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Checks and Balances Mechanism in Islamic Constitutionalism: A Critical Reflection

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Abstract

This article examines the issue of mechanism of controlling the power balance amongst three arms of the government (separation of powers) in Islamic constitutionalism. Having a look at the classic texts in the Islamic tradition, the article offers some critical reflection on the role and position of the executive, parliament and judiciary under Islamic constitutionalism. It provides an argument that the main problem could be seen to lie in the lack of attention given to the structures of political accountability, rather than to any flaws in the concept of Islamic constitutionalism itself.

Keywords: Shari'a, Constitutionalism, Islamic Law, Government, Separation of Powers

Several Muslim scholars such as Muhammad Asad[2] and Abul A'la al-Maududi[3] have written on several aspects of constitutional issues. However, in general their works fall into apologetics, as ChibliMallat points out: Whether for the classical age or for the contemporary Muslim world, scholarly research on public law must respect a set of axiomatic requirements. First, the perusal of the tradition cannot be construed as a mere retrospective reading. By simply projecting present-day concepts backwards, it is all too easy to force the present into the past either in an apologetically contrived or haughtily dismissive manner. The approach is apologetic and contrived when Bills of Rights are read into, say, the Caliphate of 'Umar, with the presupposition that the 'just' qualities of 'Umar included the complex and articulate precepts of constitutional balance one finds in modern texts.[4]

This means that while constitutionalism in the modern Western world has built upon institutional mechanism, those scholars tend to portray the model of Islamic constitutionalism from the individual found in the historical texts. The fall of the Ottoman Empire also contributes to the lack of Islamic constitutional thought since the Ottoman Empire was the last caliph state. It is also worth considering that books on political law (*fiqhsiyasa*) written in twentieth century by 'Abdurrahman Taj[5], and Ahmad Syalabi,[6] for instance, refer to the idea and the practice of the Islamic state more than a thousand years ago.[7] This suggests that their works are simply repetitions of opinions from *fiqh*books written several centuries ago without making modification through *ijtihad* orreinterpretation and without trying to link the revelation, which was sent down fifteen centuries ago, and modern problems in a nation state. In other words, what Islamic constitutionalism entails remains contested among Muslims, as well as among Western scholars who study the topics.

My article will focus on the issue of mechanism of controlling the power balance amongst three arms of the government (separation of powers) in Islamic constitutionalism. First, I will briefly explain that when scholars talk of constitutionalism, they normally mean not only that rules create legislative, executive, and judicial powers, but that these rules impose limits on those powers.

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[2] Muhammad Asad, *The Principles of State and Government in Islam*, (Kuala Lumpur, Islamic Book Trust, 1980).

[3] For example, Abul A'la al-Maududi, ***Political Theory of Islam,*** **(Lahore,** Islamic Publications, 1985).

[4]**ChibliMallat (ed.),** *Islam and Public Law: Classical and Contemporary Studies*, (London, Graham & Trotman, 1993), **1-**2

[5]'Abdurrahman Taj, *al-Siyasa al-Shar`iya wa al-Fiqh al-Islami*, (al-Qahirah, Dar al-Ta'rif, 1953).

[6] Ahmad Syalabi, *al-Siyasa fi al-Fikr al-Islami*, (al-Qahirah, Nahdah al-Misriyah, 1983).

[7]The common sources are al-Mawardi, *al-Ahkam al-Sutaniya*, ((Beirut, Dar al-Fikr, n.d)); Ibn Khaldun, *Muqaddima*, (Beirut, Dar al-Fikr, n.d).

As a concept, constitutionalism is wider and broader than the text of a constitution. Second, I will evaluate the ideas of separation of powers in Islamic literatures. Finally, I will offer my critical reflection on the role of the executive, judiciary and the parliament in providing checks and balances mechanism in Islamic constitutionalism. I would argue that the main problem could be seen to lie in the lack of attention given to the structures of political accountability, rather than to any flaws in the concept of Islamic constitutionalism itself.

1. Islamic Constitutionalism

Constitutional law can be defined simply as law which regulates the government of a state. It is concerned with the struggle between rival contenders for power and the question of what limits should be imposed on the government. In a minimalist sense of the term, a "constitution" consists of a set of rules or norms creating, structuring and defining the limits of government power or authority. In this way, all states have constitutions and all states are constitutional states. However, it should be noted that having a constitution — written or unwritten — does not necessarily mean that a state follows constitutionalism.

Louis Henkin defines constitutionalism as constituted of the following elements: (1) government according to the constitution; (2) separation of power; (3) sovereignty of the people and democratic government; (4) constitutional review; (5) independent judiciary; (6) limited government subject to a bill of individual rights; (7) controlling the police; (8) civilian control of the military; and (9) no state power, or very limited and strictly circumscribed state power, to suspend the operation of some parts of, or the entire, constitution.[8]

In other words, constitutionalism has evolved to mean the legal limitations placed upon the rightful power of government in its relation to citizens. It includes the doctrine of official accountability to the people or to its legitimate representatives within the framework of fundamental law for better securing the citizens' rights.[9]The philosophy behind the doctrine is that the people are the best judges about what is and what is not in their own interest.[10] Therefore, a constitution which has the spirit of constitutionalism must, at least, limit the power of the state; guarantee and protect the rights of the citizenry; and regulate the process and procedural paths of authority and accountability.

Now, how about Islamic constitutionalism? In this sense, Nathan J. Brown points out that the Shari`adoes provide a basis for constitutionalism and that Islamic political thought is increasingly inclined toward constitutionalist ideas. According to him, "while it is true that attempts to put these ideas into practice have not so far been successful, the problem could be seen to lie in the lack of attention to the structures of political accountability, rather than flaws in the concept of Islamic constitutionalism".[11]

Azizah Y. al-Hibri explains some key concepts of Islamic law in order to support the view that the Shari`ais compatible with constitutionalism. A state must satisfy two basic conditions to meet Islamic standards: the political process must be based on "elections," or *bay`at*; and the elective and governing process must be based on "broad deliberation," or *shura*. These two principles are part of the criteria employed to determine or to judge Islamic constitutional law. According to al-Hibri, these two principles, together with other factors (the ruler in a Muslim state has no divine attributes and there is no ecclesiastical structure in an Islamic setting), indicate that there is, in fact, little difference between an Islamic constitutional setting and a secular one.[12]

Given the alleged parallels she discovers between the Constitution of Medina and the U.S. Constitution, al-Hibri considers the possibility that the Founding Fathers of the United States were directly or indirectly influenced by the Islamic precedent. She notes that Thomas Jefferson was aware of Islam, since he had in his library a copy of George Sale's translation of the *Qur'an*.

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[8] Louis Henkin, 'Elements of Constitutionalism', Occasional Paper Series, Center for the Study of Human Rights, 1994. See also Francis D. Wormuth, *The Origins of Modern Constitutionalism,* (New York, Harper & Brothers, 1949).

[9] Dario Castiglione, 'The Political Theory of the Constitution', in Richard Bellamy and Dario Castiglione (eds.), *Constitutionalism in Transformation*, (London, Blackwell Publishers, 1996), 5.

