

ADMINISTRATION OF JUSTICE UNDER ISLAMIC LEGAL SYSTEM : AN OVERVIEW

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I. Introduction

From the early period of civilization people required protection against wrong-doers and their mutual disputes were required to be settled. To cater to this need, 'administration of justice' was necessary. It is the basis of the betterment and progress of humanity. In its absence human society is bound to be devoured by disorder, chaos and anarchy. Administration of justice, therefore, retains utmost importance in every human society.

Islam has its own justice system. In addition to the common functions of justice, that is, the protection of the weak and punishment of the wrong-doer, aims of Islamic justice system are the establishment of peace on earth, concord among humanity, advancement of society, and safeguard of social interests. It is a well-acceptable system of justice for all times. But people are in general least informed of this and therefore, they question its adaptability in present day. An attempt has been made in this article to draw an understandable picture of Islamic justice system showing its independent and impartial character and its adaptability in modern time.

II. The Concept of Islamic Justice

The Arabic word 'Al-Adl' used in the Holy Quran stands for justice which refers to fairness. To act with fairness is an absolute duty of every Muslim. It is the demand of the Almighty Allah that men must stand forth in justice, as He says,

"We sent aforetime Our messengers with clear signs and sent down the Book and the Balance (of Right and Wrong), that men may stand forth in justice; And We sent down Iron,"¹

1. Al-Quran, 57:25.

Here "(t) hree things are mentioned as gifts of Allah. In concrete terms they are the Book, the Balance, and Iron, which stand as emblems of three things which hold society together, viz. Revelation, which commands Good and forbids Evil; Justice, which gives to each person his due, and the strong arm of the Law, which maintains sanctions for evil-doers"² Thus 'Balance' "does not signify in the Quran a pair of material scales but a measure as signifying any standard of . . . judgment"³ No one is allowed to manipulate the 'Balance' in deciding cases or in mutual dealings as common Muslim.

As regards the common Muslims 'Adl' or justice is the minimum standard of behaviour. Islam rather expects some higher quality from them. That is Ehsan or goodness proper. "'Adl' simplicity, according to the Islamic concept, is the doing of good for good but Ehsan is the doing of good even where 'Adl' does not strictly demand it and where there is no question of receiving any reciprocal benefit."⁴ This quality of course inheres in highly developed souls. This may not be expected of general people. But no concession has been given by Islam in the case of Adi. In this regard Allah Ta'la says-

". . . and he has set up the Balance, in order that you may not transgress (due) balance. So establish right with justice and fall not short in the balance"⁵.

Therefore, as a minimum, the Muslims are required to do justice in their mutual dealings. None of them must act to deprive others of their rights (huqooq). They must be straight and fair in their day-to-day dealings so that a just and orderly life can prevail in society.

But if the due balance is transgressed in mutual dealings or State law is breached and the matter is brought before the court, it is then

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2. Ministry of Hajj and Endowments, K. S. A. *The Holy Quran: Meanings and Commentary*, 5313
 3. M. Ali *The Quran*, 1029.
 4. Mahmood Ur Fahman, *The Concept of Justice in Islam*, in S. M. Haider (ed.) *Shariah and Legal Profession*, 170 (Pakistan, 1985)
 5. *Al-Quran*, 55 : 7-9.

the duty of *qadi* (judge) to decide the case with justice. The Almighty Allah instructs- "When you judge among men, judge with justice."⁶ That is, Allah instructs judges to give each party to a suit his due. Everyone must be treated equally and without a tinge of bias or partiality. This point has been emphasized in the Quran which says-

"O true believers, observe justice when you appear as witness before Allah and let not the hatred of others to you induce you to do wrong : but act justly; this will approach nearer unto piety, and fear Allah, for Allah is fully acquainted with what you do."⁷

" O you who believe! be maintainers of justice when you bear witness for the sake of Allah although it be against yourselves, or your parents, or your near relations : whether the party be rich or poor."⁸

"In the Islamic legal system the *qadis* are to judge according to the commandments of *Allah Subhanahu Wa Ta'la* Who is the fountain of justice. To quote the Holy Quran- "And judge between them by that which Allah has sent down:..."⁹ "And whoever judge not by that which He has sent down then they are the infidels."¹⁰

"I (the prophet) am commanded to judge justly between you in accordance with the Book which Allah has sent down and in which I believe."¹¹

Islamic justice is administered with reference to the laws of the Quran, the traditions (Hadiths) of the prophet (*Salla Allahu Alaihi wa sallam-SM*) and the general consensus of the followers, especially of the first four caliphs (*Ijma*) and *Qiyas* (exercise of private judgment). All these sources of Islamic law being directly or indirectly from the Almighty it is accordingly said that Allah is the fountain-head of Islamic justice and not any Caliph or King.

6. *Id.* at 4 : 58.

7. *Id.* at 5:8.

8. *Id.* at 4 : 135.

9. Al-Quran 6:49.

10. *Id.* at 6:44.

11. *Id.* at 42:15.

