

## JUDICIAL CONTROL IN THE ISLAMIC SYSTEM

*Nayel Musa Shaker Al-Omran*  
Former lecturer of Sudan University  
Sudan

### Abstract

In Islam, judiciary has relatively more power than civil law courts because in the Islamic judicial system, doctrine of precedent is not applicable. In civil law systems it is stressed that judiciary should be separate from executive and should be independent. But it is a fact that in many countries, although constitutions prescribe that the judiciary will be independent, it has to face pressure from the executive. Islam ensures rule of law, separation of power and independence of judiciary. The paper discusses various aspects of these cardinal aspects of the Islamic judicial system.

### Introduction

Question is if the Islamic legal system had known the principles of judicial control over the constitutionality of laws, especially the constitutional suit, in their present form. If the answer was in the negative, then, would the adoption of this suit contradict the Islamic system? If the latter is true, then how should the control over the constitutionality of Islamic law be?

But if the Islamic system and civilisation had generally known what may be named as the constitutional suit, the inevitable questions here would be: what is the particularity of the constitutional suit in the Islamic legal system? And what are the aspects of concurrence and difference about the constitutional suit in both the American and Egyptian systems? Finally, what are the possibilities of each system benefiting from the advantages of other systems in developing the performance and capacity of the constitutional suit?

If the objective of the judicial control is to prevent the legislative authority which represents the constitutional faith of a country, from putting forward unconstitutional laws, the wisdom of such a principle is to deny the rules in the Islamic law from wording legislations that contradict the legitimacy and higher divine rule demanded by Allah (s.w.t.) for mankind.

Before studying the control over the constitutionality of laws in the Islamic System, the elements that helped to establish the judicial control in the Islamic System must be discussed, and then discussion must be made regarding the historical and political background of that control.

### Elements of the Emergence of Judicial Control in the Islamic System

Jurists link the emergence of judicial control in the Islamic System to various factors, noted among which are:

- 1- Separation of Powers in the Islamic System
- 2- The principle of the rule of law
- 3- The principle of Judicial Independence in the Islamic System

### Separation of Powers in the Islamic System

Many jurists of Islamic and modern law said that Islamic Shari'ah knows the principle of separation of powers, and the predominant opinion of Islamic jurists also hold that the Islamic legal system knew the principle of separation of powers in the country's legislative, executive and judicial branches, but all their powers were governed by the Prophet (saw) and his four orthodox caliphs.<sup>1</sup>

The principle of separation of powers was applied in the early days of Islam, where the Prophet (saw) used to invest judicial powers into a provincial government, but later on, he used to appoint a judge independently of any political or administrative consideration.<sup>2</sup> After the conversion of Arabia, when a large number of people came under the sway of Islam, the Prophet (saw) appointed various functionaries for the different parts of the peninsula. Whenever the Prophet (saw) appointed a governor and a military commander, the caliph usually took good care to appoint a judge as well over whom these officials had no jurisdiction.<sup>3</sup>

There are many examples of this practice in the Sunnah of the Prophet (saw) and the caliphs, among which are: It is reported that the Prophet (saw) asked Mu'adh ibn Jabal questions upon the latter's appointment as judge to Yemen, in answer to which Mu'adh told the Prophet that he would resort to his own ijtihad in the event that he failed to find guidance in the Qur'an and Sunnah, and the Prophet was pleased with this reply, and patted him on the chest and said: "Praised be God, who has caused the messenger of God's Messenger to please the latter!"<sup>4</sup>

"أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ لَمَّا أَرَادَ أَنْ يَبْعَثَ مُعَاذًا إِلَى الْيَمَنِ قَالَ كَيْفَ تَقْضِي إِذَا عَرَضَ لَكَ قَضَاءٌ قَالَ أَقْضِي بِكِتَابِ اللَّهِ فَإِنْ لَمْ تَجِدْ فِي كِتَابِ اللَّهِ قَالَ فَبِسُنَّةِ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ فَإِنْ لَمْ تَجِدْ فِي سُنَّةِ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ وَلَا فِي كِتَابِ اللَّهِ قَالَ أَجْتَهُدُ رَأْيِي وَلَا أَلُو فَضَرَبَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ صَدْرَهُ وَقَالَ الْحَمْدُ لِلَّهِ الَّذِي وَفَّقَ رَسُولَ اللَّهِ لِمَا يُرْضِي رَسُولَ اللَّهِ"

Through the abovementioned example, it is obvious that two basic rules are confirmed:

First: written law, as the Muslim judge neither gives his judgment according to custom and usage nor on the basis of an order given to him by the caliph or the ruler, he rather gives his judgment

<sup>1</sup> Zafir al-Qasimi (1974), *Nizam al-Hukum fi al-Shari'ah wa al-Tarikh al-Islami: Al-Sultah al-Qada'iyyah* (Bayrut: Dar al-Nafa'is), at p. 403.

<sup>2</sup> Man'ur Muhammad al-Hafnawi (1989), *Sultat al-Dawlah fi al-Manzur al-Shar'i*. (1<sup>st</sup> ed.), (Al-Qahirah: Matba'at al-Amanah), at p.349.

<sup>3</sup> Anwar Ahmad Qadri, *Justice in Historical Islam*, Lahore, SH Muhammad Ashraf, 1968, at p. 8. See also Úafir al-Qasimi (1974), *Nizam al-Hukum fi al-Shari'ah wa al-Tarikh al-Islami*; at p. 404. See also Hasan al-'Alkim (1991), *Al-Nizam al-Siyasi al-Islami: Hiwar Ma'a al-'Almaniyyah*. Mu'assasat al-'Ayn li al-Tawzi' wa al-Nashr, at p. 178.

<sup>4</sup> *Hadith* no. 3592, in *Sunan Abi Dawud*. (2001). (Beirut: Dar al-Kutub al-'Ilmiyyah). See also, Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, Second Edition, (Kuala Lumpur, Ilmiah Publishers 1998), at pp.45, 217 and 218.

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according to the Qur'an and Sunnah, and if he does not find any rule in them, he gives his opinion on the basis of his own *ijtihad*.

Second: that judiciary in Islam is an independent authority that is not subordinate to any particular person. The judge rather follows the texts before him that comprise of first the Qur'an and then the Sunnah and by the inspiration of his conscience, understanding and discernment in order to arrive at justice.

Therefore, there is a relationship between the judicial and executive authorities with respect to appointment and dismissal, without any interference with the judiciary's primary function and that is hearing and deciding cases and disputes.

Also, the first caliph, Abu Bakr, after being chosen as caliph, invested 'Umar with judicial powers. During the 'Umar ibn al-Khattab's period, he was the first caliph who directly charged other persons for the exercise of the judge's functions. He appointed Abu Darda' as a judge with him in Medina, Shari'ah as a judge in Basrah and Abu Musa al-Ash'ari as a judge in Kufah.<sup>5</sup>

There are many events which happened in Islamic history in which the principle of separation of powers was applied. But the researcher will mention some of them as examples: in the story of Mu'awiyah, the governor of Sham, with Ubadah ibn al-Samit, the judge of Palestine and Jordan, as narrated by al-Awza'i, who said "the first to take the position of judge in Palestine was Ubadah ibn al-Samit, and Mu'awiyah had then refused to execute a ruling by Ubadah, but Ubadah stood by his decision, so Mu'awiyah spoke aggressively to him, thus Ubadah said, "I would never again live with you in one area," and he left for Medina. So the caliph 'Umar said to him: "what brought you here?" 'Ubadah told him what had happened, and 'Umar replied: "go back to your position, repugnant is a land in which you and your likes are not." Then 'Umar wrote to Mu'awiyah: "you have no authority over 'Ubadah."<sup>6</sup>

If we look at this story we will find that 'Umar ibn al-Khattab emphasised on the separation between the judicial authority and the executive authority, and made a direct relationship between the caliph and the judge. As a result, there appeared the features of independence of the judiciary in the Islamic country. Thus it can be said that Islam had known the principle of separation of powers, and especially the independence of the judiciary and its separation from the other authorities, since the seventh century C.E., while contemporary nations had known it only in the late eighteenth century.

Perhaps the story of the conquest of Samarqand is a unique one in human history and it is a story that points out the clear understanding of the early Muslims of the principle of separation of powers and its implementation.

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<sup>5</sup> Ibid, at 18.

<sup>6</sup> Al-Qurtubi, Abu 'Abd al-Barr (2002), *Al-Istishab fi Ma'rifat al-Ashab* (Beirut: Dar al-Kutub al-'Ilmiyyah), at p. 356. See also Ahmad Fathi Bahnasi (1984), *Mawqif al-Shari'ah Min Nazariyyat al-Difa' al-Ijtima'i*. (Beirut. Dar al-Shuruq), at, p. 3.

