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# WILAYAT AL-QADI AND ITS MALPRACTICE IN IRAN, EGYPT, AND JORDAN

Shams Al Din Al Hajjaji\*

*“A Person who has been appointed as Judge,  
is one slaughtered without a knife.”*

–The Prophet Mohammed (peace be upon him), the Sunnah

## ABSTRACT

The people play a direct and important role in the Islamic theory of judicial power (*Wilayat Al-Qadi*). This role begins in participating in the appointment of a supreme judge. The people also ensure the independence and accountability of individual judges and the judiciary as an institution. This article argues that the judicial systems of Iran, Egypt, and Jordan abuse their powers. It offers an account of the malpractice of judicial power in these countries and recommends reforms to conform with Islamic principles.

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## INTRODUCTION

In Western countries, the concept of government by judiciary (*Wilayat al-Qadi*) conveys a deprecatory, rather than a laudatory meaning.<sup>1</sup> It may be used to insinuate that the judiciary is above the law,<sup>2</sup> because judges are considered the legal elite,<sup>3</sup> and there is fear they will abuse their powers.<sup>4</sup> In Islam, however, this term is used as a complimentary expression, referring to governmental and political obedience of the law.<sup>5</sup>

Though Islamic scholars agree that government officials must possess the highest level of legal knowledge,<sup>6</sup> they disagree whether these members are judges or jurists.<sup>7</sup> *Shia* scholars adopt a theory of government of the jurispru-

1. Philip P. Kurland, *Government by Judiciary*, 2 U. ARK. LITTLE ROCK L.J. 307, 307–308 (1979).

2. RAOUL BERGER, *GOVERNMENT BY JUDICIARY THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT*, 4 (1997).

3. James S. Amelang, *Barrister and Judges in Early Modern Barcelona: The Rise of a Legal Elite*, 89 AMER. HIST. REV. 1264, 1264–1265 (1984).

4. Graham Gee, *The Persistent Politics of Judicial Selection: A Comparative Analysis*, in *JUDICIAL INDEPENDENCE IN TRANSITION* 125 (Anja Seibert-Fohr eds., 2012).

5. Khaled Abou El Fadl, *The Centrality of Shari'ah to Government and Constitutionalism*, in *CONSTITUTIONALISM IN THE ISLAMIC COUNTRIES, BETWEEN UPHEAVAL AND CONTINUITY*, 39 (Rainer Grote & Tilmann Rode eds. 2012).

6. For *Shia* see, IMAM KHOMENI, *ISLAMIC GOVERNMENT, GOVERNANCE OF THE JURIST (VELAYAT E FAQEEH)*, 50 (2017); for *Sunni*, see, Ersilia Francesca, *The Concept of Sunna in Ibadī School*, in *THE SUNNA AND ITS STATUS IN ISLAMIC LAW: THE SEARCH FOR A SOUND HADITH*, 105 (Adis Dufeija ed. 2015).

7. *Id.*

dent (*Wilayat Al-Faqih, Vilayat Al-Faqih* in Persian),<sup>8</sup> which is contrasted with *Wilayat al-Qadi* in Part II.A.

The government by judiciary theory in Islam rests on three premises: (1) that the Prophet's main role was that of a supreme judge; (2) that Islam negatively views the judicial profession; and (3) that Islam distinguishes between two levels of judicial legitimacy. The first of these premises is that the Quran establishes that belief in God is conditioned upon acceptance of the Prophet as a judge whose judgments are drawn from God's commands.<sup>9</sup> The Prophet was not a monarch with unlimited authority.<sup>10</sup> His main role was resolving disagreements among the Muslims.<sup>11</sup>

The second premise is that Islam has a negative view of judicial profession.<sup>12</sup> The Prophet discourages Muslims from being judges,<sup>13</sup> since judges will regret making certain decisions on the Day of Resurrection.<sup>14</sup> The Prophet distinguishes between three types of judges, only one of whom will survive

8. The Islamic Government Section of the Iranian Constitution states: The concept of Islamic government, based on the governance of the jurisprudent (*velāyat-e Faqih*), which was provided by Imam Khomeini at the height of the repression and oppression by the despotic regime, produced a clear and unifying goal among Muslim people. It opened the way for authentic Islamic doctrinal struggle, and further intensified the struggle of the committed Muslim militants both inside and outside Iran.

CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN, adopted in 3 December 1979, amended in 28 July 1989, Islamic Government.

9. Quran Surat Al-Ma'idah states:  
And We have revealed to you, [O Muhammad], the Book in truth, confirming that which preceded it of the Scripture and as a criterion over it. So judge between them by what Allah has revealed and do not follow their inclinations away from what has come to you of the truth. To each of you We prescribed a law and a method. Had Allah willed, He would have made you one nation [united in religion], but [He intended] to test you in what He has given you; so race to [all that is] good. To Allah is your return all together, and He will [then] inform you concerning that over which you used to differ.

Quran Surat Al-Ma'idah, 5:48.

10. JALAL AL-DIN AL-SUYUTI, *MA RAWAH AL-ASADIEN FI A'DAM AL-MAJIE ILA-AL-SALATIN : ZAM ALQADA' WA-TAQOLD AL-AKHKAM*, 44 (1991).

11. The Quran Surat Al-Nisa states "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 an advocate." Quran Surat al-Nisa 4:105.

12. The Adoption of A Middle Course, *SUNNAH*, <https://Sunnah.com/bukhari/81/56>.

13. The Prophet said "whoever takes the responsibility of judge, or is appointed as judge between the people, then he has been slaughtered without a knife." The Chapters on Judgements From the Messenger of Allah, *Jami' at-Tirmidhi*, *SUNNAH*, <https://Sunnah.com/tirmidhi/15/5>.

14. The Prophet said "the just judge will be called (forth) on the Day of Resurrection and he will wish he had never given judgement even between two men throughout his life, due to the severity of the account he will face." Judgement, *Bulugh al-Maram* 1408, Book 14, Hadith 12, Hadith Grade: Da'if (Weak) *SUNNAH*, <https://Sunnah.com/bulugh/14/12>.

the Day of Resurrection.<sup>15</sup> The judge who will eventually go to heaven is the one who is sure of the right thing and who makes his judgment accordingly.<sup>16</sup> Meanwhile, the judge who knows what is right yet acts tyrannically in his judgment<sup>17</sup> and the judge who makes decisions based on ignorance are both doomed to Hell.<sup>18</sup> As a result, some assume that Muslims should avoid the judicial profession as a career.

The third premise of the government by judiciary theory is that there are two levels of judicial legitimacy: that of the Prophet and that of any other judge. God chose the Prophet to be the supreme judge for Muslims.<sup>19</sup> To believe in Islam, one must recognize the Prophet as the supreme judge.<sup>20</sup> Otherwise, that person is free to choose their judge.<sup>21</sup>

According to the Quran, the people are the source of legitimacy for any other senior judges. However, People consensus (*Ijma*)<sup>22</sup> is limited to senior judges.<sup>23</sup> In *Sunna*, God chose the Prophet, and the Muslims agreed to God's choice. Yet, the Prophet appointed junior judges, like Mo'az ibn Jabal, and Ali ibn Abi Talib, without the people's consent or consensus.<sup>24</sup> This distinction in

15. PATRICK SOOKHDEO, UNDERSTANDING ISLAMIC THEOLOGY, Hadith number 595 (Isaac Publishing).

16. *Id.*

17. *Id.*

18. *Id.*

19. The Quran States:

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.

Quran Surat Al-Nissa, 4:65.

20. *Id.*

21. For the Jews, Quran States:

So if they (Jews) 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, God loves those who act justly. But how is it that they come to you for judgement while they have the Torah, in which is the judgement of Allah? Then they turn away, [even] after that; but those are not [in fact] believers.

Quran Surat Al-Ma'idah 5:42–43.

For the Christians, the Quran States “And let the People of the Gospel judge by what Allah has revealed therein. And whoever does not judge by what Allah has revealed—then it is those who are the defiantly disobedient.” Quran Surat Al-Ma'dah 5:47.

22. ANN BLACK ET AL., MODERN PERSPECTIVES ON ISLAMIC LAW, 9 (2013).

23. The Quran states “And whoever opposes the Messenger after guidance has become clear to him and follows other than the way of the believers—We will give him what he has taken and drive him into Hell, and evil it is as a destination.” Quran Surat al-Nusa 4:113.

24. When the Prophet intended to send *Mu'adh ibn Jabal* to the Yemen as a judge, he asked him:

How will you judge when the occasion of deciding a case arises? He replied: I shall judge in accordance with Allah's Book. He asked: (What will you do) if you do not find any guidance in Allah's Book? He replied: (I shall act) in ac-

rank has dual purpose: protecting junior judges from the risk of engaging in the political process<sup>25</sup> and selecting the best-qualified junior judge irrespective of political influences.<sup>26</sup>

This Article focuses on one *Shia*-majority country (Iran),<sup>27</sup> and two *Sunni*-majority countries (Egypt, and Jordan).<sup>28</sup> A key disagreement between these sects centers on who is competent to succeed the Prophet in his judicial role.<sup>29</sup> From the perspective of prominent *Sunni* scholars, there is no prohibition on relying on *Shia* jurisprudence.<sup>30</sup> Shiekh Mahmud Shaltut (1893–1963), Grand Imam and President of the University of Al-Azhar,<sup>31</sup> issued a famous *fatwa* arguing that *Ja'fari*-school jurisprudence is a reliable source of authority.<sup>32</sup> And, Ayatollah Khomeini and the Iranian constitution both prohibit the disparagement of any *Sunni* scholars.<sup>33</sup> Khomeini has also permitted the *Shias*

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cordance with the Sunnah of the Messenger of Allah. He asked: (What will you do) if you do not find any guidance in the Sunnah of the Messenger of Allah and in Allah's Book? He replied: I shall do my best to form an opinion and I shall spare no effort. The Messenger of Allah then patted him on the breast and said: Praise be to Allah Who has helped the messenger of the Messenger of Allah to find something which pleases the Messenger of Allah.

The Office of the Judge (Kitab Al-Aqdiyah), (11) Chapter: Struggling for an Opinion When Passing Judgements, Grade: Da'if (Al Albani), Reference: Sunan Abi Dawud 3592, SUNNAH, <https://Sunnah.com/abudawud/25/22>.

25. To read about corruption in judicial elections, see Teresa Nesbitt Cosby, *Picking the Supremes: The Impact of Money, Politics and Influences in Judicial Elections*, 4 *Faulkner L. Rev.* 73, 100–113 (2012–2013).

26. Edward J. Jr Fox, *Judges and Politics*, 27 *TEMP. L. Q.* 1, 3 (1953).

27. Article 12 of the Iranian Constitution states “the official religion of Iran is Islam and the Twelvers Ja'fari school of [shi'] religion. This principle shall remain eternally unchangeable.” CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN, adopted in 3 December 1979, amended in 28 July 1989, art. 12.

28. Article 2 of the Jordanian Constitution states “Islam is the religion of the State and Arabic is its official language.” CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN, 1 January 1952, amend in 2011, art.59/1. See also, Law No. 15 of 2012 (Constitutional Court Law), 6 June 2013, art.2 (Jordan). Article 2 states “Islam is the religion of the state and Arabic is its official language. The principles of Islamic Sharia are the principle source of legislation.” CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 2 (Egypt).