III. Administration of Islamic Justice: Meaning and Significance

The Islamic legal terminology which is used to mean administration of justice is *qada* which means, *inter alia*, to give an order and judgement¹². Thus the *fuqaha* (Islamic jurists) have used it in the sense of deciding the disputes by a judge. The person who performs this work is called *qadi* by them.¹³

Qada or Administration of justice holds a highly dignified position in Islam. Sarakhsi says. "To render justice constitutes one of the most noble acts of devotion."¹⁴ According to Kasani, it is one of the best acts of devotion and one of the most important duties, after belief in God".¹⁵ For this lofty importance of *qada*, the Prophet (SM) himself decided cases in his life time, awarded punishments to the defaulters and engaged competent persons with the task of *qadi*. e. g. the prophet sent Ali ibn Abi Talib to Yamen as a *qadi*.¹⁶ As regards the nature of obligation with regard to *qada* the *fuqaha* are of the opinion that it is a collective obligation-*fard* or *Wajib Kifayah*. This means if someone from amongst the Muslim Community performs the obligation of *qada*, it will be deemed to be accomplished by all; but if none of them accomplishes the obligation, the whole community will be sinner or liable.¹⁷

IV. Administrators of Justice (Qadis/Judges)

(a) Qualifications of a *Qadi*

The requisite qualifications of a *qadi* are not articulated in a single Quranic verse or Hadith. The *fuqaha* have referred to them through

12. Shahir Arsalam, *Al-Qada Wa 1-Qudat*, 19,20 cited in Ghulam Murtaza Azad, *Judicial System of Islam*, 3 (Pakistan, 1987).

13. Id. at 4.

14. Sarakhsi, *Mabsut*, 16: 67, cited in Muhammad Muslehuddin, *Philosophy of Islamic Law and the Orientalists*, 103 (Lahore, 1980).

15. Kasani, *Badai ai-sanai*, 7:4, loc. cit.

16. Sunnan, *Tirmidhi*, 1: 171.7: 4, loc. cit.

17. Azad, supra note 12, at 7.

inferences and deductions. According to Hanafi Schools to be a *qadi*, a person must possess the qualifications of a witness. That is, he must be free, sane, adult, a Muslim, and unconvicted for slander. "The reason lies in the fact that the rules with respect to jurisdiction are taken from those with respect to evidence, since both are analogous to authority which signifies the passing of or giving effect to a sentence or speech affecting another (with or without consent).¹⁸ In addition, al Marghini, a Hanafi Jurist, refers to the qualification that a *qadi* should be *mujtahid*. But he mentions it as a preferable condition, not as an indispensable condition. Even an unlettered person is eligible for appointment as a *qadi*.¹⁹ Of course, al-Shafi differs from this view of the Hanafis.²⁰

On the basis of al-Hedaya G. M. Azad draws the following conclusions:²¹

1. That a minor who has still not attained the age of puberty cannot be a *qadi*,
2. That a non-Muslim is not eligible for holding the office of *qadi*,
3. That an insane person cannot be a *qadi*.
4. That a person convicted of *qadhif* (slandering with commission of adultery) loses his competency for the office of *qadi*.
5. That a *fasiq* (profligate) is competent to become a *qadi* though the appointing authority (sultan) should not select a *fasiq* for the office of *qadi*.
6. That a woman may be appointed as *qadi* in those cases wherein her evidence is admissible.²²

18 . Anwar Ahmad Qadri, *Islamic Jurisprudence in the Modern World*, 482 (Delhi, 1986).

19. Azad, *supra* note 12, at 9-10.

20 . Qadri, *Supra* note 18.

21. Azad, *Supra* note, at 10.

22. Evidence of a woman is admissible in every case except in case of punishment or retaliation.

In addition to the above, there are some other qualities which should also be taken into consideration in time of appointment of *qadis*. Hazrat Ali Karmallah Wajho is worth quoting in this respect. He writes in his letter to Malik Ibn Haris Ashter, the Governor designate of Egypt, as follows:²³

"You must be very judicious in selection of officer for dispensation of justice among your people. For this purpose you should select persons of excellent character, superior calibre and meritorious record, i. e. from among the best available in merits and morals.

They must possess the following qualities:

- i. They should not lose their temper either at the complexity of the problem nor at the pressure of abundant number.
- ii. When they are convinced that they have given a wrong judgement they must not consider it beneath their dignity to correct it or undo the wrong done;
- iii. They must not be greedy, corrupt and covetous;
- iv. They should not be satisfied with superficial enquiry or simple scrutiny of a case till everything for and against it has been thoroughly examined; when confronted with doubts and ambiguities they must pause, go for further details, clear the points and then give the decision;
- v. They must attach highest importance to evidences and reasonings and should never get tired at litigant's lengthy arguments; they must exhibit patience, perseverance in scanning the details, in examining points and shifting fact from fictions, and in this way when the truth is discovered they must

23. Quoted from A *Classic Administrative Policy Letter of Hazrat Ali (RA)*, Department of Forms and stationeries, Government of the People's Republic of Bangladesh, (1976) 12-13. Original letter in Arabic may be seen in *Nahijul Balagha* published by Sheikh Gholam Ali & Sons Lahore (1976).

be able to deliver the judgement without fear or favour and thus put an end to the dispute.