[10] Alan S. Rosenbaum (ed.), *Constitutionalism: The Philosophical Dimension,* (Connecticut, Greenwood Press, 1988), 8 (Introduction); see also J. Lane, *Constitutions and Political Theory*, (Manchester, Manchester University Press, 1996), 25.

[11] See Nathan J. Brown, *Constitutions in a Non-Constitutional World: Arab Basic Laws and the Prospects for Accountable Government*, (Albany, NY, State University of New York Press, 2002), 162.

[12]Azizah Y. al-Hibri, 'Islamic Constitutionalism and the Concept of Democracy' in Fred Dallmayr (ed.), *Border Crossings: Toward a Comparative Political Theory,* (Maryland, Lexington Books, 1999), 63-87.

Al-Hibri suggests that Sale presented Islam in as fair a light as possible, under the circumstances of the eighteenth century, thereby making the Prophet's precedent amenable to Jefferson. Al-Hibri argues that if the founding fathers were, in fact, influenced by the Islamic model of constitutionalism, then this would "support the argument that American constitutional principles have a lot in common with Islamic principles. Such a conclusion would be helpful in evaluating the possibility of exporting American democracy to Muslim countries".[13]

Although her argument could be considered apologetic,[14] it seems that Al-Hibri has attempted to show some similarities between the two traditions, using the American standard as the standard of evaluation. In addition, a Muslim scholar could readily conclude that a Muslim country may choose to be a republic and still be in compliance with theShari`a, as long as the vote for the president is genuinely free, and the consultation among all branches of government is broad. Furthermore, the existence of a House of Representatives would ensure that the people's voice is heard in legislative matters, even if indirectly. Another scholar, however, may make similar arguments for a constitutional monarchy based on the British example. One can see that Muslim countries may, or may not, satisfy the two criteria above, in their constitutions.

In relation to the protection of the rights of the citizen, despite some rights which are established in the the*Qur'an*and the *Sunna,*[15]*maqasid al-shari`a*(the objectives of Islamic law)should become another principle or criterion of Islamic constitutional law. This view is supported by UCLA Professor of Islamic Law, Khaled Abou El Fadl.[16] According to Muhammad HuseinKamali, *maqasid al-shari`a*is an important but neglected aspects in the discourse of the Shari`a. Kamali claims that even today many highly regarded textbooks on *Usul al-Fiqh*(Islamic legal theory) do not comprise *maqasid al-shari`a*in their descriptions. Generally those textbooks are more concerned with conformity to the letter of the divine text. Accordingly, this, directly or not, has contributed to the literalist direction of juristic thought.[17]

The *maqasid al-shari`a*consists of the five juristic core values of protection *(al-dharuriya al-khams)* for religion, life, intellect, honour or lineage, and property. Basically, the Shari`a, on the whole, seeks primarily to protect and promote these essential values, and validates all measures necessary for their preservation and advancement. El Fadl argues that the protection of religion would have to mean protecting the freedom of religious belief; the protection of life would mean that the taking of life must be for a just reason, and the result of a just process; the protection of the intellect would have to mean the right to freedom of thought, expression and belief; the protection of honour would have to mean the protection of the dignity of a human being; and the protection of property would ensure the right to compensation for the taking of property. [18]

It is essential to note that these five core values are not divine, but human values, since they are developed by Muslim jurists based on their interpretations of the *Qur'an*and the *Sunna.* This could mean that the *maqasid al-shari`a* is not limited to the five core values. Ibn Taimiyah, for instance, departs from the notion of confining the *maqasid al-shari`a*to a specific number of values.[19] Yusuf al-Qaradawi takes a similar approach.

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[13]Azizah Y. al-Hibri, 'Islamic and American Constitutional Law: Borrowing Possibilities or a History of Borrowing?' (1999)1 *The University of Pennsylvania Journal of Constitutional Law* 492, 497.

[14]Khaled Abou El Fadl, 'Constitutionalism and the Islamic Sunni Legacy' (2002) *1 UCLA Journal of Islamic & Near Eastern Law* 67*;* See also AnverEmon, 'Reflections on the "Constitution of Medina": An Essay on Methodology and Ideology in Islamic Legal History' (2002) 1 *UCLA Journal of Islamic & Near Eastern Law* 103.

[15] Many Muslim scholars are firm in their belief that Shari`a addresses the fundamentals of human rights. For instance, they identify the most important human rights principles in Islam to be: dignity and brotherhood; equality among members of the community without distinction on the basis of race, colour, or class; respect for the honour, reputation, and family of each individual; the right of each individual to be presumed innocent until proven guilty and individual freedom. See Tahir Mahmood (ed.), *Human Rights in Islamic Law,* New Delhi, Genuine Publications, 1993. This book compiles articles from leading Muslim scholars such as Abul A`laMaududi, M.I. Patwari, Majid Ali Khan, Sheikh Showkat Husain, and Parveen Shaukat Ali.

[16]El Fadl, above n 13.

[17]Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, (Cambridge, The Islamic Text Society, 1991), 403.

[18] El Fadl, above n 13*,* 88; more discussion on this topic can be found in M. Sa'd b. Ahmad b. Mas'ud al-Alyubi, *Maqasid al-Shari`a al-Islamiyawa `Alaqatuha bi Adillah al-Shar`iyya,* (Riyad, Dar al-hijrah li al-Nasyrwa al-Tawzi`, 1998). This work is based on his PhD thesis at al-Jami`ah al-Islamiyah bi al-Madinah al-Munawarah, 1995.

[19]Taqi al-Din Ibn Taimiyah, *Majmu` al-Fatawa,* Vol. 2, (Beirut, Mu'assasah al-Risalah, 1398 H), 134.

He extends the list of the *maqasid al-shari`a*to include "human dignity, freedom, social welfare, and human fraternity among the higher *maqasid* of the Shari`a".[20]The existence of additional objectives is upheld by the weight of both general and detailed evidence, in the *Qur'an*and the *Sunna.* A new *ijtihad*could be performed by considering the theory of the *maqasid al-shari`a,* examining the Shari`a as a unity in which the detailed rules are to be read in the light of their broader premises, substantives, and objectives. This means that by looking at the*maqasid al-shari`a,* the Shari`acould be analysed beyond the particularities of the text. In Kamali's words, "the focus is not so much on the words and sentences of the text, as on the purposes and goals that are being upheld and advocated".[21] It is worth noting that the principles and the procedural form of Islamic constitutional law could be found through the theory of the *maqasid al-shari`a.*

2. Separation of Powers

Separation of powers ensures that the three arms of government operate as checks and balances upon each other so that no one governmental arm unduly harms the interests of the governed. The "pure" doctrine of separation of powers prescribes that the functions of the three arms of government be clearly and institutionally separated. One justification for such separation is to prevent the concentration of too much power in, and consequent abuse of power by, a single arm of government. But first, before we evaluate how the concept of separation of power applies to Islamic constitutionalism, the question of whether Shariaestablished a certain form of government remains controversial.