The people of Samarqand said to Sulayman ibn Abi al-Sirri, the governor appointed by 'Umar ibn 'Abd al-'Aziz, that "Qutaba ibn Muslim, the Military leader, had deceived and oppressed us and took our country, and that Allah (s.w.t.) has shown justice and equity, so allow us to send a delegation to the Commander of the Faithful (Amir al-Mu'minin) to complain about the injustice towards us, that if we had a right we shall have it for we need it." So he allowed them. Thus they sent a delegation that met with the caliph, who then wrote for them to Sulayman ibn Abi Sirri, asking him to appoint a judge to look into their grievance, and the judge Jumai' ibn Hadir was appointed, and he ordered that the Arabs of Samarqand leave and return to their camp."

The researcher observes that 'Umar ibn 'Abd al-'Aziz fully recognises the principle of separation of powers. That is because when he knew the grievance of the people of Samarqand he did not decide the case himself, although he could have as he is the caliph of Muslims, and although the interest of Muslims lay in that. In addition he did not entrust the governor of Samarqand, Sulayman ibn Abi Sirri with that, fearing that he might be bias. Further, because he was the governor appointed by the caliph, he refused to let him decide the case, and did not authorise the military leader who committed the offence against the rules of the Shari'ah. Rather, he ordered that a judge for them who was not affected by military or political interests be appointed and did not give any consideration except for the rule of Allah (s.w.t.), enforcing the rules of Shari'ah as they are stated.

The examples mentioned above represent sample cases of the separation of powers during different periods of Islamic history, especially during the Umayyad and Abbasids periods where this principle was practically implemented.

### **The Rule of Law**

It was seen that the principle of the rule of law means, in the positive system, that the ruler and ruled submit to the rule of law. This principle became stable after the struggle of people against tyranny, injustice and absolutist authority that was not restricted or limited by any bounds. An example is the struggle of the people in the French revolution, which took place in 1789.

While the principle of the rule of law in the Islamic system was considered as the basis or cornerstone which Islam was founded on as Creed and Shari'ah, because Islam came to remove injustice and fighting tyranny and to demolish the pillars of absolutist authority. Therefore, that principle found its basis in the Qur'an, Sunnah and the consensus (ijma') even during the centuries that people grappled with despotism.<sup>7</sup>

(مَنْ لَمْ يَحْكَمْ بِمَا أَنْزَلَ اللَّهُ فَأُولَئِكَ هُمُ الْكَافِرُونَ)

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<sup>7</sup> Yasin Umar Yusuf (1995) *Istiqlal al-Sultah al-Qada'iyyah*, at p. 298. See also Al-Ma'had al-'Alami li al-Fikr al-Islami (1981), *Al-Dawlah: Al-Fikrah wa al-Arkan wa al-Mu'assasat*, (USA: Grove Street, Herndon), at pp. 66-67. See also Diya'al-Din Muhammad al-Rayyis (1976), *Al-Nazariyyat al-Siyasiyyah al-Islamiyyah*. (Al-Qahirah: Maktabat Dar al-Turath), at pp. 365-375.

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Allah says: "And if any fail to judge by (the light of) what Allah hath revealed, they are (no better than) wrongdoers".<sup>8</sup>

(وَمَنْ لَّمْ يَحْكَمْ بِمَا أَنْزَلَ اللَّهُ فَأُولَئِكَ هُمُ الظَّالِمُونَ)

Also, He (s.w.t.) says: "let the people of the Gospel judge by what Allah hath revealed therein. If any do fail to judge by (the light of) what Allah hath revealed, they are (no better than) those who rebel." <sup>9</sup>

(وَمَنْ لَّمْ يَحْكَمْ بِمَا أَنْزَلَ اللَّهُ فَأُولَئِكَ هُمُ الْفَاسِقُونَ)

And in another Verse He (S.W.T.) says: "if any do fail to judge by (the light of) what Allah hath revealed, they are (no better than) Unbelievers."<sup>10</sup>

يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولِي الْأَمْرِ مِنْكُمْ فَإِن تَنَازَعْتُمْ فِي شَيْءٍ فَرُدُّوهُ إِلَى اللَّهِ وَالرَّسُولِ إِن كُنتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ  
الْآخِرِ ذَلِكَ خَيْرٌ وَأَحْسَنُ تَأْوِيلًا

Allah (s.w.t.) in other Surah says: "O ye who believe! Obey Allah, and obey the Messenger, and those charged with authority among you. If ye differ in anything among yourselves, refer to Allah and His Messenger, if ye do believe in Allah and the last Day: that is best, and most suitable for final determination."<sup>11</sup>

According to Mohammad Asad:

Obey God and obey the Apostle and those in authority from among you," leads us inescapably to the conclusion that those who are to wield supreme authority in the Islamic state and are to be responsible for the shaping of its policies should always be Muslims: and this not merely de facto, by virtue of their majority in the country, but also de jure, by virtue of a constitutional enactment. If we are resolved to make Islam the dominant factor in our lives, we must have the moral courage to declare openly that we are not prepared to endanger our future by falling into line with the demands of that spurious "liberalism" which refuses to attribute any importance to us than the mere accident of his having been born or naturalised in our country.<sup>12</sup>

Also, the judge must implement Qur'an and Sunnah in every dispute brought before him, but if he does not implement that, his conduct and deeds will be annulled, this matter is derived from the following Verse where Allah (s.w.t.) says: "O ye who believe! Obey Allah. And obey the Messenger, and make not vain your deeds!"<sup>13</sup>

<sup>8</sup> Abdullah Yusuf 'Ali (trans.) (1984), *The Qur'an, Text, Translation and Commentary*, (Jedda: Islamic Education Center. Reprinted by the Muslim Converts Association of Singapore), *Sura*, 5, 44. See also Hasan al-'Alkim. *Al-Nizam al-Siyasi al-Islami*, at 65.

<sup>9</sup> Abdullah Yusuf 'Ali (trans.) (1984)..., *al-Qur'an* 5: 45.

<sup>10</sup> Hasan 'Alkim, at p. 65. See also Muhammad Yusuf Musa (1964), *Nizam al-Hukm fi al-Islam*. (2<sup>nd</sup> ed.). Al-Qahirah: Dar al-Kitab al-'Arabi, at 74.

<sup>11</sup> Ibid, at 4,59. See also al-Sabuni, Abd al- Rahman,. *Mukhtasar Ibn Kathir li al-Sabuni*, Vol. 1, at 520.

<sup>12</sup> Mohammad Asad, *The Principles of State and Government in Islam*, Cibraltar: Dar Al-Andalus 1980, at 34, 38.

<sup>13</sup> Tirmidhi, *al-Jami' al-Sahih*, Vol 1, at 319. See also Diya' al-Din Muhammad al-Rayyis. (1967), *Al-Nazariyyat al-Siyasiyyah al-Islamiyyah*, at p. 340.

The Sunnah came to support, emphasise and clarify these Quranic Verses. Therefore, Prophet Muhammad (S.A.W) said: "Obedience of a human being is disallowed, if it is considered disobedience to the creator (Allah)." (S.A.W) also said:

السَّمْعُ وَالطَّاعَةُ عَلَى الْمَرْءِ الْمُسْلِمِ فِيمَا أَحَبَّ وَكَرِهَ مَا لَمْ يُؤْمَرْ بِمَعْصِيَةٍ فَإِنْ أُمِرَ بِمَعْصِيَةٍ فَلَا سَمْعَ عَلَيْهِ وَلَا طَاعَةَ

"Hearing and obeying is binding on a Muslim, whether he likes or dislikes the order-so long as he is not ordered to commit a sin; but if he is ordered to commit a sin, there is no hearing and no obeying."<sup>14</sup>

لَا طَاعَةَ فِي مَعْصِيَةِ إِيْمَا الطَّاعَةَ فِي الْمَعْرُوفِ

"No obedience is in sinful matters: behold, obedience is due only in the way of righteousness "fi al-ma'ruf."<sup>15</sup>

لَا طَاعَةَ لِمَخْلُوقٍ فِي مَعْصِيَةِ اللَّهِ عَزَّ وَجَلَّ

"No obedience is due to him who does not obey God"<sup>16</sup> and he said

لَا طَاعَةَ لِمَخْلُوقٍ فِي مَعْصِيَةِ الْخَالِقِ

"No obedience is due to him who rebels against God."<sup>17</sup>

مَنْ أَحَدَثَ فِي أَمْرِنَا هَذَا مَا لَيْسَ فِيهِ فَهُوَ رَدٌّ

He (S.A.W) also said "every act that does not conform to our order is rejected."<sup>18</sup>

In the Islamic system, everyone, head of state, government and masses, is subject to the law. The Prophet (S.A.W) himself was subject to it, and was the most obedient person to the Qur'an. He was "Abd Allah wa rasuluh," the servant of God and his messenger. In the Islamic system, the head of state cannot invoke any immunity from impeachment. The principle, "Be you ever so high, the law is above you" has always been there in Islamic law, to include the Prophet (s.a.w.) himself. Just before he died, the Prophet (s.a.w.) made the following short speech:

I swear by God that I have made lawful only those things that the Qur'an made lawful and I have made unlawful only those things that the Qur'an made unlawful. If I have taken the money of any of you, here is my money, let him come and take it, and if I have lashed the body of any, here is my body, let him take back his right.<sup>19</sup>

<sup>14</sup> Bukhari, Abu 'Abd Allah Muhammad ibn Ismail, *Kitab al-Jami' al-Sahih*, Vol. 9, at 52. See also Muslim, Abu al-Husayn ibn al-Hajjaj al-Nisaburi. (n.d.). *Sahih Muslim*. n.p. Ed.m., at 111. *Sunan al-Tirmidhi*. See also Mohammad Asad, *The Principles of State and Government in Islam*, (Cibraltar: Dar al-Andalus 1980), at pp 34-6. See also Diya' al-Din Muhammad al-Rayyis (1976), *Al-Na'Dariyyat al-Siyasiyyah al-Islamiyyah*. Al-Qahirah: Maktabat Dar al-Turath, at p. 362. See also Al-Ma'had al-'Alami li al-Fikr al-Islami (1981), *Al-Dawlah*: at pp. 84,85.

