

Independence of Judiciary: Islamic Jurisprudence and International Law Perspectives

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Abstract

Judiciary is one of the tripod arms of government in Islamic state and its duty is to administer justice among citizenry without any discrimination. Islamic law constitutes one of the major legal systems in the world today. In many Arab countries, it forms the basis of legal system. Although, in many countries, it has been reformed and codified. Many countries with majority Muslim populations are officially Islamic states and their Constitutions contain provision to the effect that Islam is the state religion and that all laws should be in conformity with Islam. This applies for instance to Egypt, Iran, Pakistan, Afghanistan and some states in the northern part of Nigeria. Judicial independence is a principle of an Islamic constitution. No person in an Islamic state, not even the elected Head can be above the law and as such, he is subject to the punishments for major crimes '*Hudud*' just like any other person. Islam enjoins administration of justice in a detached approach even though the decision may go against a judge's own kinsmen or his own community. The paper therefore examined the judicial authority in Islamic legal system, qualities of judges in Islamic administrative law AND the concept of separation of powers. The paper further discussed the independence of judiciary in Islamic jurisprudence and international law. The study relied on published and unpublished materials like Qur'an, Sunnah, textbooks, journals and internet. The paper revealed that there is independence of judiciary under Islamic jurisprudence. The paper concluded that judicial independence instills rule of law in Islam but a strong and independent judiciary can have a destabilising effect on a legal system whose foundations are unsettled and considered controversial as in the case of Pakistan.

1. Introduction

Judicial system in a country is central to the protection of human rights and freedoms. Courts play major role in ensuring that victims or potential victims of human rights abuses obtain effective remedies and protection that perpetrators of human rights abuses are brought to justice and that anyone suspected of a criminal offence receives a fair trial according to international standards. The judicial system is an essential check and balance on the other branches of government, ensuring that laws of the legislative and the acts of the executive comply with international human rights and the rule of law.¹

Judiciary is the second arm of government in Islamic state and its duty is to administer justice among the citizens without any discrimination. Al Qada, that is, the adjudication, is defined under Shari'ah as an enforceable pronouncement passed by a public authority. Ibn Khaldun stated that it is the settlement among people in litigation as determination of claim and stoppage of dispute except that it must be by Shari'ah principles which are deduced from *Qur'an*, *Sunnah*, *Ijma*, *Qiyas* and other subsidiary sources of Islamic legal principles. It has equally been expressed as declaration of judgment which ought to be enforced.² It is apt from the above expressions that judiciary is an administrative system that passes judgment based on the principles deduced from the sources of Islamic legal system.³

The motive behind this is to establish an orderly society (Muslim Ummah) through the dispensation of justice among the litigants and claimants. Judicial independence and other forms of power dispersal particularly in administration of justice are interdependent. Judicial independence in decision making does not only require independent judges, also, independent input from prosecutors, lawyers, all law enforcement agents like the police,

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¹ International Commission of Jurists, 'International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors.' Practitioners Guide No. 1 (2nd edn) (Geneva, 2007). 3. www.refworld.org/pdfid/4a7837af.pdf, accessed on 16 November 2015

² Abdul-Qadir Zubair, *Islamic Constitutional and Administrative Law*, (Lagos: Al-Madinah Heritage Publications, 2006), 27-28.

³ Ibid, 28.

prison, Ministry of Justice, private counsel and other courts personnel.⁴ The high degree of independence of judiciary is needed as the ultimate arbiter and the need to ensure fairness and consistency as well as eliminate irregularity or undue influence in the process. Truly, the independent decisions require independent judges. The independence of the judge involves not only judicial employment, court and administrative practice and discipline but also more far reaching matters such as judicial selection, facilities, remuneration and periodic training to keep judges abreast of legal and social development. Court cannot deal effectively with cases if corruption or other undue influence on law enforcement or prosecutor prevent them from coming to court or distort evidence or arguments once they are before the court.⁵ It is universally agreed that human rights could best be attained where there is institutional independence and an effective and accountable justice process.

It is also worth noting here that for the purpose of ensuring judicial independence in courts administering Islamic legal principles, the applicable law should not be man-made law and must go beyond the whims and caprices of the rulers and judges. The applicable law should be the one that come from Allah and His Messenger and should be well known to the arbiters and the litigants. Okunola, JCA (as he then was), in *Husain v. Bagade*⁶ held: ‘It can be seen by its nature, Islamic law abhors a judge not learned in its proceedings toiling with the sacred law. This is why it is mandatory under Islamic legal system that only a man well versed in the science of Islamic Jurisprudence should be made a judge....’ It is clear from this case that if a person or judge is ignorant of Islamic law, his decision on Islamic law is a nullity. Although, the judges are appointed by the Imam, they are normally not subjected to his wishes and they cannot be relieved of their posts unless for a strong and serious offences. At the death of Imam who appointed them for his time and on behalf of whom they adjudicate, their appointments remain.

Under Islamic legal system, distinctive position is accorded judiciary and the appointment of judges is purely based on piety. This is why Prophet Muhammed was reported to have stated as follows:

Judges are three kinds; one kind is to enter paradise while the remaining two kinds are to enter Hell. The judge that knows the law and discovers the correct

⁴ Gurin, A. M., ‘Democracy, Human Rights and Administration of Justice under Islamic Law’, (Ahmadu Bello University Law Journal, Vols. 25-26, 2006-2007), 60.

⁵ Ibid.

⁶ CA/K798/89 (Unreported)

situations of the case before him and adjudicates accordingly, he is to enter paradise. But the judge who discovers the correct law and rightness of the case and adjudicates otherwise, he is to enter Hell-fire. Also the judge that adjudicates between people out of ignorance of the law and case is to enter Hell-fire.⁷

Furthermore, Prophet Mohammed was reported to have stated further as follows: ‘Anybody who is appointed as a judge has been slaughtered without knife.’⁸

These are the reasons why a number of pious, reputable and learned scholars of Islamic jurisprudence declined the offers of judicial appointment because it may lead them to Hell-fire. Some of the Caliphs of Abbasid period invited Ibn Dhi’b, Imam Malik Ibn Annas and Imam Abu Hanifah to take up judicial appointments. Imam Malik requested to be excused because he had been convicted and handicapped. Ibn Dhi’b said: ‘I am lowly ranked (rated) by you. It is not proper for me to join you in your administration.’ Abu Hanifah said; I am a Maolah (freed slave) and added that a slave should not be appointed as a judge. The Caliph accepted their reasons because of sincerity he knows in them.⁹

The objectives of this paper are therefore to examine the administration of justice and judicial authority under Islamic jurisprudence, concept of Separation of powers and qualifications for the post of Islamic judge. Others are independence of judiciary in Islamic jurisprudence as well as International law.

