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# PRINCIPLES AND METHODS FOR ENFORCING ACCOUNTABILITY IN THE PUBLIC SECTOR

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*In the name of Allah, Most Gracious, Most Merciful*

# PRINCIPLES AND METHODS FOR ENFORCING ACCOUNTABILITY IN THE PUBLIC SECTOR

"Allah doth command you to render back your Trusts
to those to whom they are due;
And when you judge between man and man,
that you judge with justice...."

[Holy Qur'ān, Surah al-Nisā' (4): 58]

"All political power ... [is] ... in the strictest sense a trust; and it is of the very essence of every trust to be rendered accountable; and even totally to cease, when it substantially varies from the purposes for which it alone could have a lawful existence."

[Quoted in C. B. Macpherson, Burke, Oxford University Press, Oxford, 1980, p. 32]

"The emerging constitutional orthodoxy is that the powers of government belong to and are derived from the people. But is this reflected in our experience of government today? Have the twin pillars of our constitutional arrangements - representative democracy and responsible government - served us adequately, or have they left us vulnerable to those who wield public power? If sovereign power resides in the people and if, in consequence, government is a trust for the people, do our present institutional arrangements provide sufficient reassurance that service of the people is, and will be honoured as, the first obligation of all of our public officials?"

[Paul Finn, "The Abuse of Public Power in Australia: Making Our Governors Our Servants", Public Law Review, Vol. 5, March 1994, No. 1, p.43]

# GLOSSARY OF ARABIC TERMS

| | |
|---|---|
| Al-$^c$adālah | العدالة |
| Al-ḥisbah fi al-Islām | الحسبة فى الإسلام |
| Al-isti'nāf | الإستئناف |
| Al-ma$^c$rūf | المعروف |
| Al-Muḥtasib | المحتسب |
| Al-munkar | المنكر |
| Al-musāwāt | المساوات |
| Al-naqḍ | النقد |
| Allah | الله |
| Amīr | أمير |
| $^c$Aqā'id | العقائد |
| Āyāh | آيه |
| Āyāt | أيات |
| Bay$^c$ah | بيعة |
| Caliph | خليفة |
| Caliphate | خلفاء |
| Diwān al-Maẓālim | ديوان المظالم |
| Faq̣īh | فقيه |
| Fiq̣h | فقه |
| Ḥadīth | حديث |
| Ḥajj | حج |
| Hijrah | هجرة |
| Ḥisbah | حسبة |
| I$^c$ādah al-naẓar | إعادة النظر |
| Ījab | إيجاب |
| Ijmā$^c$ | إجماع |

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|---|---|
| Ijtihād | اجتهاد |
| Imām | إمام |
| Imāmah | إمامة |
| Imān | إيمان |
| Kalām | كلام |
| Kitāb al-Zakāt | كتاب الزكاة |
| Maṣlaḥah | مصلحة |
| Maẓalīm | مظالم |
| Muftī | مفتى |
| Muḥtasib | محتسب |
| Mujtahid | مجتهد |
| Muwakkil | موكّل |
| Naẓar al-maẓālim | نظر المظالم |
| Qabūl | قبول |
| Qāḍi | قاضى |
| Qiṣāṣ | قصاص |
| Qiyās | قياس |
| Qur'ān | قرأن |
| Ra'y | رأي |
| Safar | صفر |
| Saḥīḥ Muslim | صحيح مسلم |
| Sharī$^{c}$ah | شريعة |
| Shūrā | شورى |
| Siyāsah al-dunyā | سياسة الدّنيا |
| Siyāsah al-Shar$^{c}$iyyah | سياسة الشرعيّة |
| Sunnah | سنّة |
| Surah al-An$^{c}$ām | سورة الانعام |
| Surah al-Balad | سورة البلد |
| Surah al-Baqarah | سورة البقرة |

