

Methods of Raising Constitutional Action and the Constitutional Court in the Islamic Legal System

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Abstract

This article covers the methods by which a constitutional action or suit can be brought before the courts in the Islamic legal system. It also points out that there are a number of ways to file a constitutional suit before the competent court in this system. It also presents an analysis of the methods of raising a constitutional action in the Islamic legal system and discusses whether the Islamic system knows and applies the methods of bringing a constitutional action before a court. It also highlights the constitutional court and qualifications of its judges.

Keywords: Constitutional Action, Constitutional Court, Direct Suit Method, Ex Officio Jurisdiction, Competent Court, Qualifications, Procedures, Jurisdiction, Functions, and Dismissal of a Judge.

Methods of Raising a Constitutional Action in the Islamic Legal System

The Islamic system has two methods for bringing or filing a constitutional suit before a judge or court:

1. THE DIRECT SUIT METHOD

The Direct Suit Method is adopted in order for a constitutional suit to be brought before a judge or the competent court in cases where a legislation that is in contravention with the *Qur'an* or *Sunnah* has been initiated. In such cases, any person in the Islamic state can bring such an action through the direct action method before a judge if that person had an interest in nullifying the contravening legislation. It is apparent that this method is similar to the method adopted by the Supreme Constitutional Court in Egypt which gives every person, who has an interest in cancelling a legislation that contravenes the constitution, the right to file a constitutional suit before it.

The direct action method is a petition for unconstitutionality of laws which can be brought before the court. This method can be used to question the validity of laws, at the request of Islamic government or by the caliph himself.

The best example where the *Shari'ah* applied the direct action method in a constitutional suit, is the case of the conquest of the city of *Samarqand*, when the Islamic judiciary allowed the case brought directly before it by the people of the city when they challenged the legality of the conquest of their city.¹ The petition included the condition of interest, which was a direct personal one, and this interest guaranteeing them the right to challenge the legality of the conquest of the city because there was a contravention of the texts from *al-Qur'an* and *Sunnah*.

¹Yasin 'Umar Yusuf, *Istiqlal al-Sultah al-Qada'iyyah, fi al-nidhamayn al-wad'i wa al-Islam*, Beirut, Dar Maktabat al-Hila, 1995, p. 334. at 334.

The direct action method has also been granted to individuals, when their rights have been violated by a legislative text or presidential decree. In using this method, the claimant must express in his action, how the statute can affect his right directly. Therefore, this method of constitutional complaint is not an action (persecution), but an action submitted to specific requirement for standing.

Another important case where the *Shari'ah* applied the direct action method in a constitutional action is the case which took place during the rule of the *Muwahhidin* in al-Andalus and the rule of the Ayyubid in the Egypt during (1169-1252 C.E).

When Musa ibn Maymun who, under the fanatical rule of the *Muwahhidin*, had feigned conversion to Islam, fled to Egypt and declared himself to be a Jew, a Muslim jurist-consult from Spain denounced him for his apostasy and demanded that the extreme penalty of the law be inflicted on him for this offence. However, the case was quashed by al-Qadi al-Fadil, 'Abd al-Rahim ibn 'Ali, one of the most famous of Muslim judges, and the prime minister of the great Sultan, who authoritatively declared that a man who had been converted to Islam by force could not be rightly considered to be a Muslim.²

In this case, it is obvious that the judge had accepted the defence filed by Musa ibn Maymun on the basis that the latter was forced or compelled under threat into becoming a Muslim, and found that this compulsion was in contravention of a constitutional text in the Holy *Qur'an* where Allah (S.W.T.) revealed: "*Let there be no compulsion in religion...*"³

After considering the evidence, the judge found that Musa's entrance into the Islam in that way was inconsistent with the freedom of belief stipulated in *al-Qur'an* and *Sunnah*, in many Verses and narrations, as well as the general principles of the Islamic *Shari'ah*.

Hence, it is observed that control over the constitutionality of law was clearly applied in this case. This story also demonstrates the early Muslims' understanding of the principle of control over the constitutionality of law through the direct action method.

2. "EX-OFFICIO" JURISDICTION OF THE JUDGE CONSTITUTIONAL COURT ITSELF

The Islamic system has possessed and implemented the *Ex Officio* jurisdiction of the judge or the court itself by giving the judge or the court the undertaking to look into the constitutionality of contravening legislation, without the need for a suit to be filed by individuals through the direct suit method. Thus, when a judge or a court wants to apply a particular law and during such endeavour finds that the legislation is in contravention of the *Qur'an*, *Sunnah* or consensus, then the judge or the court has the right to look into the constitutionality of that legislation.

It is apparent that the Islamic system has practiced this method long before the positive legal systems have. It is also observed that this method of the Islamic system is similar to what has been adopted by the Supreme Constitutional Court in Egypt, which practices this method when confronting any text that contravenes the constitution and this is understood from the court's own by-laws.

The best example of this jurisdiction is the event which occurred between the Abbasid caliph al-Ma'mun and the judge, Yahya ibn Aktham, in spite of their strong friendship. In this case, the caliph al-Ma'mun (as the head of the executive and legislative authorities) promulgated legislation

² T.W. Arnold, *The Preaching of Islam: A History of the Propagation of the Muslim Faith*. 2nd Edition. London: Constable & Company Ltd., 1913, at 423.