2. Judicial Authority in Islamic Jurisprudence

The duty of administration of justice is structured into a duty imposed on the society as a whole by Islam and this is called fard kifayah.. All Muslims in that community have explanation to make to Allah why their community has failed in the duty it owes to Allah.¹⁰ Imam Ahmad Ibn Hambali reported Prophet Muhammed (SAW) to have said: *‘It is not*

⁷ Reported by Abu Daud and Ibn Majah in Adamu Abubakar, ‘Islamic Law: The Practice and procedure in Nigerian Courts,’ (Kaduna: Espee Printing & Advertising, 2008), 19.

⁸ In the fifth, sixth and seventh sayings of the Prophet in Chapters of Judgment and Public Administration of the Book of Hadith by Aliiy Ibn Umar Ad-Darqutiny, in Ambali M.A., *The Practice of Muslim Family Law in Nigeria*. (Zaria: Tamaza Publishing Company, 2003), 84

⁹ Ali b. Abdul Salami At Tasuli, ‘Al-Bahjah, Commentary on Tuhfah,’ (2nd edn) (Cairo: Mustafa Al-Babi Al-Halabi and Son Press, Vol. 1, 1370H/1951), 13.

¹⁰ Ambali M.A., *The Practice of Muslim Family Law in Nigeria*. (Zaria: Tamaza Publishing Company, 2003), 84

legitimate for any three persons living in a parcel of land (where there is no government) not to appoint one of them to be their ruler.’¹¹

The exercise of the function of a kadi is regarded as a religious duty. He is obliged to follow certain basic principles of procedure. The most important is to consider all people equally and to act impartially and show the equality in your deportment to the parties, sitting arrangement and the way you dispense justice so that the weak will not despair and be frustrated about your ability to do justice and the noble will not take you for granted. The kadi should listen carefully to the evidence given by the witnesses, strive to understand reasons put before him, hand down the the judgment and enforce it on the basis of truth whenever it is clear because there is no point labouring for the truth without enforcing it. To give enough time for anyone who claims that he has evidence to produce to do so. If he produces the evidence, let him have his right otherwise, give judgment against him as due in a manner that is just to encourage compromise between parties as long as same does not violate principles of Islam. Kadis are not bound by previous judgments and no rule of binding precedent hold sway in Islamic law. Do not allow a decision you took in the past and you reflected on it and found better decision later enslave you not to go back to the truth.

A characteristic feature of Quranic legislation in this respect is the judicial autonomy accorded to different communities comprised of subjects. Far from imposing the Islamic law on everyone, Islam welcomes and encourages every group, Christian, Jewish, Pagan or other to have its own legal systems presided over by its own judges in order to have its own laws applied in all branches of human affairs, civil as well as criminal. If parties to dispute belong to different communities, a given types of private international law decides the conflict of laws. Instead of seeking the absorption and assimilation of everybody in the ruling community, Islam protects the interests of all its subjects.¹²

It is not the responsibility of any community to impose a legal system on its citizen. Allah’s judgment will be in place in the life hereafter. It is imperative that judgment should be deferred to Allah alone and we should not be judgmental in regard to our fellow human beings. This is apparent because when Allah alone was called upon, you disbelieved, and

¹¹ Abubakar Jabir A—Jazairy (1396H/1976). *Minhajul Muslim*, (8th edn) (Labonon: Darul Fikr) 462.

¹² Muhammadu Hamidullah, *Judicial System of Islam: Special Contribution of Muslims*. This is slightly edited from Introduction to Islam by Muhammadu Hamidullah, (Undated),5.

when associates were given to Him, you believed, so judgment belongs to Allah.¹³ This is imperative in the context of our doctrine and stance that we already know in this world as to who (as a group) are not going to heaven. It is correct that we believe in Islam and its legal jurisprudence because we embrace it as the truth, nevertheless, judgment is for Allah alone and there are verses in the Glorious Qur'an that are indicative that Allah's judgment might not be exclusive.¹⁴ A good example is where Allah says: 'Verily, those who believe and those who are Jews and Christians, and the Sabians, whoever believes in Allah and the Last Day, and does righteous good deeds shall have their reward with their Lord, on them shall be no fear, nor shall they grieve.'¹⁵

This exposition is reasonable to advert our mind to the fact that the only divine judgment rests in the Almighty Allah and whoever is appointed as a judge on earth is a representative of Him. To exemplify this, the Almighty Allah says:

O Dawud, (David)! Verily, we have placed you as a successor on the earth; so judge you between men in truth and justice) and follow not you desire- for it will mislead you from the path of Allah. Verily, those who wander astray from the path of Allah (shall) have a severe torment, because they forgot the Day of Reckoning.¹⁶

As for the administration of justice among Muslims, apart from its simplicity and expediency, the institution of the 'purification of witnesses' is worth mention. In fact, in every locality, tribunals organised archives regarding the conducts and habits of its citizens in order to know when necessary if a witness is trustworthy. It is not left only to the opposite party to weaken the value of evidence adduced by the witness before the tribunals or courts. It has been stated in Qur'an that if someone accuses the chastity of a woman and does not prove it according to the judicial exegesis, not only that he should be punished for defamation (*Qazf*), but is equally ordered for ever after to be unworthy of giving testimony before any courts.¹⁷

Prophet Muhammed assumed the post of a judge, at the same time, he was in charge of executive. He adjudicated among people with justice which was based on the revelation of

¹³ Hakim Abbas, 'Islamic Law and Judiciary.' (India: Random Publications, 2012), 129.

¹⁴ Ibid.

¹⁵ Suratul Baqarah (2:62).

¹⁶ Suratul Sad (38:26).

¹⁷ Ibid.