Taqiyuddin al-Nabhani opines that the Caliphate (*khilafa*)is the valid form of Islamic government contemplated under Sharia.[22] His views are supported by classic Muslim thinkers such as al-Mawardi (974-1058) who took the view that the establishment of the Islamic State (*al-Imama*or*khilafa*))[23] is obligatory, since it is intended to act as the enacter of the prophecy, in upholding the Muslim faith and managing the affairs of the world (*al-imamamawdu'ah li khilafa al-nubuwwa fi hirasat al-din wasiyasa al-dunya).*[24] Muslims had never been without a Caliph until Mustapha Kemal abolished the *khilafa*system in 1924.[25] Since then, the idea of a non-Caliphate structure of government has been introduced. The imposition of non-Caliphate governments by colonisers could be considered proof that other forms of government are concepts that are alien to the Muslim tradition.[26] For instance, Ahmad HusaynYa'qub clearly states that the system of political Islam is not a system of democracy (*al-nizam al-siyasi al-Islamilaysanizamandimuqratiyyan*).[27] Since the Islamic state is eponymous with the *khilafa*, when a Caliph is present the Islamic State exists. Therefore, it cannot be said that there is a genuine Islamic state in existence today. Many Islamic movements such as *Hizbut Tahrir* are attempting to re-establish the Caliphate, and for this reason they refuse to imitate the Western concept of government. The fall of the Ottoman Caliphate in 1924 led to the notion of nation-states in Muslim communities. Since the early twentieth century, the concepts of nationalism, along with democracy, republicanism, and the rule of law have been incorporated into the political and legal discourses of Muslim scholars. They began to ask: Is the Caliphate the only true form of Islamic government? Did the practices of the Caliphate from Abu Bakar (the first Caliph) until the Ottomans have the same form?

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[20] As quoted in Kamali, above n 16, 407.

[21] *Ibid.,* 408.

[22] See Taqiyuddin al-Nabhani, *Nizam al-Islam*, available at <http://www.hizb-ut-tahrir.org/PDF/EN/en_books _pdf/system_of_ islam.pdf>.

[23] He did not distinguish the technical meanings of *al-imama*and *al-khilafa.* Both terms have the same general meaning.

[24] Abu Hasan al-Mawardi, *al-Ahkam al-Sultaniyya*, (Beirut, Dar al-Fikr, n.d), 5.

[25] On the historical view of the abolition of the Caliphate in 1924, see Hamid Enayat, *Modern Islamic Political Thought* (1982), 52-68.

[26] It is worth noting that Ottoman Empire for several hundreds of years was not a unified form of state ruling the Muslim world. Indeed, by the later stages of the Abbasid Caliphate there were different types of Islamic states in many parts of the Muslim world. For example, during the later stage of the Ottoman empire, there were Safavid ruling in Persia, Moguls, India and other small Muslim states in other parts of the Muslim world. None of those states, including Kings of Persia, Afghanistan, and Mogul emperors, had authority from the Ottoman Caliphs to rule. Therefore, Muslims had other types or forms of government that were not necessarily the Islamic Caliphate. Nonetheless, theoretically and based on classical Islamic teaching (and in Islamic jurisprudence) Caliphate was the only form of government recognised in Islam. More information on the history of Islamic government can be read in Ann K.S. Lambton, *State and Government in Medieval Islam* (1991); MunawirSyadzali, *Islam and Governmental System: Teachings, History, and Reflections* (1991); Ahmad Syalabi, *al-Hukumahwa al-Dawlah fi al-Islam* (1958).

[27] Ahmad HusaynYa'qub, *al-Nizam al-Siyasi fi al-Islam: ra'y al-sunna, ra'y al-shi`a, hukm al-shar`* (1312 A.H.), 250.

They went further, by returning to the primary sources of Islam (the Quran and the Sunnah) in order to define the structure of Islamic government. Scholars who took a substantive approach to Sharia, such as Muhammad Abduh, Ali AbdurRaziq, and M. Husayn Haykal, came to the conclusion that the universality of Islam lies not in its political structure, but in its faith and religious guidance. Abduh believed that 'political organization is not a matter determined by Islamic doctrine but is rather determined from time to time according to circumstances, by general consultation within the community'.[28] Similarly, Raziq argued that the Caliphate was the product of history, an institution of human, rather than divine, origin, a temporary convenience; and therefore a purely political office with no religious meaning or function. The strict rules which the Prophet set down concerned only such things as prayer and fasting; and they were in fact rules appropriate for his particular culture, and for people in a simple state with a natural government.[29] According to Haykal, there is no standard system of government in Islam. The Islamic community is free to follow any governing system that ensures equality among its citizens (both in rights and responsibilities) and in the sight of the law, and manages affairs of state based on consultation, by adhering to Islam's moral and ethical values.[30] It is worth noting that both the Quran and the Sunnah literature do not prefer a definite political system; in contrast, both of these primary sources of Islamic law have laid down a set of principles, or ethical values and political morals, to be followed by Muslims in developing life within a state. Therefore, the claim that the *khilafa*is the only valid type of Islamic government is questionable.

The administration of Islamic states from the first Caliph until the fall of the Ottoman Empire have shown great variations in practice. For centuries, there were several Caliphates or dynasties (Buyids, Saljuks, and Fatimid) operating at the same time in different locations; thus, the claim of there being a single Caliph for all Muslims has not been entirely true. In fact, since the Umayyad era (661), the institution of the Caliphate resembled a monarchy where the Caliph was replaced by his heirs, not through *shura*(consultation) with Muslim communities.[31] Such practices are against the tradition of the first four guided Caliphs (*al-Khulafa al-Rashidun*).

Islamic legal tradition justifies the elements or the principles of constitutionalism, and consequently, the idea of upholding the rule of law is not an alien concept for Muslims.[32] Abd al-WahhabKhallaf states that the Islamic government is a constitutional, as opposed to a tyrannical, government (*al-hukuma al-islamiyadusturiya*).[33] In other words, based on his understanding of the Sharia, government in Islam is not based on the charisma of the person. He also asserts that Islam guarantees individual rights *(huquq al-afrad)* and separates power into *al-sulta al-tashri'iya, al-sulta al-qada'iya, al-sulta al-tanfidhiya*,which could easily be classified as the legislative, judiciary, and executive powers, respectively.[34]Khallaf's views can be justified on the grounds that the Quran provided the basic principles for a constitutional democracy without providing the details of a specific system. Muslims were to interpret these basic principles in the light of their customs and the demands of their historical consciousness. In addition, advocates of Islamic constitutional law have sought to broaden the classic understanding of *ijma`* (consensus). Only Muslim scholars had a role in reaching consensus; the general public had little significance.[35] Fazlur Rahman argues that the classical doctrine of consultation was in error because it presented consultation as the process of one person, the ruler, asking subordinates for advice; in fact, the *Qur'an* calls for "mutual advice through mutual discussions on an equal footing".[36]

