

ADMINISTRATION OF THE ISLAMIC JUDICIAL SYSTEM: AN OVERVIEW

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Abstract

Justice in Islam is all-embracing, free from restriction, and universal. Islam governs private and public life, denies deviation from justice, non-discriminative, and holds that all humans are equal before the law and are accountable for their deeds. It is universal because it is applicable to all who accepts its authority.

Abstrak

Islam memandang keadilan sebagai sistem yang utuh, bebas dari pembatasan, dan universal. Islam mengatur kehidupan pribadi dan umum, mengajarkan untuk tidak menyimpang dari keadilan, tidak diskriminatif, dan memandang manusia sama di hadapan hukum serta bertanggungjawab atas perbuatannya. Keadilan dalam Islam universal karena berlaku bagi semua manusia yang menundukkan diri padanya.

Keywords: *Islamic judicial system, justice.*

1. Introduction

Justice is a goal of every race and nation. In their strive for justice, many theories are formed with frequent modifications and reviews until they achieve their own idealistic interpretation of justice. Eventually, their ideas of justice become relative, susceptible of changes in theory and practices and in accordance with the needs of a given society.

The Qur'an and *Sunnah* have given clear concept of Islamic justice in order to safeguard the welfare of the *ummah*, the society far from differentiating between races, languages, beliefs, boundaries, politics and States. There are many Qur'anic verses which emphasise on the upholding of

justice. The word justice appears more than twenty times in the Qur'an.¹ One of them is, to the effect:

*Indeed, Allah orders justice and good conduct and giving to relatives and forbids immorality and bad conduct and oppression. He admonishes you that perhaps you will remind.*²

From the *ayah*, Allah commands that justice should be upheld and its virtue be adopted and promulgated. Islam demands that justice has to be given to all human races on all kind of issues.³

The judicature is the most important institution in a society and State. Its function is to uphold law and order and to ensure that the harmonious bond within the society

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¹ For more detail see Muhammad Ibrahim H. I. Surty, 2007, *Islam: The Qur'anic Overview*, Qur'anic Arabic Foundation, Birmingham, pp. 168-174.

² The Qur'an, 16: 90.

³ The Qur'an, 5:8.

is preserved. This is also to ensure that human rights are well protected. Tyranny and favouritism can be prevented. Where the law of Allah is held sovereign, peace and tranquillity of the human races are assured. Therefore, to strengthen the judicial institution, the methods practised and taught by the Prophet should be followed. Undoubtedly, the *Shariah* demands it and it is *fardlu*, an obligation that cannot be neglected.⁴

2. The Principles of the Administration of Justice

As a faith and a way of life, Islam includes among its most important objectives the realization of justice and the eradication of injustice. Justice is an Islamic ideal that should be upheld under all circumstances and preserved at all times. It is not to be affected by one's preferences or dislikes or by the existence or absence of kinship. Rather, it is a goal to be achieved and an ideal to be sought: [Indeed, Allah orders justice and good conduct];⁵ [And I have been commanded to do justice among you];⁶ and

*O you who believed, be persistently firm for Allah, witnesses in justice, and do not let the hatred of a people prevent you from being just. Be just; that is nearer to righteousness.*⁷

Allah has ordained measures by which justice may be known and by which it may be distinguished from its opposite. He has clarified the means by which all people might achieve this objective, facilitated the ways by which it may be accomplished, and made those ways (the most important of which is the *Qadla'*, the administration of justice) manifest to them.

Allah prescribed the institution of legal judgement as "that the people may maintain [their affairs] in justice".⁸ This institution ensures that everything will be measured by the same criteria, which would make it impossible for one to be unjust to another person or rights. As a result, all people will live in the shade of peace and justice, where their rights are protected and where contentment envelops their hearts, souls, persons, honour and wealth.

The judiciary is one of the most important institutions in Muslim society. Its concern is with the administration of justice, being the reason why the Prophets were dispatched and sacred texts revealed:

*We have already sent Our Messengers with clear evidences and sent down with them the Scripture and the balance⁹ that people may maintain [their affairs] in justice.*¹⁰

⁴ Abu Hasan Ali ibn Muhammad al-Mawardi, *al-Ahkam al-Sultaniyyah wa Wilayah al-Diniyyah*, Dar al-Kutub al-'Ilmiyyah, Beirut, p. 80.

⁵ The Qur'an, 16:90.

⁶ The Qur'an, 42:15.

⁷ The Qur'an, 5:8.

⁸ The Qur'an, 57: 25.

⁹ Three things are mentioned as gifts of Allah. In concrete terms they are the Book, the Balance, and Iron, which stand as emblems of three things which hold society together, viz. Revelation, which commands Good and forbids Evil; Justice, which gives to each person his due; and the strong arm of the Law, which maintains sanctions for evil doers. For Balance, see also the Qur'an, 42:17: and 45:50 in *The Qur'an Arabic Text with Corresponding English Meanings* (Eds. Saheeh International), 1997, Abul Qasim Publishing House, Riyad.

¹⁰ The Qur'an, 57:25.

The Arabic word *Aadl* or justice literally means to act equitably, justly and rightly. It means “he whom desire does not cause to incline, or decline, so that he should deviate from the right course in judgement”.¹¹ The word *Aadl* can be better understood with its opposite term *Uulm*. It is a verbal noun of the root *Ualama* and signifies putting a thing in a place not its own; putting in a wrong place, misplacing it, and it is by exceeding or by falling short or by deviating from the proper time and place.¹²

The word “justice” is Allah’s attribute, and to stand firm for it is to be a witness to Allah. The duty to do justice is in fact emphasised in Islam. It is stated in the Qur’an to the effect:

*Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice.*¹³

There are few other Qur’anic terms which convey either similar or close meaning to the word *Aadl*, justice such as *qist*, equity; *mizan*, balance; *iqti’ad*, middle course; *haqq*, truth and *tammasuk*, justly balanced.¹⁴ A study of *ayah* in which these terms are

referred to may facilitate the comprehension of the meaning of the *Aadl*. On a number of occasions the Qur’an establishes *Aadl* with command.¹⁵ It also equates *Aadl* with *taqwa*, Allah-consciousness.¹⁶ It vehemently forbids any kind of consideration which may deviate a person from the path of justice, whether it be to oneself, to blood relations and tribal interest or any discrimination between a rich or poor,¹⁷ because a person is born innocent, hence justice is his/her birthright. It prescribes a middle course in all human affairs avoiding two extremes.¹⁸

The Qur’anic theme of justice is not confined to the judiciary alone but is extremely far-reaching. A person is required to treat justly his/her life¹⁹ and the resources,²⁰ even important faculties of his/her body which have been granted to him/her by Allah out of His Grace and Trust. The environment in which a person lives, he/she is required to use judiciously as a trust.²¹ In Islam, for example a person is not allowed to pollute the air, water, soil etc. Such acts are regarded as *fasad*, corruption²² and commitment of sin.

¹¹ Muhammad Ibrahim H. I. Surty, 2001, the Most Comprehensive Qur’anic Verse on Socio-Economic Ethics and its Relevance to Modern Life, Qur’anic Arabic Foundation, Birmingham, pp. 10-14.

¹² E. W. Lane, 1984, Arabic-English Lexicon, The Islamic Text Society, Cambridge.

¹³ The Qur’an, 4:58.

¹⁴ Muhammad Ibrahim H. I. Surty, 2001, The Most Comprehensive Qur’anic Verse on Socio-Economic Ethics and its Relevance to Modern Life, Qur’anic Arabic Foundation, Birmingham p. 10-14.

¹⁵ There are a number of the Qur’an injunctions commanding Muslims to do justice. Right from the beginning, Allah sent His Messenger with three gifts which aim at rendering justice and guiding entire human society to the path of peace. See The Qur’an, 2:282; 3:21; 4:135; 5:8; 5:42; 6:152; 7:29; 11:85; 16:76, 49:9; 55:9.

¹⁶ The Qur’an, 5:8.

¹⁷ The Qur’an, 4:135.

¹⁸ The Qur’an, 2:143.

¹⁹ The Qur’an, 2:19, 5:61, 2:44, 4:38.

²⁰ The Qur’an, 2:282.

²¹ The Qur’an, 26:151-152.

²² The Qur’an, 30:41.