| | |
|---|---|
| Surah al-Ḥajj | سورة الحجّ |
| Surah al-Ḥujurāt | سورة الحجرات |
| Surah Āl-ᶜImrān | سورة آل عمران |
| Surah al-Mā'idah | سورة المائدة |
| Surah al-Nisā' | سورة النساء |
| Surah al-Nūr | سورة النور |
| Surah al-Qaṣaṣ | سورة القصص |
| Surah al-Shūrā | سورة الشورى |
| Surah al-Ṭalāq | سورة الطلاق |
| Surah Banī Isrā'īl | سورة بنى إسرآءيل |
| Surah al-Mu'minūn | سورة الموءمنون |
| Surah Ṣād | سورة ص |
| Surah Yūsuf | سورة يوسف |
| Taᶜāwun | تعاون |
| Taklīf | تكليف |
| Taqwā | تقوى |
| Tawḥīd | توحيد |
| Tawliyah | تولية |
| Taᶜzīr | تعزير |
| Ulu'l-amr | أولوا الأمر |
| Uṣūl al-fiqh | أصول الفقه |
| Vizier | وزير |
| Wakfs | وقف |
| Wakālah | وكالة |
| Wakīl | وكيل |

## Preface

During the past few years the idea of improving the accountability, responsibility and answerability of the public and private sectors has attracted a great deal of attention in the press and at conferences.

The purpose of this thesis is two-fold: to expound the principles, methods and ideals that could promote accountability in government and to survey the legal and socio-cultural realities which help or hinder accountability in Malaysia.

During my period of research for this thesis, I became increasingly conscious of two factors which influenced my approach towards the task. First, in an Asian context, informal amd non-legal controls over the administration seem to be more sought after than legal ones. Service Centres run by political parties, interventions by Members of Parliament on behalf of their constituents, Consumer Complaints Bureaus organised by voluntary consumer groups, and `Letters to the Editor' columns in daily newspapers seem to be much more effective in solving citizens' grievances in an expeditious, informal and inexpensive manner than the processes of the law.

Second, talking to administrators, politicians and academicians it became apparent to me that many Western ideals of democracy and "good government" are not fully acceptable in our social and political milieu. For example the adversarial question and answer session in the British Parliament does not fit in well with the deferential political culture of the country and the traditional respect that is accorded to age and authority. Some of my conclusions and recommendations are influenced by the realisation that mechanismms of control are not merely structural and legal in form but encompass values, attitudes and community responsiveness. Institutions and principles do not work adequately if the socio-economic, moral, cultural and political pre-requisites for their performance are absent. This seems to be so in Malaysia in the matter of calling public authorities to account.

I have avoided a purely legal or court-centred approach to a study of the principles and methods for redressing citizens' grievances. The importance of non-legal methods is reflected in my decision to devote three chapters to

Parliament's role as the "grand inquest" of the nation and only one to the role of the courts in providing redress for wrongs committed.

In researching and writing I received invaluable guidance and encouragement from my supervisor, Professor Tan Sri Datuk Ahmad Mohd. Ibrahim, the Shaikh and Dean of the Kulliyyah of Laws at the International Islamic University. He was most generous in giving me his time and very patient and understanding about my shortcomings and delays.
His depth and breadth in the Shariah, and in many systems of law beyond Malaysia's shores, helped to broaden my perspectives.

The library staff in the Law Section of the International Islamic University Library, especially Mrs Nooraini Ismail, Mrs Anna Kutsyana Mukandar and Muhammad Shahrir Mohd Shariff, were extremely helpful at all times. My employers, Institut Teknologi MARA (ITM), were generous to relieve me of most of my duties during the time I was researching for this thesis. My children, Shiraz and Shareeza and Shuraifa, helped me immensely, sometimes into the early hours of the morning, with the typing and printing of the manuscript.

With the blessings of Allah, I am now ready to submit this thesis to the International Islamic University. But, in some respects, its completion is an end as well as a beginning. A multi-disciplinary and in-depth study of each of the fifteen areas surveyed in this thesis awaits future endeavours.

Kuala Lumpur
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Shad Saleem Faruqui

<u>**CONTENTS**</u>

## Abstract

Controlling the government without crippling it is one of the foremost challenges of constitutional and administrative law.

To prevent untrammeled exercise of power, a number of constitutional models, control mechanisms and institutions have been devised which divide and disperse governmental authority and seek to prevent tyranny.

In most countries the apparatus of control and accountability rests on a written and supreme Constitution. The Constitution supplies legal and political restraints upon the exercise of all state powers.