29. Adam Oler, *Brief Introduction to the Sunni-Shiite Struggle: Six Key Points*, 35 *REPORTER* 2, 3–4 (2008); see also, Marzieh Samaei Sahneh Saraei et al., *Shiite and Sunni Political Expediency Position in Jurisprudence: A Case Study of Political Thought or Imam Komeini and Abu Ishaq Shatby*, 9 *J. POL. & L.* 108, 110–114 (2016).

30. Rainer Brunner, *Interesting Times: Egypt and Shi'ism at the Beginning of the Twenty-First Century*, 224 in *THE SUNNA AND SHI'A IN HISTORY: DIVISION AND ECUMENISM IN THE MUSLIM MIDDLE EAST*, (Ofra Bengio and Meir Litvak eds., 2011). See also, Hamid Enayat, *Shi'ism and Sunnism*, 81 in *SHI'ISM: DOCTRINES, THOUGHT AND SPIRITUALITY*, (Seyyed Hossein Nasr et al., eds.1988).

31. Shultut's *fatwa* believed that Islam did not impose a certain school of jurisprudence to follow. Each Muslim has the right to follow any Islamic school that follows Quran and Sunna. *Id.*

32. *Id.*

33. Article 12 of the Iranian Constitution states:

to pray behind a Sunni Imam<sup>34</sup> and has issued a famous *fatwa* to end a long debate between the *Sunni* and *Shia*.<sup>35</sup> As a result, there is no religious obstacle in comparing the jurisprudence of Iran with that of Egypt and Jordan.

This Article applies three methodologies. The first approach is a historical one, presenting the early rules of Islamic jurisprudence set forth in the Quran and through judgments issued by the prophet (*Sunna*)<sup>36</sup> and contemplating their modern application to more than 1.5 billion Muslims.<sup>37</sup> The second method is a comparative case study method. The third method mixes Islamic *Sharia* with secular rules. There are two ways this method could be applied. First, one could argue that modern legal rules and jurisprudence are in line with Islamic *Sharia* rules.<sup>38</sup> For example, many Muslim contemporary scholars argue that democracy is Islamic.<sup>39</sup> They argue that democracy is the modern application of the *Shura* principle, which is the Islamic principle of public participation.<sup>40</sup> However, there are three major differences between *Shura* and democracy. These are exclusiveness (Muslims versus non-Muslims in a plural society, where each group has its own rules);<sup>41</sup> frequency (each Muslim has to

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Other Islamic schools of thought, such as the Hanafi, Shafi'i, Maliki, Hanbali, and Zaydi, are deserving of total respect and their followers are free to perform their own religious practices, religious education, and personal matters. They may practice their religious education, personal status, (marriage, divorce, inheritance, and bequest), in accordance with their own jurisprudence. The dispute over these matters is recognized in the courts. In any area where followers of these schools of thought are in the majority, local regulations, within the domain of the council's jurisdictions, are set according to that school of thought so long as the rights of the followers of other schools of religion are maintained.

CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN, adopted in 3 December 1979, amended in 28 July 1989, art. 12.

34. ELISBEVA MACHLIS, SHI'I SECTARIANISM IN THE MIDDLE EAST: MODERNIZATION AND THE QUEST FOR ISLAMIC UNIVERSALISM, 151 (2014).

35. *Insulting the Mother of the Faithful Aisha is Prohibited*, KHAMENEI (June 11, 2016), <http://english.khamenei.ir/news/3905/Ayatollah-Khamenei-s-fatwa-Insulting-the-Mother-of-the-Faithful>.

36. MOHAND MAHER GASSEM, AL-QADA FI-AL-A'SAR AMAWYI, 33–44 (2009).

37. For statistics of the Muslims majority countries, please refer to *The Muslim World and Human Development: An Introduction*, in THE MUSLIM WORLD IN THE 21ST CENTURY SPACE, POWER, AND HUMAN DEVELOPMENT, 3–5 (Samiul Hasan ed., 2012).

38. Liv Tonnesen, *Democratizing Islam and Islamizing Democracy: An Inquiry into Hasan AlTurabi's Conception of Shura in Light of Western Democratic Theory*, 27 NORDISK TIDSSKRIFT MENNESKERETTICETER 313, 314 (2009).

39. Ali Iyad, Yakub, *The Islamic Roots of Democracy*, 12 U. MIAMI INT'L & COMP. L. REV. 269, 270 (2004). See also, Azizah Al-Hibri, *Islamic Constitutionalism and the Concept of Democracy*, 24 CASE W. RES. J. INT'L L. 1, 2 (1992).

40. *Id.*

41. The Quran denies that non-Muslims, like Christian and Jew, consult Muslims about their religion. It states "but how is it that they (the people of the book) come to you for judgement while they have the Torah, in which is the judgement of God?" The Quran Surat Al-Ma'diah 5:43.

perform their political role in isolation of religious duties);<sup>42</sup> and generality (each Muslim has their own political convictions).<sup>43</sup>

A more successful application of the third methodology is to establish new, modern rules that will truly comply with Islamic *Sharia*, as exemplified by the work of prominent legal scholar Abd El-Razzak El-Sanhuri, who assimilated the French administrative courts system (the State Council),<sup>44</sup> and the French Civil Code into Egypt, Iraq and Syria with a reference to Islamic *Sharia*.<sup>45</sup>

The Islamic theory of judicial power has three pillars: appointment, independence, and accountability, all of which are explored in Part I. Part II presents the practices of three Muslim-majority countries and several reforms to bring these judicial systems in line with *Wilayat Al-Qadi*.

## I. ISLAMIC THEORY OF THE JUDICIARY: THE CONCEPT OF *WILAYAT AL-QADI*

### A. *Judicial Appointment: Authority and Qualifications*

#### 1. Appointment of Senior Judges

Islam distinguishes between the authority of appointment of the Prophet and the authority of appointment of any other senior judge. Both God and the People appointed the Prophet.<sup>46</sup> Otherwise, Islam is based on legal pluralism, which gives each person the right to choose his or her preferred law and judge.<sup>47</sup> The role of the people in choosing the Prophet as a supreme judge takes two forms.<sup>48</sup> The first is through a formal process of giving the Prophet either an

42. The Quran states:

So by mercy from God, (O Muhammad), you were lenient with them. And if you had been rude (in speech) and harsh in heart, they would have disbanded from about you. So pardon them and ask forgiveness for them and consult them in the matter. And when you have decided then rely upon God. Indeed, God loves those who rely (upon him).  
Quran, Surat Al-Imran, 3:159.

43. The Quran states:

And when there comes to them information about [public] security or fear, they spread it around. But if they had referred it back to the Messenger or to those of authority among them, then the ones who [can] draw correct conclusions from it would have known about it. And if not for the favor of God upon you and His mercy, you would have followed Satan, except for a few.  
Quran, Surat Al-Nisa, 4:48.

44. *Id.*

45. AMR SHALAKANY, *IZDIHĀR WA-INHIYĀR AL-NUKĤBA AL-QĀNŪNIYYA AL-MISRIYYA* (2013) 277.

46. The Quran states “ 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.” Quran Surat Al-Nissa 4:65.

47. Sherman A. Jackson, *Legal Pluralism Between Islam and the Nation-State: Romantic Medievalism or Pragmatic Modernity?* 30 *FORDHAM INT’L L J* 158, 163 (2006).

48. AKRAM DIYA UMARI, *MADINAH SOCIETY AT THE TIME OF THE PROPHET ITS*



individual or group pledge.<sup>49</sup> Alternatively, like with the Madinah Constitution, tribal agreement can be a basis for recognizing the Prophet's authority.<sup>50</sup>

The divine character of legitimacy ended with the prophet's death,<sup>51</sup> and Islam established no formal procedure for obtaining the people's consent for subsequent senior judges.<sup>52</sup> Now, senior judges derive their legitimacy from the people's support.<sup>53</sup> In Islam, judicial legitimacy is based on the consent

CHARACTERISTICS AND ORGANIZATION, 112 (Huda Khattab, trans. 1991).

49. *Id.* An individual pledge occurs when someone converts to Islam, by joining a new congregation, *Umat Al-Islam*. The group pledge happens twice in the two Pledges of Al-Aqabah. The representatives of the two major tribes of Madinah announced their pledge to the Prophet. This Pledge was the main reason that the Prophet immigrated to Madinah.

50. Anver Emon, *Reflections on the Constitution of Medina: an Essay on Methodology and Ideology in Islamic Legal History*, 1 UCLA J. ISLAMIC & NEAR E. L. 103, 102–104 (2001–2002). When the prophet immigrated to Madinah, a legal question was raised about the status of the constitution and its authority over non-Muslims. Before Islam, the city of Madinah (Yathrab) consisted of two major Arabian tribes and four major Jewish tribes. When the two Arab tribes gave the prophet the Pledge in Al-Aqabah, the Prophet immigrated from Makkah to Madinah. The Jewish tribes did not give the Prophet pledge as Muslims. Rather, they engaged with him in an agreement of mutual defense, which is called the Constitution of Madinah. The constitution makes the Prophet as an arbitrator for any dispute arising from violation of any of its provisions. Hence, the Prophet's judicial authority included non-Muslims living in a Muslim majority territory.

51. Chase Robinson, *The Rise of Islam*, 195 in *THE NEW CAMBRIDGE HISTORY OF ISLAM*, (Chase F. Robinson ed 2010).

52. The Quran states only on the principle of *Shura*, letting the people determine the appropriate procedures for consultations. It states: "And those who have responded to their lord and established prayer and whose affair is [determined by] consultation among themselves, and from what We have provided them, they spend." Quran Surat Al-Shura 42:37.

53. From the period of the Prophet's death and the assent of Ali ibn Abi Talib, this showing of legitimacy took three forms. The first method was public consultation with everyone choosing the best candidate (direct democracy). When the Prophet passed away, Muslims met at Saqifah bani Sa'idah's to choose his successor. In that debate, no one claimed a divine right to take over the position. On the contrary, the debate was based on their personal and tribal merits. After a long debate, they chose Abu Bakr Al-Siddiq (Muhajreen) to be the Prophet's successor. The second method was consulting individual Muslim jurists. When Abu Bakr, who ruled for only two years, felt that his life was coming to an end, he gathered all the Prophet's friends to choose his successor. However, they delegated their power to Abu Baker to choose whomever he considered to be the best among them. After long and careful consideration and individually consulting with the Prophet's friends, Abu Bakr appointed Omar Ibn el-Khatteb as his successor. Then, he gave a speech to the people. He said, "Do you accept who I appoint on you. I did all my effort, I did not appoint a relative, and I appointed Omar Ibn Al-Khatteb. So, listen to him and obey." The third method was to choose a committee to appoint the senior judge. Omar Ibn Al-Kahatab preceded Abu Bakr as Amir al-Mu'minin. Omar ruled for the period of ten years until he was assassinated. While on his deathbed, Omar ibn Al-Katatab chose six of the Prophet's friends to form an appointment committee to choose a replacement amongst themselves: Ali ibn abi Talib, Othman ibn Abi Affan, Talha ibn Ubayd Allah, Al Zubair ibn Al-awam, Sa'd Ibn Waqqas, and Abdel Rahman Ibn Awf. After consultation with the people, Adel Rahman announced Othman as the next successor and Amir al-Mu'minin.

and the consensus of the people.<sup>54</sup> Judges must be chosen from the community because they play a major role in developing the rules that affect both the lives and afterlives of Muslims.<sup>55</sup>

## 2. Appointment of Junior Judges

Islam balances two contradictory interests in appointing junior judges: individuals must not request judicial appointments, yet junior judges must not work under tyrants. The first interest is that the Prophet banned Muslims from applying to any judicial position.<sup>56</sup> He refused to appoint Al-Abbas and Abu Dhār al-Ghifari when they requested to be given public tasks.<sup>57</sup> Islamic history does not recognize any formal process to apply for a junior judge position.<sup>58</sup> A senior judge is responsible for soliciting the best jurist to be a junior judge.<sup>59</sup> Therefore, the senior judge or council enjoys complete discretion in the appointment of junior judges.

