *dar al ilfta* – a recognized department within the executive branch of the Khilafah System – would pronounce a verdict on its legality (*al-hil*) or illegality (*al-hurma*). However, decisions of political nature were reached after serious debate between the khalifah and his hand picked personage of high caliber who were institutionalized as *shura* – a consultative body or board of advisors. *Shura* was not a legislative institution in the strict sense of the term. It was a department like any other departments within the executive branch of the Khilafah System attached to the office of the khalifah.

However, from the second generation onward, classical jurists advocated that the Khilafah System needed to institutionalize a legislative branch – better known as the *ahl al-hall wa al-'aqd* – as state institution. According to Rashid Rida, *ahl al-hall wa al-'aqd* means “men of learning, leadership, and prominence”.³⁹ The *ahl al-hall wa al-'aqd* and *shura* are not identical. The two are distinct both in scope and functions. The *ahl al-hall wa al-'aqd*, had the power of interpreting definite injunctions prescribed by the Shari'ah – Qur'an and Sunnah, framing bye-laws and rules of procedures to bring them into practice, and legislating in events the Shari'ah is silent.⁴⁰ However, a futile attempt was made to widen its scope. In addition to legislative function, the *ahl al-hall wa al-'aqd*, according to jurists, could have two more functions. Firstly, it could act as an 'electoral college' and secondly, representing citizens in exercising *bai'ah*.

The jurists in conferring the powers of appointment of successor designate as well as exercise of *bai'ah* upon *ahl al-hall wa al-'aqd* intended to reduce executive interference. However, the method advocated was erroneous and lacked critical evaluation of the nature of political leadership then existed in the Muslim World. It was and is malleable to abuse by

39. Malcom H. Kerr, op. cit., p. 161.

40. For more information see, Abu Ala Maudoodi, “Economic and Political Teachings of the Qur'an”, op. cit., pp. 194-195. Maudoodi uses the term legislature or Legislative Council not *ahl al-hall wa al-'aqd*.

the ruling authority. Though the institution of *ahl al-hall wa al-'aqd* was ever a historical reality, it cannot become an efficient institution either to decide on the question of succession or representing the masses in delegation of authority. It could better preserve its independence if its functions are restricted to formulations of by-laws only and constitutionally it is not directly responsible to the head of state or head of government. It rather should be directly answerable to the people. In the event *ahl al-hall wa al-'aqd* becomes subordinate and answerable to khalifah or anyone else, the chances of its abuse become many. Muslim jurists and scholars would violate the principle of check and balance if they tend to attribute the power of recruitment of members *ahl al-hall wa al-'aqd* to ruling khalifah. Chances of it becoming a political tool in the hands of the ruling khalifah become as many as its chances of abuse. Therefore, the constitution of the Islamic State also must provide for recruiting its new members in no vague terms.

7. Indivisibility of the Authority of the Khalifah

Sunni and Shi'i jurists have concurred on the indivisibility of the authority of the khalifah/imam. Khalifah is both religious/spiritual ruler and temporal/political leader. Khalifah is the embodiment of religious sanctions and political activities. Let us define the religious-temporal dichotomy first before submerging in discussing the religious-temporal balance in the Khilafah System. The religious-temporal dichotomy in the context of authority is certainly a practice that is western and secular. Religiosity in the west is associated with rituals that link man to his deity. It has nothing to do with other dimensions—political, social, and economic—of individual's life. However, the term temporal is employed to refer to these other dimensions of individual's life. In the west, therefore, individual's temporal activities do not need to be religiously sanctioned and man does not need divine interference in these realms of social activities and life. Hence, according to the western thought man in the realm of temporal activities has lost this intimate relation/link with his deity.

On the contrary, in Muslim – Sunnis and Shi'is alike – political thought religious-temporal dichotomy could hardly exist, as a given temporal

activity is simultaneously religious in that the activity to be divinely sanctioned or employed as required by higher purposes/objectives (*maqasid*) of Shari'ah. Thus, a given action – religious or temporal – is either Islamic or un-Islamic, as certain religious activities may not carry the approval of Shari'ah while on the contrary temporal activities may certainly do. Thus, the religious-temporal dichotomy does not exist in the Muslim political thought at all. This view is in agreement with views of many classical jurists and contemporary political thinkers.

