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 discuss 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.

1. 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:

2. 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’Én 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 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 SharÉÑah 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: YÉsÊn ÑUmar Yësuf, IstiqlÉl, p. 334. 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’Én and Sunnah.

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 Sharī‘ah applied the direct action method in a constitutional action is the case which took place during the rule of the Muwa‘īlidūn in al-Andalusia and the rule of the Ayyūbid in the Egypt during (1169-1252 C.E).

When Mīṣē ibn Maymūn who, under the fanatical rule of the Muwa‘īlidūn, 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-Qī‘ī al-Fīlīl, Nā‘ībd al-Ra‘īm ibn Nā‘īl, one of the most famous of Muslim judges, and the prime minister of the great Sulṭān, who authoritatively declared that a man who had been converted to Islam by force could not be rightly considered to be a Muslim: Arnold, The Preaching of Islam, p. 423.

In this case, it is obvious that the judge had accepted the defence-filed by Mīṣē ibn Maymūn 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’ān where Allah revealed: “Let there be no compulsion in religion…”: Al-Qur’ān, 2:256.

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’ān and Sunnah, in many Verses and narrations, as well as the general principles of the Islamic Sharī‘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.

3. “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’ān, 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‘mūn and the judge, Ya‘līyīb ibn Aktham, in spite of their strong friendship. In this case, the caliph al-Ma‘mūn (as the head of the executive and legislative authorities) promulgated legislation to allow temporary (zawīj al-mutNhah). Some people disapproved of this law and when the judge, Ya‘līyīb 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: Al-Kha‘īb al-Baghdādī, Tārīkh Baghdād, p. 202-203; Ibn Khallikān, Wafayīt al-a‘nyīn, p. 122-123.

When Ya‘līyīb came and sat near him, the caliph asked him why he looked changed. When Ya‘līyīb replied that it was grief at what has happened to Islam, the caliph asked what had happened. When Ya‘līyīb told the caliph that allowing temporary marriage was zinā” (fornication), the caliph asked for his evidence for this?»
Ya‘yÈ referred the caliph to the QurÈn and Sunnah of the Prophet. Allah 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. Al-QurÈn 23: 1-7.

Then he asked the caliph if the wife under temporary marriage is a captive (mulk al-yamÈn), to which the caliph replied she wasn’t. Then Ya‘yÈ asked if Allah 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’.

Ya‘yÈ told the caliph that, temporary marriage contravened these conditions. It was narrated by al-ZuhrÈ on the authority of ṮAbd Allah and al-×asan ibn MuÈammad ibn al- ×anafiyyah, on the authority of his father MuÈammad ibn ṮAlÈ ibn AbÈ ÙÈlib that “the Prophet ordered me to call for the prohibition of temporary marriage after he had allowed it.” When the caliph al-MaÈ mÈn asked his attendants if this narration was memorised by al-ZuhrÈ, they answered ‘yes, O Commander of the Faithful. Whereupon the caliph asked for Allah’s forgiveness and called for the prohibition of temporary marriage: Al-KhaÏÊb al-BaghdÈdÊ, TÉrÊkh BaghdÈd, p. 202-203; Ibn KhallikÈn, WafayÈt al-àNyÈn, anbÈ´ p. 122-123; NaÈr FarÈd WÈÎil, Al-sulÏah al-qaÌÉ´iyyah, p. 197-198.

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 QurÈn 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. This will be discussed in detail in the other article devoted to the conditions of the constitutional suit in the Islamic system and also in other article devoted to the effect of a ruling passed in a constitutional suit.

3. The Constitutional Court and Qualification of Its Judges

3.1. Introduction

The constitution is often protected in each country by a specific legal body variously known as 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.
4. **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 (Naqīdah), and are laws by which people worship and approach Allah. 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.

5. **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: Al-MarÎafÉwÊ, NiðÉm al-qaÌÉ’, p. 56-57; ÚÉfir Al-QésimÊ, NiðÉm al-Íukm, p. 46. 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: MuÎammad ÑAbd al-RaÎmÉn al-Bakr Al-sulÏah al-qaÌÉ´iyyah, p. 255. This has been stated in the Mejelle (Ottoman Civil Code) 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”: Hooper, (trans.), The Civi Law of Palestine and Trans-Jordan.