<sup>15</sup> Muhammad Muhsin Khan. (trans.) (1970), *Sahih al-Bukhari*, Vol. 9 (Al-Medina al-Munawwara: Islamic University), at p. 271.

<sup>16</sup> Ibn Hanbal, Ahmad (1998), *Al-Musnad: Musnad al-Ansar*, Vol. 7 (Beirut: Dar 'Alam al-Kutub), at p. 540.

<sup>17</sup> *Musannaf Ibn Abi Shaybah* (1989), Vol. 7 (Bayrut: Dar al-Fikr), at p. 736.

<sup>18</sup> Muhammad Muhsin Khan. (trans.) (1970), *Sahih al-Bukhari*. Vol. 3, at pp.535-536.

<sup>19</sup> *Hadith* no. 15119, in Al-Tibrani, Abi al-Qasim Sulayman ibn Ahmad, *Al-Mu'jam al-Kabir*, Vol. 13, (Al-'Iraq: Ihya' al-Turath al-Islami, 1984).

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Therefore, the past Verses supported with these ahadith indicate that every dispute that happens in Islamic society between individuals, between groups of people, or between people and the government, or among parts of the government and its people, must be judged by the fundamental law which we received from Allah (s.w.t.) and His Messenger. According to this principle, the country must have an institution that judge among people by the Qur'an and Sunnah, and that institution is the judicial authorities.<sup>20</sup>

Another example with regards to the rule of law according to the Shari'ah is in the report of 'A'ishah that:

عَنْ عَائِشَةَ رَضِيَ اللَّهُ عَنْهَا  
"أَنَّ قُرَيْشًا أَهَمَّهُمْ شَأْنُ الْمَرْأَةِ الْمَخْزُومِيَّةِ الَّتِي سَرَقَتْ فَقَالُوا وَمَنْ يُكَلِّمُ فِيهَا رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَقَالُوا وَمَنْ يَجْتَرِئُ عَلَيْهِ إِلَّا أُسَامَةُ  
بْنُ زَيْدِ بْنِ جَبْرِ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَكَلَّمَهُ أُسَامَةُ فَقَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ أَتَشْفَعُ فِي حَدِّ مَنْ حُدِّدَ مِنْ حُدُودِ اللَّهِ ثُمَّ قَامَ فَاخْتَضَبَ ثُمَّ  
قَالَ إِنَّمَا أَهْلَكَ الَّذِينَ قَبْلَكُمْ أَنَّهُمْ كَانُوا إِذَا سَرَقَ فِيهِمْ الشَّرِيفُ تَرَكُوهُ وَإِذَا سَرَقَ فِيهِمُ الضَّعِيفُ أَقَامُوا عَلَيْهِ الْحَدَّ وَإِنَّمَا اللَّهُ لَوْ أَنَّ فَاطِمَةَ بِنْتَ مُحَمَّدٍ  
سَرَقَتْ لَقَطَعْتُ يَدَهَا"

Verily as for the Quraish the affair of a woman of Makhzumiyyah tribe who had committed theft gave them much anxiety. They said: who will plead for her before the Messenger of Allah? They said: who will dare it than Usamah son of Zaid, who is a favourite of the Messenger of Allah? Then Usamah pleaded before him. The Messenger of Allah said: you plead for a crime out of the crimes ordained against by Allah! Then he got up and delivered a sermon. Afterwards he said: Verily those who were before you were destroyed because when a noble man from among them committed theft, they passed no sentence on him. By Allah, had Fatimah, the daughter of Muhammad, committed theft, I would have cut off her hand.<sup>21</sup>

In the same way, Abu Bakr, the first successor and caliph of the Muslim state, in his acceptance speech said:

أَمَّا بَعْدُ أَيُّهَا النَّاسُ فَإِنِّي قَدْ وُلِّيتُ عَلَيْكُمْ وَلَسْتُ بِخَيْرِكُمْ فَإِنِ أَحْسَنْتُمْ فَأَعِينُونِي ؛ وَإِنِ أَسَأْتُ فَقَوِّمُونِي ؛ الصِّدْقُ أَمَانَةٌ وَالْكَذِبُ خِيَانَةٌ وَالضَّعِيفُ  
فِيكُمْ قَوِيٌّ عِنْدِي حَتَّى أَرِيحَ عَلَيْهِ حَقَّهُ إِنْ شَاءَ اللَّهُ وَالْقَوِيُّ فِيكُمْ ضَعِيفٌ عِنْدِي حَتَّى أَخْذَ الْحَقَّ مِنْهُ إِنْ شَاءَ اللَّهُ لَا يَدْعُ قَوْمٌ الْجِهَادَ فِي سَبِيلِ اللَّهِ إِلَّا  
ضَرَبَهُمُ اللَّهُ بِالذَّلِّ وَلَا تَتَّبِعُوا الْفَاجِسَةَ فِي قَوْمٍ قَطُّ إِلَّا عَمَّهُمُ اللَّهُ بِالْبَلَاءِ أَطِيعُونِي مَا أَطَعْتُمْ اللَّهَ وَرَسُولَهُ فَإِذَا عَصَيْتُمْ اللَّهَ وَرَسُولَهُ فَلَا طَاعَةَ لِي  
عَلَيْكُمْ .

O people! I have been appointed over you, but I am not the best of you. Support me if I did good and remove me if I did badly... a weak person of you is strong before me as long as I maintain his right for him. And a strong one of you is weak before me until I take back a right from him... Obey me as long as I obeyed

<sup>20</sup> Waki', Muhammad ibn Khalaf ibn Hayyan (2001), *Akhbar al-Qudat*. (1<sup>st</sup> ed.), (Bayrut: 'Alam al-Kutub), at p. 357. See also, Yasin Umar Yusuf (1995), *Istiqlal al-Sultah al-Qada'iyah fi al-Nizamayn al-Wad'i wa al-Islami*, at p. 300.

<sup>21</sup> Muhammad Muhsin Khan (trans.) (1970), *Sahih al-Bukhari*. Vol. 8, at pp.512-513. See also Anwar Ahmad Qadri, *Justice in Historical Islam*, at pp.11-12.

Allah and his Messenger. If I disobeyed them there is no obedience of me upon you.<sup>22</sup>

Under the issue of respect for justice, an example can be found in one of the transactions that 'Umar ibn al-Khattab had entered into, where the caliph purchased a horse and on approval, allowed a rider to try it. The horse was injured in the course of the ride, and the caliph wanted to return the horse, but the owner refused to take it back. The dispute was referred to the judge who observed: "if the horse was used for the purpose of riding with the permission of the owner, it could be returned, otherwise not!" the caliph was pleased with the judgment and promoted the judge as the qadi of al-Kufah.<sup>23</sup>

On another occasion in which 'Ali ibn Abi Talib was a party, the same issue of respect for justice and submission to the law arose, where: Once the caliph lost a coat-of-mail belonging to him in his way to Siffin. After the termination of the war he returned to al-Kufah, and told him: "This armor is mine; I neither sold it nor gave it away." The Jew replied, "it is my armour and in my possession." Later, both the caliph and the Jew went to the court of Shuraih. Shuraih said: "Proceed, O prince of the faithful!" He said: Yes, this armour which is in the hands of this Jew is my armour- I neither sold it nor gave it away." Shuraih exclaimed, " what does thou say, O Jew?" He replied: " It is my armour and in my possession." Then Shuraih said: " Hast thou any proof, O prince of the faithful?" He said: "Yes, Kamar and al-xasan are witnesses to the fact that the armour is mine." Shuraih replied, "The evidence of a son is not admissible in favour of the father."