³ (*Qur'an*, 2:256).

to allow temporary marriage (*zawaj al-mut'ah*). Some people disapproved of this law and when the judge, Yahya ibn Aktham became aware of it, he agreed with the objectors, and advised them to go to the caliph first and try to discuss with him, and that he (the judge) would then intervene.⁴

When Yahya came and sat near him, the caliph asked him why he looked changed. When Yahya replied that it was grief at what has happened to Islam, the caliph asked what had happened. When Yahya told the caliph that allowing temporary marriage was *zina* (fornication), the caliph asked for his evidence. for this?"

Yahya referred the caliph to the *Qur'an* and *Sunnah* of the Prophet (P.B.U.H.). Allah (S.W.T.) revealed:

*The believers must (eventually) win through, those who humble themselves in their prayers, who avoid vain talk, who are active in deeds of charity, who abstain from sex, except with those joined to them in the marriage bond, or (the captives) whom their right hands possess, for (in their case) they are free from blame, but those whose desires exceed those limits are transgressors.*⁵

Then he asked the caliph if the wife under temporary marriage is a captive (*mulk al-yamin*), to which the caliph replied she wasn't." Then Yahya asked if Allah (S.W.T.) meant such a wife to inherit, bequeath, and be the legitimate mother of a child, or if she has been married according to a legally sound contract of marriage. Again the caliph said 'No'.

Yahya told the caliph then, that temporary marriage contravened these conditions. It was narrated by al-Zuhri on the authority of 'Abd Allah and al-Hasan ibn Muhammad ibn al-Hanafiyah, on the authority of his father Muhammad ibn 'Ali ibn Abi Talib that "the Prophet (P.B.U.H.) ordered me to call for the prohibition of temporary marriage after he had allowed it." When the caliph al-Ma'mun asked his attendants if this narration was memorised by al-Zuhri, they answered 'yes, O Commander of the Faithful. Whereupon the caliph asked for Allah's forgiveness and called for the prohibition of temporary marriage.⁶

It is evident here that this is a constitutional case that the judge initiated on his own and litigated with the caliph, where the judge was the plaintiff and the caliph was the defendant. The judge directed questions towards the caliph and discussed them with the caliph in detail, then the judge ruled the legislation as void as it contravened the *Qur'an* and *Sunnah*. The caliph abided by the ruling of the judge and promulgated a law that cancelled the legislation that the judiciary ruled as unconstitutional.

Not only is this case considered the best example of the method *Ex Officio* jurisdiction of the judge or the court itself, it occurred before the positive law system And in addition, includes many important issues related to the conditions of the constitutional suit and the effect of a ruling in it.

THE CONSTITUTIONAL COURT AND QUALIFICATION OF ITS JUDGES IN THE ISLAMIC LEGAL SYSTEM

Introduction

The constitution is often protected in each country by a specific legal body variously known as

⁴Al-Khatib al-Baghdadi, al-Hafid Abu Bakr, *Tarikh Baghdad*. Vol. 14. Beirut: Dar al-Kutub al-'Ilmiyyah, 1997, at 202-203. See also Ibn Khallikan, Abu al-'Abbas Ahmad ibn Muhammad ibn Ibrahim ibn Abu Bakr, *Wafayat al-A'yan, Anba' Abna' al-Zaman*. Vol. 5. Beirut: Dar al-Kutub al-'Ilmiyyah, 1998, at 122-123.

⁵*Al-Qur'an* 23: 1-7.

⁶Al-Khatib al-Baghdadi, *Tarikh Baghdad*, at 202-203. See also Ibn Khallikan, *Wafayat al-A'yan, Anba' Abna' al-Zaman*, at 122-123. Nasr Farid Wasil, *Al-Sultah al-Qada'iyyah wa Nidam al-Qada' fi al-Islam*. Egypt: Matba'at al-Amanah, 1983, at 197-198.

supreme, constitutional or high court. Such courts judge the compatibility of legislation with the provisions and principles of the constitution, termed “constitutionality”. Especially important is the court’s responsibility to protect the constitutionality of established rights and freedoms. Therefore, this article will present an analysis of the constitutional court and qualification of its judges in the Islamic legal system, discussing whether the Islamic legal system has a special court for looking into constitutionality of laws before it or has practiced this function before a single court or judge. Other topics discussed will be competent courts for hearing constitutional suits, qualifications of a judge and his jurisdiction, appointment and functions of judges, and immunity of judges and their dismissal.

Competent Courts for Hearing Constitutional Suits

As regards the competent courts for hearing a constitutional action and the invalidity of laws, it is evident that all courts have such competent jurisdiction. But this does not preclude the establishment of specialised high courts for the unification of Islamic laws because there is a greater need than the positive law systems for this. This is because Islamic laws are not only meant for transactions, but rather are based on the principle of belief (*‘aqidah*), and are laws by which people worship and approach Allah (S.W.T.). Specialised courts do not obstruct the right of other courts in abstaining from the implementation of any law that contravenes the principle of legitimacy, but these courts must refer such cases to specialised courts such as the constitutional court.

In the Islamic legal system there is no special body empowered to decide upon the constitutionality of state acts. Therefore, all courts in an Islamic country have the power of judicial control over the constitutionality of laws, and none of them have their jurisdiction limited in any way over the decision in a constitutional suit. Constitutional matters or issues are always decided upon by the courts when they arise in the courts and when necessary to make a decision on a case. The jurisdiction of these courts extends to numerous types of disputes, both civil and criminal, that arise in Islamic country.