Islamic conception of justice requires a man to be so upright as not to be led away by the ties of relationship! Truth is not to be sacrificed to any interest but every interest must be sacrificed to the truth. The principles of Islamic justice are simple, straightforward, rational and practical and free from confused abstractions and complication.²³ The following verses of the Qur'an manifest these principles clearly. The Qur'an stated:

And do not approach the orphan's property except in a way that is best [i.e., intending improvement] until he reaches maturity. And give full measure and weight in justice. We do not charge any soul except [with that within] its capacity. And when you speak [i.e., testify], be just, even if [it concerns] a near relative. And the covenant of Allah fulfill. This has He instructed you that you may remember.²⁴

Justice is a command of Allah, and whosoever violates it faces grievous punishment. The Qur'an mentioned:

Indeed, Allah orders justice and good conduct and giving to relatives and forbids immorality and bad conduct and oppression. He admonishes you that perhaps you will be reminded.²⁵

The Prophet of Allah is asked to tell to people to do justice as the Creator, the Nourisher and the Cherisher of all has commanded it:

Say: [O Muhammad], "My Lord has ordered justice..."²⁶

The command is repeated in *Surah al-Nisa'*:

Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice. Excellent is that which Allah instructs you. Indeed, Allah is ever Hearing and Seeing.²⁷

The Prophet is asked to administer justice according to the *Kitab Allah* or the Book of Allah:

Indeed, We have revealed to you, [O Muhammad], the Book in truth so you may judge between the people by that which Allah has shown you. And do not be for the deceitful and advocate.²⁸

The Commentators explain this passage with reference to the case of Ta'mah ibn Ubairaq, who was nominally a Muslim, but in reality was *munafiq*, a hypocrite and given to all sorts of wicked deeds. He was suspected of having stolen a set of armour, and then the trail was hot; he planted the stolen property into the house of a Jew, where it was discovered. The Jew denied the charge and accused Ta'imah, but the sympathies of the Muslim community were with Ta'imah on account of his nominal profession of Islam. The case was brought to the Prophet, who acquitted the Jew according to the principle of justice as "guided by

²³ Shamsuddin Shams, "Shariah and Western Jurisprudence Thoughts: A Comparative Overview", *The Islamic and Comparative Law Quarterly*, [vo. VI no. 4], 1986, p. 262.

²⁴ The Qur'an, 6:152 and see also 4:8, 4:105, 7:29, 16:90.

²⁵ The Qur'an, 16:90.

²⁶ The Qur'an, 7: 29.

²⁷ The Qur'an, 4:58.

²⁸ The Qur'an, 4:105.

Allah".²⁹ Eventhough attempts were made to prejudice and to deceive him into using his authority to favour Ta'mah.³⁰ The verse was revealed to intervene in the case and put the matter right.

Not only the Prophet was charged with the Divine decree to establish justice³¹ but all Messengers were expected to establish this.³² All believers have also been ordered to establish justice which is a Divine attribute:

*Indeed, Allah orders justice and good conduct and giving to relatives and forbids immorality and bad conduct and oppression. He admonishes you that perhaps you will be reminded.*³³

There is a very close relationship between justice and other noble values such as *ihسان*, kindness and *taqwa*, Allah consciousness. Justice may only be realised through efficient, just and impartial administration of the legal system. Therefore the persons entrusted with its administration and enforcement must be competent according to the criterion laid down by Allah, and Allah also commands that those parties, who are involved in a dispute, act honestly while giving evidence in order to secure or

deny claim. Such persons must consider themselves as witnesses on behalf of Allah and His Messenger because Islam requires the parties to render justice to those who are entitled to it. The Qur'an stated:

*O you who have believed, be persistently standing firm for Allah, witnesses in justice, and do not let the hatred of a people prevent you from being just. Be just; that is nearer to righteousness. And fear Allah; indeed, Allah is Acquainted with what you do.*³⁴

*And let there be [arising] from you a nation inviting to [all that is] good, enjoining what is right and forbidding what is wrong,³⁵ and those will be the successful.*³⁶

Ibn Aabbas interpreted the word *Aadl* as *Tauhid*, Oneness of Allah.³⁷ This is because through *Tauhid* justice has been done with the One True Transcendent Allah and the rest of His creation. Mughirah ibn Shuabah a prominent Companion of the Prophet , in the court of the Persian general Rustam clarified this meaning in these words:

*...to emancipate people from the obedience of men (and lead them) to the obedience of Allah.*³⁸

²⁹ The Qur'an, 4:58.

³⁰ Abd Rahman I. Doi, 1984, Shariah: The Islamic Law, Ta-Ha Publishers Ltd., London, pp. 4-5.

³¹ The Qur'an, 42:15; 7:29, 3:42.

³² The Qur'an, 57:25.

³³ The Qur'an, 16:90.

³⁴ The Qur'an, 5:8.

³⁵ According to the laws of Allah.

³⁶ The Qur'an, 3:104. Muflih, aflaha, falah: the root idea is attainment of desire; happiness, in this world and the next; success; prosperity; freedom from anxiety, care, or a disturbed state of mind-the opposite of aadhab in the next verse, which include: failure; misery; punishment or penalty; agony or anguish. The ideal Muslim community is happy, untroubled by conflicts or doubts, sure of itself, strong, united, and prosperous: because it invites to all that is good; enjoins the right; and forbids the wrong- a master-stroke of description in three clauses.

³⁷ Muhammad Ibrahim Surty, The Most Comprehensive Qur'anic Verse, *Op. Cit.*, p. 14.

³⁸ Ibn Kathir, al-Bidayah wa al-Nihayah, Sa'adah Press, Cairo, as quoted by M. N. Siddiqi in "Tawhid – the Concept and the Process", 1979, Islamic Perspective (Eds. K. Ahmad and Z.I. Anari), Islamic Foundation, Leicester, p. 26.

Ibn Uyainah define *Aadl* as equality between hidden and manifest acts which are performed for the sake of Allah. Al-Shanqiti regards it as the middle course between the two extremes, excess and neglect.³⁹ Al-Qurtubi believes the essence of the *Aadl* is equity. It includes all obligatory acts related to belief and the *Shariah* laws for the fulfilment of trust, rejection of oppression and for the preservation of rights.⁴⁰ Meanwhile, Ibn Aashur's interpretation is comprehensive. He believes a Muslim is enjoined for *Aadl* and supports this with the *ayah*:

*And spend in the way of Allah and do not throw [yourselves] with your [own] hands into destruction [by refraining].*⁴¹

A believer is enjoined for *Aadl* in all his affairs. His affairs with the Creator include acceptance of His attributes and accomplishment of His rights and association with the creation including the recognition of the principles related to family life. Integration with social life is based on words and deeds. It's substantiated these with the verses: "And give full measure and weight in justice"⁴² and "...and when you judge between people to judge with justice."⁴³

Justice must be done to all and varied, even if it is to be done against one's self, or one's parent or relatives. There must be

no difference between rich and poor. All are servants of Allah, and must be judged according to the Book of Allah.⁴⁴

Justice is one of Allah's attributes and to stand firm for justice is to be a witness to Allah, whether it is detrimental to our own interests or the interests of those who are near and dear to us. According to the Latin saying, "Let justice be done though heaven should fall".⁴⁵

It is evident from this brief survey of *Aadl* that hardly any activity related to human life, be it human resolution, speech or action is not subjected to *Aadl*. Its decisive influence on all these is easily traceable from Revealed Knowledge. Furthermore the Qur'anic theme of accountability in the Hereafter which is one of the richest themes grants more influence and extra strength to the institution of *Aadl* to generate interest among believers for its success and promotion. The very existence of *Aadl* in all round human practice guarantees a healthy and peaceful society.⁴⁶

Furthermore, from the birth of justice in Islam three judicial institutions emerged. These are the *Qadla'*, the administration of justice, the *Mualim*, ombudsman and the *Hisbah*, municipal civic judicial authority for the promotion of justice and establishment of religious duties. In view of their common

³⁹ Muhammad al-Amin ibn Muhammad al-Shanqiti, *Atwa' al-Bayan fi Itah al-Qur'an bi al-Qur'an*, vol. 3, Alam al-Kutub, Beirut, p. 348.

⁴⁰ Abu Abd Allah Muhammad ibn Ahmad al-An'ari Al-Qurtubi, 1967, *Al-Jamia al-Ahkam al-Qur'an*, vol. 10, Dar al-Kutub al-Misriyyah, Egypt, p. 166.

⁴¹ The Qur'an, 2:195.

⁴² The Qur'an, 6:152.

⁴³ The Qur'an, 4:58.

⁴⁴ The Qur'an, 4:135.

⁴⁵ Abd al-Rahman I. Doi, *Shariah: The Islamic Law*, *Op. Cit.*, p. 4-5.

⁴⁶ Muhammad Ibrahim H. I. Surty, *The Most Comprehensive ...*, *Op. Cit.*, p. 13.

goal, that is the dispensation of justice, they are triangle of Islamic judicial network. Each institution has its own judicial authority based on set jurisdiction and an organised working system fulfilling the judicial needs of different sections of the community.⁴⁷

Human experience of all these judicial system of millions of Muslims throughout the centuries clearly reflects that these institutions have been an integral part of Muslim life. Hardly any generation passed without there being independent treatises contributing to these themes. Evidences do suggest that it was the Prophet who laid the foundations of all three judicial institutions. During his lifetime, he provided a practical commentary of the Qur'anic broad principles. Through the Prophetic method of implementation, further broad principles emerged which in turn motivated a large number of jurists to codify the law during their own time.