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[28] See Malcolm H. Kerr, *Islamic Reform: The Political and Legal Theories of Muhammad 'Abduh and Rashid Rida*(1966), 148.
[29] See Hamid Enayat, *Modern Islamic Political Thought* (1982), 62-68.
[30] See MusdahMulia, *Negara Islam: PemikiranPolitik Husain Haikal*((Jakarta, Paramadina, 2001).
[31] For a full account see Antony Black, *The History of Islamic Political Thought: From the Prophet to the Present* (2001), 18-31.
[32] See numerous articles in Eugene Cotran and Adel Omar Sherif (eds.), *Democracy, the Rule of law and Islam* (1999).
[33] 'Abd al-WahhabKhallaf, *Al-Siyasa al-Shar`iyya*(1350 A.H.), 25.
[34]*Ibid*.,57-58.
[35] The doctrine of *ijma`*, or consensus, was introduced in the 2nd century AH (8th century) in order to standardise legal theory and practice and to overcome individual and regional differences of opinion. Though conceived as a 'consensus of scholars', in actual practice *ijma`* was a more fundamental operative factor. From the 3rd century AH *ijma`* has amounted to a principle of rigidity in thinking; points on which consensus was reached in practice were considered closed and further substantial questioning of them prohibited. Accepted interpretations of the *Qur'an* and the actual content of the *Sunna* all rest finally on the *ijma`*. *Ijma`,* according to one definition, should be attended by all *Mujtahids* only. The problem is, if one refers to all books of Islamic legal theory, there is no definition of *ijma`* which is accepted by all *Mujathids*. There is no consensus *(mujma` `alaih)* in defining *ijma`* itself. See 'Ali 'Abd al-Raziq, *al-Ijma` fi al-Shari`a al-Islamiya,* (Beirut, Dar al-Fikr al-'Arabi, 1948), 6.
[36] Fazlur Rahman, 'The Principle of Shura and the Role of the Ummah in Islam', in Mumtaz Ahmad (ed.), *State, Politics, and Islam*, (Indianapolis, American Trust Publications, 1986), 90-91, and 95.

In this context, the doctrine of *ijma`* is closely related to the concept of *shura*(consultation), and therefore can be implemented as a legislative power in modern sense. Louay M. Safi also notes that the "legitimacy of the state . . . depends upon the extent to which state organization and power reflect the will of the *ummah* [the Muslim community], for as classical jurists have insisted, the legitimacy of state institutions is not derived from textual sources but is based primarily on the principle of *ijma`*."[37] In this understanding, an Islamic constitution is a human product of legislation based on the practice of consultation and consensus, and thus, virtually, no longer a result of divine act. It is set by the people and approved by them. In other words, consensus and consultation offer a justification of Islamic constitutional law.

In addition, the claim that the Shari`arefutes the majority principle — what is right and what is wrong should be based on the Shari`a, not on the popular vote — is actually open to discussion. For instance, ErminSinanovic has shown that the key concepts *ijma`*, *al-sawad al-a`zham,jumhur, al-tarjih bi al-katsrah* and legal maxims *al-qawa`id al-fiqhiyya*could strengthen the case for the legitimisation of the majority principle in Islamic political thought and decision-making processes.[38]

I would also add that Muslims agree about the primacy of *HadithMutawatir*, which is reported by such a large number of people that they cannot all be expected to agree upon a lie.[39] But, how does one define 'a large number of people'? Although Muslims agree about the primacy of *Mutawatir,* they hold different opinions about the numbers of narrators for a *Hadith*to be accepted as *Mutawatir.* Some believe four persons are needed; while others again insist that a *Hadith* will achieve the degree of *Mutawatir* only when seventy or more narrate it. Actually, the number of reporters required to define 'a group' for *HadithMutawatir* is derived by analogy. The requirement of four is based on the similar number of witnesses required for legal proof; the requirement for twenty is derived from *Qur'an*(8: 65) (the number required to vanquish unbelievers). The next number (70) represents an analogy to another text of the *Qur'an*(7: 115) referring to the seventy companions of Moses. Others scholars have drawn analogy from the number of participants in the battle of Badr (313 persons).[40] Despite this debate, the point is that number in Islamic tradition does matter. Therefore, it is essential to note that deciding a case through the majority or popular vote is permitted. One of the justifications comes from the sayings of the Prophet:

"I (`Ali bin Abi Talib) said to the Prophet, 'O, Prophet, [what if] there is a case among us, while neither revelation comes, nor the *Sunna* exists." The Prophet replied, "[you should] have meetings with the scholars — or in another version: the pious servants — and consult with them. Do not make a decision only by a single opinion."[41]

3. Critical Reflection

Thus far I have examined how Muslims scholars could provide justification of the separation of powers: executive, judiciary and parliament. But how far this concept of separation of powers in Islamic literature could meet the requirements provided by Islamic constitutionalism? The topic of separation of powers and the rule of law *vis-à-vis* the Shari`ais a controversial topic. The image is that Islamic law allows the ruler (Caliph, King, Prime Minister, or President) to govern without accountability and transparency. This concurs with other images that Shari`adoes not provide procedural regulations to control the government; Shari`adoes not have a clear rule on how to elect the government and how to limit the powers of the government; and there is no judicial independence in the countries which enforce Shari`a.

Executive Power

Historically, it is the ruler's discretion — not the rule of law — which plays a greater part in Islamic constitutional law. Islamic jurisprudence came to accept the idea of *siyasashar`iyya*, which accords the terrestrial ruler a reservoir of discretionary power of command in the public interest.

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[37]Louay M. Safi, 'The Islamic State: A Conceptual Framework' (1991) *The American Journal of Islamic Social Sciences* 233.

[38]ErminSinanovic, 'The Majority Principle in Islamic Legal and Political Thought' (2004) 15 (2) *Islam and Christian-Muslim Relations*, 237-256.

[39] Mahmud al-Tahhan, *Taysir Mustalah al-Hadith* (al-Qahirah*,* Dar al-Turas al-'Arabi, 1981), 19.

[40] Muhammad Taqi al-Hakim, *al-Usul al-`Ammah li al-Fiqh al-Muqarin*, (Beirut, Dar al-Andalas, 1963), 195.

[41]As quoted in `Abd al-Halim Uwes, *al-Fiqh al-Islamibaina al-Tatawwurwa al-Tsabat,* (Madinah, Syirkah al-Madinah al-Munawwarah, n.d), 159.

If deviations from the strict Shari`a doctrine were required to protect the *maslahah al-`ammah*(public interest)[42] in implementing the guiding principles behind the Shari`a, then such deviations were allowed.[43] This expansive doctrine of government discretion was justified in terms which reflected the privileged position of the Caliph as head of state of the Islamic nation. Since caliphs were presumed to possess keen piety and the ability to engage in *ijtihad* (independent legal reasoning), they were also presumed to be ideally qualified for their office and were to be allowed the discretion to take such steps as they in their wisdom saw fit.[44]

All four *khulafa al-rasyidin*stayed in power until death (Abu Bakr) or assassination ('Umar, 'Usman, and 'Ali). Islamic history also tells us of the third Caliph, 'Usman, stayed too long in office and became very old. There was a move against him to force him to resign, but the Caliph refused to do so. In the end, he was killed, and Muslims entered a period of civil war. History continues with other caliphs ending their terms in one of the following ways: poisoned, forced to resign by military actions, or died peacefully in their old age.