Politics and religion are not separate in the Khilafah System. Khalifah, for instance, is not only to administer justice, which is considered religious in the sense that it is divinely ordained. He is also under obligation to manage and administer other aspects of life of citizens and yet required to strictly observe that his administrative policies are Shari'ah-oriented or have divine/religious sanctification. In the formative phase of the Khilafah System, the administrative responsibility of the khalifah was as important as dissemination of justice. The Orthodox Khulafa' developed a modal *operandi* and modal *vivindi* of public administration that at best reflected the virtues of Higher Purposes/Objectives (*maqasid*) of Islam as a way of life.⁴¹ The reason the Orthodox Khulafa' took keen interest in development of an elaborate yet viable system of administration indicates that the Khilafah System is not merely a religious institution. It is also the greatest social organization to promote the corporate life of its subjects based on the notion of life advocated by Islam.

8. Freedom

The emergence of the Khilafah System predates the philosophical and theological controversies in Islamic thought about the concept of freedom that emerged during the Umayyads and 'Abbaside periods. Therefore,

41. For details about development of administrative institutions by the Orthodox Khulafa, see Majid Ali Khan, *The Pious Caliphs*, Kuala Lumpur: Islamic Book Trust, 1998, pp. 43-49, 87-111, 152-157, 209-213. Majid Ali Khan, however briefly, discusses the administrations and the types of institutions developed by the Orthodox Khulafa'. His discussion indicates that these institutions developed by them were inspired by the teachings of Shari'ah and hence different from Western bureaucratic institutions.

the freedom practiced by the Orthodox Khulafa' was like a limiting factor on the authority and power of government and hence in the study under discussion is restricted to jurists/political scientists' view that freedom means freedom of opinion and expression by the citizens against the khalifah or his officers in the event of violation of the right of the citizens or Islamic Law and preventing them from participating in the decision-making processes. However, the Shi'i political writings seem to diverge from the principle of freedom defined above.

The Shi'i assumption that Imam was impeccable points out that his words are terminal and inviolable. By virtue of being divine appointee to rule His human creatures, he is incapable to commit sin. Moreover, it is impossible for him to commit sin. Citizens therefore, should declare their unconditional allegiance (*bai'ah*) to him. His disobedience is as disobedience to Allah the Most High. The imam can neither be deposed nor interfered with in the matters of administration and religious affairs. Citizens are under obligation to obey him or his representative in all circumstances irrespective of whether the ruler is just or unjust. The citizens may have to bear the prevalent chaotic conditions created by the tyrants, cruels, and despots until the situation is corrected. Thus, the discussion below broadly represents Sunni view on the question of freedom

According to Muslim scholars, personal freedom has numerous manifestations or forms. They include freedom of religion, freedom of education and dissemination of knowledge, freedom of association, and right to personal safety/security, right to privacy, honour, dignity, ownership and work. According to Kamali, "the differential classification, terminology and contents of personal liberties are partly a function of their susceptibility to change over time and circumstances, as well as the type of political philosophy and system of government under which they operate".⁴² Given the argument advanced by Kamali, institutional freedom or freedom of association is also an essential form of freedom encouraged by the Khilafah System.

42. Ibid., pg. 14.

However, the freedom encouraged by the Khilafah System is constitutionally limited and not absolute. Freedom of opinion is a relational concept. It involves two categories of individuals – the people in authority and citizens at large. In this context it is the latter category entitled to raise certain objections when misgiving is construed in the policies enacted by the former. The state of being free to express ones opinion only after the law permits one because the other has violated the law is self-explanatory instance of freedom limited by law. Hence, a citizen is entitled to freedom within constitutionally defined limits.

9. Protection of Human Rights

Social contract between the people in authority and citizens provided the foundation on which the Khilafah System was established. Inherent in this social contract was protection of basic rights of citizens by the Khalifah, as preservation of citizens' basic rights constituted an integral part of the duties and responsibilities of khalifah. Therefore, Khilafah System constitutionally provides for protection of basic human rights. During his inaugural speech, Abu Bakr in loud and clear terms guaranteed citizens' their rights of constructive criticism of khalifah and officials of the khilafah, freedom of religion, expression and association, access to basic means of survival, social justice, legal equality, peace and stability, right of non-Muslims, security of property, honor, privacy, etc. Citizens' rights as such, Abu Bakr maintained, were his government's duty. He would succumb to his citizens' demands if he failed to protect these rights.

Shari'ah in no vogue terms speaks – opposed to Western view “that there is no recognition in Islam of the idea of right and liberty, fundamental or otherwise, that is inherent to the human person – of existence and protection of fundamental human rights and liberties.⁴³ Moreover, Muslim jurists have also addressed the issue of individual rights and liberties in their works. However, Shari'ah and fiqh treat the issue of rights

43. Mohammad Hashim Kamali, *Freedom of Expression in Islam*, Kuala Lumpur: Ilmiah Publishers, Revised Edition, 1998, p.16.

and liberty in the context of *al-Ahkam al-Shari'ah* – rulings communicated in the form of command or prohibition to individuals.⁴⁴ This *juris corpus* of the law regulates the relationships and conducts of individuals in the Islamic State.