- vi. They should not be amongst those who develop vanity and conceit when compliments and praises are offered or who are puffed up by flattery and who are misled by persuasion and cajolery.

But unfortunately, you will have few persons with these virtues and qualities. When you have found and selected such men make it a point to go through some of their judgements critically and check the proceedings. You should at the same time fix for them handsome emoluments so that all their legitimate needs are satisfied and they are not compelled to beg or borrow from others, nor required to resort to corruption.

Ensure for them such a prestige and status in your Government and give them such nearness to yourself that none of your officers and courtiers dare lord over them or overawe them.

Judiciary must be free from all kinds of executive pressure and influence, must be above intrigue and corruption; it must act without fear or favour.

Ponder well and take particular note of this aspect of the matter, for before your appointment this state was under the domination of corrupt, lustful opportunists. These greedy and mischievous people had exploited the state for personal gain and used it as the means for attaining wealth and other worldly objects."

(b) Appointment of *Qadi*

Appointment of *qadi* is *fard* (obligatory). To quote al-Kasani-"The appointment of a *qadi* is one of the indispensable needs of the appointment of the Imam. Hence it is obligatory.²⁴ Again in the words of al-Mawardi, "To entrust someone with the work of judgment is

24. Cited in Azad, *Supra* note 12, at 56.

obligatory for the Imam—Caliph—because it is a part of his general duties and powers."²⁵ Thus as part of its obligation State selects persons to appoint in the office of *qadi*. One who seeks the office of *qadi* should not, according to one Hadith, be appointed as *qadi*. should not appoint incapable persons to such office, lest injustice will prevail. On appointment acceptance of the post is not however, obligatory, as held by the *fuqaha*, except in a situation when there is none other eligible and competent for the post.²⁶ Shafi-i jurists provide that "a Muslim who feels himself specially capable of exercising the functions of a judge should solicit those functions When one considers oneself not inferior to another in juridical capacity, one may, it is universally agreed, accept the position of a judge; it is even commendable to solicit it where, being learned but obscure, one hopes in this way to be able to work one's light shine for the good of humanity or create for oneself a respectable social position."²⁷

(c) Remuneration of *qadi*

On remuneration of the *qadis*, there is no specific provision of law. However, during the caliphate of Umar (R) a *qadi* was *paid* one hundred dirhams and an amount of wheat compatible with his needs per month. The same practice continued in the period of Uthman and Ali (R). Qadri suggests that "the *qadi* cannot recompense for his work but is entitled to living expenses or maintenance. For this reason, persons in affluent circumstances are to be appointed to the office."²⁸

(d) Removal and dismissal of *qadi*.

A *qadi* can be removed from the office for some causes, e. g., blindness, deafness, loss of reason and apostasy. If a *qadi* is just at

25. Al-Mawardi, *Adab al-Qadi.*, 1: 137 *loc. cit.*

26. Azad, *Supra* note 12, at 56-57.

27. Cited in Qadri, *supra* note 18, at 482.

28. *Id.* at 483

the time of appointment but becomes unscrupulous afterwards, he should be dismissed. Besides, he may be dismissed by the appointing authority for some cogent and convincing reason. The death of the sovereign, however, does not render the *qadi's* post vacant. (Fatwa-i-Alamgiri).²⁹

(e) Independence of Judiciary

Once Caliph alone was the head of the executive and the judiciary. With the development of Islamic Law and jurisprudence, judiciary was separated from the executive. At the apex of judiciary remains the chief *Qadi* / Justice. Below him, there may be a number of judges with different jurisdictions. The judges work under the control of chief Justice or *Qadi al-Qudat*. In judicial matters even the chief executive has nothing to interfere. Judiciary enjoys complete independence. Once during the caliphate of Hazrat Ali (R), a dispute between the caliph himself and a Jew came to the court. Ali claimed his ownership over an armour he found in possession of a Jew who falsely denied the claim. Then the *qadi* asked Ali to prove the case and Ali presented his slave and his son as witnesses on his part. But the *qadi* refused to accept testimony of his son saying that "the evidence of a son is not admissible in favour of a father" "The judgment was given in favour of the Jew. At the independence and impartiality of the judiciary the Jew exclaimed "I testify that there is no god but Allah, I testify that Muhammad is the apostle of Allah and that this armour is thy armour."³⁰

It is also reported that in a case Hazrat Ali (R) was sitting by the side of the *qadi*. The *qadi* told Hazrat Ali (R) to go to the dock and called him as "father of Hasan." When the case was over Hazrat Ali (R) took seat by the *qadi* who asked Hazrat Ali (R) whether he was

29. Mohammed Ullah Ibn S. Jung, *The Administration of justice of Muslim Law*, Idarah-I-Adabiyat-I-delhi, 8 (Delhi, 1977)

30. H. S. Jarret, *History of the Caliphs by Jalaluddin A'S-Suyuti* (Bibliotheca Indica) 188.

displeased with him for telling him to go to the dock. Hazrat Ali then replied that he would have been angry if he was not asked to the dock as when the case brought before the *qadi* he was to be treated equally. He further added that one *qadi* should have called him by his name, not as "father of Hasan" which meant that *qadi* showed some respect to him.³¹

v. Principles Followed in the Administration of Islamic Justice

Judges in an Islamic legal system administer justice keeping some beliefs and principles in mind. Those may be reproduced in short in the following:

Firstly, *qadis* are committed to uphold Shariah law. If any law is made contrary to Shariah, the judiciary must declare it void. Thus the principle of judicial review operates in Islamic legal system.