Islamic law adheres to the principle of a single judge and the origins of this principle are both logical and natural. Since the qÉÌÊ 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 of jurists who assist the judge by advising him, but who have no deliberative function: Tyan, “Judicial organization”, p. 240.

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 (ijtihÉd): Al-MiÎrÊ, ÑUmdat al-sÉlik, p. 245; MarÎafÉwÊ, NiðÉm al-qalÉÊ, p. 61.

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 iÑtikÉf, or a time for prayers happens to coincide with the coming of two litigants, then he may judge between them without it being offensive: Al-MiÎrÊ, ÑUmdat al-sÉlik, p. 245.
Regarding the field of control over the constitutionality of law, and since the plea of incompatibility of the decisions and situations with the Sharâ‘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 Sharâ‘ah, be cancelled: Mu‘tassif, Mu‘tannaf, p. 176. 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: Ibid.

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’ân, 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 Sharâ‘ah, implement it, and protect the individual rights and freedom within the framework of the Sharâ‘ah and its spirit.

6. 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 Sharâ‘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 have been put in place to ensure the independence and impartiality of judges, and these are: Al-Nawawî, Takmilat al-majmû‘, p. 126-128; Al-Mi‘rî, ÑUmdat al-sàlik, p. 245; Tyan, Histoire, p. 230-240.

- 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 that: «And never will Allah grant to the unbelievers a way (to triumphs) over the believers»: Al-Qur’ân 4: 141. 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.

- 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: Al-Nawawî, Takmilat al-majmû‘, p. 126; Ahmad Ibrahim, “The Shariah Court”, p. 16-18.

- Soundness of mind is a pre-requisite, and this condition is also agreed upon, based on the narration of the Prophet 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: Al-Bayhaqî, Al-sunan al-kubrî, p. 161.

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

- A majority of jurists have made it a condition that the judge must be male, thus they consider it 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 said: “the people who are ruled by a woman will never be successful.”

- According to Abu Hanifa women may pass judgment in areas where their testimony is valid, but not in areas where their testimony is not acceptable. Ibn Jarir al-Ubari 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”: Al-Qur’an, 4:34, that is, in mind and judgment, so it is improper for them to take precedence over men: Al-Mawardi, Adab al-Qim, p. 460-461; Mitwalli, Oamret, p. 10. The writer is inclined to support Abu Hanifa’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 in His Book allows a woman to testify in some cases, especially in transactions.

- 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: Úufir Al-Qésim, NiDém al-Iukm, p. 136.

- Jurists have also made it a condition that the judge must have knowledge in Sharī‘ah rulings, meaning that he must be diligent in getting the basis for the rulings from al-Qur’ān, Sunnah and consensus, as well as the method of reasoning: Ibid, p. 140.

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

- 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: al-Bakr, Al-sulûh, p. 320.

- The judge must be upright because it is not permissible to appoint a disobedient person. This is according to the revelation of Allah in which He says: “O you who have believed, if there comes to you a disobedient one with information, investigate…”: Al-Qur’ān, 49: 6. Since it is not permissible to accept information from such a person, there is greater reason to reject his judgment.

- The judge must be one who exercises ijtihād (brainstorming process) 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: Salih al-Fawzan, A Summary of Islamic Jurisprudence, p. 698.

7. 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´Én and Sunnah. The challenged text would also be examined as to its conformity with the principles and aims of the SharÉÑah.

If the court finds the said texts to be in conformity with the Qur´Én 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´Én or Sunnah or the aims and general principles of the SharÉÑah, then it must give a ruling as to the nullity of the contravening text due to its contravention of the Qur´Én and Sunnah: xasan LibÊdÊ, DaÑÉwÉ al-Íisbah, p. 100; Ibn al-AthÊr, Al-kÉmilm fê al-tÉrÊkh, p. 100; YÉsEn ÑUmar YËsuf, IstiqlÉl, p. 19; MuÎÏafÉ, MuÎannafÉt, p. 173-176. Thus, under Shari‘ah, the government of the state, as well as its jurists and scholars, while passing legislation, whether constitutional, legislative or regulative, must not exceed the scope of the eternal rulings which have been established in the Qur´Én and Sunnah: Al-BayyÉtÊ, Al-niÐÉm, p. 283; ÑÓrif KhalÊl AbË Ñôd, NiÐÉm al-Íukm, p. 100; MuÎifÉ, MuÎannafÉt, p.180.