Allah to him or upon his own discoveries which were later on authenticated by divine confirmation from Allah. Allah says: 'He never says ought of his own desire, it is not less than inspiration sent down to him.'¹⁸ Prophet appointed some of his companions to the post of judges in distant cities to Madinah. Mua'dh b. Jabal was appointed to serve as a judge in Yemen. When Abubakar succeeded the Prophet after the death of the latter, he assumed the duty of a judge and appointed judges to some places. It was also reported that he appointed Umar as a judge in Madinah. During the period of Caliph Umar Bn Khattab, territory of Islamic state has become large and he appointed judges to every region and even delegated the power of appointment of local judges to his Delegates (*Walis*). The letter of Caliph Umar to Abu Musa Al-Ash'ari remains the basic code of procedures in Islamic judicature up till today. Caliph Uthman b. Affan succeeded Umar and followed his footsteps. However, he added to the systems by building a separate house for dispensation of justice among litigants which was known as Dar-al-Qada, that is, court of law. Caliph Ali b. Abu Talib succeeded Uthman and continued the process. In his letter to his Wali at Egypt, Al-Ashtar Al-Nakha'i, an example of his division of Islamic judicial authority and administration in Islam generally was disclosed.¹⁹

Courts were divided into two during Umayyad reign, namely: courts of limited jurisdiction which were restricted to duties specified in the ordinance of its establishment and court of unlimited jurisdiction which had an extensive jurisdiction and exercised complete judicial power on all things authorised by the law. It was during this period that the post of Chief Judge (Grand Kadi) was created and Abu Yusuf was the first Grand Kadi in the history of Islamic legal system. This practice continued until Islamic caliphate was overthrown by secularities in Turkey in 1922.²⁰

The most important responsibilities of Islamic judges (Qadis) are as follows:

- a. Resolution of disputes between parties either through a compromise between the litigants or through a coercive judgment;
- b. Enforcement of claims made by plaintiffs once they have been proven;
- c. Protection of the property rights of mentally ill people for instance by appointing a Guardian charged with looking after their interests;

¹⁸ Q. 53: 3-4.

¹⁹ Abdul-Qadir Zubair, (note 2), 28-29.

²⁰ Ibid, 29.

- d. Administration of pious foundations (*wakfs*) if no administrator had been appointed;
- e. Execution of testamentary provisions of the testator as long as they are lawful;
- f. the application of *hadd* punishments and the exercise of police powers within the area under his jurisdiction.²¹

3. Qualifications of Judges/Kadis

Previously, when there were little known criteria to grade the knowledge of prospective judges (kadis) in Nigeria, the appointment was based on the performance of the prospective judge at interview. However, since the establishment of Kano Law school in 1934, its certificate serves as requisite qualification for the appointment of judge in Islamic law in Area Courts. There are number of Universities in Nigeria including Ahmadu Bello University, Zaria and Bayero University, Kano that have introduced Certificate and Diploma Courses in Shari'ah or Shari'ah and Common Law.²² There are other Diploma awarding institutions in law like Kwara State College of Arabic and Islamic Legal Studies, Ilorin, whose certificate qualifies its holders to serve as Area Courts Judges. Presently, the most welcome qualification for the post of judge whether as Area Court or Shari'ah Court of Appeal is LL.B in Shari'ah or in Shari'ah and Common law.

The requirement for the appointment of judge of Shari'ah Court of Appeal is stipulated in the Nigerian Constitution as follows:

- a. He must have attended and obtained a recognised qualification in Islamic Law from an institution approved by the State Judicial Service Commission and has held the qualification for a period not less than 10 years; and
- b. He must have either considerable experience in the practice of Islamic law or he is a distinguished scholar in Islamic law.²³

In addition to these, Fluency in Arabic language is a must for any judge in Islamic jurisprudence no matter where he operates in Nigeria and at the same time, he must also be fluent in English language in order to write and read judgments decided on the principles of Islamic legal system which are binding in his court; to actively participate in professional conferences and seminars designed to enhance the

²¹ See Adamu Abubakar, *Islamic Law The Practice and Procedure in Nigerian Courts*, (Kaduna: Espee printing & Advertising, 2008), 21.

²² Ambali M.A (note 9), 79.

²³ Sections 261 and 276 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

administration of justice in the country; and to understand the provisions of the Nigerian Constitution, Laws of the Northern Nigeria as they applied to the state where he operates and other laws, edicts and decrees which are relevant in discharging his responsibility as a judge.²⁴

The fact that the judiciary had to be appropriately staffed so as to maintain people's confidence in the system, Abdullahi devoted a large section of his Diya al-Hukkam on the important issue of the type of persons who should be appointed as judges and their qualifications and qualities.²⁵ He was of the view that unjust people even if they are learned should be warned against seeking this noble office. So also are ignorant persons to desist from getting involved in the work of the judiciary. It is only the man who knows what is right and bases his judgment on it and who, in his loyalty to Allah, has no fear of criticism, and does not look for gifts or anything of self-interest, that should hold the office of a judge. In that case, his action would be one of the greatest virtues in the eyes of Allah.²⁶ A woman may not take up the office as she is not suited to administrative office even though judgment may be made on the basis of her statements.²⁷ Abu Hanifah however says: 'Woman may make judgments concerning matters about which she is able to give testimony, but that she may not whenever her testimony is unacceptable.' Ibn Jarir at-Tabari differs from the consensus because he permits her to make judgments in all cases. However a view which rejects both consensus and Allah's words cannot be considered: Men are guardians over women by virtue of his having given more than the latter.'²⁸

Abdullahi added that judges with all these qualities are few and he identified some conditions which must be fulfilled before the judge's pronouncement and appointment become valid. The universal principles guiding the appointment of judges are summed up as follows: It is stipulated that for a person to be appointed as a judge:

He must be a Muslim because it is a condition of legal testimony and for the words of Allah: 'And never will Allah grant to the non-believers (*kafirun*) a way (to triumph) over the

²⁴ Ambali M.A (note 9), 80.

²⁵ Ibrahim S. Sada, The Judiciary under the Sokoto Caliphate with Particular Reference to the Views of Abdullahi b, Fodio, (Ahmadu Bello University Law Journal, Vol. 26-25, 2006-2006),17-29, 20. In Abdullahi Fodio, Diya al-Hukkam, (Yamusa's Translation in the Political Ideas of the Jihad leaders, Unpublished M. A. Islamic Studies Thesis, ABC/ABU Kano, 1975)

²⁶ Abdullahi Foio, Diya al-Hukkam, Ibid, 50.

²⁷ Abul-Hassan Al-Mawardi, *Al-Ahkam As- Sultaniyyah The Laws of Islamic Governance* (London: Ta-Ha Publishers Ltd, d. 450 AH), 98.