In the United States, presidential tenure is limited two terms. This regulation is based on the 22nd Amendment, passed in 1933. It is important to note that The Ottoman Caliphate was dissolved in 1924. Therefore, it is well understood that Muslim political thinkers did not propose the idea of a limit to the Caliph's tenure when the caliphate existed. It is an idea which came up after the disappearance of the Caliphate. However, it is not easy to understand why, even today, some Muslim countries and some Muslim thinkers still believe in unlimited terms for their leaders. Even if there is a constitutional mechanism which determines tenure, some leaders in some Muslim countries have held power for long periods. In Saudi Arabia, citizens do not have the right to change their Government. The King is also the Prime Minister, and the Crown Prince serves as Deputy Prime Minister.

Mu`awiya, the founder of the Umayyad Dynasty, established the hereditary principle in 676 (four years before his death) by securing *bay`at* for his son, Yazid, and having him confirmed as the next caliph during Mu`awiyah's own time. This precedent was subsequently followed throughout the Umayyad and Abbasid dynasties. It is important to note that issues related to public affairs change from time to time. A leader who was qualified to deal with particular issues may not be qualified for new issues. New leaders who are more qualified will emerge from society, and society should give them a chance to deal with these challenges. Unlimited terms for leaders and appointment by a predecessor *(bi 'ahd al-imam min qabl)* will have a negative impact on the rule of law.

Regarding one of the implications of the basic premise that the power of a head of state comes from Allah, and not from the people, several Muslim scholars such as al-Farabi (870-950) and al-Ghazali (1058-1111) did not discuss whether a head of state could be removed from office or not. Mawardi (975-1059) was the only Islamic political thinker of the Middle Ages who believed that a head of state could be replaced if it were obvious that he could no longer perform his duties, owing to moral or other problems.[45] Other Muslim thinkers cite the statement of Abu Bakr when the latter was elected as the first Caliph:

Assist me when I act rightly; but if I go wrong, put me on the right path. Obey me as long as I remain loyal to Allah and His Prophet; but if I disobey Allah and His Prophet, then none is under the slightest obligation to accord obedience to me.[46]Abu Bakr's statement confirmed the saying of the Prophet: "A Muslim has to listen and to obey (the order of his leader) whether he likes it or not, as long as those orders involve not one in disobedience (to Allah), but if an act of disobedience (to Allah) is imposed one should not listen to it nor obey it." [47] This is an indication that the first Caliph was aware that he was appointed, watched, and corrected by the people.

However, Abu Bakr himself did not explain how the Caliph's conformity with the Shari`amay be determined and how to hold the caliph accountable. This lack of a procedural mechanism continues in the Islamic governmental system. Mawardi's work also did not indicate the method of dethroning the head of state, and its implementation. In Islamic history, it is difficult to find a precedent in which a head of state was impeached in a legal way. Caliphs lost their position either because they were assassinated, poisoned, forced to resigned or died in a natural way.

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[42] More information on the concept of public interest in Islam can be found in Husain Hamid Hasan, *Nazariyah al-Maslahah fi al-Fiqh al-Islami,,* (al-Qahirah, Dar al-Nahdah al-'Arabiyah, 1971).

[43] Abdurrahman Taj, *al-Siyasa al-Shar`iya wa al-Fiqh al-Islami*, (al-Qahirah, Dar al-Ta'rif, 1953), 10-11.

[44] Taqiyuddin al-Nabhani, *Nizam al-Islam,* above n 21.

[45]Mawardi, above n 23, 17-20.

[46]Maududi, above n 2, 57.

[47] Abu al-Husain al-Qusyari al-Naisaburi, *Sahih Muslim*, book *al-Imara,* Hadith No: 3,423.

In this sense, Ann Lambton has correctly pointed out that:

Normally the subject owes a duty of complete and unquestioning obedience to the Imam. If, however, the Imam commands something that is contrary to God's law, then the duty of obedience lapses, and instead it is the duty of the subject to disobey — and resist — such a command. This principle is frequently cited by latter writers, but it never became an effective basis for 'limited government' or 'justified revolution' because first the jurists seldom discussed, and never answered, the question of how the lawfulness or sinfulness of a command was to be tested, and secondly no legal procedures or means were devised, or set up, to enforce the law against the ruler.[48]

There are at least three issues on accountability: to whom executive shall be responsible, the form of responsibility and the mechanism of impeaching the President.[49] The most important guarantee of governmental accountability is the right of the citizens to control the direction of governmental policy, and the identity of those who exercise governmental power, through the electoral process. Direct election is seen as more democratic and as fostering greater accountability of the President to the people, as well as reducing the possibility of vote-buying in the presidential election process.

Democratic governments are given the authority to make decisions through their electoral mandate. In other words, citizens choose government representatives. Regular elections allow opposition parties to compete and present alternative policies to the voting public. Citizens are then able to hold government officials accountable by having the periodic right, and opportunity, to vote them out of office.[50] In the context of the rule of law, a good election is a pre-requisite for having a 'checks and balances' mechanism between the people, the parliament and the government.[51]

In addition, elections have domestic purposes. Elections de-legitimise protests, riots, and public violence. They are the obvious and traditional way of ensuring accountability, and providing an institutional framework for the peaceful resolution of conflicts among competing political parties.[52] They also moderate some opposition supporters by convincing them that even though they may have lost this time, future elections might turn out differently.

Parliament

The legislature, or parliament, is a fundamental component of democratic government. The need for strong legislatures is reflected in the very meaning of democracy: 'rule by the people'. In order for the people to rule, they require a mechanism to represent their wishes — to make (or influence) policies in their name and oversee the implementation of those policies. It is thought that legislatures serve these critical functions. A legislature reflects in its ranks a broad spectrum of a country's political opinion, and as such is the principal forum for debate on vital issues. A legislature, or parliament, can serve as a demonstration of pluralism, tolerance of diversity and dissent, as well as a place for compromise and consensus-building.[53] In authoritarian systems, the legislature serves as a 'rubber stamp' or a justification of a government's decisions. In other words, the power of parliament is subordinated, and this is clearly against the idea of the rule of law. The balance of power between the legislative and executive branches in a country can be changed through political and legal reform. If new legislatures are going to have a central role in a nation's governance, it is up to legislators themselves to build strong legislative institutions, by asserting themselves in the regular law-making or oversight functions, or through specific structural changes via constitutional amendment, legislation, or rules of procedure. In the context of the rule of law, it can be argued that the executive must act within the confines of laws passed by Parliament; otherwise its actions will be invalid. One of the key concepts of Islamic governmental system is *shura.* It is a consultation process with the people (particularly with members of the *shura*council, namely *ahl al-hall wa al-aqd*or *ahl al-ikhtiyar*), in matters related to public affairs.