The Court in the Islamic legal system

Islamic jurisprudence has practised the concept of court since the emergence of Islam and jurists and scholars have required the judge and the parties to a suit to set and abide by a certain place and procedure for the suit to be filed, and where the court could conduct its proceedings and hear the cases.⁷ Any decisions that are passed outside that precise place are not considered, because the jurisdiction of the judge is limited to the place specified for him and does not extend to other places. Thus, if the judge passed a ruling in a place other than that specified for him, his ruling becomes void and must be overruled.⁸ This has been stated in the *Mejelle* in Article 1801 which states that: “The jurisdiction and powers of the judge are limited by the time and place and certain matters of exception.”⁹

Islamic law adheres to the principle of a single judge and the origins of this principle are both logical and natural. Since the *qadi* was the delegate-representative of the Head of State, he had to be the only one, somewhat like a governor. Tyan (1955) added that the concept of a single judge admits, at most, of the corrective influence of a *consilium*, consisting of a varying number

⁷Jamal Sudiq al-Marsafawi, *Nidam al-Qadi’ fi al-Islam*. Saudi Arabia: Jami’at Muhammad ibn Sa’ad al-Islamiyyah, 1984, at 56-57. See also Dafir al-Qasimi, *Nidam al-Hukum fi al-Shara’ah wa al-Tarikh al-Islami: Al-sultah al-qa’la’iyyah*, Beirut, Dar al-Nafa’is, 1974, at 46.

⁸ Muhammad ‘Abd al-Rahman al-Bakr, *Al-Sultah al-Qada’iyyah wa Shakhsiyyat al-Qadi’*. Cairo: al-Zahri’ li al-‘Ulam al-‘Arabi, 1988, at 255.

⁹C. A. Hooper, (trans.). *The Civi Law of Palestine and Trans-Jordan*. Vol. 1, Jerusalem, 1913.

of jurists who assist the judge by advising him, but who have no deliberative function.¹⁰

The writer agrees with Tyan that originally, the ordinary Islamic court consisted of a single judge, but in the Islamic system, it is permissible to have two or more judges in the same town. Moreover, the judge should have expert witnesses and scholars of jurisprudence present to consult with on points of difficulty. If a case is not clear, he should postpone giving a decision. He may not merely imitate another's decision on a case, but must be capable of making expert legal reasoning (*ijtihad*).¹¹

The judge should not sit in a mosque to decide cases, lest voices be raised therein, and because he might need to bring in an insane person, a child, a woman in her menstrual period, or a non-Muslim, for which reasons sitting in a mosque to decide cases is offensive. But if he is sitting in the mosque in prayer, spiritual retreat (*I'tikaf*), or a time for prayers happens to coincide with the coming of two litigants, then he may judge between them without it being offensive.¹²

Regarding the field of control over the constitutionality of law, and since the plea of incompatibility of the decisions and situations with the *Shari'ah* is considered a plea of unconstitutionality, then it is permitted in the Islamic system for a court to be established before which it can be requested that any text in the constitution or law or regulation, that contravenes the *Shari'ah*, be cancelled.¹³ But Islamic jurisprudence did not require a constitutional court, as it referred this task to the jurisdiction of the judge (meaning normal courts) who may overrule a previous ruling that contravenes a text or consensus. That previous ruling would not have conclusiveness to the extent that prohibits the courts from looking into the suit for which the ruling was passed in contravention of a text or consensus. It need not require an appeal before a higher court and has no time limit, but rather, can be held before a court of the same degree, unlike the situation in positive law where the ruling gains conclusiveness or a determinative effect the contrary of which may not be proved, no matter how clear the mistake was.¹⁴

However, the writer would like to point out that the Islamic system does not prohibit the establishment of a specialised constitutional court that looks into constitutional or legislative texts or regulations, as well as interpretations that are in violation of the texts of the *Qur'an*, *Sunnah* and by consensus, cancelling or invalidating them. The Islamic system has provided the opportunity for the establishment of this type of court as long as the purpose and objective behind it is to serve the *Shari'ah*, implement it, and protect the individual rights and freedom within the framework of the *Shari'ah* and its spirit.

Qualifications of a Judge

Jurists have agreed on a number of qualifications that must be present in a judge appointed in the Islamic system, and these conditions are in accordance with the principles of the *Shari'ah*. The purpose behind this is to avoid arbitrariness, political inclinations and other matters that do not observe justice and the interests of Muslims, in addition to the fear of interference by the leader of the state, his deputies or followers who have authority. Thus a number of conditions

¹⁰Emile Tyan, "Judicial organization", Majid Khadduri (ed.), *Law in Middle East*, Vol.1, Washington, D.C, Middle East Institute, 1955, p. 240..

¹¹Imad ibn al-Naqib al-Misri, *'Umdat al-Salik wa 'Uhd al-Nasik*.Beirut: al-Maktabah al-Amiriyah, 1995, at 245. See also, Jamal Sudiq al-Marsafawi, *Nidam al-Qadi' fi al-Islam*, 1984, at 61.

¹²Imad ibn al-Naqib al-Misri, *'Umdat al-Salik wa 'Uhd al-Nasik*, 1995, at 245.

¹³Mustafa Kamal Wasfi, *Musannafat al-Nudum al-Islamiyyah: al-Dusturiyyah, al-Dawliyyah, al-Idariyyah, al-Iqtisadiyyah wa al-Ijtima'iyah*. (1st ed.). Cairo: Maktabat Wahbah, 1977, at 176.