²⁸ Suratul Nisai (4: 38).

believers (*Muminun*).²⁹ It is not allowed to appoint an unbeliever in judgment over Muslims or non-Muslim. Abu Hanifah opined that he may be allowed to adjudicate between people of his own faith. However, even though such appointments are made by the authorities, they are to establish him as a leader and head among his people rather than to offices of judiciary and arbitration. His judgment over them is binding by virtue of their obligation towards him and not by any obligatory feature of his judgment. The Imam is not bound by his judgment between them. If they refuse to accept him as their judge, they are not to be punished and the judgment of Islam is then carried out in preference.³⁰

He must be a free male not slave because slave lacks ability to rule his own affairs. So he is precluded from being given authority over others. The same applies to those who have not attained complete freedom, like slaves to be freed upon the death of their masters (*mudabbars*), slaves with written contract to purchase their freedom (*mukatabs*) and those in partial slavery. Slavery however does not prevent him from giving fatwas just as it does not disallow him from narrating Hadiths.³¹

He should be responsible for all his actions. There is consensus of opinion that it is not enough that his intelligence be merely such that his basic powers of perception render him responsible for his action but that he is also competent in his faculty of discrimination, of astute thoughtful, removed from any lapses of intellect and from moments of inattentiveness and that he is able to arrive at a clarification of any problem by his wisdom and capable of reaching decisions in cases of complexity.³²

He must have knowledge of the laws of Shari'ah and his knowledge must extend to the comprehension of its principles and to the execution of legal decision based on these principles.³³ The principles from which the laws of the Shari'ah are based are four. First, he should have knowledge of the Qur'an in such a way as to attain a proper knowledge of the various kind of laws contained in the Book, be they of the abrogating or abrogated type, clear, general or particular, undetermined or precise. Secondly, he must have knowledge of Sunnah of the Prophet (SAW), his sayings, deeds and methods of their transmission;

²⁹ Suratul Nisai (4:40).

³⁰ Abul-Hassan Al-Mawardi, (note 26), 99.

³¹ Ibid.

³² Ibid, 98.

³³ Ibid, 100.

knowledge of whether such transmissions are sound or false and whether they may be applied only to specific circumstances or in all cases. Thirdly, he must have the knowledge of interpretations arrived at by the first generation, regarding what they have agreed upon and what they differed about in order that he can follow the consensus and strive to apply his own intellectual judgment in cases of differences. Fourthly, he must have knowledge of analogy to enable him refer matter about which the law is silent to clearly formulate principles accepted, such that he knows how to deal with new situations and able to differentiate the truth from falsehood.³⁴

He must be of sound hearing, seeing and speaking and working alone³⁵ so as to be able to attend to people's rights and claims properly. He should however be capable of discriminating between litigants and differentiating between the one who affirms and the one who denies, distinguish between truth and falsehood in the affair and recognise the truthful person from liar.³⁶ His authority is annulled if he is blind. Although, Malik permits the appointment of such a person, just as he allows his testimony. If he is deaf, the same distinctions are made as in the case of Imamate. As for the soundness of limb, it is not taken into consideration even though it is in the case of Imamate. He may make judgments while sitting and when he can no longer move. Although, absence of all physical defect is preferred in those in authorities.

He must be of just character, a quality requisite in all kinds of authorities. Justice consists being truthful in speech, manifest in his fulfillment of a trust, free of all forbidden acts, careful to guard himself against wrong actions, free of all doubt, chivalrous and vigorous both in his religious and worldly affairs, equitable both when content and when angry. If he lacks any of these qualities, his testimony is not accepted, his words are not accepted and his decisions are not executable.³⁷

Abdullahi adds sexual maturity, social justice and having said that two judges cannot sit together over the same matter, he proceeded to disagree with the view that an ignorant man can be a judge and lamented over the then situation in the Bilad as-Sudan where knowledge has indeed gone and ignorance is in abundance and ignorant persons being put at the helm of

³⁴ Ibid.

³⁵ Abdullahi Foio, *Diya al-Hukkam*, (note 24), 54.

³⁶ Abul-Hassan Al-Mawardi, (note 26), 99-100.

³⁷ Ibid

affairs. Among the conditions which facilitate perfection of judgeship are piety, intelligence and patience. He said, the judge must be pious, venerable, forbearing and capable of making independent research and interpretation of the Qur'an and the Sunnah or at least, possess the capacity to reinterpret what a Mujtahid, i.e, an exponent of Islamic law has interpreted on the basis of the Qur'an and Sunnah.³⁸ He must be in the habit of seeking the advance of scholars and be free from bad company. He must be an indigene (of the area under his jurisdiction) and must not be cunning. He must not be a person who has ever been subjected to prescribed punishment, nor of a doubtful lineage. He must neither be poor nor weak, nor unlettered nor old. He must always be strict but not wicked and humble but not weak. He must be well versed in Islamic law and Hadith.³⁹

Although, for practical purposes, where a person was qualified but was poor, he could be appointed provided that the government made him rich and paid all his debts because extreme poverty could make him humble himself before the rich and wealthy in the society⁴⁰. It is conceded that it is extremely difficult to find all the qualifying conditions in one single person, therefore, where two of the qualities, namely, knowledge and piety were found in the person, he could be appointed⁴¹.

As far as Islamic jurisprudence is concerned, the judge must strive to correct himself first by impressing upon his mind the ethics of the Shari'ah, by preserving mainly qualities and high aspirations and avoiding what may be religiously disgraceful. He must not accept gifts from anyone except from his close relative. Witnesses are also not permitted to accept gifts from any of the disputants so long as the dispute remains between them. Gifts may be donated provided that it is without personal motive; otherwise it is a bribe⁴². Where a complaint was lodged against the judge, an enquiry should be conducted and if it was found to be baseless, the Imam should retain the judge, otherwise he should be dismissed.⁴³

³⁸ Abubakar b. Hassan Al-Katsinawiy (ND) *As-halul Madarik*, Darul Firk, Labanon, Vol. iii, 196

³⁹ *Ibid*, 57.

⁴⁰ Ibrahim S. Sada, (note 24), 21

⁴¹ Aliy b. Abdulsalam Al-Tasuli (1370/H,1951), *Al-Bahjah*, Commentary on *Tahfah*, Mustafa Al-Babi Al-Halabi and sons Press, Cairo, Vol. 1, 20

⁴² Abdullahi Fodio, *Diya al-Hukkam*, (note 24), 58-59.