Secondly, every one is equal before law³² and must be dealt with in accordance with such law. An equality case is stated as that Jablah bin Al-Aiham was the ruler of a state in Syria. He accepted Islam. One day he was going to Haj and part of his gown was trampled over by a poor Arab. Jablah gave him a slap and he did the same in return. Jablah went to caliph Umar with complaint but Umar told him that he got justice. Jablah said that the Arab would have been hanged if he was in his country. The caliph replied that a poor man and a prince were equal in Islam. So the Beduin did not commit any wrongful act.³³

Thirdly, Islamic judiciary applies the principle that no body should be condemned unheard. This principle emanates from the fact that Almighty Allah Himself asked Satan to explain why he did not bow

31. Abdul Matin Khan Chowdhury, 'Independence of judiciary in Islam'in *Law and International Affairs*, IX Bangladesh Institute of Law and International Affairs, 42 (1986)

32. Al-Quran, 10: 15, 2: 285, 2: 123.

33. Gul Muhammad Khan, 'Concept of Justice in Islam, in *Shariah and legal profession, op. cit*, 215.

down before Adam. Again, He gave an opportunity to Adam to be heard before he had to vacate *Jannat* to come onto earth in consequence of violation of the command of Allah. There are verses in the Quran relating to this principle, e. g.,

a. "On the Day when their tongues, their hands and their feet will bear witness against them as to their actions."³⁴

b. "And the Earth will shine with the light of its Lord: The Record (of Deeds) will be placed (open); The prophets and the witnesses will be brought forward; And a just decision pronounced between them; And they will not be wronged (in the least)."³⁵

c. "On that Day will the Earth declare her tidings;"

On that Day will men proceed in groups sorted out, To be shown the Deeds that they (had done). "³⁶

Besides the above, there are other principles contained in the Holy Quran which are generally followed in deciding cases. The following are the most important of them:

- i. One is innocent unless proved guilty.³⁷
- ii. No offence without *mens rea*.³⁸
- iii. No offence can be created retrospectively.³⁹
- iv. There is no offence if an act is done under compulsion.⁴⁰
- v. The punishment should be commensurate with the offence and not more.⁴¹
- vi. Self defence is no offence.⁴²

34. Al-Quran, 24:24.

35. *Id.* at 39: 69.

36. *Id.* at 99: 4-6.

37. *Id.* at 24: 12-13

38. *Id.* at 33:5, 6: 54.

39. *Id.* at 44: 22, 8:38, 5:96, 2: 275.

40. *Id.* at 16 : 106.

41. *Id.* at 2: 194, 10:27, 22:60, 40:40, 42:40, 16:126.

42. *Id.* at 2: 41.

- vii. An abettor is also guilty.⁴³
- viii. No one can be held responsible for offence of others.⁴⁴
- ix. The aggrieved party is entitled to compensation.⁴⁵
- x. Decide according to the evidence produced.⁴⁶

VI. Functions And Jurisdiction of Judges

This part of discussion may best be started with the text of a letter written by Hazrat Umar during his regime to judge Abu Musa al-Ashari as the functional and jurisdictional obligations of the office of *qadi* are stated in it. The letter reads as follows:

"Now, the office of judge is a definite religious duty and a generally followed practice.

Understand the depositions that are made before you, for it is useless to consider a plea that is not valid.

Consider all the people equal before you in your court and your attention, so that the noble will not expect you to be partial and the humble will not despair of justice from you.

The claimant must produce evidence; from the defendant an oath may be exacted.

Compromise is permissible among Muslims, but not any agreement through which something forbidden would be permitted or something permitted forbidden.

If you gave judgment yesterday and today upon reconsideration, come to the correct opinion, you should not feel prevented by your first judgement from retracting for justice is primeval, and it is better to retract than to persist in worthlessness.

Use your brain about matters that perplex you and to which neither the Quran nor the Sunnah seems to apply. Study similar cases and evaluate the situation through analogy with those similar cases.

43 . *Id.* at 16: 25.

44 . *Id.* at 42: 16, 39:7.

45 . *Id.* at 17: 33.

46 . *Id.* at 4: 105.

If a person brings a claim, which he may or may not be able to prove, set a time limit for him. If he brings proof within the time limit, you should allow his claim, otherwise you are permitted to give judgment against him. This is the better way to forestall or clear up any possible doubt.