In the "check and balance" model of the Constitution of the United States, the executive, the legislature and the judiciary are institutionally separated. The powers of one organ are meant to check and balance the powers of the others. In the system of "parliamentary government" in the United Kingdom, the executive is made an integral part of Parliament and is required to be answerable, responsible and accountable to Parliament on a day-to-day basis. In federal systems executive, legislative, judicial and fiscal powers are divided and dispersed amongst general and regional governments. The existence and authority of each government is constitutionally safeguarded. Pluralism is given a territorial dimension. In the diarchical set-up in France and Cyprus there is a division of governmental competence between two or more authorities in the state other than on a regional basis so as to prevent its concentration in the same hands.

The device of judicial review of legislative and executive action, first asserted by the American Supreme Court in Marbury v Madison 1 Cranch 137, 2L.Ed. 60 (1803) enables the superior courts to use the Constitution as a touchstone on which to test every governmental action for its constitutionality. Besides the principle of constitutionality, the doctrine of *ultra vires* and the principles of natural justice are also employed by the courts to keep the administration subject to the law.

The office of the Ombudsman is charged with the responsibility of investigating complaints of maladministration against governmental authorities. Constitutional or legislative provisions for independant Auditor-Generals, Attorney-Generals, Anti-Corruption Agencies and Commissions of Enquiry are some of the other means of calling the government to account.

The electoral process supplies a periodic test of the government's acceptability to the people it seeks to serve. Constitutional safeguards for a free press seek to ensure scrutiny of governmental actions in the media. Consultative processes including public participation in the legislative process can serve to restrain executive and legislative exuberance. In some political systems, the devices of Referendum, Plebiscite, Petition and Initiative are available to enable the electorate to assert its wishes in the legislative field.

Such extra-legal checks as groups and public pressures, "service centres" run by political parties or social action groups and even the humble departmental "complaint box" if taken seriously, can help to protect citizens against abuse of power by public officials.

A Right to Information Act as in the United States is a powerful device for ensuring openness and accountability in government. The counterpart of the Right to Information Act, the Official Secrets Act, can be a hindrance to the enforcement of responsibility.

Most of the above methods and means of enforcing accountability in government have been examined in this thesis. Two contrasting constitutional models - the American system of independent government and the British system of responsible government - have been scrutinized with a view to evaluating their success or failure in enforcing responsibility in government.

Reference has also been made to principles and institutions in Islam which support the idea of answerability and accountability of public authorities to the law.
The Holy Qur'ān commands the Muslim ruler "to render back his trusts to those to whom they are due": Surah al-Nisā' (4): 58. Islam requires that power be used scrupulously

towards the fulfillment of objectives enshrined in the Shari'ah. It requires rulers and ruled alike to be virtuous and ethical. It requires the state to establish all that is right (<u>al-ma`rūf</u>) and eliminate all that is wrong (<u>al-munkar</u>): Surah al-Ḥajj (2): 41. In Islam human beings are the trustees of Allah (S.W.T.). The trusteeship is collectively entrusted to the believers and the right to rule belongs to the whole community. The ruler rules by virtue of the trust the community has delegated to him. This "popular vicegerency", in Maududi's phrase, "forms the basis of democracy in an Islamic state". The ruler is dutybound by the Holy Qur'ān to conduct public affairs by mutual consultation subject, of course, to the overriding duty to obey and enforce the Sharī`ah: Holy Qur'ān Surah al-Shūrā (42):38; Surah Āl-`Imrān (3):159. Inherent in the people's right to be consulted is the right to watch over the activities of the government and to differ with the rulers on issues of policy. The Holy Qur'ān clearly envisages situations in which the believers cannot settle their differences through consultation and exhorts them in those circumstances to turn to Allah (S.W.T.) and His Apostle for guidance: Surah al-Nisā' (4):59.

All Muslims have a duty to obey those in authority. "Oh you who believe! Obey Allah, and obey the Messenger, and those charged with authority among you...": Surah al-Nisā' (4):59. But this duty is not unconditional. If the ruler commands something that is contrary to the Sharī`ah, the community has a right to disobey his command. The first Caliph, Abu Bakr As-Siddiq (R.A.A.) declared after his election: "Cooperate with me if I am right; set me right if I go astray... Obey me as long as I obey God and His Prophet. If I disobey Him and His Prophet obey me not". If the ruler abuses his authority or violates the trust reposed in him, his authority can be withdrawn. The community may impeach the ruler before the courts and have him declared disqualified to lead.