The result was that the judgment was given in favour of the Jew. At this, the Jew exclaimed, " I testify that there is no god but God, that Muhammad is His Apostle, and that this armour is thy armour."<sup>24</sup> It can be deduced from the above and other scenarios that rulers in the Islamic system submit to the rule of law and the judiciary, without allowing any bias treatment to them, on the account of the citizens.

Below a relevant portion from the reported speech of Mu'adh ibn Jabal was reported, which he made before the ruler of Syria. In his speech, Mu'adh clearly states that the rule of law is binding to the ruler and the ruled alike; he further warns the ruler against violating the law and reminds him of power of the people. Mu'adh says:

Our leader in one of us; if he implement among us the teaching of our Religious Book (i.e., The Qur'an), and Sunnah of our prophet, we shall have him over us. But if he goes against it we shall depose him. If he commits theft, we shall amputate his hand; if he commits adultery, we shall flog him. If he abuses anyone of us, we will abuse him as he (the leader) did. If he injures us, we will take retaliation from him. He will not hide himself from us, nor will he be self-

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<sup>22</sup> Ibn Hisham, Abu Muhammad Abd al-Malik (1980), *Sirat al-Nabi Muhammad*. Vol. 3. (Al-Qahirah: Maktabat Dar al-Turath), at pp. 340-341.

<sup>23</sup> Anwar Ahmad Qadri, *Justice in Historical Islam*, at p. 23.

<sup>24</sup> *Ibid*, at 27.

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conceited. He will not reserve for himself the booty which God bestowed on us. He is a person as good as we are.<sup>25</sup>

In the application of the principle of legality, which is one of the basis that the Islamic system of rule is based on, it is seen that Muslim rulers, after the first Islamic century, were confined to implement the same principles of Shari'ah that were applied by their predecessors. So, the ruler submitted to the rules of the judiciary as ordinary individuals. Also, they always, in their conduct and in deeds, try to implement the Islamic system. This matter states that the principle of legality was not a mere personal method but it is a principle that stabilised in the conscience of people, and it existed since the establishment of the Islamic government.<sup>26</sup>

In addition to that, some rulers rejected the execution of the caliph's orders because they violated the principle of legality, such as when al-Hakam ibn Amir al- Ghafari, deputy of Ziyad ibn Abi Sufyan, and Wali of Khurasan, invaded al-Asall Mount and got a lot of money. Then Ziyad wrote to him that the commander of the faithful, Mu'awiyah, requested from him to collect gold and silver from the booty and send it to the treasury, but al-Hakam refused and answered that the book of Allah (Qur'an) has priority over the book of the commander of the faithful.<sup>27</sup>

After that it becomes clear that the principle of legality or the rule of law in the Islamic system was the cornerstone which the independence of the judicial authority was based on. So if this principle had started politically in the secular system, as a result of the struggle of the people against absolutism, then it became after that a legal principle in its essence. While in the Islamic system, the aforementioned principle of validity started as a legal principle and main center for the 'aqidah and Shari'ah, since the early days of the Islamic government's missionary work, because law is divine. So, Muslim judges rejected the application of any law, order or decision that is passed by the caliph or his officers, if that law, decision or order contradicted the general principles of the Qur'an and Sunnah. The Islamic system has known the principle of the rule of law, and thus the independence of the judicial authority, as a natural result from that, before that came to be known in the positive system by several centuries, because it is the legislation of Allah, Who created humans.

Muhammad Salim al-'Awwa went on the Medinan polity as the world's first State: The Islamic state in Madinah was the oldest example of a political society organised in the form of "state." This claim rests on the fact that it was an organised society based on "rule of law." The Supremacy of rule of law is a distinguishing factor between a "state," and other forms of organised political societies. It presupposes that all organs and agencies of the government are subject to and will abide by the rule of the same legal system which governs the individual citizen.<sup>28</sup>

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<sup>25</sup> Ahmad Hasan (1969), "The Political Role of *Ijma*", *Islamic Studies*. Vol. 2, at 138. See also Manoucherhr Paydar, *Aspects of the Islamic State Religious Norms and Political Realities*, at 2972.

<sup>26</sup> Ahmad Fathi Bahnasi (1984), *Mawqif al- Shari'ah Min Nazariyyat al-Difa' al-Ijtima'i.*, at p. 111.

<sup>27</sup> Ibid. See also, Muhammad Abu Zahrah (1997), *Usul al-Fiqh* (Al-Qahirah: Dar al-Fikr al-'Arabi), at p. 92.

<sup>28</sup> Muhammad Salim al-'Awwa (1983), *Fi al- Nizam al-Siyasi li al-Dawlah al-Islamiyyah* ( Al-Qahirah: al-Maktab al-Misri al-Hadith), at p. 1.

Diya' al-Din al-Rayyis says that none of the Muslim rulers and Jurists dispute that obedience is not allowed except in conformity with the Shari'ah, Qur'an and Sunnah, and no one ever said that obedience is allowed in transgression.

### **Judicial Independence in the Islamic System**

The independence of judiciary must be a principle of the constitution. No person in an Islamic State, not even the elected Head, can be above the law, and he is as such subject to the hudud "punishments for major crimes" as anyone else. The Qur'an repeatedly enjoins the administration of justice in an impartial manner, even though the decision may go against a judge's own kinsmen or his own community.<sup>29</sup>

Emile Tyan in his article mentioned that, Muslim judge does not have an independent or even autonomous position, especially during the early stages of the establishment of the Islamic state. He added that the head of state (caliph), at that time, derived his judicial power from no one but subordinates by virtue of his position. Tyan also asserted in his article that the concept of delegation in Islam was the complete lack of separation between the judicial authority and the executive authority.<sup>30</sup>

In summary, it appears that during the period of the pious caliphs, the judicial system was independent and integral. The judge had no register in which his judgments were recorded, because those judgments were carried out by the judge himself.

During the Umayyad period the Muslim law was characterised by two main features:

First, the judge exercised his discretion (ijtihad), because the four schools of Muslim law, by which judges had to abide, were not established until the early 'Abbasi period. At that time, the judge drew his own judgment from the Qur'an and Sunnah, or the ijma' (consensus), or to use his own discretion (qiyas).<sup>31</sup>

Second, the judge was not influenced by politics; he was independent in his judgment, far from being affected by the tendencies of the ruling dynasty. His authority was unlimited and the governors of the provinces, the collectors, and even the caliph had to submit to his judgment.<sup>32</sup>

During the 'Abbasi period, there were several important characteristics of the judiciary system:<sup>33</sup>

The appointments of judges representing the four orthodox schools in each province were made. Every one of these judges was entrusted with the task of dealing with cases related to the persons who adhered to the teaching of their particular school.

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<sup>29</sup> Farooq Hassan, *The Concept of State and Law in Islam*, University Press of America, at p. 65. See also Ahmad Hasan, "The Political Role of Ijma'," *Islamic Studies, Journal of the Islamic Research Institute*, Pakistan, Vol. VIII, No.1, 1969, at p. 188.

<sup>30</sup> Emile Tyan (1955), "Judicial Organization." Majid Khadduri. (ed.). *Law in Middle East*, at p. 236.

<sup>31</sup> Mahmud A. Faksh, "A Review of Islamic Culture," *The Islamic Quarterly*, Vol. xxviii (Number 1), England: The Islamic Culture Centre, 1984, at p. 110.

<sup>32</sup> Hassan Ibrahim Hassan, "Judiciary System from the Rise of Islam," at p. 567. (C.E.1171).

<sup>33</sup> Ibid. See also Ahmad Ibrahim, "The Shari'ah Court and Its Place in the Judicial System," paper presented at the International Islamic Conference on The role of Judiciary in The Development of Islamic Law, November 21 St- 23<sup>RD</sup> 1986, Malaysia, at 70.

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Another feature was the introduction of the system of permanent, trustworthy witness after verifying their good character from the outward, without regard to their hidden character.

A remarkable improvement was the registers, in which matters related to legacies and debts, were recorded.<sup>34</sup>

N. J. Coulson, in his article, mentioned that, the qadi Abi Khuzaymah refused to annul the marriage of a woman on the application of members of her tribe, Bani 'Abd Kulal. The plaintiffs approached the ruler, Yazid ibn Hatam, who, not wishing to offend this strong and loyal tribe, ordered the qadi to annul the marriage on grounds of non-equality. The tribe of the husband, he declared, was inferior to the Bani 'Abd Kulal. Abi Khuzayma refused. "I do not allow, he said, what Allah (S.W.T.) has forbidden, and I do not forbid what Allah (S.W.T.) has allowed. The woman was given in marriage by her wali: therefore the marriage must stand." The governor then separated the couple himself.<sup>35</sup> Coulson considered this interference by the executive power in the judicial power.