The second interest is that junior judges shall not accept to work under any tyrant.<sup>60</sup> The exclusive control of senior judges in the appointment process is in tension with the requirement that junior judges serve as partners to—not followers of—the senior judge.<sup>61</sup> In Islamic legal history, many prominent Muslim scholars refused to be judges under tyrant Calipha.<sup>62</sup> Abu Hanifa al Numan, the founding father of Hanafi School of Islamic jurisprudence, refused to be a judge during Abbasid era.<sup>63</sup> In Abu Hanifa's last days, he refused Abu Ja'far al-Mansur's request for a judicial appointment because Ja'far was a

54. The Prophet said that “my nation will not unite on misguidance, so if you see them differing, follow the great majority.” Tribulation, (8) Chapter: The Great Majority, Grade: Da'if (Darussalam), Sunan Ibn Majah 3950, SUNNAH, <https://Sunnah.com/ibnmajah/36/25>.

55. WAEL HALLAQ, AN INTRODUCTION TO ISLAMIC LAW, 8 (2009).

56. The Prophet said, “Whoever takes the responsibility of judge, or is appointed as judge between the people, then he has been slaughtered without a knife.” The Chapters on Judgements From the Messenger of Allah, Jami' at-Tirmidhi, SUNNAH, <https://Sunnah.com/tirmidhi/15/5>. See also, The Chapters on Judgements From the messenger of Allah, SUNNAH, <https://Sunnah.com/tirmidhi/15/4> (The Prophet said, “Whoever seeks to be a judge, and asks others to intercede for him with it, then he will be left on his own. And whoever is coerced into it, Allah sends an angel down to him so that he can be correct.”).

57. JALAAL AL-DIN AL-SUOTI, ZAM AL-QADA WA-TAQALAD AL-AKHAM, 79 (1991).

58. The Prophet states “Whoever seeks to be a judge, and asks others to intercede for him with it, then he will be left on his own. And whoever is coerced into it, Allah sends an angel down to him so that he can be correct.” The Chapters on Judgements From The messenger of Allah, SUNNAH, <https://Sunnah.com/tirmidhi/15/4>.

59. JALAAL AL-DIN AL-SUOTI, ZAM AL-QADA WA-TAQALAD AL-AKHAM, 79 (1991).

60. ABI AL-HASSAN AL-MAWARDI, AL-AKHAM ALSUTANIYAH WA-AL-WALAYAT AL-DAYN-YAH, 29 (unknown year).

61. *Id.*

62. Robert Hefner, *Islam Matters: Culture and Progress in the Muslim World*, 266 in DEVELOPING CULTURES: ESSAYS ON CULTURAL CHANGE, (Lawrence Harrison & Jerome Kagan eds. 2006).

63. Abu Hanifah, Muslim Jurist and Theologian, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Abu-Hanifah>.

tyrant. For example, Abu Ja'far killed many army leaders perceived as threats to his throne.<sup>64</sup> When Abu Hanifa refused the appointment, Abu Ja'far jailed and tortured him until he died.<sup>65</sup> Many other Muslim jurists have refused judicial appointments under tyrants, like Zufar (Iraq), Abd Allah Faruq (Tunisia), and Aban Isa Dinnar (Spain).<sup>66</sup>

### 3. Qualifications of Islamic Judges

Muslim scholars have identified five qualifications for holding a judicial post.<sup>67</sup> First, the candidate must possess the highest legal knowledge, though no degree is necessary.<sup>68</sup> The Prophet, his four successors, and founders of the four Muslim schools of thought did not mandate any formal legal education.<sup>69</sup> Indeed, the Prophet himself was illiterate.<sup>70</sup> During the Prophet's time, the legal knowledge was based only on Quran, *Sunna*, and *Ijtihad*.<sup>71</sup> After the Prophet and his four successors, Muslim jurists introduced several new sources of Islamic jurisprudence: consensus, analogical reasoning, juristic preference, and the public interest.<sup>72</sup> At a later stage, judges' legal knowledge was based on mastering the knowledge of at least one school of the four major Islamic schools of thought.<sup>73</sup> For example, if an Egyptian senior judge is Hanafi, the junior judge must be a specialist in Hanafi jurisprudence.<sup>74</sup>

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64. Abu Mulim, Muslim Leader, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Abu-Muslim>.

65. Why Imam Abu Hanifah (RH) was Whipped by Caliph Al-Mansur, THE REVIVERS TRUTH JUSTICE FREEDOM, (Jun 22, 2015), <https://revivers.wordpress.com/2015/06/22/why-imam-abu-hanifah-rh-was-whipped-by-caliph-al-mansur>.

66. MAHMOUD MOHAMED ARNOWS, TARKH AL-QADA FI-AL-ISLAM, 86 (1914).

67. WAEL HALLAQ, *supra* note 55 at 135.

68. *Id.*

69. *Id.*

70. The Quran states:

Those who follow the Messenger, the unlettered prophet, whom they find written in what they have of the Torah and the Gospel, who enjoins upon them what is right and forbids them what is wrong and makes lawful for them the good things and prohibits for them the evil and relieves them of their burden and the shackles which were upon them. So they who have believed in him, honored him, supported him and followed the light which was sent down with him—it is those who will be the successful.

Quran, Surat Al-A'raf, 7:157.

71. The Quran states, "Show forgiveness, enjoin the customs, and turn away from the ignorant." Surah Al-A'raf 7:199. should be noted that customs shall not violate a clear verse in the Quran or *Sunna*. Nonetheless, customs are a legitimate secondary resource for Islamic jurisprudence.

72. Cherif Bassiouni & Gamal Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E. L. 135, 133–159 (2002).

73. *Id.*

74. *Id.*

Second, the candidate to a judicial post must be a jurist who can write a *fatwa*.<sup>75</sup> *Fatwa* is a legal opinion that has no legal binding power, though it is a respected legal opinion.<sup>76</sup> The legal power of the *Fatwa* comes from its power to convey a certain message to the public.<sup>77</sup> A *fatwa* is considered merely a juristic preference unless it receives consensus support (*Ij'ma*) among Muslims.<sup>78</sup> The more a jurist is able to write consensus *Fatawa* (plural of *fatwa*), the more the jurist is qualified to hold a judicial position.<sup>79</sup>

Third, a candidate to a judicial post must be a Muslim.<sup>80</sup> Islam depends profoundly on the idea of freedom of religion and legal pluralism.<sup>81</sup> Judges, along with independent jurists, play a major role in developing legal rules in Islam.<sup>82</sup> Muslim judges rule in cases involving Muslims, while non-Muslim judges rule in cases involving non-Muslims.<sup>83</sup> Islam does not mandate applying its rules on non-Muslims.<sup>84</sup> Each religion has to apply its rules on its own followers.<sup>85</sup> Islam does not give a Muslim the right to rule among non-Muslims, unless non-Muslims specifically consent.<sup>86</sup>

Fourth, there is an age requirement.<sup>87</sup> For senior judges, the minimum age is 40, which is the age of maturity.<sup>88</sup> As for junior judges, the minimum age

75. JOSEPH SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW*, 50–58 (1982).

76. MOHAMMAD HASHIM KAMALI, *PRINCIPLES OF ISLAMIC JURISPRUDENCE*, 313–322 (2003).

77. *Id.*

78. *Id.*

79. *Id.*

80. ABI AL-HASSAN AL-MAWARDI, *supra* note 60.

81. The Quran states:

There shall be no compulsion in [acceptance of] the religion. The right course has become clear from the wrong. So whoever disbelieves in Taghut and believes in Allah has grasped the most trustworthy handhold with no break in it. And Allah is Hearing and Knowing.

Quran Surat al-Baqarah 2:256.

82. Muhammad Khalid Maud et al., *Qadis and Their Courts: An Historical Survey*, in *DISPENSING JUSTICE IN ISLAM*, 2–4 (2006).

83. The Quran states “and never will Allah give the disbelievers over the believers a way.” Quran An-Nisa 4:141.

84. *Id.*

85. *Id.*

86. The Quran states:

So if they (Jews) come to you, (O Mohammad), 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 between them with justice. Indeed, God loves those who act justly.”

Quran Surat Al-Ma'idah 5:42.

87. ABI AL-HASSAN AL-MAWARDI, *supra* note 60.

88. The Quran states:

[He grows] until, when he reaches maturity and reaches [the age of] forty years, he says, “My Lord, enable me to be grateful for Your favor which You have bestowed upon me and upon my parents and to work righteousness of which You will approve and make righteous for me my offspring. Indeed, I have repented

is determined based on customs of each country.<sup>89</sup> The age of adulthood in Yemen is 14 years,<sup>90</sup> while in Egypt it is 21 years old.<sup>91</sup>

Fifth, Muslim jurists disagree on whether women can serve as judges.<sup>92</sup> Ibn Hazem Az-Zahiri Al-Andalusia (a Spanish Muslim scholar), proclaimed that women can be judges without any exception.<sup>93</sup> However, three schools of Islamic Jurisprudence (Hanbali, Malaki and Sha'ai) banned women from being judges.<sup>94</sup> The fourth major school, the Hanafi School, allows women to be appointed as judges, except in criminal cases.<sup>95</sup> The exception is based on the nature of punishment in Quran, which include noncustodial punishments,<sup>96</sup> like death penalty (homicide), flogging (adultery), and exile (terrorism).<sup>97</sup> The Hanafi School argues that women can get emotional about some types of crimes and punishments.<sup>98</sup>

## B. *Judicial Independence: Tenure, Consultation, and Remuneration*

### 1. Tenure and Promotion

Since the start of the Prophet's divine revelation,<sup>99</sup> supreme judges have been appointed for life<sup>100</sup> and cannot be removed from office, unless they

to You, and indeed, I am of the Muslims.

Quran Surat Al-Ahqf 46:15.

89. The Quran states, "Show forgiveness, enjoin the customs, and turn away from the ignorant." It has to be noted that customs shall not violate a clear verse in the Quran or Sunna. Nonetheless, Customs come as a secondary resource after these two primary sources. Surah Al-A'raf 7:199.

90. Article 133 of the Rights of the Child Act states "A Child of working age means any persons over 14 years of age." The Rights of the Child Act, art. 133 (Yemen).

91. *Legal Ages of Consent by Country*, AGE OF CONSENT, <https://www.ageofconsent.net/world>.