Kamali further highlights the issue of right in Islam when he wrote that Muslim jurists 'never entertained any doubts about the centrality of the people's rights in the whole concept of *hukum*'.⁴⁵ Obedience to law inherently or naturally leads to the notion of obligation or what is called duty. However, inherent in the notion of duty is the notion of individual rights, as a citizen's duty inversely becomes other's right. Individuals, therefore, have duty among others to the people in authority and vice versa. When Abu Bakr in his inaugural speech spoke of his duty and that of his subjects, essentially he informed his audience of the rights the people in authority and citizens could mutually have over one another. If one violated the rights of the other, the victim – people in authority or citizen – can petition to correct the violation of his rights. However, given the centrality of rights within the concept of *hukum*, while citizens were assured of their basic rights, Abu Bakr cautioned that his government would be tough on any one or group that are engaged in unconstitutional removal or overthrow of khalifah. In the event khalifah behaved in accordance to the law of the land, he has every right to condemn rebellion against his legitimate authority, as errant activities did not fall within the prescribed limits of the principle of human rights.⁴⁶

10. Shari'ah as the Supreme Law of the Land

In Sunni and Shi'i political legacy, Shari'ah – Qur'an and Sunnah (the authentic practice of the Prophet Muhammad) – constituted the supreme law of the land. Neither analogical reasoning (*qiyas*) or private judgment

44. Ibid., pg. 17.

45. Ibid., pg. 18.

46. For details about the basic rights of the citizens as well as those of the authority, see Abu Ala Maudoodi, "Economic and Political Teachings of the Qur'an", op. cit., pp. 195-197

(*ra'y*) nor any given rational method of inquiry could have precedence in legislating rules for the conduct of public affairs over Laws prescribed by Shari'ah.⁴⁷ It is through Shri'ah, sovereignty of Allah the Most High is established in the Islamic State. Unlike Shi'i view, in Sunni discourse sovereignty of Allah the Most High refers to legal sovereignty: Allah the Most High as the Ultimate Lawgiver and Legislator.

Sunnis and Shi'is have divergent views on the legislative powers of human institutions within Muslim society. Shi'is had attributed to the imam of the age or his representative (*mujtahid*) overwhelmingly all powers of interpretations of the text. According to Shi'i sources, Imam Mehdi, the twelfth in the chain of imams, went into Concealment/Occultation. Shi'i invented the institution of *vilayat-i faqih* or the authority of the jurists who could represent the imam hidden imam until he returns. The *mujtahid* - was considered as *marja'-i taqlid*: locus of mass following. A *mujtahid* in a given age possesses supreme authority during the absence of the imam. He serves as the source of all religious ordinances and political legitimacy as he represents the imam even in exercise of *ijtihad* or deduction of juridical rulings from the sources of proof: Qur'an, the traditions of the Prophet and the imams, *ijma'*, and *'aql*. Mujtahid enjoys imam's authority in theological as well as juridical and political issues pending his return. Mujtahid therefore is *marja'-i taqlid* in all realms of life.⁴⁸ The masses therefore should follow in the footsteps of this figurehead mujtahid. The principle of divine nominee of the imam influenced Shi'i jurists to confer such an overwhelming power on imam or his representative.

However, Sunnis approach in conferring legislative powers on human institution is different. According to sunni sources, the *ahl al-hall wa al-'aqd* – the legislative organ of the Khilafah System – functions within the general framework prescribed by Shari'ah. One could think of three

47. Abu Ala Maudoodi, "Abu Hanifah and Abu Yusuf", in M. M. Sharif, op. cit., pp. 681-682.

48. For details on development and evolution of the institution and both theological and political and juridical powers of *vilayat-i faqih*, see Ahmad Moussavi, "The Theory of Vilayat-i Faqih: Its Origin and Appearance in Shi'ite Juristic Literature", op. cit. pp. 105-108.