The researcher believes that this case does not indicate the lack of independence of the judiciary in the Islamic system, because the Shari'ah gave the caliph or ruler the right to interfere in certain matters to solve them, if the qadi passed his judgment in that dispute, without acceptance from the adversary parties. In addition to that, the equality between the two spouses in certain matters is a condition for the validity of marriage contracts to be binding in many Arab countries until now. Furthermore, equality between the two spouses is considered a necessary requirement for the validity of marriage contracts by some Muslim schools. Therefore, the caliph has the right to annul some contracts or judgments if these contracts would result in great harm.

The researcher agrees that several cases, that had taken place in Islamic judiciary, illustrated that the executive power interfered with the independence of the judicial power. For example, there is a case that took place when Ma'mun (813-833 C.E.) proclaimed the doctrine of the createdness of the Qur'an as the true creed; he ordered his governor to test the fidelity of the qadi's of their provinces to this proclaimed doctrine. Al-Ma'mun had punished several scholars of Shari'ah for their acceptance of this doctrine especially Ahmad ibn Hanbal.<sup>36</sup>

In one of his articles, N. J. Coulson asserted that the qadi appeared in early Umayyad times as the legal secretary of the governor. And these were delegated, through appropriate measures, to the subordinate state officials. N. J. Coulson also asserted that the political authority, which defined

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<sup>34</sup> Hassan Ibrahim Hassan, "Judiciary System from the Rise of Islam," at p. 567. (C.E.1171). Ali Abd Al-Kader, "A Review of Islamic Culture", *The Islamic Quarterly* VI Numbers 1, 2, England: the Islamic Culture Centre, 1961, at p. 24.

<sup>35</sup> N. J. Coulson, "Doctrine and Practice in Islamic Law," *Bulletin of the School of Oriental and African Studies*, Vol. xviii, University of London: Published by The School of Oriental and African Studies, 1956, at p. 215. See also Manouchehr Paydar, *Aspects of the Islamic State: Religious Norms and Political Realities*, 1973, at pp. 95-97.

<sup>36</sup> Sami Zubaida, *Law and Power in the Islamic World*, London: I. B. Tauris- 2003, at p. 42.

the scope and nature of the qadi's jurisdiction, and naturally the decisions given and actions taken by the qadi, were subject to the approval or otherwise of the governor.<sup>37</sup>

The Islamic history has shown many eminent judges, who were distinguished by their faith, strong belief, manners, morals, dignity, knowledge, deep wariness of rules, courage and independence.

Many of them stood fast against the interference of the executive, rejecting, in firm determination, such interferences. They refused all kinds of direct and indirect influence or orientation. Marvelous were their courage, dignity and readiness to resign as soon as exposed to pressure from the rulers, their relatives' friends, or assistants.

During the life of Prophet Muhammad (s.a.w.) he was the leader and Chief of judicial authority in the Islamic State. However, he also appointed several close companions to assist him in the administration of the law.<sup>38</sup>

During the reign of the Rashidin caliphs, the judicial authority took a form similar to that in the period of the prophet (s.a.w.). There was no demarcation of judicial authority with that of other powers. The Rashidin caliphs upheld and respected the independence of the judiciary, especially both caliphs 'Umar and 'Ali who had had occasion to appear and plead their cases before the qadi like any other parties to litigation and both have exhibited sensitivity and concern not to be given preferential treatment in court. So that, the qadi would accept a suit against the person of the head of state and would try him in an open court; this feature of the Islamic judiciary is an indication of its independent status.<sup>39</sup>

However, there was a significant change in the period of the Umayyad and the 'Abbassi caliphate. The judges enjoyed freedom especially in the exercise of independent *ijtihad*. Moreover, Caliph Mu'awiyah was the first to abdicate all his judicial powers to appointed judges. The judiciary was completely independent from the executive authority without any exceptions.

In the period of the 'Abbassi caliphate, all the judicial powers were transferred to a specially appointed person. Consequently, the caliph no longer played an active role in the administration of the Islamic legal system and the operation of the judicial authority. During this period, there was a special appointed person who was called qadi al-qudah. Harun al-Rashid was the first caliph to be instituted in the office of qadi al-qudah, Abu Yusuf was the first chief judge (qadi al-qudah) appointed by the caliph Harun al-Rashid. In addition, Harun al-Rashid did not appoint any judge without consulting Abu Yusuf (the delegated head of judiciary), also the qadi exercised judicial authority in the capacity of a hakim (ruler), not a muwazzaff (task of al-qudah officer).<sup>40</sup> In several cases they deserved the explicit respect "judicial independence" and appreciation of the caliph and rulers.

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<sup>37</sup> N. J. Coulson, "Doctrine and Practice in Islamic Law," *Bulletin of the School of Oriental and African Studies*, at p. 214.

<sup>38</sup> Masudul Hasan, *Reconstruction of Political Thought in Islam* (Pakistan: Islamic Publications (PVT) Limited, 1988), at p. 207.

<sup>39</sup> Mohammad Hashim Kamali, "Appellate Review and Judicial Independence in Islamic Law", *Islamic and Public Law*, 1993, at 53-54.

<sup>40</sup> *Ibid*, at 55.

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Shurayk ibn 'Abd Allah is very distinguished and famous for his courage and strong judicial personlaity. After many refusals to be a judge, Caliph al-Mahdi, obliged him to accept, but under his condition approved by the caliph al-Mahdi. An essential condition is that there should be no interference in justice, from any, from any person or any side what so ever.

A woman once came to Shurayk complaining from the 'Abbasi prince Musa ibn 'Isa, the governor of the caliph, saying that the prince wanted to force her to sell him her garden, and when she refused, he destroyed her fence. The judge ordered the prince governor to come to court. When the latter sent instead, the chief commander of police, Shurayk ordered him to be put in jail. The same happened as the prince sent his chamberlain, and after wards group of the noble men of Kufah who were friends of Shurayk. Because intermediation is strictly forbidden in judicial matters, the firm and independent judge Shurayk sent all to prison, as a disciplinary measure, so that they refrain from mediation to the judge and from carrying the message of an unjust. At night, the prince governor ordered the door of prison to be opened and the said prisoners to be released.<sup>41</sup> The judge made up his mind to go from Kufah to Baghdad to resign before the caliph, saying "we did not ask to be judge; they obliged us to do. We accepted only provided that our dignity and independence should be guaranteed". The prince begged him not to go, and accept that all the prisoners be returned to jail! This done, the judge ordered the prince governor to come and stand the same as his adversary, the complaining woman, before the court. The case was seen and the judgment was issued to the favour of the woman against the oppressor. That is a slide of Islamic justice!!<sup>42</sup>

Indeed, the independence of the judiciary is considered a healthy development to ascertain contemporary demands and needs. It made the role of the judicial authority more prominent and effective in the state. Although the judicial authority had changed hands, the caliph was still highly responsible in regard to the judiciary institution.

Therefore, if we made a comparative study about the independence of the judiciary in the Islamic legal system and Western countries, we will find in these Western countries that the executive is the strongest authority, stronger than both the legislative and the judiciary. So, the people in these countries until now feel that there is no true progress or development in the independence of the judiciary.

Therefore, several conferences were held during 1985 to 1989, which established a number of basic principles for the independence of the judiciary. The essential points mentioned in the events are:<sup>43</sup>

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<sup>41</sup> Husayn Abd Allah 'Uthman (1993), *Al-Qada' fi al-Islam: 'Ilm wa Qiyam* (Al-Qahirah: Dar al-I'tisam), at pp. 32-33.

<sup>42</sup> Ibid, pp. 36-37.

<sup>43</sup> Muhammad al-Ghazali, "Introduction to a Draft Islamic Constitution," *Islamic Studies, Journal of the Islamic Research Institute*, Vol. 20, 1981, pp. 155-160.

The principle of independence of the judiciary should be respected and guaranteed without any encroachment by the head of the state or by any other influence.

Impartiality should be considered by the judiciary, without restrictions, improper influence, inducements, pressures, threats or interference, direct or indirect, from any party or for any reason.

To protect judges and lawyers, who are harassed or persecuted, as a result of carrying on their professional duties.

The judiciary should ensure that judicial proceedings are conducted fairly, and that the rights of the parties are respected.

Judges should be free to form associations of judges- or other organisations, to represent their interests, to promote their professional training and protect their judicial independence.

### **Summary**

The judicial role is not merely a career or profession." It is so vital, important and noble, that it is considered to be a sacred message, a kind of worship. And that is not a matter of theory or hope. Islamic basic principles of justice and judicial independence were actually and practically implemented in many countries of the world, through different ages of history. The real outcome was security, freedom, fairness and legality, through the sovereignty of the Shari'ah."<sup>44</sup>

### **The Background of Judicial Control in the Islamic System**

#### **Judicial Control over the Constitutionality of Laws in Shari'ah**

All principal sources of the Islamic political system, the Qur'an and Sunnah, stipulate the obedience by the individuals or groups to the Head of State, but this obedience is not absolute but is restricted to conformity with the conduct of the Head of State, irrespective of whether it were legislative or administrative, with the Qur'an, Sunnah and consensus of Shari'ah scholars on legal rulings.<sup>45</sup> Therefore, if any government orders contradict the authority of these sources, they are void and should not be obeyed. Therefore, the Islamic judiciary, in centuries where injustice was at its most, rejected any order, law or decision that was not in conformity with the Shari'ah.<sup>46</sup>

The researcher will study this subject through two fields of research, which are: First, Judicial control over the acts of legislative authorities; second, the control over acts and deeds of caliph and his workers and delegates.