92. The Quran is neutral on the issue of the woman appointment. This can be seen in the Quranic position from the Queen of Saba, when Solomon send her a message to believe in God. The Quran states:

She said, "O eminent ones, indeed, to me has been delivered a noble letter (29) Indeed, it is from Solomon, and indeed, it reads: 'In the name of Allah, the Entirely Merciful, the Especially Merciful, (30) Be not haughty with me but come to me in submission [as Muslims].'" (31) She said, "O eminent ones, advise me in my affair. I would not decide a matter until you witness [for] me." (32) They said, "We are men of strength and of great military might, but the command is yours, so see what you will command." (33) She said, "Indeed kings — when they enter a city, they ruin it and render the honored of its people humbled. And thus do they do. (34)

Quran Surat Al-Naml 27:34.

MAHMOUD MOHAMED ARNOWS, *supra* note 66.

93. *Id.*

94. *Id.*

95. *Id.*

96. MOHMAED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW, 100 (1972).

97. *Id.*

98. MAHMOUD MOHAMED ARNOWS, *supra* note 66.

99. *Id.*

100. IBRAHIUM MOHMAED IBRAHIMI, QAWA'AD WA-AL-DAWABAT AL-FAQHIYAH LENAZAM

become incapable of performing their jobs.<sup>101</sup> Any ruling made by the Prophet is considered Islamic judicial precedent (*Sunna*).<sup>102</sup> After the Prophet's death, all four successors (Abu Bakr, Omar ibn Al-Khatib, Othman ibn Afan, Ali ibn Abi Taleb) held their judicial posts until their natural death or assassination.<sup>103</sup>

There is a strict delineation between senior and junior judges, and their appointment processes differ. Senior judges must receive the direct consent of the people to appoint another senior judge, as was the case for Abu Bakr's appointment of Omar.<sup>104</sup> However, a senior judge does not need the people's approval to appoint junior judges, as seen in the Prophet's appointment of Mo'az ibn Jabal.<sup>105</sup>

## 2. Judicial Consultation Versus Inappropriate Interference

Islamic trials are public. The Prophet and his first four successors made their judicial decisions within the Madinah Mosques (*Al-Masjid an-Nabawi*),<sup>106</sup> where every Muslim could observe the judicial process.<sup>107</sup> Considering the public nature of Islamic trials, it is important to differentiate between the principle of consultation in judgement (*Shura*) and inappropriate intervention by private actors.<sup>108</sup> Two examples from the *Sunna* illustrate these concepts.<sup>109</sup> In the first example, the Prophet sought his followers' advice on whether to kill or release prisoners of war following the Battle of *Badr*.<sup>110</sup> The Prophet supported the second opinion, after hearing opinions on both course of action.<sup>111</sup> In a second example, a noblewoman from *Bani Makhzum* committed a theft.<sup>112</sup> When her relatives asked Usama bin Zaid to convince the Prophet to pardon her, he refused.<sup>113</sup>

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AL-QADA FI-AL-ISLAM, 29–35 (1999).

101. *Id.*

102. *Id.*

103. WILFERD MADELUNG.

104. *Id.*

105. *Supra* note 24.

106. MIRZA YAWAR BAIG, UNDERSTANDING ISLAM, 204 (2012); *see also*, RAHIME KAYA, PROPHET MUHAMMAD: THE SEAL OF ALL PROPHETS, *Al-Masjid an-Nabawi* section (2014).

107. *Id.*

108. *See generally*, AHMAD AL-RAYSUNI, AL-SHURA: THE QUR'ANIC PRINCIPLE OF CONSULTATION, 9–12 (2011) (for more about the principle of *Shura*); *see also*, MISHAL FAHM AL-SULAMI, THE WEST AND ISLAM: WESTERN LIBERAL DEMOCRACY VERSUS THE SYSTEM OF SHURA, 40–46 (2003).

109. *Id.*

110. *Id.*

111. The Quran states, "If not for a decree from Allah that preceded, you would have been touched for what you took by a great punishment. So consume what you have taken of war booty [as being] lawful and good, and fear Allah. Indeed, Allah is Forgiving and Merciful." Quran Surat Al-Anfal 8:68 and 8:69. The Quran later revealed that God disagreed with the Prophet's choice.

112. TALIB JALEEL, NOTES ON ENTERING DEEN COMPLETELY: ISLAM AS ITS FOLLOWERS KNOW IT, 506 (2015).

113. Usama ibn Zayed was the son of Zayed ibn Al-Harathah. Zayed was the former

Unlike inappropriate intervention, *Shura* is done in a public sphere, like in *Al-Masjid an-Nabawi*, where the Prophet openly sought assistance from other Muslims, who deliberated as equals.<sup>114</sup> Usama, on the other hand, had attempted to use his personal relationship with the Prophet to private advantage. Another point of departure is that *Shura* aims to reach widely accepted answers for legal issue that are not explicitly dealt with in either the Quran or the *Sunna*.<sup>115</sup>

### 3. Remuneration

Neither the Prophet, nor his next-of-kin (*Ahl al-Bayt*) were allowed to receive money from the Zakat's treasury for the public work they performed.<sup>116</sup> The Prophet even disciplined his young grandson for attempting to eat a date collected as Zakat, saying, "Do you not know that we do not eat from Sadaqat."<sup>117</sup> And when the Prophet died, his first successor requested that his daughter return her inheritance — a small ranch — to the public treasury,

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adopted child of the Prophet before Islam banned adoption. Zayed was very close friend to the Prophet. See, Alia Hanafi, *Two New Arabic Editions: A Land Survey from Inhas and Hadiths*, in DOCUMENTS AND THE HISTORY OF THE EARLY ISLAMIC WORLD, 279 (Alexander T. Schubert & Petra M. Sijpesteijn eds. 2015). See also, Sahih Bukhari, *Volume 004, Book 056, Hadith Number 681*, in HADITH COLLECTION, <http://hadithcollection.com/sahih-bukhari/89/4383-sahih-bukhari-volume-004-book-056-hadith-number-681.html>. The Prophet said to Usama:

Do you try to intercede for somebody in a case connected with God's Prescribed Punishments? Then the Prophet got up and delivered a sermon saying, "What destroyed the nations preceding you, was that if a noble amongst them stole, they would forgive him, and if a poor person amongst them stole, they would inflict God's Legal punishment on him. By God, if Fatima, the daughter of Mohamad stole, I would cut her hand."

114. The Quran states:

And when there comes to them information about [public] security or fear, they spread it around. But if they had referred it back to the Messenger or to those of authority among them, then the ones who [can] draw correct conclusions from it would have known about it. And if not for the favor of Allah upon you and His mercy, you would have followed Satan, except for a few.

Quran surat An-Nisa, 4:83.

The Quran also states, "And lower your wing to those who follow you of the believers." Quran Surat Ash-Sh'ara 26:215.

115. The Quran states:

So by mercy from Allah, [O Muhammad], you were lenient with them. And if you had been rude [in speech] and harsh in heart, they would have disbanded from about you. So pardon them and ask forgiveness for them and consult them in the matter. And when you have decided, then rely upon Allah. Indeed, Allah loves those who rely [upon Him].

Quran, Surat Al-Omran 3: 159.

116. The Quran states, "Say, [O Muhammad], "I do not ask you for this message any payment [but] only good will through kinship." Ash-Shuraa 42:23.

117. *alsadqatmuhamaratealaamuhamadwalihlihukumjalila*, FATWACENTER, (24April2002) <http://fatwa.islamweb.net/fatwa/index.php?page=showfatwa&Option=FatwaId&Id=15881>.

based on her father's preaching that "Prophets leave neither a dinar, nor a dirham [names of old currencies], they only leave knowledge."<sup>118</sup>

Unlike the Prophet, the Quran allows other judges to be fairly compensated for their work from<sup>119</sup> *al Zakat*,<sup>120</sup> the only tax that an Islamic government is mandated to levy.<sup>121</sup> Even though the *Zakat* is dedicated to the poor,<sup>122</sup> Islamic scholars consider it appropriate for judges to collect *Zakat*, as well.<sup>123</sup> The senior judge has discretion over what amount of *Zakat* to take. On his deathbed, Abu Bakr returned his full salary to the public treasury,<sup>124</sup> while Omar Ibn Khattab limited himself to a token annual salary of one and a half dinars and a single piece of cloth.<sup>125</sup>

### C. *Judicial Accountability: Legitimacy, Scope and Misconduct*

Every Muslim is accountable for their actions and choices.<sup>126</sup> The Prophet was accountable to God and the People. When the Prophet made faulty

118. *Id.*

119. The Quran states:

And to [the people of] Madyan [We sent] their brother Shu'ayb. He said, "O my people, worship Allah ; you have no deity other than Him. There has come to you clear evidence from your Lord. So fulfill the measure and weight and do not deprive people of their due and cause not corruption upon the earth after its reformation. That is better for you, if you should be believers.

Quran Surat Al-Araf 7:45.

120. Anwar & Mulia Saputra, *The Empowerment of Zakah According to Islamic Law*, 8 J. ISLAMIC ST. PRAC. INT'L L. 69, 72 (2012); *see also*, Quran, Surat Al-Tawbah 9:104 ("Do they not know that it is God (Allah) who accepts repentance from His servants and receives charities and that it is God (Allah) who is the Accepting of repentance, the Merciful?").

121. The Quran states:

"And the camels and cattle We have appointed for you as among the symbols of God (Allah); for you therein is good. So mention the name of God (Allah) upon them when lined up [for sacrifice]; and when they are [lifeless] on their sides, then eat from them and feed the needy and the beggar. Thus have We subjected them to you that you may be grateful. Their meat will not reach God (Allah), nor will their blood, but what reaches Him is piety from you. Thus have We subjected them to you that you may glorify God (Allah) for that [to] which He has guided you; and give good tidings to the doers of good."

Quran Surat Al-Haj 22:37–38.

122. The Quran states:

"Zakah expenditures are only for the poor and for the needy and for those employed to collect [zakah] and for bringing hearts together [for Islam] and for freeing captives [or slaves] and for those in debt and for the cause of Allah and for the [stranded] traveler—an obligation [imposed] by Allah. And Allah is Knowing and Wise."

Quran Surat Al Ahzab, 9:60.

123. ABU BAKR AL-KHASAF SHARH KETAB ADAB ALQADI, 53 (2013).

124. *Id.*

125. *Id.*

126. The Quran states, "And Stop them; indeed, they are to be questioned." Quran, Surat As-Saffat 37:24. The Prophet also stated:

All of you are guardians and are responsible for your subjects. The ruler is a guardian



judgments in legal affairs, God intervened to correct his judgment through the Quran.<sup>127</sup> When the Prophet decided that he was no longer going to eat honey<sup>128</sup> because it gave him bad breath,<sup>129</sup> the Quran said that the Prophet could not forbid what God permits.<sup>130</sup> When the Prophet and his allies were defeated in the Battle of *Uhud*, they decided to retaliate against the infidels.<sup>131</sup> The Quran revealed that punishments levied must be equivalent to the harm addressed.<sup>132</sup>

The Muslim community was a second source of the Prophet's legitimacy. During the Battle of *Badr*, the first Islamic war against non-Muslims, one of his companions, *El Habab ebn Monzer*, asked, "Is this place, where we are now, a place that Allah chose for us, or is it a place of your choice based on war tactics and intrigue?"<sup>133</sup> Since his decision had not been related to any revelations from Allah, the Prophet accepted El Habab's recommendation to search for a place where there was more water.