¹⁴ Ibid.

have been put in place to ensure the independence and impartiality of judges, and these are:¹⁵

1. Muslim jurists have agreed on the condition that the judge must be a Muslim, and this is considered among the principal conditions that must be present in a judge based on the revelation of Allah (S.W.T.) that: “*And never will Allah grant to the unbelievers a way (to triumphs) over the believers.*”¹⁶ So, in order to be just, the judge must be Muslim. Besides, it is required to degrade the disbelievers, not to raise them in rank through appointing them in such a sublime position of judgeship.

2. It has also been agreed by jurists that a minor (one who has not reached puberty or the age of majority) cannot be appointed as a judge because judiciary requires maturity of thought, strong personality and experience in life, and this is not present in a minor.¹⁷

3. Soundness of mind is a pre-requisite, and this condition is also agreed upon, based on the narration of the Prophet (P.B.U.H.) who said:

The actions of three persons are not recorded (by the Angels): a sleeping person until he is awake, a child until he comes of age and a mad man until he becomes normal.¹⁸

Thus, the person to be appointed must have good discernment, sound judgment and be free from inadvertence and forgetfulness, in order to use his wits to arrive at a solution for any dilemma.¹⁹

There are other conditions which the jurists have disagreed upon, and these are:

1. A majority of jurists have made it a condition that the judge must be male, thus they consider it is not permissible, that a female be appointed. Although judgment may take their testimony into consideration, some jurists consider women are not qualified to hold major government positions, basing this opinion on the *hadith* narrated by Abu Bakr that the Prophet (P.B.U.H.) said: “the people who are ruled by a woman will never be successful.”

According to Abi Hanifah, women may pass judgment in areas where their testimony is valid, but not in areas where their testimony is not acceptable. Ibn Jarar al-Tabari departed from the consensus by making women eligible to hold judgeship under all circumstances, but there is no strength in a view that meets with unanimous rejection, in addition to God's own Words, (most exalted is He): “*Men are in charge of women, for God has preferred in bounty one of them over the other*”,²⁰ that is, in mind and judgment, so it is improper for them to take precedence over men.²¹

¹⁵Al-Nawawi, Yahya ibn Sharaf al-Din. *Takmilat al-majmu' sharh al-muhadhdhab*, El-Medina Al-Munawarah, al-Maktabah al-Salafiyah, (n.d.), p. 126-128. See also, 'Imad ibn al-Naqib al-Misri, *'Umdat al-Sslik wa 'Uhdut al-Nasik*, 1995, at 245. See also Emile Tyan, *Histoire De L'organisation Judiciaire En Pays D'Ā Islam*, Paris: Tome Premier, 1938, at 230-240.

¹⁶*Al-Qur'an*4: 141.

¹⁷Al-Nawawi, Yahya ibn Sharaf al-Din. (*Takmilat al-Majmu'*, n.d.) at 126. See also Ahmad Ibrahim, «The Shariah Court and its Place in the Judicial System,» International Islamic Conference on the role of Judiciary in the Development of Islamic.

¹⁸Al-Bayhaqi, Ahmad ibn al-Husayn, *al-Sunan al-Kubra, Hadith* No. 16988, Vol. 10, Beirut: Dar al-Fikr, 1980, at 161.

¹⁹Muhammad 'Ayyish Mitwalli, *Damanat al-'Adalah fi al-Qada' al-Islami*. Beirut: Dar al-Kutub al-'Ilmiyyah, 2003, at 10. See also Al-Imam al-Hafid, Abu 'Umayr Yusuf ibn 'Abd al-Bar al-Nimri al-Qurtubi. *Al-Intiqa' fi Fada'il al-Thalathah al-A'immah al-Fuqaha'*, (n.d.) Cairo, Maktabat al-Quds, at 88-89. See also Anwar al-'Armusi, *Al-Tashri' wa al-Qada' fi al-Islam*. Alexandria: Mu'assasat Shabab al-Jami'ah, 1984, at 65. See also Emile Tyan, *Histoire De L'organisation Judiciaire En Pays D'Ā Islam*, at 230-240.

²⁰ (*Qur'an*, 4:34).

²¹Al-Mawardi, *Adab al-Qadi*. Vol. 5. Baghdad: Matba'at al-Irshad, 1971, at 460-461. See also Muhammad 'Ayyash Mitwalli, *Damanat al-'Adalah fi al-Qada' al-Islami*, 2003, at 10.

The researcher is inclined to support Abi Hanifah's opinion that gives the woman the right to be a judge in some cases, especially civil, because, in such cases, the court or the judge accepts a woman's testimony. The second reason is that Allah (S.W.T.) in His Book allows a woman to testify in some cases, especially in transactions.

2. Al-Mawardi says a judge must be honest in his speech, have apparent trustworthiness, be pure from sin, and be trusted at times of anger and contentment.²²

3. Jurists have also made it a condition that the judge must have knowledge in *Shari'ah* rulings, meaning that he must be diligent in getting the basis for the rulings from *al-Qur'an*, *Sunnah* and consensus, as well as the method of reasoning.²³

4. The judge must have soundness of senses, meaning he must be able to speak, hear and see.

5. Some scholars have made it a condition that the judge must be free, and thus, according to them, a slave cannot be appointed to the judiciary.²⁴

6. The judge must be upright because it is not permissible to appoint a disobedient person. This is according to the revelation of Allah (S.W.T.) in which He says: "O you who have believed, if there comes to you a disobedient one with information, investigate..."²⁵ Since it is not permissible to accept information from such a person, there is greater reason to reject his judgment.