kinds of laws vis-à-vis *ahl al-hall wa al-'aqd*. First, laws that are clearly mentioned in the Qur'an and Sunnah. No one can alter its content. Khalifah is under obligation to implement it provided necessary pre-conditions are present. In the absence of those pre-conditions a law could be suspended until the khalifah is enabled to restore the pre-requisites required for its effective implementation. 'Umar's al-Khattab suspension of amputation of the hands of a thief illustrates this point. The Khalifah had the mandate to provide basic means of survival and only all the basic means of survival available to citizens; the laws as such could be implemented. Khalifah 'Umar felt that his administration could not observe this prerequisite and hence suspended its implementation. It was restored only after the khalifah was able to provide basic amenities to citizens. Scholars of Ibn Taymiyyah, Shatibi, and Ibn Qayyim al-Jawziyyah caliber have argued that implementation of laws in the absence of its pre-requisites is not in line with Divine Justice. Jurists have categorized policies as such by the ruling khalifah under *Siyasa Shar'iyah* (Shari'ah-Oriented Policy). *Siyasa Shar'iyah* generally refers to discretionary powers of the ruling khalifah to enact policies and decide on rules and procedures that are not stated in the Shari'ah, however, sometime even at the risk of abandoning its letter and yet essential for administration of justice in line with the spirit and objective of Shari'ah.⁴⁹ In a sense *Siyasa Shar'iyah* are policies enacted to protect the five higher objectives and purposes of Shari'ah (*Maqasid Shari'ah*), namely the protection of faith, life, intellect, lineage, and property.⁵⁰ Second, laws prescribed by Shari'ah that need interpretation and enactment of by-laws for their proper implementation, *ahl al-hall wa al-*

49. For details of views of jurists, see Mohammad Hashim Kamali, op. cit., pp. 200-218. The definition cited in the text is the result of thorough reading of the aforesaid pages of Kamali's work. Therefore, it is difficult to provide a specific page reference. However, Kamali discusses views of prominent jurists on *Siyasa Shar'iyah*. In addition, he also quotes Qu'anic verse and Prophetic Traditions on the issue under discussion. On the whole, Kamali delineates parameters for Shari'ah-Oriented Policies the Khalifah could enact. He concludes that Khalifah cannot justify his every policy in the name of *Siyasa Shar'iyah*. His policies, according to him, must stand the test of Divine Justice, which is the highest purpose of Shari'ah. The frame of reference delineated by Kamali, therefore, represents a yardstick for distinguishing policies of tyrannical regimes and benevolent khalifah whom is aspired to establishment of Divine Justice. It is noteworthy that Kamali's work is extensive and covers almost all important works on *Siyasah Shar'iyah*.

50. Ibid., pg. 206.

'*aqd* can only interpret them. Third, laws about matters about which Shari'ah is silent, *ahl al-hall wa al-'aqd* is in liberty to enact laws for all purposes and needs of society keeping in view the general spirit of teachings of Islam and public interests. "The very fact that no clear injunction exists about them in the Qur'an and Sunnah is sufficient to show the Lawgiver has Himself left it to the good sense of the believers"⁵¹ However, the doctrine of *Siyasa Shar'iyya*, as discussed earlier, is closely associated with this category of laws.

11. *Shura* as Fundamental Principle of Decision-Making

Shura literally means consultation or seeking opinion regardless of the nature of the issue. An issue that needs expert opinion could be political, economic, social or personal in nature. *Shura* in the context of decision-making means seeking opinion of personage of high caliber related to public affairs. *Shura* understood as seeking opinion about public life was employed by Prophet Muhammad (s.a.w.) and Orthodox Khulafa'. However, neither Qur'an anywhere discusses institutionalization of the principle of *shura* as public office nor Prophet Muhammad (s.a.w.) institutionalized it as public office or state institution that could be referred to for seeking opinion on issues related to public affairs. However, Abu Bakr as-Siddiq the first Orthodox of Khulafa', institutionalized *shura* for the first time in the history of Islam. However, *shura* employed by Prophet Muhammad or the Orthodox Khulafa' had no legislative safe advisory function.

However, *shura* as public office or state institution may take several forms and each form subject to certain by-laws and procedures in order to ensure that public policies are made in the best interests of citizens. But, institutionalization of a given form of *Shura* depends on the nature of issue. Thus, in the Khilafah System, given the nature of issue, three forms of *Shura* has been institutionalized by the Orthodox Khulafa': (1) consultative council or advisory board, (2) council of heads of tribes/

51. Abu Ala Maudoodi, "Economic and Political Teachings of the Qur'an", op. cit., pg. 195.

ethnic groups and pressure groups, and (3) general council or assembly of representatives of the people. In modern terminology this third form is often called legislature. Therefore, modern legislature could have advisory function and the executive branch should be required by the constitution to seek its approval on certain issues such as declaration of war and conclusion of peace treaty, imposition of taxes, and so on. Issues of general nature fall within the scope of this form of *Shura*. Selection of the members of the first form of *Shura* falls within the prerogative of the ruling Khalifah. While the selection of members of the first category of *Shura* would be exclusive prerogative of the Khalifah, adequate institutions and procedures need to be put in place for election or selection of members of the second and third categories of *Shura*.