The *qadli*'s court adjudicates cases after open trial and ensures that the sentences are carried out by the *shurtah*, the executive authority. The *mualim* courts provide an opportunity for all citizens of the Islamic State to file their suit against the injustice of any official of the State however high his/her rank may be. The accused shall be tried in the *Mualim* court and if proved guilty shall

be dealt with accordingly.⁴⁸

Meanwhile, the *hisbah* institution governed by public authorities and later entrusted to an official called *muhtasib* to supervise matters mostly and religious behaviour, as well as the health and administration of the city. The aim of this supervision is to bring these matters into conformity with the applications of Islamic law and punish those who violate them. Al-Mawardi defines *hisbah* as enjoining what is right when it is being neglected, and to forbidding what is wrong when if it is being practiced.⁴⁹ The *Hisbah* courts can adjudicate cases based on complaint concerning weight and measures, fraud in sales and non-payment of debts.⁵⁰ It is interesting to note that a common citizen enjoys the privilege to file a suit against an *muhtasib* in either *qadli* or *mualim* court. The person who takes account of the people is also accountable for himself and his office.⁵¹ The practical wisdom for these three law enforcing institutions would come clear if one were to analyse briefly a few broad principles of the Qur'an.⁵²

According to Islam, all the parties in a dispute are charged with the obligation of upholding justice and rendering it to the rightful person. It is not considered a success if it merely displaces justice from the person entitled to it. The Qur'an says: "And let not

⁴⁷ *Ibid.*, p. 14.

⁴⁸ *Ibid.*

⁴⁹ Abu Hasan Ali ibn Muhammad al-Mawardi, *Ahkam al-Sultaniyah* ..., *Op. Cit.*, p. 240.

⁵⁰ *Ibid.*, p. 9-10.

⁵¹ Muhammad Ibrahim H. I. Surty, *Op. Cit.*, p. 16.

⁵² The broad principles from the above quoted ayah are clear. A person is required to deal justly with himself or herself and with other fellow creatures without any discrimination of race, colour, blood relation, class, religion, rank, power and authority. Witnesses summoned to court shall appear as witnesses for Allah and not for the litigants; therefore witnesses will not suddenly turn hostile against those on whose behalf they are appearing. See the Qur'an, 4:135.

the witnesses refuse when they are called upon.”⁵³

With this general background, it is proposed to deal specifically with the province of the judicial administration in Islam that is with that phase where the law is found operation. The law books present a theoretical system of legal precepts, courts, judges, and modes of procedure, whereas the course of the judicial administration presents phenomena not always reconcilable with the law books. As a preliminary the origins of Islamic law are examined, followed by an estimation of the position occupied by al-Mawardi, a leading Islamic jurist on constitutional theory and as a judge.⁵⁴ The administration of justice is finally studied under the three main institutions: the *Qadla'*, the *Mualim* and the *Hisbah*. In the context of this works the authority and jurisdiction of *qadli*, *mualim* and *hisbah* courts will entirely based on al-Mawardi's works in his two books known as *Adab al-Qadli* and *Ahkam al-Sultaniyyah*.

It was in this mainstream of Islamic judicial system that al-Mawardi developed his concept of the judicial in *Adab al-Qadli* and *Ahkam al-Sultaniyyah*. Al-Mawardi's full name is Abu al-Hasan Ali ibn Muhammad ibn Habib Mawardi – the theorist of power in Islam-who taught in Baghdad and Ba'rah, belonged to the *Shafi'i* school of law. Al-

Mawardi was born in Ba'rah in 364/974 and died in Baghdad on 30 Rabiul Awwal 450/27 May 1058, aged 86 years. His birthday witnessed a phase in which the supremacy of the Abbasids Caliphate declined and the Caliphs came under the tutelage of the Buwayhids dynasty.⁵⁵

In 429/1038, he was awarded the honorific surname of *Aqdla' al-Qudlah* in spite of the opinions of eminent jurist, including Abu Tayyib al-Tabari (d. 450/1058), who denied the legality of this title.⁵⁶ The Abbasid Caliph al-Qaim ibn Aamr Allah appointed him as his roving ambassador and sent him to a number of countries as the head of special missions. In this capacity he played a key role in establishing harmonious relations between the declining Abbasid Caliphate and the rising powers of Buwayhids and Seljuqs. He was still in Baghdad when it was taken over by Buwayhids.

The most important works in Islamic judicial system he had contributed is *Adab al-Qadli* and in Islamic political thought is *Ahkam al-Sultaniyyah wa al-Wilayah al-Diniyyah*. Al-Mawardi freely relied upon the opinions of four schools and recognized ruler's right to exercise *ijtihad* or to act upon any one opinion. He acted in true spirit of the *Imam Shafi'i* who thus explained his viewpoint “we regard our opinion correct

⁵³ Al-Qur'an, 2: 282.

⁵⁴ Al-Mawardi also the first Muslim to attempt to spell out systematically the requirements of the Shariah in regard to governance had to introduce a universal concept of justice as a supplementary criterion for evaluating governance behavior. See detail in Hanna Mikhail, 1995, *Politic & Revelation*, Mawardi & After, Edinburgh University Press, Edinburgh, p. xxxi.

⁵⁵ Ann K. S. Lambton, 1981, *State and Government in Medieval Islam, an Introduction to the Study of Islamic Political Theory: The Jurists*, Oxford University Press, Oxford, p. 83.

⁵⁶ Abu Hasan Ali ibn Muhammad al-Mawardi, 1971, *Adab al-Qadli*, edited by Muhyi Hilal al-Sirhan, Vol. 1 & 11, Matbaah al-Irshad, Baghdad, p. 38.

but admit the possibility of mistake in it. Similarly we regard the view point of other school wrong but admit the possibility of soundness in it.”⁵⁷

Al-Mawardi concerned with proposing the *fiqh* solutions to contemporary issues, held the ruler responsible for their enforcement. The composition of the *Ahkam al-Sultaniyyah* and *Adab al-Qadli* was primarily an effort in the same direction. Al-Mawardi wrote these works to assist the ruler in the management of different religious, legislative, administrative and political affairs according to Divine law. For example, al-Mawardi concerned about the appointment of the judges. He insisted the judges must be capable to make *ijtihad*, the effort to derive rulings from the Qur’an and the *Sunnah*. *Ijtihad* is the idea used by the Islamic law to understand its the application. *Ijtihad* is applied, not only for the judges but equally to others who have legitimate authority.

3. The Meaning of the Term *Qadla’* and *Hukm*

Having concluded the above, let us now examine the related terms *qadla’*, the administration of justice and *hukm*,

judgement, both of which are the main functions of the judiciary, as they are found in the Qur’an. These terms appear frequently in the sources of Islamic law, and in the compilations on jurisprudence as a synonym of the *qadla’* and its cognates. Islam is a religion of peace which lies in submission to the law of Allah. The *qadla’*, therefore, relates to the Divine ordinances and rules pertaining to the protection of rights settlement of cases.

The word *qadla’* (v. *qadla-yaqddli-qadla-qadla’an*; plural ‘*aqdliyyah*’)⁵⁸ has various literal meanings as indicated in a number of verses in the Qur’an. It means discharge,⁵⁹ dissolved,⁶⁰ judgement,⁶¹ command,⁶² creation⁶³ and compulsion,⁶⁴ According to Ibn Manuur, the *qadla’* means to strengthen a thing, to ratify it or to dispose it of or be relieved of it. Its primary meanings are to cut and divide in parts.⁶⁵

However, *qadla’* in Arabic is used for other purposes besides this. It is used for such as: commandment, as the Qur’an stated: “And your Lord has decreed “*qadla’*” that you do not worship except Him”,⁶⁶ completing doing something, as the Qur’an stated: “The matter has been decreed “*qudliya*” about which you both inquire,⁶⁷ performance, as

⁵⁷ Abu Hasan Ali ibn Muhammad al-Mawardi, *al-Ahkam al-Sultaniyyah ...*, *Op. Cit.*, p. 1-5.

⁵⁸ Muhammad ibn Mukarram ibn Manzur Jamaladin Abu al-Fadl, *Lisan al-Arab*, vol. 15, Dar al-Sadir, Beirut, pp. 186-187.

⁵⁹ The Qur’an, 2:200.

⁶⁰ The Qur’an, 33:37.

⁶¹ The Qur’an, 10:33.

⁶² The Qur’an, 17:23.

⁶³ The Qur’an, 41:12.

⁶⁴ Shams al-Din Muhammad al-Ramli, 1968, *Nihayah al-Muhtaj*, vol. 8, Maktabah al-Halabi, Cairo, p. 238; Muhammad Sadiq, *Dalil al-Qata’ al-Sharai*, Matbaah al-Najfi, p. 2.

⁶⁵ Muhammad ibn Mukarram, *Lisan al-Arab*, *Op. Cit.*, p. 186.

⁶⁶ The Qur’an, 17:23.