All Muslims are acceptable as witnesses against each other, except such as have received punishment (stripes) provided for by the religious law, such as are proved to have given false witness, and such as are suspected (of partiality) on (the ground of) client's status or relationship, for God, praised by he, forgives because of oath and postpones (punishment) in face of evidence.

Avoid fatigue and weariness and annoyance at the litigants.

For establishing justice in the court of justice God will grant you a rich reward and give you a good reputation. Farewell.⁴⁷

Besides the above the following is an enumeration of the functions and jurisdiction of judges:

- (a) Judges were primarily concerned with settling suits between litigating parties applying the relevant laws.

This function includes fixation of date of hearing and further hearing, passing *ex-parte* orders in default of the appearance of the plaintiff or his witnesses, reviewing the decided cases for correction of error and performance of other duties relating to administration of justice. A *qadi* had to decide cases relying on the evidence of the parties and he had no power to add his opinion to such evidence. Side by side passing contested decree, a judge made attempt to bring the parties to a compromise.

- (b) Besides disposal of suits brought on private initiative of the parties, judges could take public interest matters into cognizance at their own.
- (c) *Qadis*, with different territorial jurisdictions, may have both civil and criminal jurisdictions. There were some special *qadis* in charge of deciding insolvency cases, marital disputes cases, waterways and guardianship cases etc.

47. Cited in Qadri Supra note 18 at 485-86.

- (d) In addition to settling of suits, certain general concerns of the Muslims were included within the scope of functions of a *qadi*, e. g., supervision of the property of insane persons, orphans, bankrupts, supervision of wills and religious endowments, supervision of public roads and buildings, etc.
- (e) The *qadis* were entrusted with the task of interpretation of the law by analogical deduction so as to cover the growing needs of society. In the interpretation of law, reason is "subject to analogy" which keeps the discretion of the judge within bounds and also preserves the law both in its ideal form and stability, "while the Rule of Necessity and Need serves as a supplement to accommodate the change and to meet the growing needs of society"⁴⁸

vii. Procedure in The Administration of Justice

A. Civil Matters.

(a) Choice of forum:

At the outset court of right jurisdiction has to be chosen. The jurisdiction of the court is determined by the powers of the judge provided in his letter of appointment. Also the residence of the plaintiff and his witnesses is taken into consideration. The suit lies in the court within the jurisdiction of which they reside, even if the defendant resides in or the subject-matter of the suit is situated within the jurisdiction of another *qadi*. Here preference is given to the plaintiff's place of residence as the plaintiff is the aggrieved party.⁴⁹

(b) Claim before the court:

The claim is called *Dawa*. When a person demands a thing and it is disputed by another, it is *dawa*. The person who puts forward a claim is called *muddai*, i. e. claimant or plaintiff, and the person who denies or disputes the claim is called *Mudda'alah* or defendant.

The plaintiff may state his claim in writing or make oral statement in respect of his claim. If orally made, an assistant of the court is required

48. Quoted in Muslehuddin, *Supra* note 14 at 275.

49. Husain Wahed, *Administration of Justice During Muslim Rule in India*. Idarah-i-111 (Delhi, 1934).

to reduce his statement in writing. The plaint contains (a) the name of the parties, their parentage and address, (b) the same particulars regarding witnesses; (c) sufficient particulars of the claim; if it is for movable articles, the plaint must specify the value, quality, genus and quantity of the commodity; if it is immovable its four boundaries, the place where it is situated, the name of its owner and possessor, (d) the nature of the claim, cause of action and relief prayed for.⁵⁰

(c) Hearing and Trial of the Case:

(1) issuance of summons and processes.

After the plaintiff has presented his plaint, the *qadi* looks into its *prima facie* character and if satisfied, will summon the defendant. Where the defendant is suffering from illness and is unable to appear or is a *purdah* observing lady, summon will not be sent, rather a commission will be appointed who shall record the statement of such person. But if that person so exempted appoints a representative (*wakil*), the procedure shall proceed in its normal course and no commission shall record the statement.

On being summoned if the defendant appears and admits the claim, the case will be decided in the plaintiff's favour. But if it is denied, the plaintiff is given an option to put the defendant on oath or produce evidence in support of his case. The defendant may however, dispute the plaintiff's claim without admitting or denying it and may put his own case. For instance, in a suit for realization of debt the defendant may dispute the claim by saying that the debt was due but has been paid.