In Islam, as sovereignty belongs only to Allah (S.W.T.) the state and the ruler are not above the law. Politically this rules out all forms of absolutism. Legally it paves the way for the development of constitutional and administrative law to limit state powers and enforce accountability. In Islamic theory the government is a "limited government". There is a strong commitment to the rule of law and to an independent judiciary. There is no theoretical possibility as in many modern legal systems of a supreme Parliament or an absolutist ruler. Fundamental rights as defined by the Shari`ah are entrenched and the legislature and the executive cannot amend or repeal what Allah (S.W.T.) has decreed. The "flexibility" of constitutional safeguards in many countries is in contrast with the certainty and visibility of Islam's basic texts. In Islam the ruler is not entitled to immunities and privileges normally granted to the Head of State or the government in modern constitutional law. The qādi can accept a suit against the very person of the Amīr and try him in open court.

In the theory of Islam, human rights have been accorded an honourable place and it is noteworthy that not only political but also socio-economic rights have been given legitimacy. There is strong emphasis on dignity and equality. Neither race nor sex nor economic standing entitles one to any superiority. Only devotion to Allah and moral uprightness qualify one for superiority over another. In the criminal process there is a legal presumption of innocence. There is right to due process during interrogation and trial. Islamic justice prohibits someone other than the offender from being responsible for a crime. "No soul commits [an evil] but against itself, and no bearer of burden bears the burden of another": Surah al-An`ām (6):164.

The establishment and enforcement of justice is a duty of the highest order in Islam. "O you who believe, be maintainers of justice, bearers of witness to Allah even if it is against yourselves or your parents or close relatives": Surah al-Nisā' (4):135. Independence of the judiciary is a cardinal principle of Islam. Though this ideal has not always been honoured in the history of Islamic societies, there is no doubt that the Shar`īah envisages a competent, committed and courageous judiciary. The theory of ijtihād requires the judges to be independent in the exercise of personal reasoning. The subordination of the state, the ruler and the officials of the state to the ordinary law and the subjection of them to the ordinary courts necessitate independence and security of tenure for judges in an Islamic society.

In the area of judicial review of administrative discretion, though the writer has not been able to find any references to the "prerogative orders or writs", Islamic public law is rich with doctrines and principles which find their equivalent in modern public law. There is clear evidence of "appellate review" (al-isti'nāf) and "judicial reconsideration" (i`ādah al-nazar) in a host of circumstances such as when the judge departs from the clear injunctions of the Qur'ān, Sunnah and ijmā`. Generally, the judgement of a qāḍi is final and there is no appeal from it. This is because of the idea of the inviolability of the ijtihād of a competent mujtahid and the immunity of ijtihād against arbitrary intervention and review. But there being a fundamental duty to do justice, Islamic public law does supply internal and external "corrective mechanisms" to the judicial process. Firstly, the qāḍi who pronounces a judgement has the authority to reconsider his own decision if, upon reflection, it appears to him that it is defective. Unlike judges in Western-based legal systems, the qāḍi need not wait for the aggrieved party to apply to him before commencing the i`ādah al-nazar (lit. reconsideration). Secondly, there is power of appellate review (al-isti'nāf) before a separate tribunal. It is exercised, inter alia, if the personal reasoning of a kadi is a clear violation of the Qur'ān, the Sunna and ijmā` or amounts to a gross error of judgement or a manifest miscarriage of justice or because of suspicion of personal bias. But the decision is not reviewable simply on the ground that the reviewing qāḍi disagrees with it. The ijtihād of one competent qadi is not reversible by the ijtihād of another. The appellate tribunal may consist of the head of state (for administration of justice in accordance with the law is one of the basic obligations of the imām) or of regular courts and tribunals which have been appointed by the head of state in accordance with siyāsah shar`iyyah (shari'ah-oriented policy).

The doctrine of ultra vires and the common law principle of audi alteram partem have their equivalent in Islamic jurisprudence. The rule against bias is also accepted in Islamic public law. The Holy Qur'ān enjoins that punishment must be equivalent to the suffering inflicted. "The recompense for an injury is an injury equal thereto": Surah al-Shūrā (42):40. This principle of equivalence is similar to the French doctrine of "proportionality" and the rule of "Wednesbury unreasonableness" in England.