⁴³ *Ibid*, 66.

4. Separation of Power in the Islamic Legal System

The doctrine of separation of powers is the division of governmental authority into three branches of government, that is, legislative, executive and judicial arms of government with each having specific duties on which neither of the other branches can encroach.⁴⁴ It is a fundamental doctrine from which the principle of judicial independence is rooted. When the legislative and executive powers are united in the same person, or in the same body of magistrate, there can be no liberty ...there is no liberty if the power of judging is not separated from the legislative and executive...there would be an end to everything, if the same man or the same body... were to exercise those three powers.⁴⁵ Separation of powers is one of the cardinal tenets of Islamic Constitution because it distincts the legislative powers from executive and judicial authorities. The separation of powers follows a divine order which cannot be changed by any means. Many jurists of Islamic and modern law opine that the Islamic legal system recognises the principle of separation of powers and the predominant opinion of Islamic jurists also holds that the emerging Islamic legal system knew the principle of separation of powers in the country's legislative, executive and judicial branches, but all these powers were governed by the Prophet Muhammad and his four orthodox caliphs.⁴⁶

In the early days of Islam, the principle of separation of powers was applied when Prophet Muhammad first invested judicial powers in a provincial government then later appointed a judge who was independent of any political or administrative consideration.⁴⁷ After the conversion of Arabia, when a large number of people embraced Islam, Prophet Muhammad appointed various functionaries for the different parts of the peninsula.⁴⁸ Whenever a governor or a military commander was appointed, the caliphs followed the example of the

⁴⁴ Garner, A. B, *Black's Law Dictionary*, (America: Thomson West, 1990), 1396.

⁴⁵ Montesquieu, Charles de Secondat, Baron de . *The Spirit of Laws* (c. 1748) Translated and edited by Anne Cohler, Basia Miller, Harold Sotne (New York: Cambridge University, press, 1989).

⁴⁶ ÚÉfir al-QésimÊ, *NiĐÉm al-×ukum fÊ al-SharÊÑah wa al-TÉrÊkh al-IslÉmÊ: Al-Sullāh al-QalÉ`iyah*. (Beirut: DÉR al-NafÉ`is, 1974), 403.

⁴⁷ ManÎÉR Mułammad al-×afnÉwÊ, *Sullāat al-Dawlah fÊ al-ManĐÉR al-SharÑÊ*. (1st ed.). (Cairo: MałbaÑat al-AmÉnah, 1989), 349.

⁴⁸ Nayel Musa Shaker Al-Omran, Thabet Ahmad Abdallah Abualhaj, Dato and Mohd Yakub, 'Historical and Political Background of Judicial Review in the Islamic Legal System (American Research Journal of History And Culture, Vol. 1, Issue, 1, 2015),1-13, 4. <respository.un.edu.my/982921/1/1.pdf>, accessed on 12 November 2015.

Prophet and usually appointed a judge as well, over whom these officials had no jurisdiction.⁴⁹

There are many examples of this practice in the Sunnah of Prophet Muhammad and the caliphs. It is reported that the Prophet of Islam asked Mu'adh ibn Jabal questions upon the latter's appointment as judge and governor to the Yemen, the Prophet asked him: 'How will you decide the cases that will be brought before you?' Mu'adh replied: I shall decide them according to the Book of God. 'And if you find nothing concerning a particular matter in the Book of God?' 'Then I shall decide according to the Sunnah of God's Apostle, 'And if you find nothing about it in the Sunnah of Gods Apostle?' Then, replied Mu'adh, 'I shall exercise my own judgment (ajtahidu bi-ra'yi) without the least hesitation.' Thereupon the Prophet slapped him upon the chest and said: 'Praised to be God, who has caused the messenger of God's Messenger to please the later!'

Through this example, it is obvious that two basic rules are confirmed: First: Written law, when 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, but rather gives his judgment 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: The judiciary in Islam is an independent authority that is not subordinate to any particular person. The judge rather follows the texts before him, firstly the Qur'an and then the Sunnah and only after these does he use the inspiration of his conscience, understanding and discernment in order to arrive at justice. There is a relationship between the judicial and executive authorities with respect to appointment and dismissal, but without any subsequent interference with the judiciary's primary function which is to hear and decide cases and disputes.⁵⁰

There are many events which happened in Islamic history in which the principle of separation of powers was applied. After being chosen as the first caliph, Abu Bakr vested Umar with

⁴⁹ Anwar Ahmad Qadri, *Justice in Historical Islam*, (Lahore: SH Muhammad Ashraf, 1968), 8. See also ÚÉfir al-QésimÊ, *NiĐém al-×ukum fÊ al-SharÊÑah wa al-TÉRÊkh al-IslÊmÊ*, (1974), 404. ×asan al-ÑAlkÊm, *Al-NiĐém al-SiyÊsÊ al-IslamÊ: ×ÊwÊr MaÑa al-ÑAlmÊniyyah*. (Mu'assasat al-ÑAyn li al-TawzÊÑ wa al-Nashr, 1991), 178.

⁵⁰ Nayel Musa Shaker Al-Omran, Thabet Ahmad Abdallah Abualhaj, Dato and Mohd Yakub (note 47), 4.

judicial powers. During Umar ibn al- Khattab's caliphate, he was the first to directly charge other persons to exercise the functions of a judge. He appointed Abu Darda' as a judge with him in Madinah, Shurayh as a judge in Basra and Abu Musa al-Ash'ar as a judge in Kufah.⁵¹

There is the story of Mu'awiyah, the governor of Sham and Ubadah ibn al-Samit, the judge of Palestine and Jordan, as narrated by al-Awza'i. 'The first to take the position of judge in Palestine was Ubadah ibn al-Samit, and Mu'awiyah refused to execute a ruling by Ubadah who stood by his decision. So Mu'awiyah spoke aggressively to him, and Ubadah said, he would never again live with Mu'awiyah in the same area, and he left for Madinah. When Umar asked what brought him here, Ubadah told the caliph what had happened. 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 and told him, 'You have no authority over Ubadah.'⁵²