(2) Ex parte judgment

Normally a claim cannot be judicially decided in absence of the defendant or the opposite party. But if the defendant is not available, the *qadi* may decide it *ex parte* provided, according to the Hanafi School, a representative is appointed to observe the interest of the

50. *Fatwa-i-Alamgiri*. V. IV, chapter on claims.

defendant and the proceedings of the court. The condition of appointment of representative is, however, unacceptable to the Shafi'i School.⁵¹

Ghulam M. Azad has added a condition that in case of an *ex parte* decree, the plaintiff shall be ordered to furnish sureties lest the defendant appear in future and prove his cause.⁵² But this seems to undo the purpose of the law of limitation. If the defendant fails to defend the case within a fixed period of time, the case should be decided *ex parte*, otherwise multiplicity of litigation will be the consequence. To quote Qadri-

"the law of limitation has an application in the procedural laws governing adjudication of disputes. To the older jurists, a person's rights were not barred by the lapse of time and thus the *qadi* was obliged to hear the claim under the law. However, the law took into account the principles of human welfare in order to suppress undue litigation and thus different provisions were developed to meet the requirements of the changing time. The limitation of time was recognized by the process of *Figh* and the claims could not be heard after the different fixed periods of limitation."⁵³

(3) *Compromise:*

When in a case that has taken place between relations, or there is an expectation that two parties are inclined to compromise, the judge advises and warns compromise. If they are willing to do so, he makes the compromise in accordance with the precepts written in the books about compromise and if they are not willing, he completes the trial.⁵⁴

(4) *Pronouncement of judgment*

When a suit is contested the judge hears both the parties and pronounces his judgment. If however, judgment is given in absence of one party and he comes up with a good rebuttal of the plaintiff's

51. Qadri, *Supra* note 18, at 495-6.

52. Azad, *Supra* note 12, at 71.

53. Qadri, *Supra* note 18, at 499.

54. Arti 1826 of the *Mejelle*, *Durr-ul-Mukhter III*, 434 cited in Qadri, *id.* at 496.

claim, it is heard and decided. But if an action is not brought in rebuttal of the claim or if it is done but it is not a good rebuttal of the claim, the judgment given is put into execution and is carried out.⁵⁵ Such a suit being once decided cannot, as the doctrine of *res judicata* applies, be re-decided in future nor can it be produced as evidence in the court of law.

(d) Execution of decrees

The court which has passed the decree should execute the same. If a *qadi* passes a decree and subsequently ceases to hold the office, his successor shall execute, maintain and enforce the decree passed by him subject to revision.⁵⁶

(e) Review

A *qadi* has the power to review his judgment or decree correcting thereby accidental or clerical error or arithmetical mistakes. Again, if he finds that his judgment has been given in violation of the principle of Sharia, he can revise it.⁵⁷ Such authority follows from Hazrat Umar's (R) advice given to Abu Musa al Ashari quoted earlier. Here the relevant portion may again be reproduced:

"If you gave judgment yesterday and today, upon reconsideration, come to the correct opinion, you should not feel prevented by your first judgment from retracting: for justice is primeval, and it is better to retract than to persist in worthlessness."⁵⁸

(f) Appeal and Revision

The authority regarding preference of appeal has been laid down in a long hadith in which Hazrat Ali (R) is reported to have said to the disputants whose case was decided by him:

"Hold fast to my judgment *ad interim* till you appear before the Messenger of Allah (SM) and he decide your case."⁵⁹

55. Arts. 1829 to 1836 of the Mejjelle, Minhaj, 505f, cited in Qadri, id. at 497.

56. Azad, *Supra* note 12, at 83.

57. Durrul-Mukhta, III: 231f; Minhaj, 505f, cited in Qadri, *Supra* note 18, at 497.

58. *Supra* note 47.

59. Waki, Akhbar al-Qudat, 1: 97, cited in Azad, *Supra* note 12, at 84.

From this hadith it may be inferred that (1) *ad interim* injunctions are valid and (2) a case may be referred to higher authorities if it does not fall within the jurisdiction of the trial court or if it deems fit to be decided by the higher authority.⁶⁰

Besides, there are certain jurists according to whom a *qadi* of higher court has the power to usually revise the decision of the subordinate court on a point of law⁶¹

B. Criminal Matters.

a) Trial of Cases

Judges in Islamic legal system may have as said above, both civil and criminal jurisdiction or there may be separate criminal courts. The court may award either kind of punishments- *hadd* or *tazir*. *Hadd* punishment is fixed by the Quran, Sunnah and Ijma while *tazir* depends on the discretion of the *qadi*. *Hadd* being stern punishment guilt of the accused must be strictly proved. If the guilt is not so proved, the *qadi* may award punishment applying his discretion. Thus one Abdullah bin Sahl was murdered by the Jews of Khaybar and, Muhesa, the deceased's cousin, filed a complaint (in Arabic *istighathah*) before the Prophet (SM). But as no eye-witness of the deed was produced, the prophet did not interfere but allotted 100 camels from the treasury, *bait-ul-mal*, as blood money.⁶²

A case of *had* or *qisas* (nearly same as *hadd*) can be proved either by evidence of witnesses or by the confession by the accused provided all conditions of testimony and evidence are duly completed. Hearsay evidence is not admissible and similar are cases of oath or by testimony of woman.⁶³

Again in such cases admission of the guilt by the lawyer is inadmissible. In the cases of fixed sentencing, it is the duty of the

60. Azad, id.

61. *Hedaya* III: 67, 69, 83.