The ombudsman principle which is usually attributed to the genius of the Scandinavians may have had its origin in Middle Eastern civilisations. During the Caliphate of Hazrat Ali (R.A.A.) from 35-40 Hijrah or 656-661 A.C. a system of Maẓālim courts was fully in operation to adjudicate disputes between citizens and the administration. The Dīwān al-Maẓālim was a powerful tribunal which performed the dual function of a general administrative tribunal to hear disputes between the citizen and the state as well as to entertain appeals from decisions of the Sharī`ah court.

The Islamic state as well as every citizen of such a state are dutybound to enjoin what is right and forbid what is wrong: Surah al-`Imrān (3):104 and 110; Surah al-Ḥajj (22):41. Viewing this in the perspective of the law on locus standi, it is arguable that individual citizens or a class of citizens who go to the courts to seek justice, or to stand up for what is right and oppose what is wrong, should be treated by the law as public benefactors and not as busybodies to be denied locus standi and turned away.

The writer is of the view that the quest for openness and accountability, and trust and transparency in public life has an important ally in Islamic public law doctrines. The task of reviving and giving effect to doctrines, mechanisms and institutions of Islamic public law beckons the Muslim jurist. The student of Malaysian public law, who is steeped in the tradition of British common law, can learn from the theory of Islamic constitutional and administrative law.

In this study of the Malaysian scene, the writer has found that a wealth of principles, procedures and institutions are in place to enforce accountability in the public sector. But these control mechanisms are not always operating effectively. A wide gap exists between theory and reality and between promise and performance.

In the name of Allah, Most Beneficent, Most Merciful

# PRINCIPLES AND METHODS FOR ENFORCING ACCOUNTABILITY IN THE PUBLIC SECTOR

## CHAPTER I : INTRODUCTION

CONTENTS

*In the name of Allah, Most Beneficent, Most Merciful*

# PRINCIPLES AND METHODS FOR ENFORCING ACCOUNTABILITY IN THE PUBLIC SECTOR

## I: INTRODUCTION

Controlling the government without crippling it is the foremost challenge of modern constitutional and administrative law. Keeping public authorities responsible, accountable and answerable is a significant problem in most societies today.

In Malaysia, thirty-seven years into independence, the principal problem of bureaucracy is not the traditional one of securing competence but of ensuring responsibility.

### A. What is Accountability?

Despite the centrality of the concepts of "responsibility", "answerability" and "accountability", there is no universally agreed or precise definition of these terms. Exactitude in their description is no more possible than for such terms as "freedom" and "justice".

(a) In modern, secular states commentators often distinguish between "responsibility" (by which they mean ethical and normative restraints) and "accountability" (by which they mean answerability to some external agency).[1] Others distinguish between "control" (which is _ex ante_, i.e. before a decision is made) and "accountability" (which is _ex post facto_ i.e. after a decision is taken).[2]

It is submitted, however, that existing literature in political science and public administration employs these terms in such a variety of ways and with such interchangeability that clear distinctions among the concepts of "responsibility", "answerability" and "accountability" are not possible to make. For example, in parliamentary democracies the relationship between the executive and the legislature is characterised by the doctrine of ministerial _responsibility_ to Parliament and

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1. Fesler, _Public Administration: Theory and Practice_, Prentice Hall, 1980, Chapters 10-11; Guy Peters, _The Politics of Bureaucracy: A Comparative Perspective_, Longman, 1978, Ch. 8; Anthony Downs, _Inside Bureaucracy_, Little Brown, 1967, Chs. 11 & 12.

2. Patrick Birkinshaw, "Decision-Making And Its Control In The Administrative Process - An Overview" in McAuslan & McEldowney, _Law, Legitimacy And The Constitution_, London, 1985, pp. 152-53.

not ministerial accountability to Parliament. For the purpose of this thesis, therefore, the terms "responsibility", "accountability" and "answerability" will be used interchangeably.