Both senior and junior judges are held accountable for the profit gained from their positions of authority; even a profit as small as a needle is an abuse of judicial power.<sup>134</sup> Senior judge Amir Al-Mo'minin Omar ibn Al-Khatib

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of his subjects, the man is a guardian of his family, the woman is a guardian and is responsible for her husband's house and his offspring; and so all of you are guardians and are responsible for your subjects.

*Hadith, The Book of Miscellany, SUNNAH*, <https://Sunnah.com/riyadussaliheen/1/283>.

127. There are many more examples in the Quran, like the example of the blind man that God blame the Prophet for not responding him. The Quran states:

The Prophet frowned and turned away, Because there came to him the blind man (interrupting), but what would make you perceive, (O Muhammad), threat Perhaps he might be purified, Or be reminded and the remembrance would benefit him? As for he who thinks himself without need, To him you give attention, and not upon you (in any blame) if he will not be purified, But as for he who came to you striving (for Knowledge), while he fears (God), from him you are distracted, No indeed, these verses are a reminder.

Quran, Surat Abasa verses 80:1–11.

128. COELI FITZPATRICK & ADAM HANI WALKER, *MUHAMMAD in HISTORY, THOUGHT, AND CULTURE: AN ENCYCLOPEDIA OF THE PROPHET OF GOD VOLUME 1*, 264 (2014).

129. *Id.*

130. The Quran states, "O Prophet, Why do you prohibit (Yourself from) what God has made lawful for you, seeking the approval of your wives? And God is Forgiving and Merciful." Quran Surat At-Tahrim 66:1.

131. TAFSEAR AL-TABARI, SURAT AL-NAML, 281.

132. The Quran states:

And if you punish [an enemy, O believers], punish with an equivalent of that with which you were harmed. But if you are patient—it is better for those who are patient. (126) And be patient, [O Muhammad], and your patience is not but through God. And do not grieve over them and do not be in distress over what they conspire. (127) Indeed, God is with those who fear Him and those who are doers of good. (128)

Quran Surat Al-Naml, 16: 126–128.

133. IBN HESHAM, 2 EL SAIRA EL NABAWAYA 278.

134. The Prophet said, "Whosoever among you is appointed by us to a position and he conceals from us even a needle or less, it will amount to misappropriation and he will be

heard many complaints from young men that the bride price was too high, so he tried to limit the dowry.<sup>135</sup> But when he announced this judgment, a woman from the public, challenged him. She argued that the Quran did not allow for a limitation to be put on the dowry.<sup>136</sup>

Junior judges are also held accountable to senior judges, as shown by the case of Moez ibn Jabel, who served in Yemen under Abu Bakr.<sup>137</sup> When Moez returned to Al-Madinah, he had acquired many slaves, and Abu Bakr asked that he should return excess slaves to the Public Treasury.<sup>138</sup>

Two forms of misconduct—bribery or receiving gifts, and deliberately violating Islamic sharia’a—can disqualify senior and junior Islamic judges. The Quran incriminates bribery,<sup>139</sup> and in the *Sunna*, the Prophet repudiated people who offered or took bribes.<sup>140</sup> Judges are also banned from taking gifts while on duty.<sup>141</sup> Moreover, while deliberately violating Islamic rules is incriminated, the Prophet pardoned unintentional mistakes made by judges.<sup>142</sup> The great diversity in Islamic jurisprudence gives judges a leeway to choose the best legal course of action according to their notion of justice. Hence, they cannot knowingly commit malpractice.<sup>143</sup>

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called upon to restore it on the Day of Resurrection.” *Book of Miscellany, Sunnah*, <https://Sunnah.com/riyadussaliheen/1/215>.

135. MAGADA AMER, AN ISLAMIC PERSPECTIVE ON LEGISLATION FOR WOMEN, PART TWO, 11 (2012).

136. The Quran states:

But if you want to replace one wife with another and you have given one of them a great amount (in gift), do not take (back) from it anything. Would you take it in injustice and manifest sin? And how could you take it while you have gone in unto each other and they have taken from you a solemn covenant?

Quran Surah An-Nisa 4:20.

137. Mahmoud Arnaws, *supra* note 66.

138. *Id.*

139. The Quran states, “And do not consume one another’s wealth unjustly or send it (in bribery) to the rulers in order that (they might aid) you (to) consume a portion to wealth of the people in sin, while you know (it is unlawful).” Quran Surah Al-Baqarah 2:188.

140. The Prophet said, “cursed the one who bribes and the one who takes bribes to influence the judgement.” *Judgements, SUNNAH*, <https://Sunnah.com/bulugh/14/15>.

141. *Gifts, SUNNAH*, <https://Sunnah.com/bukhari/51/19>.

142. The Prophet stated, “If a Judge strives hard to seek the truth and reaches the right judgment, he will be rewarded twice; and if he strives to seek the truth but fails to reach the truth, he will be rewarded once.” *The Book of the Etiquette of Judges, SUNNAH*, <https://Sunnah.com/nasai/49>.

143. The Quran states, “O you who have believed, upon you (responsibility for) yourselves. Those who have gone astray will not harm you when you have been guided. To God is your return all together; then He will inform you of what you used to do.” Quran Surah Al-Ma’idah 5:105.

## II. JUDICIAL PRACTICES (AND ABUSES) IN IRAN, EGYPT, AND JORDAN

### A. *Iran: Legitimacy and Authority of the Supreme Judge*

Iran's government by the jurispudent (*Wilayat Al-Faqih*) differs from Islamic theory of government by judiciary (*Wilayat Al-Qadi*) in several key ways. This Part starts with the distinctions between the two theories. It then presents the different aspects of the theory of *Wilayat Al-Faqih*, its historical foundation, and contemporary *Imamah* applications. Finally, it presents the judicial authority of the *Faqih*.

#### 1. Distinctions Between *Wilayat Al-Faqih* and *Wilayat Al-Qadi*

There are three major distinctions between *Wilayat Al-Faqih*, and *Wilayat Al-Qadi*. The first is the legal nature of the Leader. While *Wilayat Al-Faqih* requires that the leader must be a Jurist (*Faqih*), *Wilayat Al-Qadi* maintains the leader must be a judge (*Qadi*). Though every Islamic judge is a jurist, not every jurist is a judge.<sup>144</sup> Judges issue binding judgements (*Hukm*), while jurists write nonbinding legal opinions (*fatawa*). Judges deal with specific incidents, and jurists deal with abstracts. While a judicial decision has a very limited application (with the exception of Supreme Court precedent) to specific lawsuits, scholars, judges, and legislators can rely upon *fatawa*.<sup>145</sup>

The second distinction lies in the role of God, in the appointment of the jurist or the judge. According to *Wilayat al-Qadi*, God participated only in choosing the Prophet. No other Muslim can claim a divine nomination to the position of the senior judge. In *Wilayat al-Faqih*, the Twelvers enjoy the same source of legitimacy from God.<sup>146</sup> This does not extend a divine nature to any person beyond the Twelvers.<sup>147</sup> In Iran, the constitution gives the Leader (*Faqih*) a popular legitimacy.

The third distinction is in the role of the people in choosing the *Faqih*. *Wilayat Al-Qadi* allows the people to directly choose the senior judge, putting them on equal footing with him. The Prophet did not have any authority over the people, except what they were willing to offer.<sup>148</sup> Meanwhile *Wilayat Al-Faqih* does not recognize the practice of a pledge of the people, as God has already chosen his Prophet and the Twelvers. This leads the Iranian Constitution to set the *Faqih* and his delegates as real guardians over the people's will.

144. M. Cherif Bassiouni and Gamal Badr, *supra* note 72 at 175.

145. *Id.*

146. MOOJAN MOMEN, AN INTRODUCTION TO SHI'Ī ISLAM, 23–45 (1985).

147. *Id.*

148. The Quran states, "Remind, O Muhammad, your role is to remind the people, not control them." Quran Surat Al-A'la 88:22–23.

## 2. Historical Foundations: Nubuwwah Versus Imamah

In *Sunni* understanding, God directly intervened once to choose the Prophet,<sup>149</sup> and indirectly to choose other leaders.<sup>150</sup> However, the *Shia* believe that God chose the Prophet as well as the Twelvers to lead the Muslims,<sup>151</sup> though the Prophet (*Nabi*) and his Prophecy (*Nubuwwah*) comes in a higher level than the Twelvers (*Imam*), and their leadership (*Imamah*).<sup>152</sup> The *Imamah* principle comes from the word *Imam*, which means leader, or a role model for the righteous.<sup>153</sup> So, while the *Sunni* believe only in *Nubuwwah*, the *Shia* believe in both *Nubuwwah*, and *Imamah*.

The *Imamah* principle establishes the authority of the Muslims in Twelve *imam*, which is called the Twelvers.<sup>154</sup> It is limited to limited to Ali and eleven of his decedents,<sup>155</sup> The Twelvers are the Prophet's grandsons, except Ali, who is his cousin and son in law.<sup>156</sup> They are:

Amir Al-Mo'minin Ali ibn Talib,  
 Amir Al-Mo'minin Al-Hasan ibn Ali,  
 Al-Hasyn ibn Ali,  
 Ali ibn Husayn,  
 Muhammad ibn Ali,  
 Ja'afar ibn Muhammad,  
 Musa ibn Ja'afar,  
 Ali ibn Musa,  
 Muhammad ibn Ali,  
 Ali ibn Muhammad,  
 Hasan ibn Ali, and  
 Muhammad ibn al-Hasan (al-Mahdi).<sup>157</sup>

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149. The Quran states, "Muhammad is not the father of [any] one of your men, but [he is] the Messenger of God and last of the prophets. And ever is God, of all things, Knowing." Quran Surat Al-Ahzab 33:40. It also states:

Have the people been amazed that We revealed [revelation] to a man from among them, [saying], "Warn mankind and give good tidings to those who believe that they will have a [firm] precedence of honor with their Lord"? [But] the disbelievers say, "Indeed, this is an obvious magician."

Quran Surat Yunis 10:1.

150. The Quran states:

Say, "O God, Owner of Sovereignty, You give sovereignty to whom You will and You take sovereignty away from whom You will. You honor whom You will and You humble whom You will. In Your hand is [all] good. Indeed, You are over all things competent.

Quran Surat Ali-Imran 3:25.

151. HAMID MAVANI, RELIGIOUS AUTHORITY AND POLITICAL THOUGHT IN TWELVERS SHI'ISM FROM ALI TO POST-KHOMEINI, 152 (2013).

152. *Id.*

153. *Id.*

154. Vivienne Angeles, *The Development of the Shi'a Concept of the Imamate*, 21 ASIAN STUD. 145, 146-147 (1983).

155. *Id.*

156. HAMID DABASHI, AUTHORITY IN ISLAM: FROM THE RISE OF MUHAMMAD TO THE ESTABLISHMENT OF THE Umayyad's, 115-116 (1989).

157. *Id.*

The origin of the principle of *Imamah* started with the assassination of the Amir Al-Mu'minin Othman ibn Afan, and the appointment of Ali Ibn Abi Talib as Amir Al-Mu'minin.<sup>158</sup> Ali, was the most qualified candidate, especially that he was among the Appointment Committee that Omar ibn Al-Khatab appointed on his deathbed. The death of Othman triggered great rage among the Muslims. Mua'wiya Ibn Abi Soufiane, among other relatives of Othman, requested that Ali should take revenge against those who are charged with killing Othman.<sup>159</sup> Ali requested Mua'wiya to give his pledge first to be able to judge these aggressors.<sup>160</sup> Yet, Mua'wiya, as well as others, refused to give him such a pledge.<sup>161</sup> As a result, a civil war broke out between Ali and Mua'wiya.