7. The judge must be one who exercises *ijtihad* and must exercise it, even in the school in which he follows the opinions of any of the great scholars. That is, the judge has to be able to differentiate between sound and unsound rulings in that school.²⁶

PROCEDURES

A constitutional suit under the Islamic system is settled by following the same procedures and steps for the settlement of normal cases and disputes. Hence, after the court or judge specifies the constitutional issue raised through the challenged text, the court embarks on examining the subject of the suit by examining the compatibility or conformity of the challenged text, (whether constitutional, legislative or regulative), with the texts of the *Qur'an* and *Sunnah*. The challenged text would also be examined as to its conformity with the principles and aims of the *Shari'ah*.

If the court finds the said texts to be in conformity with the *Qur'an* and *Sunnah*, then the court must not accept the suit. But if the court finds these texts to be contradictory to or in contravention of the texts of the *Qur'an* or *Sunnah* or the aims and general principles of the *Shari'ah*, then it must give a ruling as to the nullity of the contravening text due to its contravention of the *Shari'ah*.²⁷ Thus, under *Shari'ah*, the government of the state, as well as its jurists and scholars,

²²Dafir al-Qasimi, *Nidam al-Hukm fi al-Shari'ah wa al-Tarikh al-Islami*, at 136.

²³Ibid, 1974, at 140.

²⁴Muhammad 'Abd al-Rahman al-Bakr, *Al-Sultah al-Qada'iyah wa Shakhsiyyat al-Qadi'*, 1988, at 320.

²⁵*Al-Qur'an* 49: 6.

²⁶Salih al-Fawzan, *A Summary of Islamic Jurisprudence*, Vol. 2, Saudi Arabia: al-Maiman Publishing House, 2005, at 698.

²⁷Hasan Libadi, *Da'awa al-Hisbah*, Egypt, Jami'at Asyut, 1983, at 100. Ibn al-Athir al-Jazri, (1982), *al-Kamil fi al-Tarikh*. Vol. 4, Beirut, Dar Sadr, 1982, at 100. See also Yasin 'Umar Yusuf, *Istiqlal al-Sultah al-Qada'iyah*, at 19. See also Mustafa Kamal Wasfi, *Musannafat al-Nudum al-Islamiyyah: al-dusturiyyah, al-dawliyyah, al-idariyyah, al-iqtisadiyyah wa al-ijtima'iyah*. (1st ed.). Cairo: Maktabat Wahbah at 173-176.

while passing legislation, whether constitutional, legislative or regulative, must not exceed the scope of the eternal rulings which have been established in the *Qur'an* and *Sunnah*.²⁸

Jurisdiction

The judge in the Islamic system used to undertake all judicial functions of the state assigned to him, and would have to settle disputes, whether the dispute was criminal, civil, administrative, or constitutional as they are classified today, or matters related to family law or any other dispute that fell within his competency.²⁹

However, after the expansion of the state and its conquests, as well as the increase in the population, the disputes started to increase and vary. Thus, some judges were given jurisdictions to settle certain disputes that arose at that time, regardless of whether such jurisdictions were consequently limited by time or place considerations. Certain non-judicial functions were also given to some judges, such as the endowments and the surveillance of the crescent of Ramahin.³⁰

The jurisdiction of a *qadi* includes all cases and matters and all sorts of conflicts. Al-Mawardi divided the *qadi* jurisdiction into two categories:

Firstly, solving conflicts and deciding disputes.

Secondly, preventing tyranny and safeguarding the rights of those whose rights have been infringed.

In addition, the jurisdiction of a *qadi* includes the protection of the weak, the administration of *waqf* property, the execution of wills, providing for unmarried women who have no guardians, the application of the *hudud*, the policing of buildings and public highways, controlling the *shuhud* and judicial assistants, as well as the choice and appointment of the *qadi*'s deputies.³¹

It is clear that the jurisdiction of a *qadi* is very wide and was not dissimilar to that of the territorial jurisdiction of *madalim*, although the territorial jurisdiction of *madalim* was not bound by any strict procedure and regulation.

According to Tyan, in the Islamic legal system; there is no distinguishing between original jurisdiction and appellate jurisdiction. Tyan also said that the office of *qadi al-qudah*, which was created in the later part of the second century A.H. and which corresponds to the *qadi al-jama'a* of Muslim Spain, does not establish a degree of jurisdiction.³²

The writer believes that the Islamic system did not know the principle of separation between original jurisdiction and appellate jurisdiction in its modern form. Nevertheless, the Holy *Qur'an* mentions more than one statement about the original and appellate jurisdictions. An example can be seen in a judgment of Prophet Sulayman (Solomon) when two women, classified in *al-Turuq al-Hukmiyyah* as "the older and younger," appeared before him, on an

²⁸Munir Hamid al-Bayyati, *Al-Nidam al-Siyasi fi al-Islam, Muqaran bi al-duwal al-qanuniyyah*. (2nd Print). Amman: Dar al-Bashir. at 283. See also 'Arif Khalil Abu 'Aiyd, *Nidam al-Hukm fi al-Islam*, at 100. See also Mustafa Kamal Wasfa, *Musannafat al-Nudum al-Islamiyyah*, 1996, at 180.