⁶⁷ The Qur’an, 12:41.

in “So, decree “*faqdlī*” whatever you are to decree”,⁶⁸ volition as the Qur’an mentioned: “And when He decrees *qadla*’ a matter, He but says to it, “Be,”⁶⁹ and it is the death, as the Qur’an mentioned: “And they will call, O Malik, let your Lord put an end to us!” He will say, “Indeed, you will remain”⁷⁰ discharging and substituting of previously neglected religion and predestination.⁷¹

Muslim jurists differ in providing the legal terminology of the *qadla*’. According to Ibn al-Humam, the *qadla*’ means binding (decree).⁷² Ibn Abi al-Dam, gives the meaning “settling litigation with binding judgement that comes from a person having general jurisdiction”.⁷³ The *qadla*’ also means “the *Shariah* jurisdiction on point of law for public interest acting on behalf of the ruler,” and “settling suits and breaking off disputes and dissension”.⁷⁴ According to Muhammad Sallam Madkur it means to fulfil a desire to pay a debt, to command. This is why the *qadli* is also called a *hakim* because he prohibits a transgressor from an unjust action.⁷⁵ Ibn Khaldun states the meaning of the *qadla*’, as an office of deciding the disputes between the people in order to dispose of the suits and put an end to controversies and conflicts.⁷⁶

Having discussed the definition of the *qadla*’ by various Muslim jurists, we may

conclude that the *qadla*’ means settling on and breaking off disputes, acting on behalf of the ruler, in accordance with the *Shariah* law; that lay down by the Qur’an and the *Sunnah*. This has been the practice of the previous Messengers. The Qur’an ordains in *Surah Saad*:

*[We said], “O David, indeed We have made you a successor upon the earth, so judge between the people in truth and do not follow [your own] desire, as it will lead you astray from the way of Allah.”*⁷⁷

This verse indicates the *qadla*’ is one of the positions that fall into the Caliphate and fall under it generally. According to al-Mawardi the word *khalifah* indicates two different meanings. The first means Prophethood, and secondly a Ruler.⁷⁸

According to the classical concept of the *Shariah* law the *khalifah* himself holds all power and, in particular, the power of action. The Caliph is the temporal and religious Head of State and in this person centred all the powers necessary to its role. Regardless of the category to which they belong, all officials act only by virtue of a delegation of jurisdiction conferred upon them by the Caliph. This delegation is a representation.⁷⁹

⁶⁸ The Qur’an, 20:72.

⁶⁹ The Qur’an, 40:68.

⁷⁰ The Qur’an 43:77.

⁷¹ Muhammad ibn Mukarram, *Lisan al-Arab*, *Op. Cit.*, p. 186, entry word “qataya”.

⁷² Ibn al-Humam, 1898, *Fath al-Qadir*, vol. 5, Dar al-Sadir, Beirut, p. 453.

⁷³ Ibn Abi al-Dam, 1984, *Kitab Adab al-Qata*’, al-Irshad, Baghdad, p. 126.

⁷⁴ Ibn Khaldun, 1958, *The Muqaddimah*, vol. 1, Princeton University Press, U.S.A., p. 452.

⁷⁵ Muhammad Sallam Madkur, 1960, *al-Madkhal l’il-Fiqh al-Islami*, Dar al-Nahdah al-Arabiyyah, Cairo, p. 333.

⁷⁶ Ibn Khaldun, *The Muqaddimah*, *Op. Cit.*, p. 450.

⁷⁷ The Qur’an, 38:26.

⁷⁸ Abu Hasan Ali ibn Muhammad al-Mawardi, *Adab al-Qadli*, p. 118.

⁷⁹ Emile Tyan, “Judicial Organization”, in *Law in the Middle East*, vol. 1 1955, (Eds. Majid Khadduri and Herbert J. Liebesny), Washington, D.C., p 236.

The exercise of the *qadla'* is a vital principle of religion and the process of the judicial administration being a devotional act remains as an accomplishment of a religious duty. According to Sarakhsi, "it is one of the best acts of devotion" and "one of the most important duties after belief in Allah".⁸⁰ Furthermore, Imam al-Ghazali considered it prior to *jihad*.⁸¹ Hence, the *qadla'* is regarded as a *fardl kifayah*, that is, one of the religious obligations which are imposed upon every believer, and the refusal of a judicial office by persons of the judicial qualification is considered a sin.⁸²

It is a *fardl* because the nature of human being tends to incur injustice on other people and deprive others of their right. Moreover, the ruler is unable to settle all suits himself and, therefore, he must appoint a *qadla'* in his place. In the Qur'an, Allah ordains:

*O you, who have believed, be persistently standing firm in justice, witnesses for Allah, even if it be against yourselves or parents and relatives.*⁸³

According to Ibn Qudamah, it is a must because people's affairs in life would not be in harmony without exercising the *qadla'*. The situation is just like *jihad* and having *Imamah*.⁸⁴ In the historical development of the *qadla'*, the Messengers of Allah were sent to adjudicate among their people. During his

life time the Prophet Muhammad sent Aali ibn Abi Talib and Muadh ibn Jabal to Yemen as judges respectively. It has become the general practice of the Caliphate to appoint judges in various cities, such as Shuraih as a judge of Kufah and Abu Musa al-AshAari as a judge of Ba'rah.⁸⁵

However, it is *fardl Aain* on the ruler to appoint a judge since he is always burdened with more important duties besides the judicial function.⁸⁶ Thus, the Muslim community is collectively responsible for the administration of justice. In this regard the *Shafi'i* school of law is of the opinion:

*"A Muslim, who feels himself special capability of exercising of the function of judge, should solicit these functions. When one considers oneself not inferior to another in juridical capacity, one may accept the position of judge."*⁸⁷

Another term which needs explanation and worth discussing is the word *hukm* (v. *hakama*). Originally the root of the word *hukm* is *h-k-m*. Its basic meaning is to prevent and to restrain someone from acting in an evil way. Regarding the form *hukm*, the root *h-k-m* occurs 209 times in the Qur'an. It principally means 'the process of making decisions or ruling for mankind', and it can occasionally denote the following two meanings: mediation and arbitration.

⁸⁰ Shams al-Din Muhammad ibn Sahl Sarakhsi, *al-Mabsut*, vol. xv, Matbaah al-Saadah, Cairo, p. 59.

⁸¹ Shams al-Din Muhammad al-Ramli, 1968, *Nihayah al-Muhtaj*, vol. 8, Maktabah al-Halabi, Cairo, p. 236.

⁸² Shams al-Din Muhammad al-Khatib al-Sharbini, 1950, *Mughni Muhtaj ila Ma'rifah Alfaz al-Minhaj*, vol. 4, Maktabah al-Halabi, Cairo, p. 371.

⁸³ The Qur'an, 4:135.

⁸⁴ Abd Allah ibn Ahmad ibn Qudamah al-Muqaddisi, *al-Mughni wa al-Sharh al-Kabir*, vol. 10, Dar al-Kitab al-Arabi, p. 373.

⁸⁵ *Ibid.* p. 373; al-Khatib, *Op. Cit.*, p. 327; Ibn Khaldun, *Op. Cit.*, p. 453.

⁸⁶ Al-Ramli, *Op. Cit.*, p. 236.

⁸⁷ Al-Nawawi, *Minhaj al-Talibin*, Law Publishing Company, p. 500.

The Qur'anic verses, in which the word *hukm* and its derivatives occur, refer to judgement by the Prophet Muhammad in ten verses, all of which are Madinan. One is in *surah al-Baqarah*, three in *surah al-Nisa'*, four in *surah al-Ma'idah* and two in *surah al-Nur*. In *Surah al-Nisa'*, the relevant verses are mentioned separately from one another whereas in *surah al-Ma'idah* and in *surah al-Nur* they appear closely to one another.

The Qur'an stated:

*And do not consume one another's wealth unjustly or send it [in bribery] to the rulers (hukkam) in order that [they might aid] you [to] consume a portion of the wealth of the people in sin, while you know [it is unlawful].*⁸⁸

The Qur'an uses the word *hukkam* to refer to those who pass a legal judgement. According to the occasion of the revelation, *hukkam* refers to the Prophet Muhammad. The Qur'an 2:188 was revealed in connection with Imru al-Qays ibn Aabis al-Khindi, who was called by Rabi'a ibn Aabdan al-Hadrami: "Do you have any proof?" He said: "No". The Prophet said: "Then you should have his oath". He went away to make him swear an oath. The Prophet said: "If he swore that the land is his in order to obtain it unjustly, he will meet Allah in a way that Allah will reject him".⁸⁹ *Hukkam* therefore denotes those who pass legal judgement.

The Qur'an stated to the effect:

*Indeed, Allah commands you to render trusts to whom they are due and when you judge (wa idha hakamtum) between people that you judge (tahkum) with justice: verily how excellent is the teaching which Allah gives you. Truly, Allah is Ever All-hearing, All-Seeing.*⁹⁰

The above verse was revealed after the Prophet entered Makkah in 8/630. When the Prophet wanted to enter the Ka'bah, 'Uthman ibn Talha ibn Aabd al-Dar, who held the key to it, refused to allow him to enter. Aali ibn Abi Talib took the key and opened the door of the Ka'bah. The Prophet entered and performed the prayer. When the Prophet came out, al-Aabbas ibn Aabbas ibn Aabd al-Mutallib asked for the key. The verse was revealed in which Allah commanded the Prophet to return the key to 'Uthman.⁹¹ According to the occasion of the revelation of this verse, it refers to a judgement by the Prophet. However, this does not limit the application of the verse to him, for its reference is general and could be applied to other people. This is understood not only because he was an example to the believers, but also because the word "you", in plural form, refers generally to all believers. Therefore, if the Prophet is ordered to do something, his followers are expected to follow him. On the other hand the exegeses disagree over whom the verse refers to. Al-

⁸⁸ The Qur'an, 2:188.

⁸⁹ Ala al-Din Ali ibn Muhammad ibn Ibrahim al-Baghdadi al-Khazin, 1995, *Lubab al-Ta'wil fi Maani al-Tanwil*, vol. 1, Beirut, p. 217.