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[48] Ann K.S. Lambton, *State and Government in Medieval Islam,* (New York, Oxford University Press, 1991), 63-64.

[49] Charles D. Kenney, 'Reflections on Horizontal Accountability: Democratic Legitimacy, Majority Parties and Democratic Stability in Latin America', paper for the conference on Institutions, Accountability, and Democratic Governance in Latin America, Kellogg Institute for International Studies, University of Notre Dame, May 8-9, 2000.

[50]**Bernard Manin, *The Principles of Representative Government,* (**Cambridge, Cambridge University Press, 1997), 124.

[51] See International Commission of Jurists, *The Dynamic Aspects of the Rule of Law in the Modern Age,* Report on the Proceedings of the South-East Asian and Pacific Conference of Jurists, Bangkok-Thailand, 15-19 February 1965, 44.

[52]MunaNdulo, 'Globalisation and Empire: the Democratization Process and Structural Adjustment in Africa' (2003) 10 *Indiana Journal of Global Legal Studies* 350.

[53]**Ron Gould, Christine Jackson, and Loren Wells, *Strengthening Democracy: a parliamentary perspective,* (**Aldershot, Dartmouth, 1995), 41.

Although there is a direct reference to the term *shura*in two verses of the *Qur'an* (3:159 and 42:38), it is an essentially contested concept. This happens because the *Qur'an* does not provide detailed provisions on the technical aspects of the *shura.* In Islamic history, the second Caliph, 'Umar b. Khattab, did not want to follow the method used by Abu Bakr when the latter appointed him. 'Umar appointed six people and asked them to select the next Caliph. It seems that 'Umar was the first Caliph to institusionalise the *shura,* although in its first form it had been left solely to the discretion of the Caliph as to whom he should consult. This explains why in al-Mawardi's book the main task of *ahl al-ikhtiyar*is to appoint the Caliph and the *ahl al-ikhtiyar*or the *shura*council is appointed by the Caliph.

Others interpret *shura*as advice, wherein the ruler merely asks religious leaders, tribal leaders or influential people for advice. Such an interpretation was practiced by Mu`awiya, who governed 661-680. The implication of this practice is that the ruler does not have any obligation to follow or implement the advice. Maududi, for instance, takes the view that the head of state is not obliged to follow the opinion of the *shura*council, which is supported by the majority of votes. He can also follow the opinion supported by a minority group, and he can even totally neglect the (majority or minority) opinion of the *shura*council.

Fazlur Rahman rejects this kind of *shura*,on the grounds that this totally alters the original foundation of the *shura.* The *shura*should be "mutual advice, through mutual discussions, on an equal footing."[54] A *Shura*council has an equal position with the government. Therefore, the outcome of the *shura*should be legally binding on both the ruler and the community. Hasan al-Turabi provides a solid justification for this, when he recalls that: the Prophet used to consult his companions and take their views on almost every issue related to public affairs, and sometimes even related to his private life, though he was the Prophet of God and supported by divine revelation.[55]

According to Rahman, the phrase *"amruhum"* in the *Qur'an* 42:38 refers to the community as a whole, not an elite nor any specific group.[56] Rahman's interpretation is opposed to Maududi,[57] and 'Abd al-Wahab Khallaf[58] who express the view that those participating in *shura*must be a well-specified group of people (i.e. '*Ulama* or Muslim scholars).[59] One of the consequences is that it is the community which chooses its representatives (*ahl al-hall wa al-aqd*or *ahl al-ikhtiyar)*, not the head of state. Given the practice of the *shura*in Islamic history, this will radically change the face of Islamic government. For instance, Saudi Arabia is a monarchy, without elected representative institutions or political parties. The *Majlis al-Shura*, or Consultative Council, consists of 120 appointed members.

How then can members of the *shura*council be elected? Once again, neither the *Qur`an* nor the classic works of Muslim scholars cover this topic. Once again, this provides wide room for *ijtihad*in the modern era. Even a fundamentalist thinker, like Sayyid Quthb, does not insist on a particular form of *shura.* According to Quthb, let the Muslim community decide its own methods to facilitate the *shura*, in relation to its environment, social circumstances and requirements. [60]

Therefore, it is up to Muslims to choose one electoral system, to determine the best system for casting and counting votes, with regard to the situation in the country concerned, such as its geography, ethnic composition, demography, political format, legal system and so on. There are two main electoral systems which can be selected or combined. The first electoral system is the proportional system (commonly known as the proportional representation system). This system is based on the principle of 'one person one vote', and the concept that parties should be represented in an assembly or parliament in direct proportion to their overall voting results. Their percentage of seats should equal their percentage of votes gained. The second system is the district system (single constituency system or majority system), which means that the country is divided into constituencies, each approximately the same sizes. Voters select a single candidate by marking the candidate's name on the ballot paper.

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[54] Fazlur Rahman, 'The Principle of Shura and the Role of the Ummah in Islam', in Mumtaz Ahmad (ed.), *State, Politics, and Islam*, (Indianapolis, American Trust Publications, 1986), 90-91.

[55] Mishal Fahm al-Sulami, *The West and Islam,* (London, RoutledgeCurzon, 2003), 123.

[56] Rahman, above n 53, 95

[57]Maududi believes that only the *'ulama* can legislate on matters not covered by the Holy Texts. Maududi, above n 2, 30-31.

[58]Khallaf proposes that they should consist of Muslim scholars *(al-mujtahidunwaahl al-futya).* Khallaf, above n 32, 42.

[59] See Fazlur Rahman, 'A Recent Controversy Over the Interpretation of Sh*f*r~' (1981) 20*History of Religions*, 291-301.

[60] See Sayed Khatab, 'The Concept of Jahiliyyah in the Thought of Sayyid Quthb', Ph.D Thesis, University of Melbourne, September 2002, 245.

The candidate with the most votes wins the district seat (the 'First-Past-the-Post' rule).[61] According to Gamil Mohammed El-Gindy, the flexibility of the *shura* makes it compatible with any of these electoral systems.[62] Apart from appointing of the Caliph, other functions of *ahl al-ikhtiyar* have not yet been determined by classic Muslim scholars. So, what are the other functions? Has the parliament the right to legislate? This has been a major question, since legislation in Islam is a crucial matter. The debate over popular sovereignty and God's sovereignty re-appears. Quthb, for instance, takes the position that the *shura* does not fit with secular government, since the *shura* is divinely inspired, and its foundation lies in God's sovereignty. [63] The main consequence is that the parliament can not produce legislation or regulation in contradiction to the Shari`a.

The final issue is the structure of parliament. Turabi expresses the view that the unicameral legislature model is the best option for an Islamic state. He provides the evidence that Muslims do not have two gods, and therefore do not like to have two legislative houses. [64] It would appear that Turabi's argument is made in the context of legislation under God's sovereignty, in which case it is impossible to have two kinds of legislators.