²⁹Dafir al-Qasimi. (1974). *Nidam al-Hukm fi al-Shari'ah wa al-Tarikh al-Islami*, at 255.

³⁰Jamal Sudiq al-Mirsafawi, *Nidam al-Qada' fi al-Islam*, at 80.

³¹Emile Tyan, "Judicial Organization," at 261.

³²Ibid, at 240-242.

appeal, claiming to be the mother of a child

The case was previously heard before Prophet Dawad (David) where the older was decided to be the mother of the child. Prophet Sulayman asked for a knife to cleave the child and both will equally get their portion. Ironically, the older agreed to the idea while the younger strongly objected, and this helped Prophet Sulayman to decide that the child belonged to the younger.³³

In addition, *al-Qur'an* refers to an incident in which Prophet David adjudicated a dispute that was brought to him over the ownership of a flock of sheep.

The relevant *Qur'anic* passage (Sad, 38: 20-26) indicates that David rushed to pass a judgment on the basis of a mere claim without giving the defendant an opportunity to present his case. This manner of adjudication, as the text runs, was erroneous and therefore invoked God's admonition which was communicated to David, as *al-Qur'an* declares, in the following terms "O David We have made you a vicegerent in the earth, so judge among people with truth and follow not the (vagaries) of desire (*hawa*)."³⁴

This practice may be considered relevant to the principle of separation between the original and appellate jurisdictions.

The chief *qadi* was the Appellate, where appeals from subordinate courts were filed. The *mufti* usually advised the *qadi* in interpreting and applying the law.

Under the principle of *takhsis al-qada'* (specialisation of the judiciary) in the Islamic system, the caliph can establish several courts, with each court having a specified jurisdiction to look into specific cases or matters, such as a criminal court, a civil court, an administrative court and a constitutional court.³⁵ It is generally agreed that the setting up of appellate courts, with both general or specialised authority and defining their jurisdiction, falls within the purview of the *Shari'ah* oriented policy (*siyas shar'iyyah*) with *takhsis al-qada'* being merely an instrument of such a policy. There is no text in the *Qur'an* and *Sunnah* forbidding the establishment of a judiciary consisting of specialised and well-defined spheres of jurisdiction, or the issuance of a judicial order in which the administration of justice is ensured by guarantees to the enforcement of a court decision, independence of the judiciary, and the nature of its relations with the other organs of state.³⁶

The notions of *siyas shar'iyyah* empowers the head of state with discretionary powers over the people and the establishment of good government. Matters pertaining to court organisation are for the most part procedural in characters and there is no text in the *Shari'ah* to proscribe judicial review. Hence, the discretionary power of the head of state in this area remains, by and large, unrestricted. Finally, it has been correctly observed that modern statutory legislation on judicial review in present day Islamic countries is generally in agreement with the *Shari'ah* and falls within the scope of *siyas Shar'iyyah*.

³³Ibn al-Qayyim al-Jawziyyah, *Al-Turuq al-Hukmiyyahfi al-Siyasah al-Shar'iyyah*. Cairo: Matba'at al-Sunnah al-Muhammadiyah, 1953, at 5.

³⁴Ibid, at 130.

³⁵ Al-Mawardi, *Al-Hkam al-Sultaniyyah wa al-Wilayat al-Diniyyah*. Cairo: Matba'at Mustafah al-Halabi, 1973, at 60-61. See also Muhammad Hashim Kamali. (1993). "Appellate review and judicial independence in Islamic law." Chiblis Mallat and Graham Trotman (eds.). *Islamic and public law*. London: Graham & Trotman. at 60-62.

³⁶ Abd al-Wahhab Khallaf, *Al-Siyasa al-shar'iyya*, Cairo, 1335 A.H., at 50.

The purpose of the action of *Madalim* jurisdiction was to ensure that the abuse of power by influential persons or state dignitaries did not escape the law due merely to their capacity to resist it.³⁷ The *Madalim* was the first and primarily an administrative court which looked into disputes between citizen and state. But it was also a high court of appeal, entertaining appeals against the decisions of *Shari'ah* courts. It is therefore not surprising that many observers have considered the *Madalim* to be a high court of appeal and an integral part of the judiciary. Furthermore, the very establishment of this jurisdiction is reflective of the need that the judiciary must enjoy full powers and be able to act independently to ensure government acts under the rule of law. The creation of this tribunal as the most powerful judiciary authority of the 'Abbasid state also warrants the conclusion that a high court of appeal has actually found a distinctive place in the organisational structure of the Islamic judiciary.

Appointment of Judges in the Islamic System

In principle, the judge in the Islamic system is to be appointed by the caliph or the leader (*imam*) because the judiciary is considered as one of the functions of the state and under its jurisdiction. Thus, only the leader or his deputy may act in that regard. That can be observed in the Prophet's act of appointing some of his companions as judges and sending them to other states. The orthodox caliphs have followed the Prophet (P.B.U.H.) in his conduct and procedure, but after the expansion of the Islamic state and the broadening of its borders, as well as the increasing preoccupation of the caliph or the leader in other matters, the appointment of judges was delegated to the deputy of the leader (*imam*) who nowadays represents the prime minister or the minister delegated for the appointment of judges.³⁸ Judges could also be appointed through elections if the leader or his deputy was not present, and this is considered as an exceptional case or state of emergency.³⁹

Judgeship may be conferred like other offices, orally if the person is present, or by written correspondence if absent, but must however be accompanied by evidence proving its genuineness to the appointee and the people of his district of jurisdiction.