This story highlights that Umar ibn al-Khattab emphasised the separation between the judicial authority and the executive authority and made a direct relationship between the caliph and the judge. Thus, since the seventh century C.E., the principle of separation of powers and especially the independence of the judiciary and its separation from the other authorities has been established in an Islamic country, while contemporary nations only recognised this in the late eighteenth century. The story of the conquest of Samarqand is a unique one in human history and illustrates the clear understanding of the early Muslims of the principle of separation of powers and its implementation.⁵³ The people of Samarqand said to Sulayman ibn Abi al-Sirri, the governor appointed by Umar ibn Abd al-Aziz, that Qutuba ibn Muslim, the military leader, had deceived and oppressed them and took their country, and since Allah has shown justice and equity, allow us to send a delegation to the Commander of the Faithful (Amir al-Mu'minan) 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. The judge Jumai' ibn Hadir was appointed and he ordered that the Arabs of Samarqand leave and return to their camp. 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 was the caliph of Muslims. In addition he did not entrust the governor of

⁵¹Sunan Abe Dewed, ' Beirut: Der al-kutub al-Nilmiyyah,' (Hadith No. 3592, 2001). See also Mohammed Hasim Kamali, *Principles of Islamic Jurisprudence*, (Kuala Lumpur: Llmiah Publishers, 1998), 217-218

⁵²Ibid..

⁵³ Nayel Musa Shaker Al-Omran, Thabet Ahmad Abdallah Abualhaj, Dato and Mohd Yakub (note 47), 5.

Samarqand with the settlement of the case, fearing that he might be biased. Further, because he was the governor appointed by the caliph, Umar refused to let him decide the case and neither did he authorise the military leader who committed the offence against the rules of the Shari'ah. Rather, he ordered that a judge who was not affected by military or political interests be appointed and he did not give any consideration except for the rule of Allah to enforce the rules of Shari'ah as they are stated.

The above cases illustrated that there was separation of powers during different periods of Islamic history, especially during Umayyad and Abbasid periods where this principle was practically implemented.

5. Judicial Independence in the Islamic Legal System

The historical circumstances of the emergence of Islamic law in the 7th century continue to determine the essential features of Islamic law today. The fact that Islamic law is a divine, i.e. religious law has a profound impact on the development of the sources of Islamic law. The divine character of Islamic law is not only reflected in the hierarchy and essential characteristics of these sources but also explains the conceptual limitations on individual law-making. However, the Islamic polity has developed legal methods to deal with situations not directly provided for in the Qur'an and the Sunnah of the Prophet. Indeed, many Arab countries have implemented modern codifications of Islamic law which, whilst being in harmony with Islamic law, nevertheless provide legal solutions for situations not contemplated in the main source of Islamic law.⁵⁴

The position of courts and of legal procedure in Islamic law is closely related to the historical development of Islam. Similar with the legal systems of ancient Rome and Greek and also Europe in the Middle Ages, Islamic law did not provide for a proper separation between judicial and executive powers. At the beginning of Islam, it was the Caliph himself who administered justice. It was only under the rule of the Caliph Umar that judges were appointed. However, these judges are referred to as kadis in Islamic law and they are regarded as the delegates of the Caliph or of the governor of a province. A kadi court is

⁵⁴ *Martin Lau*, 'The Independence of Judges Under Islamic Law, International Law and the New Afghan Constitution,' (Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht, 2004), 917-927, 917, <http://www.zaoerv.de/64_2004_4-a_917_928>, accessed on 12 November, 2015.

usually a single-judge court with general jurisdiction – there were no specialist courts dealing for instance with only criminal or only civil cases.⁵⁵

Whilst the Qur'an itself does not contain any express provision on the independence of the judiciary, there are nevertheless a number of contemporary juristic views of Islamic law which stress the importance of the independence of the judiciary. The Chief Justice of Supreme Court of Canada in the case of *Queen v. Beauguard* stated that 'the role of the courts as resolver of disputes, interpreter of the law and defender of the constitution requires that they be completely separate in the authority and function from all other participants in the justice system.'⁵⁶ The keystone of the rule of law is judicial independence. The judiciary must be detached from politics and free from parliamentary, administrative and executive interference.⁵⁷ The Supreme Court of Pakistan observed in the case of *Al-Jehad Trust v Federation of Pakistan*⁵⁸ that 'Upon the advent of Islam, judicial functions were separated from the executive functions at its very initial stage. The reason being that, the foundation of Islam is justice. The concept of justice in Islam is different from the concept of the remedial justice of the Greeks, the natural justice of the Romans or the formal justice of the Anglo-Saxons. Justice in Islam seeks to attain a higher standard of what we may call 'absolute justice' or 'absolute fairness.

Judicial independence must be a principle of an Islamic constitution. No person in an Islamic State, not even the elected Head, can be above the law and as such, he is subject to the *Hudud* 'punishments for major crimes' just like 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.⁵⁹ Judicial independence is considered a healthy development to meet contemporary demands and needs. It made the role of the judicial authority more prominent and effective in the Islamic state, and although judicial authority changed hands, the Caliph was still largely responsible for maintaining the judiciary institution. Justice is an attribute of Allah and He enjoins doing justice among the litigants.

⁵⁵ Ibid, 920.

⁵⁶ (1986) 2 S. C. R. 56 at para. 30 [Beauguard] <<https://harrystephenarunda.wordpress.com>> accessed on 12th November, 2015.

⁵⁷ Harry Stephen Arunda, The Extent of Judicial Independence and Separation of Powers under Kenya's legal System, <<https://harrystephenarunda.wordpress.com>> accessed on 12th November, 2015.

⁵⁸ (1996) PLD, SC 324, at 424.

⁵⁹ Q. 4:135. Also see Farooq Hassan, *The Concept of State and Law in Islam*, (America: University Press of America), 65. See also Almad xasan, 'The Political Role of IjmÉÑ,' (*Islamic Studies, Journal of the Islamic Research Institute*, (Pakistan, Vol. VIII, No.1, 1969), 188.