⁹⁰ The Qur'an, 4:58.

⁹¹ There are many versions of the occasion of the revelation of this verse. What is given here is a summary of those versions. For details see, Nasir al-Din Abi Sa'id Abd Allah al-Baidawi, 1988, *Asrar al-Tanwil wa Asrar al-Ta'wil*, vol. 1, Beirut, p. 220; al-Khazin, *Lubab al-Ta'wil*, *Op. Cit.*, p. 98; cf. Abu Jaafar Muhammad ibn Jarir al-Rawi al-Tabari, 1992, *Jamia al-Bayan fi Ta'wil al-Qur'an*, vol. 4, Beirut, pp. 148-9.

Tabari cites three different opinions: the first is those in charge of the affairs of the Muslims, second is the Ruler, the third is the Prophet. Al-Tabari concludes by saying that the verse is general, referring to those in charge of the affairs of the Muslims.⁹²

This verse also contains two obligations: the first one is the rendering of trust to those to whom they are due, and secondly is judging with justice. The significance of mentioning trust before the judging with justice is, according to some exegeses, that the Qur'an begins with the responsibility towards one's self before that towards others.⁹³ Accordingly, the combination of trust and judgement is to state the function of people as the servants of Allah.⁹⁴ The Qur'an uses the expression "verily Allah" to stress the importance of the obligations in this verse.⁹⁵

*We have sent down to you the Book in truth that you might judge (li-tahkum) between men as guided by Allah (bi-ma araka Iillah) so be not (used) as an advocate by those who betray their trust.*⁹⁶

The preceding verse speaks of fighting unbelievers, and this verse follows to remind

the Prophet not to betray the unbelievers and wrongly accuse them.⁹⁷

The following verses are from *surah al-Ma'idah*. They appear closely to one another and are related to *hukm*. All the verses are directly related to the judgement by the Prophet Muhammad.⁹⁸

From discussion on the Prophet Muhammad's judgement it is clear that the root *h-k-m* denotes a "legal judgement" which consequently produces laws. However, it can be argued that *h-k-m* in the verses quoted above denotes "authority". In arguing this, two aspects need to be considered: the context of the verses, and the background of the verses which refer to his judgement.

Following the analysis of the verses pertaining to the judgement of the Prophet and its meaning, other aspects of these verses will now be considered. All these verses are Madinan which show the exercise of adjudication by the Prophet Muhammad. In all these verses, they are related to a common idea of *hukm*. That is the *hukm* of Allah, which implies His dominion over mankind and His laws for it.

⁹² Al-Tabari, *Jamia al-Bayan*, *Op. Cit.*, p. 147-9.

⁹³ Al-Razi, *al-Tafsir al-Kabir*, vol. 5, p. 262; Abu Hayyan Muhammad ibn Yusuf, *al-Bahr al-Muhit*, 1993, eds. Adil Ahmad Abd al-Mawjud, Ali Muhammad Muawwad, Zakariyyah Abd al-Majid al-Nuni, Ahmad al-Najwali al-Jamal, vol. 3, Beirut, p. 289.

⁹⁴ Kamali says that the concept of trusts in the first part of this verse is given a concrete expression in the second part [justice]. See Mohd. Hashim Kamali, "The Limit of Power in an Islamic State", 1989, *Islamic Studies* [vo. 28 no. 4], p. 327.

⁹⁵ Abu al-Su'ud Muhammad ibn Mustafa, *Irshad al-Aql al-Salim ila Mizaya al-Kitab al-Karim*, vol. 1, Egypt, p. 539.

⁹⁶ The Qur'an, 4:105. The verse was revealed concerning Tuama ibn Ubayriq who had committed a theft, and concealed the evidence of the stolen goods to a Jew to keep them for him. The Prophet (pbuh), basing his judgement on their report, showed a certain inclination to believe Tuama and his people. The verse was revealed to intervene in the case and put the matter right. Thus the verb *tahkum* means "to judge".

⁹⁷ Al-Razi, *Tafsir al-Kabir*, *Op. Cit.*, p. 431.

⁹⁸ "So if they come to you, [O Muhammad], judge between them or turn away from them. And if you turn away from them- never will they harm you at all. And if you judge, judge between them with justice. Indeed, Allah loves those who act justly." The Qur'an, 5:42.

With these verses the Qur'an produces a united framework of Allah's dominion over His servants, using the concept of *hukm*. The Prophet was informed in the Makkah period of the necessity to conform to Allah's decisions, one of which is the exercise of justice. The Prophet seemed to understand that the only way to exercise justice was by acquiring authority. Therefore, during the Makkah period Allah did not reveal to the Prophet a particular verse about the legal judgement of two disputing parties. Only after the Prophet moved to Madinah, then the verses on legal judgement were gradually revealed to him.

Madinan verses continue to emphasize Allah's dominion but from a wider perspective. The verses are divided into two types, displaying two different responses to the *hukm* of Allah. Verses in *surah al-Nisa'*, *al-Ma'idah* and *al-Nur* were revealed after the Prophet's *hijrah* from Makkah to Madinah highlighting in greater detail the Prophet's position in Madinah regarding adjudication and the administration of justice. His authority to pass judgement was derived from his role as a leader with political power, a role that he held throughout his time in Madinah. Political authority was evidently important for effective adjudication.

The Qur'anic verses of 4:58 and 4:59 classify people into two groups; the Rulers and the ruled. The Rulers here included the judges and religious scholars. They are commanded to fulfil their trust by applying justice not only when passing judgement, but also in the governance as exemplified

by the Prophet's leadership. So, justice is the Qur'anic principle for human society, and it is very important to establish trust as well because the absence of trust in society can lead to the absence of justice. When the Prophet returned the key of Ka'bah to 'Uthman, he was fulfilling a trust and at the same time establishing justice.

In the context of enforcement of the *hukm* of Allah, the main objective is to ensure justice. Thus adjudication must be based on truth, justice and the *hukm* of Allah and these three elements are interdependent. Justice is the aim of the judicial judgement and this judgement must be based on truth so that justice can be exercised. However, the best way to ensure justice is by the *hukm* of Allah, namely the *Shariah* which is expressed by: "what Allah has sent down". This is because the *Shariah* ordained by Allah, the All-Knowing and the Wise, whose judgement raises no questions of validity and suitability. Hence, the function of the *Shariah* is to ensure justice by making Divine revelation a unique source of legislation. Once Allah has ruled on a certain issue, there is no longer room for human speculation.⁹⁹

In short, *hukm* in the Qur'an involves a concept of belief in Allah which demands not only an acknowledgement of the sovereignty of Allah and His ruling over the universe, but also that the order of society must demonstrate this belief. The concept of justice is not only a basis of judgement; rather, it is a basis of the political activity which also governs human affairs. Justice here reflects a concept of social justice since it involves the

⁹⁹ Muhammad ibn Muhammad Abu Hamid al-Ghazali, *A Thematic Commentary on the Qur'an*, translated by Aashur A. Shamis, vol. 1: The International Institute of Islamic Thought, Herndon, p. 94.

element of the ruled and not only the ruler,¹⁰⁰ thus, Islam is not only a religion of ritual but is also a social-political and theological religion which governs the affairs of human being. The Qur'anic framework presents the idea of political activity which is related to human society.¹⁰¹ The Qur'an also reforms the practice of enforcing the law. It gives authority to jurisdiction and thus the society must accept the judgement given by the judge and this is reflected in al-Mawardi's work especially *Adab al-Qadli* in his theory of *qadla'*.

The words *hukm* and *qadla'* are synonymous. In this regard the *qadla'* means adjudicating a dispute and getting it clear. It also refers to giving a judgement. Whereas the word *hakama* (r. *hukm* – n. *hakim*) means to judge, to rule and to arbitrate.¹⁰² The Qur'an with reference to the judicial system uses both terms in a number of verses. A judge is also a *qadli* and the word a *qadli* is usual term. Hence, *hukm* is whatever decision reached at by a judge in the course of administering justice. In this respect it differs from *qadla'* which requires to have dispute and other necessary procedures in

the court of justice. A judge has the power to execute any sentence such as banishment, or imprisonment and other lawful punishments. Such power is derived from the Head of State.¹⁰³

4. The Two Authoritative Sources (the Qur'an and the Sunnah) on Qadla'

The legal material occupies only a small portion of its text in the Qur'an, hence the Qur'an is not a legal or a constitutional document. The Qur'an calls itself *huda*, or guidance, not a code of law.¹⁰⁴ Out of over 6,222 *ayah*, less than one-tenth relate to law and jurisprudence, while the remainder are largely concerned with matters of belief, morality, the five pillars of the faith and a variety of varied themes. Its ideas of economic thought and social justice, including its legal contents, are on the whole integral part of faith.¹⁰⁵ There are about thirty *ayah* speak of justice, equality, evidence, consultation, and the rights and obligations of citizens.

The Qur'an contains three types of instructions; articles of faith, ethics and legal regulations.¹⁰⁶ The legal prescriptions are comparatively limited and few in number.

¹⁰⁰ One of the definitions of social justice is that each member of society takes his right without harming the right of others. See al-Nabhan, *Niwam al-Hukm*, p. 222.