Turabi's argument seems odd, since, the choice between one and two chambers in Western democracy is not related to monotheism nor polytheism. Unicameral parliaments are justified on the grounds that an assembly based on direct popular election is a reflection of the popular will and, therefore, should not be hindered by a second chamber. Such arguments are rejected by the defenders of bicameral parliaments. They believe that the upper chamber provides checks and balances. It can play this role by defending individual and regional interests, and those of other groups, against a potentially oppressive majority in the lower house. Moreover, a second chamber guarantees a voice in parliament for distinct territories within the state.[65]

Therefore, the choice one or two chambers is dependent upon the structure of, the environment surrounding, and the circumstances faced by Muslim communities. This is not opposed to the concept of the *shura* in Islamic tradition since, as has been stated, the *Qur'an* does not explain it in detail. To conclude, the *shura* might not equate with parliament in a modern sense, but the concept of the *shura* can be modified and adapted to the contemporary era.

Judiciary

Thus far, I have examined the role of the Executive and the Parliament. In this section, I will focus on the last topic: the Judiciary. Special focus will be given to the issue of judicial independence. Judicial independence is critical on at least two grounds. Firstly, protection of human rights depends partly on a robust, fair, and independent judiciary, willing to hold all political and social actors accountable to legal and constitutional protections. Secondly, judicial independence facilitates political stability and fairness. What are the elements of judicial independence? The seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Milan from 26 August to 6 September, 1985, adopted a number of rich principles which guarantee judicial independence. These are known as the Basic Principles on the Independence of the Judiciary. These principles were then endorsed by General Assembly Resolutions 40/32, of 29 November, 1985, and 40/146, of 13 December 1985.[66] The principles, endorsed by the UN General Assembly, fall into six categories. The first concerns general issues of judicial independence which must be guaranteed; but this is not enough.

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[61] For a full account, see David M. Farrell, *Comparing Electoral Systems,* (London, Prentice Hall/Harvester Wheatsheaf, 1997).

[62] Gamil Mohammed El-Gindy, 'The Shura and Human Rights in Islamic Law: The Relevance of Democracy' in Eugene Cotran and Mai Yamani (eds.), *The Rule of Law in the Middle East and the Islamic World,* (London, I.B. Tauris, 2000), 166; see also Ibrahim Hosen, 'FiqhSiyasahdalamTradisiPemikiran Islam Klasik', (1993) 2 (4) *JurnalUlumul Qur'an*, 58-66.

[63] Khatab, above n 59,246.

[64] Al-Sulami, above n 54, 141.

[65] Rod Hague and Martin Harrop, *Comparative Government and Politics,* (Hampshire, Palgrave, 2001), 220.

[66] See 'Basic Principles on the Independence of the Judiciary', adopted by the seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Milan from 26 August, to 6 September, 1985, and endorsed by General Assembly Resolutions 40/32, of 29 November, 1985, and 40/146, of 13 December, 1985. It is worth considering that the General Assembly did not attempt to devise a single system for all countries. Instead, it proclaimed twenty general principles which should apply, regardless of the prevailing legal and political order. The document recognises that there continues to be a gap between theoretical principles and actual practice and expresses the wish that the twenty principles would serve to "assist Member States in their task of securing and promoting the independence of the judiciary, should be taken into account and respected by Governments, within the framework of their national legislation and practice, and be brought to the attention of judges, lawyers, members of the executive and the legislature, and the public in general."

The Judiciary must also be given jurisdiction; it must receive the resources necessary to perform its tasks; its rulings must be implemented; and tribunals eschewing established procedures must not be used as a device to by-pass the Judiciary. The second category concerns freedom of expression and association. The third group of principles endorsed by the United Nations General Assembly involves the qualifications, selection, and training of judges. The principles do not require specific practices, but they bar discrimination and improper criteria in judicial appointments. The fourth group of principles covers the conditions and terms of service for judges. Here the principles require that such matters be governed by law, that judges serve either until retirement or until a legally-fixed term expires, and that assignment of cases be based on internal administrative grounds. The fifth group of principles involves professional secrecy and immunity, barring judges from revealing, or being forced to reveal, confidential information; and requiring that they receive appropriate immunity from civil suits, connected with their professional duties. The sixth and final set of principles involves the disciplining, suspension and removal of judges, requiring appropriate processes, and insisting that judges may be disciplined only for good cause.[67]

The topic of *Qada*(judiciary) has been discussed widely in Islamic law literature. It is claimed that the independence of the judiciary is "a cardinal principle of Islam".[68] This claim is supported by a number of arguments. Firstly, Muhammad Idris al-Shafi'i takes the view that a judge must be a Muslim scholars (*mujtahid)*, because of the mastery of the religious sciences and integrity of character required to perform *ijtihad*.[69]Khallaf shows similar views when he says: *fakanarijal al-qada' min al-mujtahidin*(persons who are in charge at the court are *mujtahid*).[70]In the context of judicial independence, such views are significant, on the grounds that not only must judges possess the same knowledge as that of Muslim scholars (*mujtahid),* but also their decisions must be based on their independent judgment on religious problems.

Mawardi explains further:

A Shafi'ite may appoint to a judgeship a follower of Abu Hanifah's doctrine, for a judge has the right to use personal opinion in his rulings, and does not have to follow the precedent of members of his own school in problems or judgments. If he is a Shafi'ite he does not have to implement the pronouncements of al-Shafi'i unless he is led to accept them by his own efforts. But if his endeavours lead him to adopt Abu Hanifah's views, then he should do so.[71]

The theory of *ijtihad*requires judges to be independent in the exercise of personal reasoning. 'Umar, the second caliph, is considered to have been the first person to guarantee judicial independence.[72] This leads to the second argument: the practices of the *khulafa al-rasyidin*,who respected the judges' decisions. For instance, Kamali provides examples that 'Umar and 'Ali (the fourth Caliph) appeared before judges as parties to litigation, and both made clear statements that the judge should not give them any special treatment.[73] 'Usman, the third Caliph, appeared personally before the court to get back a suit of armour from a Jew. However, 'Usman's claim was dismissed, since the only witnesses who supported his claim were his slave and his son; both are not competent witnesses under Islamic law.[74]

The third argument supporting the claim to judicial independence in Islam is the existence of *wilaya al-mazalim*(the redress of wrongs). It is the embryo of the administrative tribunal, or constitutional court, in the modern sense. Mawardi has outlined ten areas which can be reported to this tribunal, including oppression and maltreatment of the public by government officials, and the implementation of sentences when judges are too weak to enforce them, owing to the sentenced person's power or social standing.[75]

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[67]*Ibid.*

[68]Shad Saleem Faruqi, 'Constitutional Law, the Rule of Law and Systems of Governance in Islam', paper presented in Islamic Law and the West: Can Secular Laws and Syari'ah Co-Exist?, Asian Law Centre, University of Melbourne, 19 September 2002, available at http://www.law.unimelb.edu.au/ alc/assets/faruqi%20paper.pdf

[69] Ibn Rusyd, *Bidayah al-Mujtahid,* Vol. 2, (Beirut, Dar al-Fikr, 1995), 377

[70]Khallaf, above n 32, 47.