This first Great Muslim Civil War lasted for four years.<sup>162</sup> After the assassination of Ali, his supporters chose Al-Hasan, Ali's elder son, to be the next Amir Al-Mu'minin.<sup>163</sup> Al-Hasan was the first grandson of the Prophet, the son of the Prophet's most beloved daughter Fatmah, and the Prophet's preferred grandson.<sup>164</sup> Al-Hasan's supporters wished to continue the war with Mua'wiya. However, Al-Hasan wished to end the bloodshed among the Muslims.<sup>165</sup> He agreed to end the Great Civil War six months after his father's assassination, on grounds that Mua'wiya would become the Muslims' ruler, and Al-Hasan would be his successor.<sup>166</sup>

Ten years later, Al-Hasan's wife poisoned him, according to both *Shia* and *Sunni* historical texts.<sup>167</sup> Mua'wiya then changed the government to an absolute monarchy, abolishing the traditions of the Prophet.<sup>168</sup> A true Islamic government is ruled based on *Shura* and power is not handed down to the ruler's descendants. Yet, Mua'wiya allowed his son, Yazid, to inherit his power, turning away from Islamic systems to a theocratic regime.

158. HASSAN NAHIM, *THE DIVISION AFTER PROPHET MUHAMMAD*, 11–13 (2012).

159. *Id.*

160. *Id.*

161. *Id.*

162. TABARI, *THE HISTORY OF AL-TABARI VOL.17: THE FIRST CIVIL WAR*, 227 (G.R. Hawting trans. 1996).

163. *Id.*

164. ALI M. SALLABI, *AL-HASAN IBN ALI HIS LIFE AND TIME*, 45–47 (2004).

165. The Prophet once said, in reference to Al-Hasan, "This son of mine is a Master and perhaps God will bring about an agreement between two sects of the Muslims through him." *Companions of the Prophet, Chapter: The merits of Al-Hasan and Al-Husain*, SUNNAH, <https://Sunnah.com/bukhari/62/93>.

166. *Id.*

167. SHAMS AL DIN MUHAMED AHMED OTHMAN AL ZAHABI, SAYAR A'LAM AL-NOBALA, BOOK 3, 270–275, (1981); see also, Nicole Burke et al., *A Forensic Hypothesis for the Mystery of al-Hasan's Death in the 7th Century Mercury (i) Chloride Intoxication*, 56 (3) MED. SCIENCE & THE L. 167, 168 (2016).

168. MOHAMED EMARAH, YA'RAFUN 'WALAKAN YATHYALUN, IN AL-A'MANYAH HEYA AL-HAL: MEN AJL MOWATNAH AL-HAQAH WA-AL-SALAM ALIJTMA'I, 140 (2014).

The third member of the Twelvers, Al-Hasyn ibn Ali, disagreed with Mua'wiyah's decision to turn the government to Yazid.<sup>169</sup> Many Muslims who disagreed with Mua'wiyah's decisions asked Al Hasyn to be their next leader.<sup>170</sup> Al-Hasyn moved from Al Madinah to Kufa in Iraq, to meet his supporters but they abandoned him and he was ambushed and killed by Yazid's soldiers.<sup>171</sup>

After the massacre of Al-Hasyn, None of *Ahl al-Bayat*,<sup>172</sup> including the Imams, sought any leadership role within the Muslim community.<sup>173</sup> They have dedicated their life to knowledge, as they were all jurists.<sup>174</sup> Nonetheless, the ruling members of the Umayyads and Abbasids lived in continuous fear of the Imams' popularity.<sup>175</sup> All but the last of these Imams were assassinated. Mohamed ibn al-Hasan (al-Mahdi) went undercover to avoid being killed.<sup>176</sup> Many *Shia* believe that *Imam* al-Mahdi will return one day to spread justice among the people.

### 3. Contemporary *Imamah*: the Role of the People

The theory of *Imamah* faced a dilemma when *Imam* al-Mahdi disappeared without appointing a clear successor. Article 107 of the current Iranian constitution attempts to solve this problem by claiming that the people consented to the appointment of Grand Ayatollah Khomeini as leader (*Faqih*) and *Imam*, stating that he was "acknowledged and accepted by the undisputed majority of the people," who gave him 98.2 percent of the vote.<sup>177</sup> This approach represents the *Khomeini's* practice of the theory of *Wilayah al-Faqih*.

Under Iran's constitution, four entities share appointment powers over any future leaders: the current Leader, the Guardian Council, the people, and

169. MATTHEW GORDON, *THE RISE OF ISLAM*, 40–42 (2005).

170. *Id.*

171. IBN EL-NEIL, *THE TRUTH ABOUT ISLAM*, 205–207 (2008).

172. *Ahl-Al-Bayt*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/topic/Ahl-al-Bayt>.

173. *Id.*

174. Michael Bonner, *The Waning of Empire*, in *THE NEW CAMBRIDGE HISTORY OF ISLAM*, 326 (Chase F. Robinson ed. 2011).

175. *Id.*

176. AYATULLAH IBRAHIM AMINI, *AL-IMAM AL-MAHDI, THE JUST LEADER, OF HUMANITY*, 73 (unknown year).

177. Koh Nakata, *Wilayah Faqih, Sovereignty, and Constitution: Political Theories in Post-Khumaini-Era Iran*, (2000) [https://www.jstage.jst.go.jp/article/orient1960/35/0/35\\_0\\_1/\\_pdf](https://www.jstage.jst.go.jp/article/orient1960/35/0/35_0_1/_pdf).

The Iranian Constitution states:

Based on the sovereignty of the command [of God] (*velāyat-e amr*) and continuous religious leadership (*imāmat*), the constitution prepares the background for the actualization of leadership by a qualified jurist who is recognized as leader by the people ("Administration of affairs should be by those scholars who are learned in regard to God and that which He has permitted and that which He has forbidden") this leadership protects various institutions against deviations in fulfilling their authentic Islamic responsibilities . . .

CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN, adopted in 3 December 1979, amended in 28 July 1989, Preamble.

the Council of Experts. The current Leader<sup>178</sup> is responsible for choosing half of the members of the Guardian Council.<sup>179</sup> The second half is chosen by the head of the judiciary to the Islamic Consultative Assembly, and are selected by the vote of the Assembly.<sup>180</sup> The Guardian Council determines the qualifications and the procedures for selecting the Council of Experts and oversees their election.<sup>181</sup> The people elect 88 members to the Council of Experts through a direct, secret ballot vote.<sup>182</sup> The last entity is the Council of Experts,<sup>183</sup> which consists of 88 members. The Council then chooses the next Leader.<sup>184</sup> So, the people will play an indirect but important role in appointing future leaders.

#### 4. Judicial Authority of the *Faqih*

The *Faqih* has unlimited judicial powers and is considered the Supreme Judge.<sup>185</sup> The *Faqih* appoints a jurist to administer the judicial power as the

178. The Iranian Constitution further states:

An assembly named the Guardian Council is established in order to protect the commands of Islam, and the constitution from discord with the proceedings of the Islamic Consultative Assembly. The Guardian Council has the following composition: 1. Six just Islamic jurists who are conscious of the issues and needs of the time. These are selected by the leader. 2. Six legal scholars (hoquqdan), specialized in different fields of law, from among Muslim jurists who are presented by the head of the judiciary to the Islamic Consultative Assembly and are selected by the vote of the Assembly.

*Id.* art. 91.

179. *Id.*

180. *Id.*

181. Article 108 of the Iranian Constitution states:

The law on the number and qualifications of the Experts, the manner of their selection, and the internal guidelines of their meetings in the first term must be prepared by the jurists of the first Guardian Council. It must be ratified by their majority vote, and submitted to the leader for the final approval. Whence, any change or review of this law and approval of the regulations related to the responsibilities of the Experts falls within the authority of the Experts themselves.

*Id.* art. 108.

182. Executive Bylaws for the Election of the Assembly of Experts of the Leadership for year 1982 modified in 2006, art.2 (Iran).

183. CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN, adopted in 3 December 1979, amended in 28 July 1989, art. 92.

184. Article 107/2 of the Iranian Constitution states:

The Experts consider all the qualified jurists as discussed in Articles 5 and 109, and consult with one another about them. If they find one of them the most knowledgeable about the rules and subjects of jurisprudence, or political and social issues, or acceptability by the public, or significance in any one of the qualifications indicated in Article 109, that person shall be selected as the leader; otherwise, one of the Experts is chosen and declared as the leader.

*Id.* art. 107/2.

185. Seyed Mohammad Reza Ayati & Mahdi Moghaddasi, *A Comparative Study of the Extent and Scope of Absolute Guardianship of the Islamic Jurist (Vilayat-e Faqih) from the Perspective of Shiite Jurists; and the Rashidun Caliphate in the View of Sunni Scholars*, 9 J.

Head of the Judiciary.<sup>186</sup> The Head of the Judiciary appoints the head of the Supreme Court, and the Chief Public Prosecutor.<sup>187</sup>

Additionally, even though the *Faqih* is the Supreme judge, he does not issue judgments, only religious rulings (*fatwa*).<sup>188</sup> However, the *fatwa* of the *Faqih* is a legal source, unlike the regular form of *fatwa*.<sup>189</sup> Judges issue their judgements based on the codified law.<sup>190</sup> In the absence of a legal rule, the judge must resort to “reputable Islamic sources, or religious rulings.”<sup>191</sup> Hence, the concept of the *Faqih’s fatwa* is a unique aspect of the theory of *Wilayat Al-Faqih*.

The meaning of guardianship in Quran is exclusive to God and the Prophet in all religious matters.<sup>192</sup> The Prophet did not have a guardianship over the People and Muslim in secular matters.<sup>193</sup> On the contrary, the theory of *Wilayat al-Faqih* expresses Khomeini’s authority as guardian of the people even in issues regarding state administration. Thus, there are several discrepancies between the theories of *Wilayat Al Faqih* practiced in Egypt and *Wilayat Al-Qadi*.

#### B. *Egypt: Lack of Judicial Accountability*

The Egyptian Constitution makes only a passing reference to Sharia as its main source of legislation.<sup>194</sup> Unlike the Iran, Egypt did not adopt a specific Islamic theory, so its laws around the judiciary are more secular. However, Islam remains a key factor in both legal philosophy and debates among judges, lawyers, and scholars. Hence, the Egyptian judicial profession is widely assumed to be in compliance with Islamic teachings. But this is the case due to three structural issues: (1) the judicial appointment process is not accountable

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POL. & L. 247, 248 (2016).

186. *Id.* art. 157.