¹⁰¹ Politics refers to the art and science of government, public life and affairs as involving authority and government; and activities concerned with the acquisition or exercise of authority or government. See Della Thompson, 1996, *The Concise Oxford Dictionary of Current English* [9th edition], Oxford University Press, Oxford, p. 1057. The Arabic word for politics is *siyasah*; it means to be in charge of something and to work for its well-being. See *Lisan al-Lisan: Tahdhib Lisan al-Arab*, 1993, revd. Abd Allah Ali Mahana, vol. 1, Dar al-Kutub al-Ilmiyyah, Beirut, p. 637; Abd al-Wahhab Khallaf, 1987, *al-Siyasah al-Sharaiyyah* [3rd edition], Mu'assasah al-Risalah, Beirut, p. 5.

¹⁰² The Qur'an, 4:35.

¹⁰³ Ahmad Abd al-Munaim Al-Bahi, 1965, *Tarikh al-Qata' fi al-Islam*, Matbaah Lajnah al-Bayan al-Arabi, Beirut, p. 20.

¹⁰⁴ Al-Mawardi discussed the Qur'an as a first sources in the Shariah in *Adab al-Qati*. See Al-Mawardi, *Adab al-Qati*, *Op. Cit.*, pp. 277-367.

¹⁰⁵ Mohamad Hashim Kamali, 1991, *Principles of Islamic Jurisprudence*, Islamic Texts Society, Cambridge, p. 19.

¹⁰⁶ Muhammad 'Anis Ubadah, 1965, *Tarikh Tashria al-Islami*, Matbaah Dar al-Ta'alif, Cairo, pp. 61-62.

Seventy injunctions are laid down for family law, another seventy for civil law, thirty for penal law, thirteen for jurisdiction and procedure, ten for constitutional law, twenty five for international relation, and ten for economic and financial orders.¹⁰⁷

Such a numeration, however, can only be approximate. The legal bearing of some injunctions is disputable, whereas of others it simultaneously applies to more than one sphere of law. The major portion of the Qur'an is code of Divine exhortation and moral principles.¹⁰⁸

In *Adab al-Qadli*, al-Mawardi listed several *ayah* from the Qur'an the evidences that the administration of justice should be implemented by human beings in order to establish the justice.¹⁰⁹ The evidences from the Qur'an are from *surah al-Saad*,¹¹⁰ *surah al-Anbiya*,¹¹¹ *surah an-Nisa*,¹¹² and *surah al-Ma'idah*.¹¹³

In surah al-Saad, the Qur'an says:

*[We said] "O David, indeed We have made you a successor upon the earth, so judge between the people in truth and do not follow [your own] desire (hawa), as it will lead you astray from the way of Allah."*¹¹⁴

Al-Mawardi interpreted the meaning of khalifah from *ayah* "... indeed We have made you a successor upon the earth..." as the Prophethood and secondly the Caliphate.¹¹⁵ The *ayah* "... so judge between the people in truth..." al-Mawardi gives two explanations; firstly the word *hukm* is taken from the word *hikmah*, wisdom that means to put everything at the best place. Secondly, the word *ahkam* means make it binding.¹¹⁶ The word *haqq* means justice or Allah's rights.¹¹⁷

In the *surah al-Anbiya*' the Qur'an stated to the effect;

*And [mention] David and Solomon, when they judged concerning the field – when the sheep of a people overran it [at night], and We were witness to their judgement.*¹¹⁸

and

*And We gave understanding of it [i.e., the case] to Solomon, and to each [of them] We gave judgement and knowledge. And We subjected the mountains to exalt [Us], along with David and [also] the birds. And We were doing [that].*¹¹⁹

Al-Mawardi in his tafsir *Nukat wa al-Uyun*, explains the meaning of "nafashat" is the sheep going out at night.¹²⁰ This verse

¹⁰⁷ Muhammad Yusuf Musa, 1961, *al-Madkhal li-Dirasah al-Fiqh al-Islami*, Dar al-Fikr al-Arabi, Cairo, pp. 10-11.

¹⁰⁸ Ahmad bin Mohammad Ibrahim, 1975, *Islamic Law in Malaya*, Malaysia Sociological Research Institute Ltd., Singapore, p. 11.

¹⁰⁹ Al-Mawardi, *Adab al-Qati*, *Op. Cit.*, pp. 117-126.

¹¹⁰ The Qur'an, 38: 26.

¹¹¹ The Qur'an, 21: 78.

¹¹² The Qur'an, 4: 58 and 65.

¹¹³ The Qur'an, 5: 49.

¹¹⁴ The Qur'an, 38: 26.

¹¹⁵ Al-Mawardi, *Adab al-Qati*, *Op. Cit.*, p. 118.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ The Qur'an, 21: 78.

¹¹⁹ The Qur'an, 21: 79.

¹²⁰ Al-Mawardi, *Adab al-Qati*, *Op. Cit.*, p. 119.

was revealed regarding judgement between the owner of sheep and the owner of garden. Prophet Dawud said the owner of garden can take the sheep as compensations. But Prophet Sulayman gives a judgement that the owner of garden will take the production of the sheep. While the owner of sheep needs to replant destruction of the garden as it was.

Allah said “And We gave understanding of it [i.e., the case] to Solomon...” that means the judgement of Prophet Sulayman was the right one and the judgement of Prophet Dawud was cancelled.¹²¹ Here, al-Mawardi discussed how Prophet Dawud was deleted by ijthihad of Prophet Sulayman by revelation.¹²²

The meaning of ayah “...and to each [of them] We gave judgement and knowledge...” has two meanings. According to al-Mawardi the first meaning is they were equal in knowledge and adjudicate people. Secondly, the knowledge and judgement was different from the other. Al-Mawardi interpreted the words hukm as ijthihad and ‘ilm as the text. Second interpretation is hukm as qadla’ and ‘ilm as the fatwa.¹²³ Al-Mawardi cited that Hasan al-Ba-ri (d. 110/728)¹²⁴ said the ayah was released as hukkam because Allah executed Prophet Sulayman because of his ijthihad and Prophet Dawud because he was right.¹²⁵

The other ayah in surahal-Nisa’ Allah said: *But no, by your Lord, they will not [truly] believe until they make you, [O Muhammad], judge concerning that over which they dispute among themselves and then find within themselves no discomfort from what you have judged and submit in [full, willing] submission.*¹²⁶

According to al-Mawardi the judiciary in Islam is very much respected and highly looked upon. Allah has said in surah al-Ma’idah to the effect that:

*And if you judge, judge between them with justice. Indeed, Allah loves those who act justly.*¹²⁷

Allah has commanded him to decide and judge between people by the Qur’an and to implement justice. We read in the Holy Book the verse which means:

*And this [al-Qur’an] is a Book We have revealed [which is] blessed, so follow it and fear Allah that you may receive mercy.*¹²⁸

The duty to do justice is in fact emphasised in Islam. It is stated in the Qur’an to the effect:

*Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice. Excellent is that which Allah instructs you. Indeed, Allah is ever Hearing and Seeing.*¹²⁹

¹²¹ *Ibid.*, p. 120.

¹²² *Ibid.*, p. 121.

¹²³ *Ibid.*, p. 121.

¹²⁴ His full name is Abu Said al-Hasan ibn Yasar al-Tabiai al-Basri al-Ansari. The great scholar who had a wider knowledge in fiqh and tafsir.

¹²⁵ Al-Mawardi, *Adab al-Qati*, *Op. Cit.*, p. 122.

¹²⁶ The Qur’an, 4: 65.

¹²⁷ The Qur’an, 5:42.

¹²⁸ The Qur’an, 6: 155.

¹²⁹ The Qur’an, 4: 58.

and

O you, who have believed, be persistently standing firm in justice, witnesses for Allah, even if it be against yourselves or parents and relatives. Whether one is rich or poor, Allah is more worthy of both. So follow not [personal] inclination, lest you not be just. And if you distort [your testimony] or refuse [to give it], then indeed Allah is ever, with what you do, Acquainted.¹³⁰

These ayah clearly indicate that it is legitimate to judge between the people and indeed that it is obligatory to do so, referring only to the system of Allah.

The Qur'anic stress on hukm bi-ma anzal Allah, to judge according to what Allah has revealed¹³¹ implies that the norms propounded by the Qur'an must be applied in practice, a factor which obviously facilitated the development of the Islamic judicial institution. Moreover, the fact that a publicly administered system had already come into being seems to be implied by the following verse:

And do not consume one another's wealth unjustly or send it [in bribery] to the rulers hukkam in order that [they might aid] you [to] consume a portion of the wealth of the people in sin, while you know [it is unlawful].¹³²

It seems obvious that, had there not been any functionary appointed by the State as distinct from arbitrators of the pre-Islamic type – to administer justice at the time of the revelation of this verse; this admonition would have little meaning.