62. This case was reported in *Shahi Bukhari* and *Nisai*..

63. Qadri, *Supra* note 18, at 291.

court to secretly investigate the case, and, ordinarily, should not satisfy itself with the evidence furnished by the witnesses.⁶⁴

According to Abu Hanifa, bail is not permitted in hadd and qisas cases and the author of *Hedayah* says that it is not valid with respect to any right of which the fulfillment is impracticable by means of it in such cases because proxies are not admitted in case of corporeal punishment. But bail for the persons of the criminals under sentence of such punishment is lawful. In crimes where damages are to be paid, the accused can be compelled to furnish surety.⁶⁵

b) Appeal and Revision:

Under Islamic legal system judgment of criminal cases may be preferred to appeal and revision. Thus in a case where while four persons from the tribes of Yaman were on hunting, a lion fell in a well and one of them slipped. When he was about to fall into the well, he caught hold of second one who caught hold of the third and the third the fourth. Ultimately all the four hunters fell into the well and being easy preys to the lion all died. The tribes of the latter three persons claimed blood money from the tribe of the first person. But his tribe was prepared only to pay the same for one person whom he caught hold of. This matter was brought to Hazrat Ali (R) who was then in charge of judiciary at Yaman and he issued an ad interim decision till they came to the Prophet (SM) They all agreed. Ali, hearing the case, ordered that a full blood money of all the deceased be brought together and decreed that the heirs of the lowest one in the well be given $\frac{1}{4}$, of the second one $\frac{1}{3}$, of the third one $\frac{1}{2}$ and of the last one the full amount. They agreed to obey the ad iterim order and appeared before the Prophet in the season of Hajj. The Holy Prophet (SM) upheld the decision of Ali (R).⁶⁶

The right of appeal emanates from the Holy Quran which reads:

64. *Id.* at 292.

65. *Hedayah*, II: 585.

66. Waki, I; 95-97, cited in Azad, *Supra* note 12, at 98-99.

"O you who believe
 Obey Allah, and obey the Messenger
 And those charged with Authority among you.
 If you differ in anything among yourselves.
 Refer it to Allah and his Messenger⁶⁷

VIII. Arbitration⁶⁸

Under Islamic law a case may be referred to an arbitrator for arbitration. It is called *Tahkim*. The arbitrator is required to have the essential qualities of a *qadi*. The arbitrator, appointed by the parties according to their choice, has the power to examine witnesses and administer oath like a court. He gives award according to the facts of the case and in accordance with the law to which the parties are subject. If the parties accept the award, the decision of the arbitrator will be binding upon the parties and will have the force of decree. But if a party does not accept the award and refers it to the *qadi* for its revision (*marafia*), the latter has the power to interfere and set it aside if the award is not in accordance with the law; otherwise, the *qadi* will pass a decree confirming the award. An award in favour of the arbitrator's parent, wife and child, like the decrees of a *qadi*, is null and void.

It is important to note that the office of arbitrator differs from that of a *qadi* in that a woman may be appointed an arbitrator and a non-Muslim party may appoint a person of his faith as an arbitrator, in which case the qualifications of *qadi* need not inhere in the arbitrator.

xi Proof of Cases⁶⁹

Proof of cases attaches supreme importance in the process of administration of justice. The burden of proof lies on the plaintiff. If the defendant denies the plaintiff's claim, he will have to take an oath.

67. Al-Quran, 4; 59.

68. Wahed, *Supra* note 49, at 132-133.

69. *Id.*, at 118-123,

But if he does not take the oath, the case is to be decreed, and if he takes the oath, plaintiff has to prove his case.

In the Shariah law, a fact may be established by admission, evidence or oath.

Admission:

To decide a case in the plaintiff's favour the most strongest proof is the admission by the defendant of the plaintiff's claim. A person is bound by his own admission. In this regard Allah instructs that "O you who believe, be maintainers of justice when you bear witness for the sake of Allah, even though it goes against yourself."⁷⁰ and the Prophet (SM) also directs, "Speak the truth even though it be against yourself."⁷¹

It is a rule of admission that a claim once admitted cannot be contradicted. Thus, if in a suit the defendant has admitted that the property claimed by the plaintiff belongs to him (the plaintiff), he cannot say afterwards that the property belongs to himself. This is the doctrine of estoppel (*Tanaqus*).

Evidence:

If the defendant denies the claim of the plaintiff, it is incumbent on the latter to provide evidence. Important provisions relating to evidence may be summarized in the following:

- i) It is the general principle that evidence should be made by at least two men or one man and two women. In criminal cases the evidence of two men, but in whoredom, of four men, is necessary. But the court may accept the evidence of one witness provided it is convincing and unapproachable.⁷² In certain cases falling within female area, e. g., child birth or virginity evidence of one woman is sufficient. According to

70. *Supra* note 8.

71. Suyuti, *Jami, Sighir*, No 5004 cited in Qadri 502.

72. *Al-Faruq-ul Hukumia*, 48 cited in Wahed 121.

Imam Shafi' such cases of course require the evidence of four women.