187. Omar Sial, *A Guide to the legal System of the Islamic Republic of Iran*, HAUSER GLOBAL LAW SCHOOL PROGRAM, (March 2006), <http://www.nyulawglobal.org/globalex/Iran.html>.

188. *Id.* at 109/1.

189. *Id.* at 167.

190. *Id.*

191. *Id.*

192. The Quran states:

God is the ally of those who believe. He brings them out from darknesses into the light. And those who Disbelieve—their allies are Taghut. They take them out of the light into darknesses. Those are the companions of the Fire; they will abide eternally therein.”

Quran Surat Al-Baqarah 2:257.

193. The Quran states:

But if God had willed, they would not have associated. And We have not appointed you (O Muhammed) over them as a guardian, nor are you a manager over them.”

Quran Surat Al-An’am 6:107.

194. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 2 (Egypt).



to the people; (2) the Ministry of Justice (MoJ)'s interference with the judiciary; (3) overly-broad judicial immunity.

### 1. Lack of Accountability in Appointments

Egypt's Supreme Judicial Council (SJC) appoints both judges and prosecutors. Though the SJC is designed to be independent from the executive authority, the seniority-based appointment process is neither democratic nor Islamic.<sup>195</sup> The judicial appointment process shows clear discrimination against women and lower socioeconomic status (SES) candidates.<sup>196</sup> While women are explicitly allowed to be appointed to fill judicial vacancies under the 2014 Constitution,<sup>197</sup> SJC prevents them from joining the bench,<sup>198</sup> or the Public Prosecution Office.<sup>199</sup> The 2014 Constitution guarantees full equality based on social class,<sup>200</sup> but nepotism has prevented the appointment of officials from underprivileged classes. In 2013, more than 114 out of 475 appointees within the prosecution bureau were the relatives of judges.<sup>201</sup> In 2014, this percentage increased from 25 percent to 35 percent.<sup>202</sup>

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195. *Id.* art. 34. The SJC consists of eight members: the president of the Court of Cassation, the representative of the MoJ, the president of the Cairo Court of Appeal, the Attorney General, an elected member from the public assembly of the CoC, elected members from the public assembly of the Cairo Court of Appeal, and the president of the Cairo Primary Court.

196. Article 11 of the Egyptian constitution states, "the state commits to achieving equality between women and men in all civil, political, economic, social, and cultural rights in accordance with the provisions of this Constitution." *Id.* art. 11.

197. Article 9 eliminates any form of discrimination against women. It states:

The state ensures equal opportunity to all citizens without discrimination.' This was not efficient to ensure that women will secure positions in the judiciary. The same article existed when *al-Sanhori* stated that it is no prejudice against women in the appointment of certain posts, as long as there is no misuse of discretionary power of the administration. Article 3 of the 1923 Constitution stipulates "Egyptians are equal. They are equal in practicing civil and political rights and duties. Discrimination based on ethnic origin, language, or religion is prohibited."

*Id.* art 9.

198. Ahmed Sayed, *Female Judges in Egypt* 13 YB ISLAMIC & MIDDLE E. L. 135, 136, (2006–2007).

199. *Id.* 138.

200. The Egyptian Constitution states "Citizens are equal before the law, possess equal rights and public duties, and may not be discriminated against on the basis of religion, belief, sex, origin, race, color, language, disability, social class, political or geographical affiliation, or for any other reason." CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014 art. 53.

201. Ahmed Sa'd, 'Abna al-Qodah yastahowzown ala rob' ta'ynat dof'at al-nayabah al-gedidiah' SHOROUK (7 December 2013) <http://shorouknews.com/news/view.aspx?cdate=07122013&id=32b2ce69-695b-484d-b358-2214a8cdc824>.

202. Ahmed Said, Bel-asma . . . abna al-qodah yastohwazown ala 35% men ta'yanat elnayabah al-gedidah SHOROUK, (17 July 2014) <http://www.shorouknews.com/news/view.aspx?cdate=17072014&id=52446ae9-860f-4183-8c4c-31818a678860>.

## 2. Improper Influence of the Ministry of Justice

The Ministry of Justice exercises improper influence on judicial decision-making in two ways. First, the MoJ chooses the president of the primary court, the person who assigns judges to various circuits. The president of this court can then retaliate against judges whom he disagrees with, which happened in 2012 when Judge Mahmoud Shokri was forced to resign from a case simply because he refused to comply with the Cairo Court of Appeal's president's request to release the defendant on bail.<sup>203</sup> MoJ also has ultimate power over the Judicial Inspection Department (JID), which regulates the judicial profession, but MoJ has wielded that power arbitrarily. After the 2013 military coup, though many judges violated the ban on political participation MoJ only impeached those judges who had supported ex-President Mohamed Morsi.<sup>204</sup>

## 3. Overbroad Judicial Immunity

Judicial immunity in Egypt is overbroad, protecting judges not only from civil damages that result from their judgments, but also from criminal liability.<sup>205</sup> Moreover, judges are not supposed to derive any form of civil immunity from their nonjudicial work, but in reality the JID creates such immunity. If a plaintiff claims that a judge has failed to pay rent, the plaintiff must first obtain JID's approval to sue the judge.

Judges and prosecutors enjoy a special status regarding their criminal liability, especially with arrest, search, and seizure procedures.<sup>206</sup> Few criminal cases can be initiated against judges without approval of a special judicial committee.<sup>207</sup> This committee includes chief judges of the Court of Cassation, the Cairo Court of Appeal, the Alexandria Court of Appeal, and the Attorney General.<sup>208</sup> There is only one exception if a judge or a prosecutor is caught engaging in illegal conduct, they can be arrested by a judicial investigator or police officer.<sup>209</sup> When that happens, the Attorney General must notify the SJC of the issue within 24 hours and decide whether to release the offender on bail.<sup>210</sup>

Granting a special status to judges and prosecutors leads to an abuse of judicial power.<sup>211</sup> This immunity exacerbates social and legal inequality. A

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203. 'Al-Mostashar Mahmoud Shokri Yabki 'al hal alqodah ma' Mahmoud Said, YOUTUBE (28 March 2012) [https://www.youtube.com/watch?v=iZ0v\\_MXkB44](https://www.youtube.com/watch?v=iZ0v_MXkB44).

204. *Egypt refers 60 pro-brotherhood judges to disciplinary board*, AHAM ONLINE, (20 October 2014) <http://english.ahram.org.eg/NewsContent/1/64/113517/Egypt/Politics-/Egypt-refers-proBrotherhood-judges-to-disciplinar.aspx>.

205. *Id.*

206. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasm yah*, 5 October 1972, art. 52 (Egypt).

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

judge who commits a crime is prosecuted and tried by their colleagues.<sup>212</sup> And, the SJC essentially refrains from prosecuting judges for minor crimes like traffic violations, because it only convenes when serious charges, like murder, are brought before them. Hence, there is a growing consensus among the public that judges are above the law.

### C. *Jordan: Structural Deficiencies in the Design of the Constitutional Court*

The Jordanian Constitutional Court (JCC) is one of newest constitutional courts in the Arab region,<sup>213</sup> established in 2012.<sup>214</sup> It was introduced to enhance the role of the law and legal transparency under an otherwise monarchical regime.<sup>215</sup> However, it needs reform in three dimensions: philosophical (to maintain its legitimacy, the JCC should be more democratic), substantive (the JCC should expand its jurisdiction to be more effective), and procedural (the JCC should be more accessible).

#### 1. Philosophical Reforms

In democratic systems, courts can strike down unconstitutional laws, but in constitutional monarchies, the power of the courts has historically been more limited. In the Kingdom of the Netherlands, the 2008 Constitution forbids courts from reviewing laws and treaties.<sup>216</sup> In the United Kingdom, courts can issue a nonbinding declaration of unconstitutionality but cannot invalidate laws.<sup>217</sup> In the Kingdom of Egypt (1923–1953), for instance, courts were not permitted to tackle the constitutionality of any law until 1926.

Another philosophical issue is that there are no checks and balances regulating the balance of power between the King, the JCC, and the Parliament. The JCC's appointment process currently rests solely with the King.<sup>218</sup> Before the 2011 Constitutional Amendments, article 93 gave members of Parliament, who are elected by the public,<sup>219</sup> the right to challenge the King's decision in

212. *Egypt: arbitrary and unfair removal of judges must be reversed*, INTERNATIONAL COMMISSION OF JURISTS (28 March 2016) <http://www.icj.org/egypt-arbitrary-and-unfair-removal-of-judges-must-be-reversed>.

213. CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN, 1 January 1952, amend in 2011, art.59/1. *See also*, Law No. 15 of 2012 (Constitutional Court Law), 6 June 2013, art.15/A (Jordan).

214. Issam Saliba, *Jordan: Constitutional Law Court Newly Established in Jordan*, GLOBAL LEGAL MONITOR, LIBRARY OF CONGRESS, (Dec. 3, 2012), <http://www.loc.gov/law/foreign-news/article/jordan-constitutional-law-court-newly-established-in-jordan>.

215. Alnswr: Alt'adilat al-dusturiat Iidafat muhima fi 'amaliat al'iislah alsiyasii wa-taeziz aldiymuqratia, PETRA (Jul. 7 2017), [http://petra.gov.jo/Public\\_News/Nws\\_NewsDetails.aspx?Site\\_Id=2&lang=1&NewsID=164113&CatID=13](http://petra.gov.jo/Public_News/Nws_NewsDetails.aspx?Site_Id=2&lang=1&NewsID=164113&CatID=13).

216. CONSTITUTION OF THE KINGDOM OF THE NETHERLANDS, 20 OCTOBER 2008, art. 120.

217. David Jenkins, *Common Law Declarations of Unconstitutionality*, 7 INT'L J. CONST. L. 183, 200 (2009).

218. Constitutional Court Law, art.5/A.

219. Law No. 48 of 1979 (The Supreme Constitutional Court; *al-Mahkamah al-Dusturiyah al-Ulya al-Jaridah al-Rasmiyah*, art 19 (Egypt).

the event of his refusal to ratification any new law.<sup>220</sup> In 2011, constitutional amendments gave the JCC's judges the right to nullify any unconstitutional law,<sup>221</sup> and it failed to give the Parliament any authority over the JCC.<sup>222</sup> If the King opposes any law, he may use the JCC to strike it down.<sup>223</sup> Therefore, hypothetically, the JCC can be used against the public will.

Jordan should adopt a republican system of checks and balances. In the US, a split in the authority of appointment and impeachment, between the President and the Congress, ensures a democratic government. The President has the right to choose federal judges, while the Senate has the right to confirm the choice.<sup>224</sup> Moreover, the House of Representatives has the sole right to impeach judges,<sup>225</sup> who hold offices "during good behavior," unless the House votes to impeach and Senate votes to convict.<sup>226</sup> In Germany, both houses of parliament elect Federal Constitutional Court judges.<sup>227</sup> This increases public confidence in the judges and imbues them with more authority to strike down unconstitutional legislation.<sup>228</sup>

## 2. Substantive Reforms

The JCC's relative power is also weak because its jurisdiction is limited to interpreting and applying the constitution to laws that have already been passed.<sup>229</sup> It should also be allowed to issue advisory opinions on the constitutionality of not-yet-enacted laws and to settle conflict-of-law disputes. Currently, the JCC's constitutional supervision begins only after the promulgation of a law.<sup>230</sup> The French *Conseil Constitutionnel*, in contrast, has ultimate authority to decide the constitutionality of any law before its passage.<sup>231</sup> Similarly, the Tunisian Constitutional Court is responsible for reviewing laws before they are submitted to the President, and it can pass judgment on proposed

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220. *Id.* at art. 67/1.