[71]Mawardi, above n 23, 67.

[72] Muhammad al-Zuhayli, *Tarikh al-Qada' fi al-Islam,* (Beirut, Dar al-Fikr al-Mu`asir, 1995), 91.

[73] Mohammad Hashim Kamali, 'Appellate Review and Judicial Independence in Islamic Law',in ChibliMallat (ed.), *Islam and Public Law,* (London, CIMEL, 1993), 53.

[74] C.G. Weeramantry, *Islamic Jurisprudence,* (Baringstoke, Macmillan, 1988), 80.

[75]Mawardi, above n 23, 80-92.

All three arguments above prove that the *Qada*(judiciary) played a vital role in the administration of the state and the life of the community and also in the transmission of Islamic traditions. However, this claim should be examined critically. There was, from early times, reluctance on the part of the pious to accept office from the Caliph, for fear of jeopardising their integrity. For instance, Yazid ibn 'Amr, Governor of Iraq, proposed Abu Hanifah, the Imam of the Hanafi school, to become a judge for the law-court of Kufah. He refused the appointment. Following his refusal, at the command of Yazid, he was given a whipping, one hundred and ten blows to the head. His face and head swelled. Abu Hanifah was not alone; other pious scholars like Zufar (Abu Hanifah's disciple), 'Abd Allah b. Faruq (a scholar-jurist at Qairawan), Aban b. Isa b. Dinnar (a Muslim scholar in Spain) refused to serve as judges, owing to executive interference in the judiciary.[76]

IritAbramski-Bligh observes that during the Umayyad and early Abbasid periods, judges were assigned non-judicial functions as tax collector, tribal administrator, governor, or chief of police. He cites that under Mu'awiyah regime, Fadala b. 'Ubayd al-Ansari was in charge of *Qada* and military raiding, and 'Abida b. Qays al-Salmani served both as judge and part of the military staff.[77] This suggests that the independence of the judiciary in the early Islamic periods was dependent on the personal attitude of both Caliph and judge, since the *Qada*was not as yet institutionalised and formalised as a clearly religious-judicial post, separate from governmental-administrative works. This explains why the topic of the independence of the judiciary in Islamic history is a controversial one. One can point to a certain period of time, or to certain persons, to prove the independence or the subordination of the judiciary in Islam.[78] This is understandable since the notion of judicial independence is a modern one, and it is difficult to judge old period with more recent experience.

Another problem is the conflict between theory, or doctrine, and practice. Whilst the doctrine of *ijtihad* suggests the independence of legal reasoning as a basis of a judge's decision, in practice, *ijtihad*has been restricted to certain forms and cases, or, to some extent, even been abandoned completely. This problem also reaches the modern era, where all modern constitutions guarantee judicial independence, but not all countries implement them.[79] For the purpose of this book, it is enough to demonstrate that, theoretically, the character of judicial independence is recognised and valued in the Islamic legal tradition. "There is nothing in Islam", as Khallafhas observed, "against the independence of the judiciary".[80]

4. Conclusion

It should be noted that having a constitution – written or unwritten – does not necessarily mean that a state follows constitutionalism. In other words, constitutionalism does not reside only in the powers of the state. When scholars talk of constitutionalism, they normally mean not only that rules create legislative, executive, and judicial powers, but that these rules impose limits on those powers. As a concept, constitutionalism is wider and broader than the text of a constitution. For instance, a state can have a written constitution that is against the spirit of constitutionalism. Shari`aand constitutionalism should not lead to a political chaos or to inflict harm (*mafsadah*) upon society. Instead, it protects *maslahah al-`ammah* (public interest) — as the main objective of Shari'a. "Islamic constitutionalism" should not stop at the point reached by the modernists – that the Shari'a can borrow from western constitutionalism.

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[76] More information on the refusal of appointment of judges in the early centuries of Islam can be found in Noel J. Coulson, 'Doctrine and Practice in Islamic Law' (1956) 18 *Bulletin of the School of Oriental and African Studies* 2, 211-226. However, it should be noted that Abu Yusuf (d. 798 AD), the chief disciple of Imam Abu Hanifah, was the Chief Justice *(qadi al-qudat)* under the Harun al-Rasyid regime. See Al-Haj Mahomed Ullah Ibn S. Jung, *The Administration of Justice of Muslim Law,* (Delhi, Idarah-I Adabiyat-I Delhi, 1977).

[77]IritAbramski-Blig, 'The Judiciary (Qadis) as a Governmental-Administrative Tool in Early Islam', in Wael Hallaq (ed.), *The Formation of Islamic Law,* (Burlington, Ashgate, 2004).

[78] For instance, one of the unstated conditions of becoming a judge in Nasrid kingdom of Granada (629/1232 to 897/1492) was loyalty to the sultans. The political elite used removal from office as a mechanism for control of the judiciary. See M. Isabel Calero Secall, 'Rulers and Qadis: Their Relationship During the Na‰rid Kingdom' (2000) 7 (2) *Islamic Law and Society* 235. However, in Cordoba (5th/11th century), unlike other officials, the Qadis jurisdictional authority could be terminated only by dismissal; it could not be temporarily interrupted by the interference of the ruler in a particular case. See Christian Muller, 'Judging with God's Law on Earth: Judicial Powers of the Qadi al-Jama`a of Cordoba in the Fifth/Eleventh Century' (2000) 7 (2) *Islamic Law and Society* 159.

[79] The intersection of law, courts and politics is demonstrated in Herbert Jacob (et.al),***Courts, Law, and Politics in Comparative Perspective,*** **(**New Haven, Yale University Press, 1996).

[80]Khallaf, above n 32, 48.

Rather, it goes further by asking: Can the Shari'a develop a new theory, type, idea, of form of constitutionalism? The main problem could be seen to lie in the lack of attention given to the structures of political accountability, rather than to any flaws in the concept of Islamic constitutionalism. How does "Islamic constitutionalism" respond to a critical issue here: to provide checks and balances mechanism to the power of the government? Does it put some restrictions based on traditional interpretation of Shari'a? Or does it ignore them and just copy + paste from International and Western documents? Or does it give 'inspiration' to uphold and maintain the institutional mechanism of political and legal accountability? Is it possible to create a different or modified structure of power and governance (the traditional separation of powers of the legislative, judiciary, and executive powers)? Even in the Western world, new powers emerge in the form of regulatory institutions in the area of administrative law.

To end this article, I would like to give two reminders that firstly "Islamic constitutionalism" is a human product of legislation based on the practices of consultation and consensus, and thus, virtually, no longer the result of a divine act. It is set and approved by the people. In other words, consensus, consultation and compromise are the key words. It is part of our *ijtihad*. Finally, even in the Western world, there has been a long history of struggle to uphold constitutionalism. There can be no shortcuts to meaningful democratic reform. Gradualism and long-term planning are critical to the agendas of a reformist government. Many of the problems identified in the Arab Spring, as an example, are products of the overcrowded reform agenda, carried out in a very short time.