He says: ‘O ye who believe, be maintainers of justice, bear of witness for Allah, even though, it against your selves.’⁶⁰

Emile stated that a Muslim judge does not have an independent or even autonomous position, especially during the early stages of the establishment of the Islamic state. He adds that the then head of state (the Caliph) derived his judicial power from no one but subordinates by virtue of his position. It has further been asserted that the concept of delegation in Islam was the complete lack of separation of the judicial authority from the executive authority.⁶¹ 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 his life, Prophet Muhammad was the leader and chief judicial authority in the Islamic State. However, he also appointed several close companions to assist him in the administration of the law.⁶² During the reign of the Rashidun caliphs, the judicial authority took a form similar to that in the period of the Prophet of Islam. There was no demarcation of judicial authority with that of other powers. The Rashidun caliphs upheld and respected the independence of the judiciary, especially Umar and Ali who had occasion to appear and plead their cases before the *kadi* like any other parties to litigation and both of whom exhibited sensitivity and concern not to be given preferential treatment in court. The fact that a *kadi* would accept a suit against the person of the head of state and try him in an open court is a feature of the Islamic judiciary and an indication of its independent status.⁶³ In fact, there was a dispute between Umar and Ubay b. Ka.ab. They appointed Zaid b. Thabit to resolve it for them. They went to Zaid b. Thabit’s house where the adjudication took place. Thabit welcome them and pointed to a conspicuous place where Umar would sit. Umar told him, this is the first injustice you have committed. I will sit in the same place where my co-litigant sat. They both therefore sat in front of Zaid, the judge.⁶⁴

⁶⁰ Suraul Nisai (Q. 4:135).

⁶¹ Emile Tyan, ‘Judicial Organization’ Majid Khadduri, (ed.), (*Law in Middle East*, 1955), 236

⁶² Masudul Hasan, *Reconstruction of Political Thought in Islam*, (Pakistan: Islamic Publications (PVT) Limited, 1988), 207

⁶³ Mohammad Hashim Kamali, ‘Appellate Review and Judicial Independence in Islamic Law,’ Chiblis Mallat and Graham Trotman, *Islamic and Public Law*, 1993), 53-54.

⁶⁴ See Ambali M.A (note 9), 96

However, there was a significant change in the period of the Umayyad and the Abbasi caliphates. 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.⁶⁵ In the Abbasi period, there was a specially appointed person who was called *qadi al-qudah*. Harun al-Rashid was the first caliph to create the office of *qadi al-qudah*, and Abu Yusuf was the first chief judge (*qadi al-qudah*) appointed by him. In addition, Harun al-Rashid did not appoint any judge without consulting Abu Yusuf (the delegated head of judiciary), and the *kadi* exercised judicial authority in the capacity of a *Hakim* (ruler), not a *muwaddaff* (task of *al-quḥah* officer).⁶⁶

During the Umayyad period, Muslim law was characterised by two main features: First, the judge ruled according to *ijtihad* because the four schools of Muslim law by which judges had to abide, were not established until the early Abbasi period. He drew his own judgment from the Qur'an and Sunnah or the *ijma*⁶⁷ or his own discretion (*qiyas*).⁶⁸ Second, the judge was not influenced by politics; he was independent in his judgment, far from being influenced by 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.⁶⁹

In the early Umayyad period, the *kadis* (judges) played the role of legal secretaries to the governor. The political authority which defined the scope and nature of the *kadi's* jurisdiction, decisions given and actions taken by the *kadi* were subject to the approval or otherwise of the governor.⁷⁰ Islamic history has many eminent judges who were distinguished by their faith, strong belief, manners, morals, dignity, and knowledge, deep wariness of rules, courage and independence. Many of them stood fast against the interference of the executive, firmly and determinedly rejecting all kinds of direct and indirect influence or orientation. Marvelous was

⁶⁵ Mohammad Hashim Kamali, (note 62).

⁶⁶Ibid, 36-37

⁶⁷ Consensus opinion of companion on Islamic legal issue at particular time in a given society.

⁶⁸ Mahmud A. Faksh, 'A Review of Islamic Culture,' (*The Islamic Quarterly*, England: The Islamic Culture Centre, Vol. xxviii No. 1, 1984), 110.

⁶⁹ Hassan Ibrahim Hassan, 'Judiciary System from the Rise of Islam,' (C.E.1171), 567. Ali Abd Al-Kader, *The Islamic Quarterly, A Review of Islamic Culture*, Vol. vi, Nos 1, 2, (England: the Islamic Culture Centre, 1961), 26-27.

⁷⁰ Coulson, N.J. 'Doctrine and Practice in Islamic Law,' *Bulletin of the School of Oriental and African Studies*, 214.

their courage, dignity and readiness to resign as soon as they were exposed to pressure from rulers, relatives, friends, or assistants.⁷¹

During the Abbasid period, several important characteristics were established in the judicial system.⁷² First was the appointment of judges representing the four orthodox schools in each province. Each 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. Secondly, the system of permanent, trustworthy witnesses after verifying their good character from the outward, without regard to their hidden character was introduced. Finally, a remarkable improvement was the registers in which matters related to legacies and debts were recorded.⁷³

6. Judicial Independence under International Law

The existence of independence and impartial tribunals is at the heart of a judicial system that guarantees human rights in full conformity with international human rights law. The constitution, laws and policies of a country must ensure that the justice system is truly independent from other branches of the state. Within the justice system, judges, lawyers and prosecutors must be free to carry out their professional duties without political interference and must be protected, in law and in practice, from attack, harassment or persecution as they carry out their professional activities in the defence of human rights. They should in turn be actively protectors of human rights, accountable to the people and must maintain the highest level of integrity under national and international law and ethical standards.⁷⁴

The establishment of institutional mechanisms to monitor judicial independence in compliance with international law took place in 1985 when the United Nations General Assembly adopted the Basic Principles on the Independence of the Judiciary. These basic principles concretize what is meant by judicial independence *inter alia* providing that judges must have tenure and be free from direct or indirect pressure in the performance of their

⁷¹ Nayel Musa Shaker Al-Omran, Thabet Ahmad Abdallah Abualhaj, Dato and Mohd Yakub, (note 47), 8.

⁷² Ibid. See also Ahmad Ibrahim, 'The Shari'ah Court and its Place in the Judicial System,' International Islamic Conference on the Role of Judiciary in the Development of Islamic Law, Malaysia (November 21 St-23rd 1986), 70.

⁷³ Hassan Ibrahim Hassan, (note 68), 24.

⁷⁴International Commission of Jurists (note 1), 20.

duties.⁷⁵ The Basic Principles also include a requirement that the independence of the judiciary be guaranteed by the state and enshrined in the Constitution or some other legislative instrument. However, it took close to another decade before the first Special Rapporteur on the Independence of Judges and Lawyers was appointed in 1994. Since then, the Special Rapporteur has produced a number of reports concerning not just with judicial independence but also with complaints about corruption and attacks on the judiciary and lawyers.