221. *Id.* at art. 15/B.

222. *Id.* at art. 5/A.

223. *Id.* at art. 15/A.

224. U.S. CONST. art. II, § 2, cl. 2.

225. U.S. CONST. art. I, § 2, cl. 5.

226. U.S. CONST. art. III, § 1.

227. Federal Constitutional Court Act in the version of 11 August 1993 (Federal Law Gazette I p. 1473), last amended by Article 8 of the Regulation of 31 August 2015 (Federal Law Gazette I p. 1474); Part 1, § 5.

228. Mary Volcansek, *Judicial Elections and American Exceptionalism: A Comparative Perspective*, 60 DEPAUL L. REV. 805, 809 (2010–2011); See also, Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 COLUM. J. TRANSNATIONAL L. 285, 307 (2014–2015).

229. Constitutional Court Law 15/2012, art. 2.

230. Ali Essa Yaqibie, *Al-raqabah a'a Dustorihat al-Qawanun fi Franca*, [http://www.tqmag.net/body.asp?field=news\\_arabic&id=2161&page\\_namper=p3](http://www.tqmag.net/body.asp?field=news_arabic&id=2161&page_namper=p3).

231. CONSTITUTION OF THE FRENCH REPUBLIC, 4 October 1958, amended in 23 July 2008, art. 61.

constitutional amendments. This vetting process gives legislation greater constitutional legitimacy.<sup>232</sup>

The JCC should also take responsibility for settling jurisdictional conflicts within Jordan's legal system, where both religious and civil systems function simultaneously.<sup>233</sup> In Egypt, the Supreme Constitutional Court assesses whether cases should be heard by the State Council or ordinary courts. In Spain, the Constitutional Court has authority to make decisions about jurisdictional disputes that arise between "the State and the Self-governing Communities, or between the Self-governing Communities themselves."<sup>234</sup>

### 3. Accessibility Reforms

The JCC's power is severely limited by the power of Jordan's supreme court, the Court of Cassation (CoC), to refer cases to the JCC. Effectively, the CoC constrains the JCC's ability to control its own jurisdiction, in violation of the independent, watchdog role the JCC is meant to play. This also creates an extra burden on litigants seeking constitutional review. When Egypt's Supreme Constitutional Court (SCC) was created in 1979, jurisdiction over constitutional claims was transferred over from the CoC to the new SCC. The same should be done in Jordan, and all judges should have the right to refer claims to the JCC, and to review the constitutionality of laws themselves. In Germany, constitutional review powers have been decentralized,<sup>235</sup> but only the Federal Constitutional Court can strike down any unconstitutional law referred to it by the lower courts. The same is true in Egypt.<sup>236</sup> These models can be followed in Jordan.

Additionally, a commissioner's office or legal clerkship positions should simultaneously be introduced to ease the burdens the JCC will face when the CoC is no longer an intermediary and the JCC is confronted with a wave of cases directly transferred from lower courts. Commissioners or law clerk can be hired to prepare cases, and to write unbinding constitutional opinions for the JCC's judges.<sup>237</sup>

The establishment of the JCC is undoubtedly a major step in the legal reform process in Jordan, but more reforms are warranted for the JCC to reach its full potential. Jordan should institute a republican system of checks and balances, expand the court's jurisdiction, and ensure that the JCC is accessible to the public.

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232. Federico Fabbrini, *Kelsen in Paris: France's Constitutional Reform and the Introduction of A Posteriori Constitutional Review of Legislation*, [http://cadmus.eui.eu/bitstream/handle/1814/20483/Fabbrini\\_GLJ\\_Kelsen%20in%20Paris.pdf](http://cadmus.eui.eu/bitstream/handle/1814/20483/Fabbrini_GLJ_Kelsen%20in%20Paris.pdf).

233. *Id.*

234. CONSTITUTION OF THE KINGDOM OF SPAIN, 6 December 1978, art. 161.

235. *Federal Constitutional Court*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Federal-Constitutional-Court>.

236. Supreme Constitutional Court Law no 48/1979, art. 29/B.

237. See William Nelson et al., *The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation*, 62 VAND. L. REV. 1747, 1748 (2009).

### III. RECOMMENDATIONS: APPLYING THE ISLAMIC THEORY OF JUDICIAL POWER

Iran, Egypt, Jordan, and other countries governed by Islamic law would benefit from making three key reforms. First, they should ensure that the people retain a direct role in choose the supreme judges or judicial council so they can help prevent discrimination and corruption. In the US, the judicial appointment process involves the use of checks and balances: the executive branch (the President) nominates a federal judge (for and legislative authorities (the Senate) can approve that appointment by confirming the nomination.<sup>238</sup> At the state level, judicial appointment processes vary widely, and twenty-two states popularly elect judges.<sup>239</sup>

In Germany, federal-level electoral committees formed by the parliamentary vote or nomination of legal professionals play a large role in the selection process in each of the eight States/*Länder*.<sup>240</sup> They also include the Minister of Justice and practitioners.<sup>241</sup> On the state level, there is no formal method of choosing candidates in Germany.<sup>242</sup> Each state has its own system of choosing its judges. Hence, the people should play a role in the appointment process of the judges, especially senior judges.

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238. Russell Wheeler, *Judicial Independence in the United States of America*, in JUDICIAL INDEPENDENCE IN TRANSITION, 528–29 (ANJA SEIBERT-FOHR (ED)) (Springer 2012). David Law, *Appointing Federal Judges: The President, the Senate and the Prisoner's Dilemma*, 26 *CARDOZO L. REV.* 479, 482 (2005).

239. The U.S. Constitution states:

He shall have Power, by and with advice and consent of the Senate, to make treaties, provided that two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, other public ministers, counsels, judges of the supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the appointment of junior officers, as they think proper, in the President alone, in the Courts of Law, or in the heads of departments.

U.S. Const. art. II, § 2.

Malia Reddick & Rebecca Love Kourlis, *Choosing Judges: Judicial Nominating Commissions and the Selection of Supreme Court Justices*, [http://iaals.du.edu/images/wygwam/documents/publications/Choosing\\_Judges\\_-\\_JNC\\_Report.pdf](http://iaals.du.edu/images/wygwam/documents/publications/Choosing_Judges_-_JNC_Report.pdf); see also, *Judicial Selection in the States*, NAT'L CTR. FOR STATE COURTS, (2015) <http://www.judicialselection.us>.

240. Article 98/4 of the Basic Law states “the Lander may provide that land judges shall be chosen jointly by the land’s Minister of the Justice and a committee for the selection of judges.” Grundgesetz [GG] [Basic Law], translation at [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html).

241. Fiona O’Connell & Ray McCaffrey, *Judicial Appointments in Germany and the United States*, (March 2012), 15 <http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2012/justice/6012.pdf>; see also, J Reidel, *Recruitment, professional Evaluation and Career of Judges and Prosecutors in Germany*, Recruitment, <http://www.difederico-giustizia.it/wp-content/uploads/2010/09/recruitment-evaluation-and-career.pdf>.

242. *Id.*

Second, Islamic states must reform the administration of judicial institutions by placing reform power in the hands of elected judges or a judicial committee. The public assembly of each primary court should choose the chairperson through general elections in which candidates maintain the decorum of the judiciary simply by presenting their qualifications to the public rather than through mounting their own election campaigns.

Third, the authority that is in charge of judicial impeachment and disciplinary investigations of judges should be a democratically-chosen institution that is independent of the judicial branch. In *Nixon v. U.S.*, a case where a federal district court judge had been sentenced to prison for false statements before a grand jury, the United States Supreme Court ruled that the Senate (an elected body) has the sole discretion to choose the procedures governing judicial impeachment.<sup>243</sup>

Moreover, the impeachment process should comply with the principle of *Nulla Poena Sine Lege* (“no penalty without a law”).<sup>244</sup> To comply, the law must clearly state what constitutes illegal behavior by a judge or prosecutor such that they become subject to disciplinary procedures.<sup>245</sup> In France, disciplinary action extends beyond intentional professional negligence to issues like theft and alcoholism,<sup>246</sup> because judges and prosecutors represent the institution they belong to, the judiciary.<sup>247</sup>

Additionally, judges and prosecutors must be protected against arbitrary actions by the disciplining body.<sup>248</sup> The French Constitution and the nation’s Judicial Ordinance offer several safeguards against arbitrary decisions or unfair trials: (1) defendant judges and prosecutors are entitled to full access to evidence and files relevant to their cases; (2) their houses and persons are secured against any form of search or seizure; and (3) the *Conseil d’Etat* (the body responsible for adjudicating administrative disputes) reviews the legality of disciplinary actions taken against judges and prosecutors.<sup>249</sup> In such cases, the *Conseil d’Etat* acts as a *juge de cassation* if the defendant is a judge,<sup>250</sup> and it acts as a *juge de l’excès de pouvoir* if the defendant is a prosecutor.<sup>251</sup>

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243. 938 F.2d 239 (1991).

244. Stefan Glaser, *Nullum Grimen Sine Lege*, 24 J. COMP. LEGIS. & INT’L L. 3D SERIES 29, 34 (1942).

245. *Id.*

246. Antoine Garapon & Harold Epinuse, *Judicial Independence in France*, in JUDICIAL INDEPENDENCE IN TRANSITION 290 (Anja Seibert-Fohr ed., 2012).

247. *Id.*

248. Sandra Day O’Connor, *Judicial Accountability must Safeguard, not Threaten, Judicial Independence: An Introduction*, 86 DENV. U. L. REV. 1, 1 (2009).

249. Antoine Garapon & Harold Epinuse, *Judicial Independence in France*, in JUDICIAL INDEPENDENCE IN TRANSITION 291 (Anja Seibert-Fohr ed., 2012).

250. *Id.*

251. *Id.*

These safeguards ensure that sanctions are not “clearly disproportionate to the offences.”<sup>252</sup>

### CONCLUSION

This Article endeavors to redefine the theory of judicial power in Islam, based primarily on two lessons from the Quran and *Sunna*: (1) with one exception (the Prophet) the people are the ultimate source of legitimacy for Islamic judges; and (2) while Islamic judges are mandated to seek expert advice, they must remain accountable to the public rather than to private factions. A comparison of the judicial practices of Iran, Egypt, and Jordan reveals that these countries are out of line with these core tenets. Though Ayatollah Khomeini attempts to create a theocratic regime, his dictatorship undermines the will of the Iranian people. Meanwhile, Egypt’s courts and Jordan’s Constitutional Court have flawed appointment processes and do not have robust systems in place to ensure judicial freedom from executive interference. These contemporary Islamic societies can better comply with the principles of government by judiciary by following the Prophet’s early traditions. First, the people must be directly involved in appointing supreme judges and holding them accountable. Second, judges must take responsibility for the administration of justice and ensuring that the judiciary regulates itself in accordance with Islamic values. And finally, judicial independence must be preserved by protecting judges against arbitrary discipline or impeachment.

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252. *Id.*