8. 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: ÚÉfir Al-QésimÊ, NiÐÉm al-Íukm, p. 255.

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 jurisdiction to settle certain disputes that arose at that time, regardless of whether such jurisdiction was 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 RamaÌÉn: Al-MarÎafÉwÊ, NiÐÉm al-qaÌÉ' fÊ al-IslÉm, p. 80.

The jurisdiction of a qÉÌÊ includes all cases and matters and all sorts of conflicts. Al-MÉwardÊ divided the qÉÌÊ 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 qÉÌÊ includes the protection of the weak, the administration of waqîf property (endowment), the execution of wills, providing for unmarried women who have no guardians, the application of the IudÉd (Punishments), the policing of buildings and public highways, controlling the shuhÉd (Witnesses) and judicial assistants, as well as the choice and appointment of the qÉÌÊ’s deputies: Tyan, “Judicial Organization,” p. 261.

It is clear that the jurisdiction of a qÉÌÊ is very wide and was not dissimilar to that of the territorial jurisdiction of maÐÉlim (judicial-administrative organ), although the territorial jurisdiction of maÐÉlim 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 qÉÌÊ al-quÌÉh (the first chief judge), which was created in the later part of the second century A.H. and which corresponds to the qÉÌÊ al-jamÉÑa of Muslim Spain, does not establish a degree of jurisdiction: Ibid, p. 240-242.
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’Én mentions more than one statement about the original and appellate jurisdictions. An example can be seen in a judgment of Prophet SulaymÉn (Solomon) when two women, classified in al-Uruq al-xukmiyyah as “the older and younger,” appeared before him, on an appeal, claiming to be the mother of a child.

The case was previously heard before Prophet DÉwëd (David) where the older was decided to be the mother of the child. Prophet SulaymÉn 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 SulaymÉn to decide that the child belonged to the younger: Ibn al-Qayyim, Al-luruq al-xukmiyyah, p. 5.

In addition, al-Qur’Én 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’Énic passage ((ØÉd, 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’Én 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 (hawÉ): Ibid, at 130.

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

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

Under the principle of takhÎí al-qalÉ’ (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: Al-MÉwardÊ, Al-aÍkÉm al-sulÏÉniyyah, p. 60-61; Kamali, “Appellate review and judicial independence in Islamic law.” P. 60-62. 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 SharÊÑah oriented policy (al-SiyÉsah al-SharÑiyyah) with takhÎí al-qalÉ’ being merely an instrument of such a policy. There is no text in the QurÑÉn 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: KhallÉf, Al-sulÏÉt al-thalÉth, p. 50.

The notion of al-SiyÉsah al-SharÑiyyah 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 character and there is no text in the SharÊÑah 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 SharÊÑah and falls within the scope of al-SiyÉsah al-SharÑiyyah.

The purpose of the action of MÉÐÉlim 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: Al-MEdwardÊ, Al-afkÊm al-sulfÊniyyah, p. 64; al-QurÎubÊ, BidÊyt al- Mujtahid, p. 461; Ibn ×azm, Al-mufallÊ, p. 435. The MEdwardim 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 SharÊnah courts. It is therefore not surprising that many observers have considered the MEdwardim 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.

9. **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 imÊm (the leader) 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 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 (imÊm) who nowadays represents the prime minister or the minister delegated for the appointment of judges: Al-NawawÊ, Takmilat al-majmÊN, p. 126. 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: Al-MEdwardÊ, Adab al-qÊÌÊ, p. 175-176; Hashim Kamali, “Appellate Review and Judicial Independence in Islamic,” p. 61; Al-×umaylÊ, Al-qalÊ , P. 263-264.