#### **Judicial Control over the Acts of Legislative Authorities**

We cannot study judicial control over the acts of legislative authorities, whether individual or in groups, without first studying the nature of the Islamic constitution and Islamic legislation. This is followed by a discussion on the manner of judicial control.

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<sup>44</sup> Husayn Abd Allah 'Uthman (1993), *Al-Qada' fi al-Islam*, at p. 40.

<sup>45</sup> Muhammad Salim al-'Awwa (1983), *Fi al-Nizam al-Siyasi li al-Dawlah*, at 397.

<sup>46</sup> Sulayman Muhammad al-Tamawi (1976), *Al-Sultat al-Thalath fi al-Dasatir*, at 329-330.

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The researcher will divide this subject into two branches: Firstly, the nature of Islamic constitution and legislation, and secondly, the manner of judicial control.

Nature of the Islamic Constitution and Legislation

If judicial control was established on the principles of legality and separation of judicial authority from other public powers in the country, then the nature of the constitution and legislation in Islam has two meanings the influence of which is reflected on that control.

They are explained in the following paragraphs.

a) Nature of constitution: The constitution in positive legal systems is a collection of legal rules that show the ruling system, its type in the country, and the organisation of public powers, limitation of individuals' rights, and their obligations or duties. This definition does not conflict with the ruling system in Islam. However, the researcher finds that the constitution in the Islamic legal system has a deeper and more comprehensive meaning than that of the constitution in the positive legal system. The Islamic constitution is concerned with expressing faith in Allah (s.w.t) and solidarity in implementing Allah's orders and abstinence from his prohibitions.<sup>47</sup> Also, that the Qur'an and Sunnah are the convention of people and that the realisation of interests and the repelling of harm in order to realise the aims of Shari'ah is an obligation, and that ijihad must conform to the rules of the Shari'ah.<sup>48</sup> Therefore, the constitutional rule in the Islamic legal system differs from the constitutional rule in the positive system.

There is controversy about the sources of Shari'ah among jurists, but they are said to be of three main sources: Qur'an, Sunnah and al-ra'y (opinion),<sup>49</sup> and this is what the former Imam of al-Azhar, Mahmud Shaltut, had deduced. However, there is a group that said that the sources are divided into two levels: the first is Qur'an and Sunnah, and the second is al-ra'y (opinion) and qiyas. They also considered that the Qur'an and Sunnah are both constitutional legislations.<sup>50</sup> While the principles that derived from other sources and fell under the heading al-ra'y are similar to normal legislations.

The analogy between the Islamic Shari'ah and constitutionalism was first made in the nineteenth century and became more common in the late twentieth century. Despite the analogy, there are some differences between Western and Islamic forms of constitutionalism.

First, Western constitutionalism has expressed itself most frequently in human-authored constitutional texts that generally reflect the idea of popular sovereignty; the Islamic Shari'ah is based on the will of God. This difference is not as great as might initially appear, because many constitutional scholars acknowledge that the root of Western constitutionalism lies in religious sources.<sup>51</sup>

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<sup>47</sup> Yasin Umar Yusuf (1995), *Istiqlal al-Sultah al-Qada'iyyah*, at 328. See also, Sulayman Muhammad al-Tamawi (1976), *Al-Sultat al-Thalath*, at p.330.

<sup>48</sup> Mahmud Shaltut (1959), *Al-Islam: 'Aqidah wa Shari'ah*. Kuwait, at p. 398.

<sup>49</sup> Ibid. See also, Sulayman Muhammad al-Tamawi (1976), *Al-Sultat al-Thalath*, at p. 328.

<sup>50</sup> Ibid.

<sup>51</sup> Sulayman Muhammad al-Tamawi (1976), *Al-Sultat al-Thalath*, at p. 330.

Second, Western constitutionalism has generally focused on procedural ways of limiting government authority and rendering it accountable. Western constitutions and other constitutions based on Western models devote most of their attention to creating structures of government and clear lines of authority and accountability.<sup>52</sup> Western constitutions do contain substantive as well as procedural limitations on government (such as guarantees of free speech), but even some of those substantive limitations are presented in procedural form (the famous first amendment to the U.S. Constitution states that Congress shall make no law abridging freedom of the press). The Islamic Shari'ah, on the other hand, provides much guidance on what the substantive law should be but far less on the procedures of government.<sup>53</sup>

b) Nature of legislation and domain of Shari'ah: There is a big difference between the nature of legislation in an Islamic system and nature of legislation of the secular system. The lawmaker in manmade systems can legislate on any matter except matters that are explicitly excluded by the constitution. Whilst the legislation in the Islamic legal system must conform to the Qur'an and Sunnah, the interest that it aims to achieve must not contradict the text of the Qur'an and Sunnah. So there are several points that limit the domain of shura as legislative authority, which include the following:<sup>54</sup>

There is agreement among scholars of Shari'ah that shura is a kind of ijtihad in public opinion on various affairs: legislative, economic, political and social. Also, ijtihad is not allowed where there is a conclusive text in the Qur'an or Sunnah.<sup>55</sup>

Concerning the implication of non-conclusive texts, there is room for individual ijtihad, so public ijtihad would be in priori for the prevention of chaos. Such public ijtihad would take place by giving preference to some interpretations of one text over other interpretations.<sup>56</sup>

If there is no text of Qur'an or Sunnah or its counterpart of qiyas or ijma' (consensus of opinion) then the scope is open for shura. In this case, most of the political or governing issues derive their rules through the shura council on the basis of interest, and sadd al-dhari'ah. In other words, legislating ijtihad systems for the realisation of legislation in the country and organisation of its administration and institutions in every subject that has no text, and that is based on the interests of fiqh.<sup>57</sup>

'Abd al-Wahhab Khallaf expressed and conveyed this point where he said that legislation has two meanings: finding a new legislation and this in Islam could not be except by Allah (s.w.t.) only; and secondly, illustrating a judgment required by existing legislations and this is the meaning in Islam, and judicial control extends to three domains of shura. Its control extends in the first kind, decreases in the second, and dwindles in the third, and in all these kinds the judiciary checks the conformity of legislations to the public principles of Qur'an and Sunnah and ijma', and what the salaf agreed upon as to that in which interest does not change.<sup>58</sup>

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<sup>52</sup> Fathi al-Dirini (1987), *Khasa'is al-Tashri' al-Islami fi al-Siyasah wa al-Hukm*, (2<sup>nd</sup> ed.) (Beirut: Mu'assasat al-Risalah), at p. 444.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Abd al-Wahhab Khallaf (1937), *Al-Sultat al-Thalath fi al-Islam: Bahth fi Majallat al-Qanun wa al-Iqtisad*, at pp.565-570.

<sup>56</sup> Ibid, at p. 577.

<sup>57</sup> Fathi al-Dirini (1987), *Khasa'is al-Tashri' al-Islami fi al-Siyasah wa al-Hukm*, at p. 447.

<sup>58</sup> Abd al-Wahhab Khallaf (1988), *Al-Siyasah al-Shar'iyyah*, (Kuwait: Dar al-Qalam), at p. 9.

## JUDICIAL CONTROL IN THE ISLAMIC SYSTEM

What is the jurisdictions and scope of the legislative authority in the Islamic State? The researcher believes that the legislative power in Islamic system has several jurisdictions to perform.

First, explanation of the directives of God and his Messenger are available, in spite of the fact that the legislative authority cannot replace or change or amend them; the legislative authority alone will be competent to legislate them in the shape of sections, devise relevant definitions and details, and make rules and regulations for the purpose of enforcing them.

Second, provisions and injunctions in the Holy Qur'an and Sunnah construed and interoperated, in the same instance, in various manners. So, it is to the legislature to choose which interpretation to be brought into operation.

Third, if there was no explicit provision in the Holy Qur'an and Sunnah pertaining to a subject, it would be incumbent on the legislature to enact laws pertaining to that subject in line with the spirit of Islamic and public interest.