Tyan and Coulson in their articles, mentioned in more than one illustration, that the caliph or governor had used force against persons to accept a judicial function and to this end, the governor had also used such physical coercion as fines and imprisonment.⁴⁰

N. J. Coulson mentioned that 'Abd Allah ibn Faraq, a noted judge and scholar, was appointed as the *qadi* of *Qayrawan* in 787. Upon his refusal of the position, he was chained, and thrown from the roof of the mosque by the governor's guards⁴¹

To undertake an Islamic judgeship is a communal obligation "for those capable of performing it in a particular area." If there is only one competent person who can perform it, then it is obligatory for him to do so. If he refuses, he is compelled to accept, though he is only obliged to accept the judgeship when it is in his own home area, not when it is elsewhere, for this would be like a punishment, involving as it does leaving his home. Such a person may not claim a

³⁷Al-Mawardi, *Al-Hkam al-sultaniyyah wa al-wiliyyat al-diniyyah*. Cairo: Matba'at Mustafa al-Halabi, 1973, at 64. See also Muhammad bin Ahmad Rushd al-Qurtubi, *Bidayt al-Mujtahid wa Nihayat al-Muqtasid*, 5th end., Cairo, 1981, II, at 461. See also Ibn Hazm al-Andalusi, *Al-muhalla*. Vol. 4. Beirut: Dar al-Fikr, 1956, at 435.

³⁸Al-Nawawi, Yahya ibn Sharaf al-Din. (n.d.). *Takmilat al-Majmu'*, at 126.

³⁹Al-Mawardi, *Adab al-Qadi*, 1971, at 175-176. See also, Mohammad Hashim Kamali, "Appellate Review and Judicial Independence in Islamic," at 61. See also 'Abd al-Rahman Ibrahim 'Abd al-'Aziz al-Humaydi, *Al-Qada' wa Nidamuh fi al-Kitab wa al-Sunnah*. Vol. 1. Saudi Arabia: Jami'at Umm al-Qura, 1989, at 263-264.

⁴⁰N. J. Coulson, «Doctrine and Practice in Islamic Law,» at 211-212. See also Emil Tyan, *Judicial Organization*, at 237.

⁴¹N. J. Coulsen, *A History of Islamic Law*, Edinburgh: University Press, 1964, at 120.

salary, because it has become a personal obligation, and it is not permissible to take a wage for something that is a communal obligation, for which accepting a wage is not permissible unless one is in need. In this case the Muslim treasury may give the appointee enough to cover his expenses and those of his dependents. But if he agrees to judge without being paid, in expectation of the reward from Allah (S.W.T.), it is better for him.⁴²

Functions of Judges

The function of a judge in an Islamic state is to protect the society and the rights of its members so that no one is wronged by someone else, including the state. In order to guarantee the protection of the society, judges are required to judge in accordance with the instructions of the *Qur'an* and the teachings of the *Sunnah*. If they fail to find an explicit text in these sources, they can judge using consensus of opinion "if it is available" or they are allowed to exercise their one personal judgment.⁴³ The Islamic judiciary aims to establish justice for all members of the society, and to do so, judges are required to make and explain their decisions about what is lawful and unlawful.⁴⁴

Immunity of Judges in the Islamic System

Judges in the Islamic system enjoy immunity, which means their immunity against dismissal; after their appointment to the judiciary, by the leader or the caliph. Islam has known this principle for a long time and many scholars have put restrictions on the powers (jurisdiction) of the caliph to dismiss a judge, even to the degree that some jurists have prohibited the dismissal of a judge altogether.⁴⁵

Thus, the judge is considered a representative of the Muslims and not of the leader because the judicial appointment of the judge by the leader is a contract for the interest of the Muslims. Therefore, the leader does not have the authority to dismiss a judge as such a dismissal is considered tampering (corruption), and the judge is immune from such acts of a leader because that would involve a deprivation of people's rights.⁴⁶

Nevertheless, according to some jurists, a judge can be dismissed—in certain cases, such as forbearing from dispensing justice, ruling unjustly, contravening of the *Sunnah* and consensus, taking bribes, standing up for people in a court session and hastiness in ruling. These are the reasons that necessitate the dismissal of a judge.⁴⁷

Bribes are prohibited,⁴⁸ on the authority of the *hadith* narrated by Ibn 'Umar (may Allah be pleased with him) in which he said: "The Prophet (P.B.U.H.) cursed the one who bribes and the one who takes a bribe."⁴⁹

In addition, it is prohibited for a judge to accept gifts from those who are not accustomed to giving him gifts before he became a judge. In this respect, the Prophet (P.B.U.H.) said: "Gifts

⁴²Al-Nawawi, Yahya ibn Sharaf al-Din. *Takmilat al-Majmu'*, (n.d.), at 126. See also 'Imad ibn al-Naqib al-Misri, *Umdat al-Salik wa 'Uhd al-Nasik*, 1995, at 624.

⁴³Jamal Sudiq al-Marsafawi, *Nidam al-Qada' fi al-Islam*. Saudi Arabia, 1984, at 97-98.

⁴⁴Nasr Farid Wasil, *Al-Sultah al-Qada' iyyah wa Nidam al-Qadi' fi al-Islam*, 1983, at 197-198.