This verse, in our view, suggests the existence of a changed institutional framework in which the pre-Islamic system of justice had been modified in several ways. First, in the new situation a disputing party, even if in the wrong, could force the other party to refer the matter to the hukkam. Secondly, the verdict of the hukkam was binding on both parties so that on the basis of the verdict it would be possible to 'devour a portion of the property of others', even wrongfully.¹³³

The Sunnah is the second main source of law after the Qur'an.¹³⁴ The Sunnah comprises the sayings of the Prophet, his deeds and his tacit approval.¹³⁵ To the ulama' of ahadith, the Sunnah refers to all that is narrated from the Prophet, his acts, his sayings and whatever he has tacitly approved, plus all the reports which describe his physical, attributes and character. The 'ulama' of jurisprudence, however, exclude the description of the physical features of the Prophet from the definition of the Sunnah.¹³⁶ The Sunnah is not only explanatory of the

¹³⁰ The Qur'an, 4: 35.

¹³¹ The Qur'an, 5:44.

¹³² The Qur'an, 2:188.

¹³³ Zafar Ishaq Ansari, "The Contribution of the Qur'an and the Prophet to the Development of Islamic Fiqh", *Journal of Islamic Studies* [3:2], 1992, p. 148.

¹³⁴ Abu Ishaq Ibrahim Al-Shatibi, *al-Muwafaqat fi Usul al-Ahkam*, vol. 4, Matbaah Muhammad Ali Sobih, Cairo, p. 5-6. See al-Mawardi, *Adab al-Qati*, *Op. Cit.*, p. 367.

¹³⁵ Muhammad Sallam Madkur, 1958, *Tarikh al-Tashria al-Islami wa Ma'adiruha*, Matbaah al-Fujalah al-Jadidah, Cairo, p. 219.

¹³⁶ Mustafa Husni Sibaai, 1982, *al-Sunnah wa Makanatuha fi al-Tashria al-Islami* [3rd edition], Beirut, p. 44.

text of the Qur'an but also complementary to it.¹³⁷

According to Imam al-Shafi'i, the Sunnah of the Prophet falls in three categories. First, for whatever acts there is textual legislation provided by Allah in the Qur'an, the Prophet merely specified clearly what is in the text of the Qur'an. Second, as to any ambiguous communication in the Qur'an laid down by Allah, the Prophet specified the meaning implied by Him. Third, consists of what the Prophet has laid down in the Sunnah and concerning which there is no text in the Qur'an.¹³⁸

We read in the Qur'an to the effect:

There has certainly been for you in the Messenger of Allah an excellent pattern for anyone whose hope¹³⁹ is in Allah and the Last Day and [who] remembers Allah often.¹⁴⁰

and

Nor does he speak from [his own] inclination. It is not but a revelation revealed. Taught to him by one intense in strength [i.e. Gabriel].¹⁴¹

The Qur'an does not contain a detailed code of law. Except a few matters, the guidance given in the Qur'an is in the form of general principles rather than detailed prescriptions. The Prophet was also careful not to bind the Muslims with too much detail.

His approach was practical. Whenever he was asked if the matter had already occurred, and he discouraged his Companions from raising hypothetical questions by which they would find themselves later bound.¹⁴²

The Muslims treated the latter with utmost respect, and in most cases worthy of emulation, but they continued to keep the distinction between the Divine and the human in the Sunnah. Thus, while the Qur'an is a complete guide for everything¹⁴³ much was left to the reasoning, or *ijtihad*, of the Muslims.

When MuAadh ibn Jabal was sent as the Prophet's delegate to Yemen, he was asked how he would decide matters referred to him. His reply was:

According to the Qur'an. The Prophet then asked him 'What if you do not find a definite ruling in the Qur'an?' MuAadh replied, "I will look into the Sunnah of the Prophet." Once again the Prophet asked, "What if you do not get a definite ruling there from?" MuAadh replied, "I shall do my best to form an opinion and spare no pains". The Messenger of Allah then patted him on the breast and said "Praise is to Allah to find a thing which pleases the Messenger of Allah."¹⁴⁴

Al-Mawardi in *Adab al-Qadli* cited Hadith from Aamru ibn al-Aa' who reported the Prophet as saying:

¹³⁷ Al-Mawardi gave details discussion on the Sunnah as second sources to the Shariah in *Adab al-Qati*. See al-Mawardi, *Adab al-Qati*, *Op. Cit.*, pp. 367-449.

¹³⁸ Muhammad Idris Al-Shafai, 1961, *al-Risalah*, tran. by Majid Khadduri, The Johns Hopkin Press, Baltimore, p. 120.

¹³⁹ We now have the psychology of the Believers-God-fearing men, led by that pattern of men and of leaders, the Prophet Muhammad (pbuh).

¹⁴⁰ The Qur'an, 33: 21.

¹⁴¹ The Qur'an, 53:3-5.

¹⁴² Said Ramadan, *Islamic Law*, p. 66.

¹⁴³ The Qur'an, 16:89.

¹⁴⁴ Al-Mawardi, *Adab al-Qati*, *Op. Cit.*, p. 129.

*When a ruler (or a judge) gives a decision having tried his best to decide correctly and his right, he will have double reward; and when he gives a decision having tried his best to decide correctly and is wrong, he will have a single reward.*¹⁴⁵

This hadith implies that regardless of its result, *ijtihad* never partakes of sin.¹⁴⁶ When the necessary requirements of *ijtihad* are present, the result is always meritorious and never blameworthy.¹⁴⁷ According to al-Mawardi, a *qadli* who does not exercise *ijtihad* in his judgement the decree which he issues is null though it is correct. A learned *qadli* is, therefore, not permitted to follow other's ruling blindly. Al-Mawardi cited second hadith that narrated by Buraidah that the Prophet Muhammad said to the effect:

*Judges are of three kinds, one of whom will go to Paradise and two to Hell. The one who will go to Paradise is a man who knows what is right and gives judgement accordingly; but a man who knows what is right and acts tyrannically in his judgement will go to hell; and a man who gives judgement for people when he is ignorant will go to Hell.*¹⁴⁸

It is stated in the Qur'an to the effect:

*O you, who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result.*¹⁴⁹

Another hadith narrated by Abu Ayub al-An'ari, the Prophet Muhammad said:

*Allah is with the distributor when he distributes and with the judge when he gives judgement.*¹⁵⁰

Hadith narrated from Abu Hurairah, the Prophet Muhammad said:

*When the judge sits to adjudicate between people, Allah sent two Angels to support him, if he was just, they will stay with him but if the judge unjust, they leave him.*¹⁵¹

As for the Sunnah, the Messenger of Allah was himself in charge of the judicial system and he judged between people. Al-Mawardi stated that among the proof of Sunnah, the Prophet Muhammad judge among his people himself.¹⁵²

¹⁴⁵ Hadith narrated from Abdallah bin Amr and Abu Hurairah. See al-Mawardi Adab al-Qati, *Ibid.*, p. 127; Sunan Abu Dawud, Kitab al-Aqtiyyah, p. 1014.

¹⁴⁶ Al-Mawardi, *Ibid.*, p. 129.

¹⁴⁷ According to Mahdi Zahraa, a sincere judge who exerts his efforts and concludes a correct decision is rewarded one reward for his good effort. He further mentioned that the reward mentioned here is Divine reward. For more detail see Mahdi Zahraa, "Characteristic Features of Islamic Law: Perceptions and Misconceptions", Arab Law Quarterly [vo. 15 no. 2], 2000, p. 192.

¹⁴⁸ Al-Mawardi, Adab al-Qati, *Op. Cit.*, p. 128.

¹⁴⁹ The Qur'an, 4:59.

¹⁵⁰ Al-Mawardi, Adab al-Qati, *Ibid.*, p. 129.

¹⁵¹ *Ibid.*, p. 130.

¹⁵² *Ibid.*, p. 130. Muslim reported on the authority of A'isha, wife of the Messenger of Allah, that she said, "Saad ibn Abi Waqqas and Abd ibn Zamaa disputed with each other over a young boy. Saad said: Messenger of Allah, he is the son of my brother Utbah ibn Abi Waqqas as he made explicit that he was his son. Look at his resemblance. Abd ibn Zamaa said: Messenger of Allah, he is my brother as he was born on the bed of my father from his slave-girl. Allah's Messenger looked at his resemblance and found a clear resemblance with aUtbah, but he said: He is yours O aAbd ibn Zamaa, for the child is to be attributed to one on whose bed it is born, and stoning is for the adulterer. This is proof that Prophet Muhammad (pbuh) judged between the people, and that his judgement carried authority to be implemented.

Umm Salamah narrated that the Prophet had said:

You have argued before me, it may be that between you one is more eloquent in his argument than the other. Therefore my decision is based on what I heard from him. Those that I have decided for him a right that is his brother's (right), (due to his eloquence of speech), let him not take it, for I have cut for him a piece of Hellfire.¹⁵³

The above hadith stresses on the importance of evidence and argument during the course of trial. There may be instances where the advocate's eloquence of argument and speech may influence the judge's finding in favour of his client but nevertheless justice and righteousness is not on his side. In such a situation the advocate have only managed to do evil; what he had won is nothing more than sin, falsehood and Hellfire.