Sayyid Qutb has said: If sovereignty lies with God, so does legislative authority, leading Islamic constitutionalists to affirm the absolutely binding nature of the Shar'ah. Any action by any human government has to be measured against the requirements of the Shar'ah, and any man-made rule, policy, or regulation that contradicts any provision of the Sha 'ah is invalid.<sup>59</sup>

Rashid al-Ghannushi has said that Islam makes the binding nature of provisions a basis for legitimacy of the state and makes the ruler bound in the decisions he takes, the procedures and the commands he issues-by the provisions of the Islamic Shar'ah.<sup>60</sup>

Tawfiq al-Shawi, member of the Muslim brotherhood, says that, the application of the Islamic Shari'ah is not confined to applying the Islamic fiqh to relations among individuals in the society, whether in civil, commercial or other aspects. But it is the state itself be bound by compliance with the sovereignty of the Shari'ah. All the organisations, institutions, and individuals who represent (the state) must be bound to comply with its principles and rules and apply them on themselves and on their own exercise of authority before they apply them on the general population and the individuals within society.<sup>61</sup>

Muhammad Salim al-'Awwa mentioned in his book, that the messenger of Allah left the matter of choosing the ruler and the determination of the system of government "also left without specifying details" to Muslims to decide according to their interests and the requirements of time, place and changing circumstances; and nothing decreed was binding on them except the general

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<sup>59</sup> Sayyid Qutb (1983), *Ma'alim fi al-Tariq*, at pp. 20-12.

<sup>60</sup> Rashid al-Ghannushi (1993), *Al-Hurriyyat al-Ammah fi al-Dawlah al-Islamiyyah* (Beirut: Markaz Dirasat al-Wihdah al-Arabiyyah), at p.105.

<sup>61</sup> Tawfiq al-Shawi, (1992), *Fiqh al-Shura wa al-Istisharah* (Al-Mansurah: Dar al-Wafa'), pp. 168-170.

rules of Islamic law in regard to consultation, justice and equality, and the ordinances and moral values which the Prophet had promulgated during the Madinan period, that is, from the inception of first Islamic state until he passed away.<sup>62</sup>

'Awdah similarly accepted the idea that the Shari'ah was the defending feature of Islamic politics. He wrote "The basic constitution for the Muslim is the Islamic Shari'ah and "Islam forbids each Muslim from obeying a law or command that violates the Shari'ah of Islam and exceeds limits established by God and his prophet". Positive legislation thus has a sharply limited role. Not only must it be contained within the bounds of the Shari'ah, it is only legitimate for one of two purposes:

The first: implementing legislation that aims at guaranteeing the implementation of the Shari'ah of Islam. The second: organising legislation, to organise the group, defend it, and meet its needs on the basis of the principles of the Islamic Shari'ah. This legislation can only exist where the Shari'ah is silent and there are no particular texts. Such legislation must agree with the general principles of Shari'ah and its legislative spirit.<sup>63</sup>

### **The Control of Islamic Judiciary over the Constitutionality of Laws**

Originally, the judge should, when making his decisions, depend on the Qur'an, Sunnah of the Prophet (s.a.w.) and consensus, and if he does not find any (ruling) he should exercise judicial interpretation (ijtihad) to derive at the Shari'ah ruling from other evidence in order to apply it to the facts before him.

What can be conceived in the field of judicial control over the constitutionality of laws, as far as Islamic Shari'ah is concerned, is that it is implemented on legislation passed by the parliament which is known as (Ahl al-Hall wa al-'Aqd). Legislation here is based on judicial interpretation (ijtihad) solely, because the definitive rulings that are found in the Qur'an and Sunnah are considered constitutional texts over which the judge has no control, and what has been passed by way of consensus is infallible and there is no control over that as well, yet control can be had over rulings of the source which is judicial interpretation (ijtihad).<sup>64</sup>

What is known is that one of the functions of "parliament" is juridical interpretation (ijtihad) and legislation, and that is where it uses juridical interpretation in cases where there exists no text from the Qur'an or the Sunnah or consensus in order to derive the Shari'ah ruling. If these

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<sup>62</sup> Nathan J. Brown, *Constitutional in a Non Constitutional World (Arab Basic Laws and the Prospects for Accountable Government)* (New York: State University of New York Press, 2002), at p. 168.

<sup>63</sup> 'Awdah, 'Abd al-Qadir (1951), *Al-Islam wa al-Wad'iyyah al-Qanuniyyah* (Beirut: Mu'assasat al-Risalah), at p. 61.

<sup>64</sup> Munir Hamid al-Bayyati (1994), *Al-Nizam al-Siyasi fi al-Islam: Muqaran bi al-Duwal al-Qanuniyyah*. (2<sup>nd</sup> Print). (Amman: Dar al-Bashir), at p. 281.

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derived rulings were drafted as laws for the judiciary to implement, then the judicial control over the constitutionality of law and their legitimacy would appear, because the judge in the Islamic system is not allowed to implement a law which he sees as conflicting with the Qur'an and Sunnah, as there is no obedience to a human in disobedience to the Creator.

There are two kinds of Verses in the Qur'an, namely, absolute and presumptive, the latter being those which are capable of different interpretations. The decisive Verses are the basis of the book and contain the fundamental principles of religion. So, whatever may be the differences of interpretation over allegorical Verses, the fundamentals of religion are not affected by them.<sup>65</sup>

The Court has articulated this principle on numerous occasions. In 1996, for instance, a father brought a case to the Court involving an administrative decree issued by the Minister of Education barring female students from wearing niqab "a veil covering the full face in contradistinction to the permitted hijab, a veil covering only the hair" in state schools. The proponents of a Shari'ah-based constitutional jurisprudence finally seemed to have a strong case. The challengers could cite not only Article 2, but also personal rights provisions of the constitution. The father claimed that the minister's decree violated both the Islamic Shari'ah and rights of a liberal provenance. The court rejected the claim, however, laying out once again a view that grants executive and legislative authorities tremendous latitude:

It is not permitted for a legislative text to contradict those shura provisions definitive in their certainty and meaning "qat'i al-thubut wa-al-dalalah." These rules alone are those for which ijtiḥad is forbidden because they signify the comprehensive principle and fixed roots of the Shari'ah, accepting neither interpretation nor substitution...The judgment of reason, where there is no text, develop on a practical basis and are more compassionate to humankind and more dedicated to their affairs in their content. [The judgments based on reason] are more protective of humanity's true interests, which the [shura] provisions are prescribed to realise in terms of what is appropriate for these interests. The underlying factor is that the essence of God's Shari'ah is truth and justice. Being limited by the Shari'ah is better than widespread depravity.<sup>66</sup>

For [the Shari'ah] to be closed upon itself is neither acceptable nor necessary. The statements of an expert of fiqh on a matter related to the shura, are not granted any sanctity, or placed beyond review reexamination. Rather they can be replaced by other [such statements]. Opinions based on ijtiḥad in debated questions do not in themselves have any force applying to those who do not hold them. It is not permitted to hold [such opinions] to be firm, settled Shari'ah law that cannot be contravened. To do so would be to end contemplation of and reflection over Almighty God's religion; it would deny the truth that error possible in all ijtiḥad ....The challenged decree does not contradict...the text of article 2 of the constitution. The rule has-in debatable questions-the right of ijtiḥad to facilitate the affairs of the people and reflect what is authentic in their customs and traditions, so long as overarching purposes of their shura is not abrogated ....

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<sup>65</sup> Farooq Hassan, *The Concept of State and Law In Islam*, at 36.

<sup>66</sup> Case 8, judicial Year 17, issued by the Supreme Constitutional Court 18 May, 1996.

An attempt to use Article 2 as the basis for the application of a Shari'ah - based law must now overcome one of two hurdles. First, one might resort directly to the Court. Yet, by rejecting any claim that is not a clear and permanent injunction of the shura, the Court has made this barrier formidable. Others have distinguished between unalterable sources of law "the Qur'an and Sunnah," on the one hand, and those based on human judgment, on the other.

The jurists have the right to make sure that ijihad in the non-peremptory provisions is achieving the interest of the people.

Ijtihad is a brainstorming process to deduct practical rules to regulate the life of people and achieve their interest. Hence ijihad should cope with the context of events prevailing at the time. It does not have a binding power but on those who believe in it. This sign of God's mercy that permitted different ijihad to encourage people to think and avoid the possibility of human error. Thus, the Islamic Shari'ah is always developing and flexible to accept ijihad of the responsible people to achieve the utmost interest of the people.

A number of Muslim jurists have shown that Islamic Shari'ah has known, in theory, the control system over the constitutionality of law, but did not practice it. Among them is the Muslim scholar Abu al-A'la al-Mawdudi who says:

Does Islam permit the judiciary to reject some legislation that are passed by the legislative council as being contradictory to the Qur'an and Sunnah? I did not look into a text under this topic and there is no doubt that what the work of the orthodox caliphs (al-Khulafa' al-Rashidin) indicate that the judiciary had no such powers, at least we have not found until now an example of this matter, but the reason for this as I see it is that all the members of parliament (Ahl al-Hall wa al-'Aqd) were at that time very knowledgeable in the Qur'an and Sunnah, and on top of them were the orthodox caliphs who did not pronounce in any way an issue that is in contradiction to the Qur'an and Sunnah.<sup>67</sup>

Although the researcher agrees with many aspects of this opinions, but the researcher is of the view that the legislative council consists of normal people who are human beings and are affected by matters that all people are affected by. So, some might have made mistakes according to the circumstances, thus the promulgation of a legislation that is not in conformity with the Qur'an and Sunnah is not an impossible proposition. On the contrary, it is a conceivable proposition and the objective behind the promulgation of such legislation is not the contradiction of the Qur'an and Sunnah per se, it might rather be caused by the absence of discernment or the actual purpose behind its promulgation.