⁴⁵Dafir al-Qasimi, *Nidam al-Hukm fi al-Shari'ah wa al-Tarikh al-Islami*, 1974, at 216. See also, Nasr Farid Wasil, *Al-Sultah al-Qada' iyyah wa Nidam al-Qada' fi al-Islam*, at 240-245.

⁴⁶Al-Mawardi, *Al-'Hkam al-Sultaniyyah*, at 73. See also Muhammad 'Abd al-Rahman al-Bakr, *Al-Sultah al-Qada' iyyah wa Shakhsiyyat al-Qadi'*, 1988, at 197.

⁴⁷Jamal Sudiq al-Marsafawi. (1984). *Nidam al-Qada' fi al-Islam*, at 55.

⁴⁸Salih al-Fawzan, *A Summary of Islamic Jurisprudence*, at 703.

⁴⁹Ibn Hanbal, Ahmad, *Al-Musnad*, Beirut: Dar 'Olam al-Kutub. 1998, *Musnad al-Ansar*.

given to a governor are (considered) ill-gotten property.”⁵⁰

Dismissal of a Judge (*Qadi*)

The *qadi*'s office is an important organ in an Islamic state. Due to the fact that the post of *qadi* is for the interest of the public and as an administrator of the *Shari'ah* court appointed by the caliph by mutual consent, a *qadi* can lose his post in any one of the following three ways.⁵¹

Firstly, if the judge is no longer suitable for the duty either because of insanity, prolonged coma, imbecility, senility, paralysis, or indulgence in deviation (*fisq*), or by an act of hostility towards the duty or denouncement of his appointment without any valid reason.

Secondly, if the judge is no longer qualified to hold the post or for such other reasonable ground as Public interest (*maslahah 'ammah*). Therefore, all jurists of *Shari'ah*, especially Shafi'i and some Hanbalis, would consider that a dismissal is invalid without any reasonable grounds.⁵²

Thirdly, when a judge has voluntarily applied to retire from his office, but this is improper.⁵³

Nevertheless, when he appoints a judge, the Caliph does not give up his right to act as judge himself. For the administration of justice is one of the basic obligations of an Imam. However, he is, in theory, subject to precisely the same rules as are applicable to the *Qadi* with regard to the grounds of his decisions and admissibility of witnesses etc. A majority of scholars have held that in his capacity as *mawakkil*, the Imam has the right to remove a judge from office.

The Islamic system practises two methods for putting into motion judicial control over legislation. The first occurs when an application would be made to a constitutional court which would then be obliged to pass a judgment upon the validity of a statute. The second when, in the course of deciding on the illegality of an ordinance, it appears to the constitutional judge that the statute on which the ordinance is based might be unconstitutional. The court could, on its own motion, halt its own proceedings to take up the question of the statute's constitutionality.

In addition, in the Islamic system of judicial control, it is the duty of all judges and courts to examine the constitutionality of laws and to declare, when necessary, that a particular law or statute is unconstitutional and must therefore be considered null and void. Therefore, the Islamic system is considered to belong to a diffuse system of judicial control, which gives all courts and judges the right to exercise control and declare the unconstitutionality of legislation. This ability logically stems from the acceptance of the supremacy of the constitution.

CONCLUSION

This article has addressed the methods by which a constitutional suit can be brought before the courts in the Islamic system. It has also pointed out that there are a number of ways that could be used for filing a constitutional suit before the competent court according to the Islamic legal system. Hence, the Islamic system had adopted the method of direct suit which allows every

⁵⁰Ali' al-Din al-Kasani, *Bada' al-Sana' fi Tartib al-Shara'f*. Vol. 7. Beirut: Dar Ihya' al-Turath al-'Arabi, 2000, at 16.

⁵¹Mohammad Hashim Kamali, "Appellate Review and Judicial Independence," at 61. Ahmad Ibrahim, "The Shariah Court and its Place in the Judicial System," International Islamic Conference on the Role of Judiciary in the Development of Islamic Law, Malaysia, November 21- 23, 1986, , at 8-10

⁵²Ibn Farhun Ibrahim ibn 'Ali ibn Muhammad, *Tabsirat al-Hukkam fi Usul al-Aqdiyyah wa Manahij al-Ahkam*. Vol. 1. Cairo: Maktabat al-Kulliyat al-Azhariyyah, 1986, at 25. See also Muhammad 'Ali al-Hashimi.(2005). *Mafakhir al-Qada' al-Islami kama yujalliha al-Islam fi al-Kitab wa al-sunnah*. Beirut: Dar al-Basha'ir al-Islamiyyah.at 159-160.

⁵³Ibn Farhun Ibrahim ibn 'Ali ibn Muhammad, *Tabsirat al-Hukkam, fi usul al-aqdiyyah wa manahij al-ahkam*. Vol. 1. Cairo: Maktabat Kulliyat Azhariyyah, at160.

individual; who has a right, to bring his suit before a judge. The Islamic system had also adopted the method of the *ex-officio* jurisdiction, as applied in some of the cases discussed. In examining the courts that have the jurisdiction to hear constitutional suits in the Islamic system, it was found that the right or power of control over the constitutionality of laws has been given to all courts and judges, regardless of whether the judge was a normal judge or the chief judge. It was also found that in the Islamic system, the applied system of control is a decentralised system due to the absence of a Constitutional Court. Nevertheless, the establishment of such a court in the Islamic system is not prohibited, as it can be established for the purpose of looking into constitutional suits, when the centralised control method can be followed.

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