Responsibility and accountability are concepts whose value is acknowledged in disciplines as diverse as theology, philosophy, law, sociology, economics, political science, public administration and psychology. These concepts are based not only on rules, institutions and procedures but also encompass a wide range of ethical and normative restraints, structures of authority, management aids and other considerations as is shown in Table A below.[1]

A precise definition of these terms is, therefore, well nigh impossible. For the purpose of this thesis the following description is proposed:

"Accountability (or answerability) refers to the liability or obligation attaching to those invested with public powers or duties. Its primary ingredient is an obligation to explain and justify decisions made or actions taken".[2]

Accountability (or answerability) means having to answer

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1. See page 33A, infra.

2. Colin Turpin, British Government And The Constitution: Text, Cases & Materials, 2nd ed., London, 1990, p. 75.

for, or render account of, the way in which one carries out his official tasks. The essence of accountability is discharging one's responsibility at all times in accordance with established ethical norms, values and laws, and being willing to submit oneself to public scrutiny of every aspect of one's conduct.

When acts of the administration affect individual rights or interests, accountability requires that appropriate compensation be given to the victim of illegal action or maladministration. Here accountability overlaps with the redress of grievances.[1] Accountability can be individual or collective, explicit or implicit, positive or negative. It may refer to acts of commission or omission. It may involve responsibility for powers or for duties.

(b) The Islamic concept of accountability (taklīf)[2] is,

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1. Colin Turpin, British Government And The Constitution: Text, Cases & Materials, 2nd ed., London, 1990, p. 76.

2. Taklīf refers to charging someone with something and holding him accountable for the results. According to Muhammad Badawi, taklif is the nearest word in meaning to the concept of accountability. See Sheikh Osman Abdulkader Al-Safi, Accountability - A Comparative Study of Human Responsibility Between Islam and Man-Made Doctrines, Translated from Arabic by Muhammad Badawi, Darulfikir, Kuala Lumpur, 1992, pp. 4-8.

understandably, far wider than positive[1] or secular notions referred to above. Accountability is not confined to answerability to other human beings but includes accountability to Allah (S.W.T.). Accountability is not applied exclusively to the social and public aspects of man's life but is also concerned with the individual's private life.[2] The basis of accountability in Islam does not rest on positive law alone but lies, first and foremost, in the message of Revelation addressed to man charging him with responsibilities. Every person, high and low, has a "book", a register of acts, in which all deeds, small or great are written down.[3] And on the Day of Judgement everyone will face the consequences of his deeds and be rewarded or punished.[4] In Islam accountability is

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1. By `positive' is meant `man-made' as opposed to `divinely revealed'.

2. Al-Safi, <u>op. cit</u>, p.5

3. Al-Safi, <u>ibid</u>, p. 81.

4. There is some difference of opinion amongst the scholars on the source of responsibility in Islam. Is it `nature' or `reason' or `revelation' or all the above? Al-Safi says that responsibility is intertwined with man's nature. He also refers to the dispute between the <u>kalām</u> philosophers and the theologians on the source of responsibility in Islam. The former attribute responsibility to the mind or to reason. The latter rely on revelation and religious tradition as the only source of accountability: Al-Safi, <u>ibid</u>, pp. 1-3. Whatever the differences on this issue be, all scholars are agreed that man is accountable and responsible within his mental, physical and other capabilities. There are

not confined to the earthly life but extends to life after death in the sense that the rewards and punishments shall operate in the hereafter. Accountability is not confined to actions which are empirically observable, measurable, monitorable and controllable but extends to the motives for one's acts of commission or omission.

B. <u>To whom is Accountability owed?</u>

According to Turpin, accountability in a democratic state under the rule of law implies a duty to account *to an independent agency* which is outside the organization whose actions are in question. The outside agency may be the legislature, or a court, or a tribunal, or some other independent body or officer.[1] . It is submitted, however, that accountability need not be owed to external agencies only. It may be vertical or horizontal or downwards. It is vertical when it is owed to Allah (S.W.T.). Again, it is

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...Continued...

many āyāt in the Holy Qur'ān to require man to be responsible for his acts: <u>Holy Qur'ān</u>, Surah al-Baqarah (2): 233 and 286; Surah al-Nisā'(4): 84; Surah al-An`ām (6): 52; Surah al-Ṭalāq (65):7. [All references to the Holy Qur'an are to A. Yusuf Ali, <u>The Holy Quran - Text, Translation & Commentary</u>, 1983, Amana Corp., USA]

1. Turpin, <u>op. cit</u>, 75.