The Islamic system, during the period of the four pious caliphs, did not know the principle of judicial control over the constitutionality of laws or acts. There was no room in Islam for the judiciary to reject or to restrict the powers of the legislature in respect of enacting laws in contravention of the Qur'an and Sunnah. During this period, the caliphs proved that the judiciary did not enjoy or exercise such powers at the time. There was no instances of any qadi

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<sup>67</sup> Abu al-A'la al-Mawdudi (1985), *Tadwin al-Dustur al-Islami* (Al-Sa'udiyah: Dar al-Sa'udiyah), at p. 61.

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taking such an action. This is because the members of the legislative authority at that time had very deep and true insight in the Qur'an and Sunnah and almost all the caliphs too were the most reliable persons in all respects. In addition to that, under their authorities, there was no real danger of any such legislation taking place which was contrary to the spirit of the Qur'an and Sunnah. While the principle of judicial control over the constitutionality of laws appeared after the end of this period, the judicial authority gave the right to declare void, and ultra vires of the constitution, all laws and legislation enacted in contravention of the Qur'an and Sunnah.

Perhaps, the best example to be given here is where Caliph Umar ibn al-Khattab (may Allah be pleased with him) refused to divide the conquered lands of Iraq among the conquerors while most of the Prophet's companions, who formed the legislative council (Ahl al-Hall wa al-'Aqd), were asking for that division and the most eager amongst them was Billal ibn Rabah. But 'Umar was able to convince them using evidence from the Qur'an and Sunnah and by showing the wisdom behind the refusal of such a division among the conquerors which was the fear of stoppage of the Islamic conquests and the defense of the wide Islamic borders. He also explained to them that the decision not to divide was not based on his own desire but was rather in agreement with the Qur'an and Sunnah.<sup>68</sup> Thus we can say that the Islamic judiciary has the power to reject any law that is not in conformity with the Qur'an and Sunnah, and not give a judgment based on it for its illegality. Moreover, the judge is bound, in exercising his function of giving a judgment, by what Allah (s.a.w.) has revealed. The Prophet (s.a.w.) said: "there is no obedience to a human in disobedience to the Creator,"<sup>69</sup> and Allah (s.a.w.) revealed: "... If any do fail to judge by (the light of) what Allah hath revealed, they are Unbelievers."<sup>70</sup> Thus, it is obvious that the Islamic Shari'ah has control over the constitutionality of law before the positive law systems have.

Furthermore, the right of control that the judiciary has over the constitutionality of law, the source of which is juridical interpretation (ijtihad), is not absolute, as a judge may not merely claim that a law contradicts the Shari'ah. This is because the juridical interpretation that emanates from people who have the correct mechanism of juridical interpretation, and the law that is promulgated on its basis and is met by the approval of the leader after its promulgation must be implemented by the judge even if it contradicts the judge's own interpretation. This is because it is a well established legal maxim in the science of jurisprudence that one judicial interpretation (ijtihad) does not become overruled by its like.<sup>71</sup>

“لَا يَنْقُضُ الْإِجْتِهَادُ بِالْإِجْتِهَادِ”

Among the most important jurists who talked about the control over the constitutionality of law is Ibn Hazm al-Andalusi where he said: "no ruling is permitted unless it is based on what Allah (S.W.T.) has revealed to His Prophet (s.a.w.) and it is the truth, and all that is not, is considered injustice and tyranny, and any ruling based on it is not permitted and must be annulled if the judge ruled by it."<sup>72</sup> Ibn Hazm supported his view by some Verses of the Holy Qur'an, such as

<sup>68</sup> Abu Yusuf Ya'qub Ibrahim (1970), *Kitab al-Kharaj* (Beirut: Dar al-Ma'ifah), pp. 28-38.

<sup>69</sup> Al-Bayhaqi, *al-Sunan al-Kubra*, Vol. 3, 122. See also *Sunan al-Nasa'i: Kitab al-Qada'*. (n.d., n.p.).

<sup>70</sup> Abdullah Yusuf 'Ali (trans.) (1984), *The Qur'an, Text, Translation and Commentary, al-Qur'an* 5: 44.

<sup>71</sup> Munir Hamid al-Bayyati (1994), *Al-Nizam al-Siyasi fial-Islam*, at p. 283.

<sup>72</sup> Ibn Hazm al-Andalusi (1956), *Al-Muhalla*, Vol. 6. (Beirut: Dar al-Fikr), at pp. 362- 363.

the revelation of Allah (s.w.t.): "... and any who transgresses the limits of Allah, does verily wrong his (own) soul..."<sup>73</sup> and added: "the approval of injustice may not be permitted and the wrong may not be let to pass."<sup>74</sup>

It is to be noted that even though rules based on ijma' and ijihad are not directly based on the Qur'an and Sunnah, these rules are to be in conformity with the principles of shura and its spirit which is directly derived from the Qur'an and Sunnah.

Abu Hanifah said, "If I said a statement in non-conformity with the Qur'an and Sunnah of the Prophet, do not take my saying."<sup>75</sup>

He also said, "It is not permissible to anyone to adopt our opinion or saying unless he knows where we took it from."<sup>76</sup>

Imam Malik said, "I am a human being and I can be right or wrong. So look at my opinion, if it is in conformity with the Qur'an and Sunnah take it, but if it is not in conformity with the Qur'an and Sunnah, leave it."<sup>77</sup>

Al-Shafi'i said, "If you find in my book things that do not conform to the Qur'an and Sunnah, do not take my opinion and abide by the Qur'an and Sunnah."<sup>78</sup>

Ibn Hanbal said, "Do not imitate me and do not imitate Malik, Abu Hanifah, al-Shafi'i, and al-Thawri, and you take from where they have taken."<sup>79</sup>

## **Conclusion**

It is clear then that the Islamic legal system has known judicial control over constitutionality or legitimacy of laws. As well as, it has applied the judicial control in practice in several occasions that had taken place in the Islamic history and civilisation especially during the Umayyad, 'Abbasi and the Ottoman periods. However, there is no scope to mention these occasions or cases in this study as we feel there is no need to go into details, because that could be explained in future studies which could elaborate more.

While during the orthodox caliphs period there was no room in the Islamic system for the judiciary to reject or to restrict the powers of legislature in respect of enacting laws in non-

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<sup>73</sup> *Al-Qur'an* 65: 1.

<sup>74</sup> Ibn Hazm al-Andalusi (1956), *Al-Muhalla*, Vol. 6 (Beirut: Dar al-Fik), at p. 362.

<sup>75</sup> Al-Imam al-Hafiz, Abu Umayr Yusuf ibn Abd al-Bar al-Nimri al-Qurtubi. (n.d.), *Al-Intiqā' fī Falā'il al-Thalathah al-A'imma al-Fuqaha'* (Al-Qahirah: Maktabat al-Quds), at p. 20.

<sup>76</sup> Ibn al-Qayyim, Shams al-Din Abu Abd Allah Muhammad al-Dimashqi. (1969). *A'lam al-Muwaqqi'in 'An Rabb al-'Alamin*. Vol. 1. (Beirut: Dar Ihya' al-Turath al-'Arabi), at p. 302.

<sup>77</sup> Al-Imam al-Hafiz, Abu Umayr Yusuf ibn Abd al-Bar al-Nimri al-Qurtubi. (n.d.). *Al-Intiqā' fī Falā'il al-Thalathah al-A'imma al-Fuqaha'*, at p. 20.

<sup>78</sup> *Ibid*, at 72

<sup>79</sup> Al-Nawawi, Yahya ibn Sharaf al-Din. (n.d.). *Takmilat al-Majmu' Sharh al-Muhadhdhab* (Al-Madinah al-Munawwarah: al-Maktabah al-Salafiyyah), at p. 63. See also Ibn al-Qayyim, Shams al-Din Abu Abd Allah Muhammad al-Dimashqi (1969), *A'lam al-Muwaqqi'in 'An Rabb al-'Alamin*, at p. 361.

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conformity with Qur'an and the Sunnah. We believe that during the period of the pious caliphs the judicial power did not enjoy or exercise such powers at that time. At least there is no instance of any Qadi taking such an action. Because, the members of the legislature at that time had very deep and true insight in the Qur'an and the Sunnah and almost all the Caliphs too were the most reliable person in all respects. Under them, therefore, there was no real danger of any such legislation taking place which was contrary to the principles and spirit of the Shari'ah or the Qur'an and Sunnah provisions.