It is interesting that *Shura* and *ahl al-hall wa al-'aqd* are two separate state institutions in terms of scope and functions. The former is mainly concerned with giving advice to the Khalifah on numerous state policies that affect every citizen's life. The function of the latter, however, is legislative. The constitution of the Islamic State must define the functions, duties and relations between the above two state institutions.

12. Accountability, Answerability and Transparency in Administration

A high degree of accountability, answerability, and transparency in administration, policy-making, and management of the public life characterize the Khilafah System. As the Orthodox Khulafa' viewed political power as trust from the people and people's property, they always endeavored to act in line with the public interest. The khalifah therefore is under obligation to put necessary institutions in place to prevent corruption, misuse of trust and abuse of power. In Khilafah System decisions and policies are transparent because the public needs to be kept informed about its activities. Public property, fund, and treasury are protected from all kinds of misuse. The people hold the Khalifah and public officials any misgiving and abuse of power. It is the duty of the chief executive to carefully appoint his officers based on merits and qualifications. Personalities of high integrity should be

appointed to the most important public positions. It is also the duty of khalifah that to closely watch the actions and behavior of his officials. The shi'is concur with sunnis on all but holding the very person of imam answerable to the people or any other respectable state institution. The imam being divine appointee was sinless and not accountable before the law. He is above the law. In fact he is the law; as he possesses the power of interpreting the law.

The Orthodox Khulafa' would propose the names of officials to the Shura and then publicly call them to take oath of office. The instruments of duties and responsibilities were given to the officers after being read by the officer in the public. The aim was to prevent the public officials from misusing their positions. Notwithstanding these; the khalifah would admonish his officers if they committed wrong acts while bearing the deeds of office. A best example that illustrates transparency, accountability, and answerability during the time of the Orthodox Khulafa' is the provision of compulsory presence of all provincial governors on the occasion of Hajj (an annual Muslim ritual of performing pilgrimage to Mecca) to listen as well as respond to the complains raised by their subjects.

It is argued that Abu Yusuf, who was Abu Hanifah's disciple, wrote this book of law – *Kitab al-Kharaj* – for 'Abbasid Khalifah Harun al-Rashid to rule the Islamic State according to it. His book is held to be a constitutional plan according to which Harun al-Rashid to conduct the affairs of the realm. However, it is believed that in expounding constitutional duties and responsibilities of the Khalifah, Abu Yusuf was intended to revert the Abbasid Khalifah to the tradition of the Orthodox Khulafa'. This, it is held, is evident in the fact that Abu Yusuf always refers to the conduct of the Orthodox Khulafa' and the only Umayyad Khalifah 'Umar bin Abdul 'Aziz, also known as 'Umar II. He never quotes any precedent from any other Umayyad or Abbasid Khalifah. Abu Yusuf, therefore, holds Khalifah accountable and describes his responsibility as follows. "The Caliph to be answerable not only to God but also to the publics, and has quoted at several places from the sayings of the Prophet and the Companions to prove that the Muslims have unquestionable rights to criticize their rulers, and that such criticism contributes to the good of the people and the state. Enjoining the right and forbidding the wrong is an inalienable

rights and a duty and its negligence in a community is equivalent to inviting the wrath of God upon its head. It is the duty of rulers to have forbearance for truth being spoken before them, as nothing is more hurtful in a ruler than his being short-tempered and intolerant of criticism, and the Muslims have a right on him and of their properties that have been entrusted to his care".⁵²

Conclusion

The system of government that emerged in the formative phase of Islamic political thought and institutions came to be known as the Khilafah System. The Structure of the Khilafah System outlined above makes it unique political institution in the sense that it is more practical than the Imamate System propagated by Shi'i sect of Muslim community. Moreover, it also suggests that the system of government in Islam is different modern Western democratic system of government on two grounds: First; historically, khilafah emerged long before the birth of modern democracy and second; philosophically, the source of legal sovereignty in khilafah is divine. Given its distinct philosophical foundation, the operational organs of the Khilafah System, therefore, differ from those of modern democratic forms in terms of scopes, functions, and purposes. However, this is not to suggest that similarities may not exist between the western democratic system of governance and the Khilafah System of government. A comparative study of the Khilafah System and modern western democracy will be helpful for investigating the philosophical issues underlying the two systems of governance.

52. Abu Ala Maudoodi, "Abu Hanifah and Abu Yusuf", in M. M. Sharif, op. cit., pg. 698.