- ii) Evidence of an eye witness is preferable to hearsay evidence.
- iii) Opinions of experts and the persons specially versed in some particular branch of science is admissible.
- iv) Documents executed in presence of two witnesses, official and judicial records, and books of accounts maintained in the course of business may be accepted in evidence if they are proved.
- v) Circumstantial evidence is admissible provided it is of a conclusive nature.
- vi) Keeping separate, the witnesses should be examined and cross examined so that one cannot hear the statement of the other, after the deposition of witness has been recorded the *qadi* should read out the evidence to the witness and put his seal on it.

Oath:

On denial of the plaintiff's claim by the defendant if the plaintiff fails to advance evidence, he (plaintiff) may ask that the defendant be required to deny the claim under oath. An oath, according to one Hadith, must be taken only in the name of Allah. "The process of oath is accepted only in property and related cases but not in violation of public rights or rights of God in penal cases."⁷³

x. Court-Fee and Stamp Duties

Justice under Islamic legal system is administered without cost and, therefore, there is no need of levying court fee or stamp duties. The underlying idea is that justice should not be sold. The cost of maintaining court and the judiciary should be paid from the state Treasury. In India during Muslim rule, however, it was found that the

73. Qadri, *Supra* note 18, at 506.

successful party was required to pay a portion (e. g. a fourth, tenth or fifth part) of the property recovered through the court.⁷⁴

xi. Court Officials And *Wakils*

In Islamic judicial system there are different court assistants. Of them legal assistants were entrusted with the maintenance of order while the court was in session. There were also court clerks and interpreters. Supplementary judicial functions were given to officials called *A'wan*. The *Katib* (writer) sitting near the *qadi* recorded the evidence and other statements of the parties. The *Muzzaki* was entrusted with the responsibility of investigating the character of *Shuhud* (witnesses). The *Qasim* supervised the division and apportioning of goods. *Amin al-Hukm* took into custody, for safe keeping, the assets of legally incompetent persons, orphans, absentees, etc. and the *Khazin Diwan al Hukm* was in charge of safe keeping the court archives.⁷⁵

The institution of *Wakalah* (advocateship) has been gradually recognized by Islam. According to Imam Abu Hanifah, of course, a party to a case may *appoint* someone as his *Wakil* to fight his case against the other party obtaining the latter's consent thereto. "This opinion rests on the reason that the advocates are more eloquent in arguments and the other party may suffer from one-sided strong presentation. Now a days this fear is purged because both the parties to a case do engage well versed and experienced counsellors who extend their invaluable help not only to the litigants but to the court a well and to the society at large".⁷⁶

According to the opinions of Abu Yusuf, Muhammad al-Shaybani, and al-Shafi, one may engage some one as his *Wakil* to contest his case in the court of justice without consent of the

74. Wahed, *Supra* note 49 at 27.

75. *Vide Qadri, Supra* note 18, at 488.

76. Azad, *Supra* note 12 at 112.

opposite party. He can do so as of right and consent of his adversary is not required.⁷⁷

Thus it is well settled that *Wakalah* is lawful and it was in practice in Islamic legal system. Bahiqi points out that the fourth Caliph (Hazrat Ali) used to appoint' Aqil as Wakil to conduct cases, and when he became very old, Abdullah bin Jafar Tayar was appointed in his place.⁷⁸ During Emperor Aurangzib's rule there was practice of *Wakalah* in *qadis'* courts."⁷⁹ Thus "the practice of professional lawyer was in vogue from remote time. This practice is no innovation in Islam."⁸⁰

xii. Conclusion

Islam is a complete code of life. No aspect of human life falls outside its periphery. It has its own economic, social, political and legal systems. A survey of its justice administration system, as undertaken above, shows that it is mostly similar to the secular system of modern time, of course, with the basic differences between them, e. g. the concept of state sovereignty, nature and sources of laws applied in the respective systems. But the excellence of Islamic system lies in that it is based on *Taqwa* or fear of Allah. As every individual involved in the dispensation of justice fears Allah, he does not follow the lusts of his heart and sincerely tries to award justice. Here the following statement is very relevant-

"Islamic justice is something higher than the formal justice of Roman Law or any other Human Law. It is even more penetrative than the subtler justice in the speculations of the Greek Philosophers. It searches out the innermost motives, because we are to act as in the presence of Allah, to whom all things, acts and motives are known."⁸¹

77. *Hedaya*, II, 178.

78. *Sharh-i-Vaqaya*, V. III chapter on Vakalata cited in Wahed, 130.

79. Ibn Sung, *op. cit.*, 77.

80. Abdus Salam Nadvi, *Al-Quza fil Islam*, 19 cited in Wahed, Supra note 49, at 78.

81. The holy Quran, (Supra note 2).

This is the internal beauty of Islamic justice system while external beauty is its independent and impartial character. Such a system can meet the needs of all times. So, it may be adopted to fit in modern time developing or borrowing new methods and techniques of law, if necessary, which of course must commensurate with Shariah. For this what is most important is the preparedness of our mind to accept the judicial system and as a whole the life system prescribed by Islam.