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 (1955) and Coulson (1956) 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: Coulson: “Doctrine and practice in Islamic law”, p. P. 211-212; Tyan, “Judicial organization,” p. 237.

N. J. Coulson mentioned that NAbd Allah ibn FarÈq, a noted judge and scholar, was appointed as the qÊÌÊ of QayrawÈn in 787. Upon his refusal of the position, he was chained, and thrown from the roof of the mosque by the governor’s guards: Coulsen, A History of Islamic Law, p. 120.

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 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, it is better for him: Al-NawawÊ, Takmilat al-majmÊ, p. 624.
10. 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’Èn 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: MarÎafÉwÊ, NiÐÉm al-qaÌÉ’ , p. 97-98. 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: NaÎr FarÊd WÉÎil, Al-sulÏah al-qaÌÉ´iyyah, p. 197-198.

11. 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: ÚÉfir Al-QésimÊ, NiÐÉm, p.216; NaÎr FarÊd WÉÎil, Al-sullah al, p. 240-245.

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: Al-MÉwardÊ, Al-aÍkÉm al-sulÏÉniyyah, p. 73; al-Bakr, Al-sullah, p. 197.

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: Al-MarÎafÉwÊ, NiÐÉm al-qaÌÉ’, p.55.

Bribes are prohibited, Salih al-Fawzan, A Summary of Islamic Jurisprudence, p. 703, on the authority of the ÍadÊth narrated by Ibn ÑUmar (may Allah be pleased with him) in which he said: “The Prophet cursed the one who bribes and the one who takes a bribe”: Ibn Ïanbal, Musnd al-anÎÉr.

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 said: “Gifts given to a governor are (considered) ill-gotten property.” Al-KasÉnÊ, BadÉ´iÑ al-ÎanÉ´iÑ, p. 16.

12. DISMISSAL OF A JUDGE (QADI)

The qÉÌÊ’s office is an important organ in an Islamic state. Due to the fact that the post of qÉÌÊ is for the interest of the public and as an administrator of the SharÊÑah court appointed by the caliph by mutual consent, a qÉÌÊ can lose his post in any one of the following three ways: Kamali, “Appellate Review and Judicial Independence,” p. 61; Ahmad Ibrahim, “The Shariah Court and its Place in the Judicial System”, p. 8-10.

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 (maÁIah ÑÉmmah). Therefore, all jurists of SharÊÑah, especially ShÉfiÑÊs and some ×anbalÊs, would consider that a dismissal is invalid without any reasonable grounds: Ibn Farhun, Tabsirat al-Hukkam, p. 25; MuÎammad NAÎÉ Al-HÉshimÊ, MaÎkhîral-qalÉ´ p.159-160.

Thirdly, when a judge has voluntarily applied to retire from his office, but this is improper: Ibn Farhun, Tabsirat al-Hukkam, p. 25.

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 QÊÌÊ with regard to the grounds of his decisions and admissibility of witnesses etc. A majority of scholars have held that in his capacity as mÉwakkil, 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.

13. 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 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.

References

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[12] Ibid., p. 245.


[14] Ibid.


[16] Al-Qur’ān, 4: 34.


[22] Ibid., p. 140.


[27] Ibid., p. 140.


[32] Ibid., p. 140.

[33] Al-Qur’ān, 4:34.


[35] Ibid., p. 140.
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[29] ÚÉfir Al-QésimÊ, NiDÊm al-İukm Ûê al-SharÊÑah wa al-tÉrÊkh al-IslÉmÊ, p. 255.
[34] Ibid, at 130.
[40] Al-NawawÊ, Y aÎyÉ ibn Sharaf al-DÊn, Takmilat al-majmËÑ sharÍ al-muhadhdhab, p. 126.
[45] NáÎr FarÊd WÉÎil, Al-sulÏah al-qaÎÉ´iyyah wa niDÊm al-qaÎÉ´ fÊ al-IslÉm, p. 240-245.
[53] Ibn FarfÎÉn, IbrÉhÊm ibn NÁÍÉÊ ibn MuÎammad, Tabsirat al-İukkÉm Ûê uÎÊê al-aqliyyah wa manÉhij al-alÊkÉm, p. 25.