As the leader of the ummah, Prophet Muhammad was called upon to resolve dispute and, when he did so, He acted in His capacity as Allah's Messenger. His actions in this regard, as remembered by posterity, established a model for the ideal judge. It is reported that the brother of a man who had been slain apprehended the murderer and brought him to the Prophet to decide the case. The murderer confessed to his crime, whereupon the Prophet asked if he or his relatives could pay the diyah, blood money. When he replied in the negative, the Prophet gave him to the person who had apprehended

him, saying, "He is yours." As they were leaving, the Prophet said, "If he kills him, he will be no different than the murderer." Upon hearing the Prophet's explanation, the man returns and released the murderer. Here the Prophet Muhammad used his position as the Messenger of Allah to adjudicate the application of tribal justice and to produce an outcome that was acceptable to both parties.¹⁵⁴

The Prophet Muhammad also appointed other Companions to be a judge like 'Utab ibn Asid as a judge in Makkah after fathu Makkah, MuAadh ibn Jabal in Yemen, Dahiyah al-Kalbi also in Yemen, al-Aala' ibn al-Hadrami in Bahrain, Aali ibn Abi Talib, Abu Musa al-AshAari, Aamru ibn al-Aa', Hudhaifah ibn al-Yaman and Ma'qal ibn Yasar.¹⁵⁵

Thus we find that the jurists of Islam have been active in researching and finding solutions to the problems encountered by them in their time and we have a vast literature in the fiqh of Islam. To those who argue that because the Qur'an and the Sunnah are fundamental and cannot be amended or changed there is little scope for the intellect in the formation of Islamic law, one has only to point to the vast library of Islamic jurisprudence, the result of the efforts of Muslim jurists in using their reason and power of intellect to arrive at solutions to problems not specifically dealt with in the Qur'an and the Sunnah, and to expand upon the Divine revelation either to cover new

¹⁵³ Sahih Muslim, Sharh al-Nawawi, vol. 12, al-Matbaah al-Misriyyah wa Maktabuha, Egypt, 1924, p. 4.

¹⁵⁴ Muhammad Khalid Masud, Rodolph Peters and David S. Power (eds.), "Dispensing Justice in Islam Qadis and their Judgments", Studies in Islamic Law and Society, Brill, Leiden and Boston, 2006, p. 7.

¹⁵⁵ Al-Mawardi, Adab al-Qati, *Op. Cit.*, p. 132. See the lists of judges during the Prophet Muhammad period in Muhammad al-Zuhayli, Tarikh al-Qata' fi al-Islam, pp. 64-74.

cases or to realise greater equity under the challenging circumstances of history. And yet, throughout Islamic history, the Divine and the human elements in legislation were never mixed. The vast difference between the inspired sources of Islamic law-the Holy Qur'an and the Sunnah-and the non inspired sources-the result of *ijtihad* by Muslim scholars has never been far from sight.

5. The Supplementary Sources (the *Ijma'*, *Qiyas*, *Ijtihad*, *Aaql* and '*Urf*) on *Qadla'*

Many scholars have related to us that there is consensus among Muslims on the legal status of the judicial system in Islam.¹⁵⁶ The Companions clarify that and gave attention to the *qadla'* and one of them became a judge or appointed other Companions to be a judge. During the *Khulafa' al-Rashidun* time, they appointed a judge in all province of Islamic State. For example, Abu Bakr appointed 'Umar ibn al-Khattab as a judge and said to 'Umar ibn al-Khattab: "judge between people because I'm busy with the other thing". 'Umar ibn al-Khattab became a Caliph and he appointed many of his Companions to be a judge. He appointed Abu al-Darda' in Madinah and Damascus, Abu Musa al-AshAari in Ba-rah and Shuraih ibn al-Harith al-Kindi in Kufah.

Aali ibn Abi Talib also was a judge and this situation continued during the Umayyads and the Abbasids periods until the collapsed of Islamic Caliphate.¹⁵⁷

Thus, 'Umar ibn al-Khattab said that the *qadla'* is "the task of the judiciary is an undisputed obligation and the Sunnah to be followed."¹⁵⁸ Ibn Qudamah (d. 620/1223) says: "The Muslims are unanimously agreed that a judicial system must be established for the people."¹⁵⁹

The *qiyas* is the extension of the Shariah law from an original case to a new case. Recourse to analogy is only warranted if the solution of a new case cannot be found in the Qur'an, the Sunnah or the *Ijma'*. According to al-Mawardi, the *Qiyas* is a form of *ijtihad*,¹⁶⁰ which is expressly validated in the hadith of MuAadh ibn Jabal.¹⁶¹ It is reported that the Prophet asked MuAadh ibn Jabal, upon the letter's appointment as a judge to the Yemen, questions in answer to which MuAadh ibn Jabal told the Prophet that he would resort to his own *ijtihad* in the event that he failed to find guidance in the Qur'an and the Sunnah, and the Prophet was pleased with this reply. Since the hadith does not specify any form of reasoning in particular, analogical reasoning falls with the meaning of this hadith.

The *ijtihad* is the most important source of Islamic law next to the Qur'an and the

¹⁵⁶ Al-Mawardi discussed al-Ijmaa in *Adab al-Qati*. See al-Mawardi, *Adab al-Qati*, *Ibid.*, pp. 450-487.

¹⁵⁷ Muhammad al-Zuhayli, *Tarikh al-Qata' fi al-Islam*, pp. 28-29.

¹⁵⁸ Al-Mawardi, *Ahkam al-Sultaniyyah*, p. 91.

¹⁵⁹ Abd Allah ibn Ahmad Ibn Qudamah al-Muqaddisi, 1969, *al-Mughni*, vol. 10, *Maktabah al-Qahirah*, Egypt, p. 32.

¹⁶⁰ Al-Mawardi divided al-Qiyas into two parts. First part is *ijtihad* and second part is al-Istinbat. See al-Mawardi, *Adab al-Qati*, vol. 1, p. 488. Mawil Izzidien stated that al-Qiyas according to the Shafiai, is not different from *ijtihad*, individual opinion. For more detail see discussion by Mawil Izzidien, 2004, *Islamic Law from Historical Foundations to Contemporary Practice*, Edinburgh University Press, Edinburgh, pp. 51-56.

¹⁶¹ M. H. Kamali, 2003, *Principles of Islamic Jurisprudence*, The Islamic Texts Society, Cambridge, p. 288.

Sunnah. Thus, *ijtihad* continues to be the main instrument of interpreting the Divine law and relating it to the changing conditions of the Muslim community to attain justice. The ‘*ulama*’ are in agreement that *ijtihad* is the authority in Islamic judicial system. The hadith of MuAadh ibn Jabal “...I shall judge in accordance with Allah’s Book,”...with the Sunnah of the Prophet,”...I shall do my best to form an opinion and spare no pains.”¹⁶² The Prophet agreed on this and it provides a clear authority for *ijtihad* in Islamic judicial system. According to one hadith narrated by Abu Dawud from Umm Salamah, the Prophet to have said: “When I do not receive a revelation, I adjudicate among you on the basis of my opinion.”¹⁶³

According to al-Mawardi, the *qadla*’ is part of enjoining right conduct and forbidding indecency, *amr bi al-ma’ruf wa al-nahy Aan al-munkar*.¹⁶⁴ The ayah promotes the Qur’anic principle of the *amr bi al-ma’ruf wa al-nahy Aan al-munkar* as the Qur’an mentioned:

*...those who enjoin what is right and forbid what is wrong...*¹⁶⁵

Al-Mawardi mentioned that it is necessary for people to have someone to judge between them because the natures of people make them to compete each other and caused have a conflict. Therefore, all tradition of nation and legal system has the *qada*’institution. Moreover, the rulings of

ijtihad are differences so they are a need for a clear and binding judgement for them.¹⁶⁶

The duties of the judiciary include enjoining what is right, helping the oppressed, securing people’s rights, and keeping oppressive behavior in check. None of these duties can be performed without the appointment of a judiciary. A judicial system is a necessity for the prosperity and development of nations. Humankind lived in the society and need some kind of institution of justice to solve their dispute. It is needed to secure human happiness, protect the rights of the oppressed, and restrain the oppressor. It is the way to resolve disputes and ensure human rights. It facilitates enjoining what is right, forbidding what is wrong, and curbing immoral behavior. In this way, a just social order can be enjoyed by all sectors of society, and every individual can feel secure in his life, property, honor, and liberty. In this environment, nations can progress, civilization can be achieved, and people are free to pursue what will be better for them both spiritually and materially.¹⁶⁷

6. Conclusion

In the context of the enforcement of the *qadla*’ of Allah, the main objective is to ensure justice. Thus adjudication must be based on truth, justice and the *hukm* of Allah. All humans are the servants of Allah, and as such all should be treated equally in courts of law, and all are accountable for their deeds.

¹⁶² Al-Mawardi, *Ahkam al-Sultaniyyah*, *Op. Cit.*, p. 85.

¹⁶³ Muhammad al-Zuhayli, *Tarikh al-Qata’ fi al-Islam*, p. 50.

¹⁶⁴ Al-Mawardi, *Adab al-Qati*, *Op. Cit.*, p. 135.

¹⁶⁵ The Qur’an, 9:112.

¹⁶⁶ Al-Mawardi, *Adab al-Qati*, *Op. Cit.*, p. 136.

¹⁶⁷ Muhammad al-Zuhayli, *Tarikh al-Qata’ fi al-Islam*, p. 29-30.

For generations, Muslims have witnessed prosperity, peace and tranquillity through their judicial experiences of the Qur'an and

the Sunnah mentioned above. These Islamic judicial systems have integral part of Muslim life throughout the centuries.

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