The principle of judicial independence is firmly enshrined in international law. The starting point for the gradual endorsement of this principle is the Universal Declaration of Human Rights which provides as follows: ‘Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal’⁷⁶. It was followed by the International Covenant on Civil and Political Rights which states: ‘Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.’⁷⁷

The International Covenant on Civil and Political Rights (ICCPR), signed and ratified by 160 states stipulates that: ‘All persons shall be equal before the courts and tribunal’ and that ‘in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.’⁷⁸ Article 6 (1) of the European Convention on Human Rights specifies that ‘in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within reasonable time by an independent and impartial tribunal established by law. Also article 7 (1) of the African Charter on Human and peoples’ Rights provides that ‘Every individual shall have the right to have his cause heard,’ a right that comprises, ‘the right to be presumed innocent until proved guilty by competent court or tribunal’ and ‘the right to be tried within a reasonable time by an impartial court or tribunal.’ This Article must be read in conjunction with article 26 of the Charter which establishes that member of states ‘shall have the duty to guarantee the independence of courts.’ The Human Rights Committee, the body in charge of monitoring state compliance with the Covenant, has unequivocally stated that the right to be

⁷⁵ See Martin Lau, (note 63), 922.

⁷⁶ Article 10

⁷⁷ Article 14 (1).

⁷⁸ Article 14 (1), International Covenant on Civil and Political Rights,

tried by an independent and impartial tribunal is an absolute right that may suffer no exception.⁷⁹

Cairo Declaration on Human Rights adopted by the Organization of Islamic Conference in Cairo in 1990 provides that ‘All individuals are equal before the law, without distinction between the rulers and the ruled.’⁸⁰ Article 116 (1) of the Constitution of Islamic Republic of Afghanistan provides as follows: ‘The judicial branch is an independent organ of the Islamic Republic of Afghanistan.’ The Constitution further states that the Supreme Court is the highest judicial organ.⁸¹

Since the late 1990s, the Commonwealth has been active in the area of judicial independence. In 1998, a joint colloquium consisting of the Commonwealth Lawyers Association, the Commonwealth Magistrates and Judges Association, the Commonwealth Parliamentary Association and the Commonwealth Legal Education Association produced a document entitled, ‘The Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence.’ These Guidelines were later endorsed by a gathering of Commonwealth Chief Justices at Edinburgh on 9 September 2000. They have been adopted by the Chief Justices of a number of Commonwealth countries and have now been formalised as Commonwealth principles on accountability and the relationship between the three arms of government. The objective of the Principles is to provide, in accordance with the laws and customs of each Commonwealth country, an effective framework for the implementation by governments, parliaments and judiciaries of the Commonwealth’s fundamental values. John stated that Paragraph iv deals with Independence of the Judiciary and it states:

‘An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country.’⁸²

⁷⁹ Communication No. 263/1987, M.Gonzalez Rio v. Peru (Views adopted on 28 October, 1992), UN document CCPR/C/46/263/1987 (Jurisprudence), para 5.2.

⁸⁰ Article 19 (a).

⁸¹ Article 116 (3) of Constitution of Islamic Republic of Afghanistan, 2004.

⁸² Martin Lau, (note 63), 922-923. In John H a t c h a r d , **The New Commonwealth Principles**: from Latimer House to Abuja, in: Commonwealth Legal Education, (June 2004), 96, 5-6.

On a visit to Saudi Arabia in 2002, the Special Rapporteur stated that ‘The administration of justice in Saudi Arabia is guided by the *sharia*, of which the *Qur’an* and the *Sunnah* of the Holy Prophet are the constitution. The *sharia* contains many of the guarantees with respect to the independence of the judiciary, the right to a fair trial and due process contained in international human rights law. It is not disputed that the essence of the *sharia* is the pursuit of justice. What I have been most interested in under my mandate are the procedures presently applied to achieve this very objective, i.e. justice.’⁸³

7. Concluding Remarks.

The absence of interference from the government authority in the liberty of the opinion of the judges and jurists proved great favour for the rapid progress in the science of Islamic jurisprudence. Islamic constitutional theory is very explicit on the principle of limitation of power of the state under the rule of law.⁸⁴ Islamic state is bound to administer and uphold Shari’ah as contained in *Qur’an*, *Hadith* and other sources of the law. There is no place in Islamic law for arbitrary rule by a single individual or group. The Islamic legal system has limited the powers of the ruler and made the rights of individuals a strong barrier in the face of these powers. As such, Islamic legal system follows a substantive hierarchy of laws where the legislative or executive authorities or the head of the state may not issue or promulgate a constitution, law or decree that is in contravention of any text in the *Qur’an*, *Sunnah* and *Ijma*. It does not advocate for rigid approach to the principle of the rule of law, particularly, the principle of legality that suggests that a person may be punished only in pursuance of a statute which prescribes a penalty and the crime precisely described in the law code.

It must be stated here that a strong and independent judiciary may have destabilising effect on a legal system whose very foundations are unsettled and considered controversial.⁸⁵ The case of the role of Islam in the legal system was summarised by the Pakistani Supreme Court as having given rise to controversy and a debate which has no parallel and shaken the very constitutional foundations of the country made the express mandatory words of the constitutional instrument yield no nebulous, undefined and controversial juristic concepts of Islamic jurisprudence.

⁸³ See Martin Lau, *Ibid*, 922.

⁸⁴ Ibrahim S. Sada, (note 24), 28.

⁸⁵ Martin Lau, (note 63), 926.

There is similar controversy in Afghanistan where Article 1 provides that Afghanistan is an Islamic Republic and an independent, unitary and indivisible state. The Constitution consists of many features and hallmarks which reflect its genesis as a compromise between different political concerns concerning the status and the role of Islamic law on one hand and International law on the other. Article 3 provides that, 'no law can be contrary to the beliefs and the provisions of the sacred religion of Islam which enables the Supreme Court to review laws on the basis of Islam. This Islam provision has to be read with Article 7 which provides that the state shall abide by the UN Charter, International treaties and international conventions that Afghanistan has signed and the Universal Declaration of Human Rights. The tensions within legal systems caused by the co-existence of International Human Rights norms and Islamic law is considerable. Many countries which pledged adherence to Islamic law as the primary source of law have entered reservations to those international human rights treaties which may clash with particular provisions of Islamic law.

Therefore, the judiciaries of various countries that adopt Islamic legal system need to reconcile the different demands of Islam and international human rights law.