

## **A TALE OF TWO THEORIES: GOVERNMENT BY JUDICIARY THEORY VERSUS GUARDIANSHIP OF THE JURIST THEORY**

*Shams Al Din Al Hajjaji\**

### **ABSTRACT**

*This research argues that Muslim scholars developed two theories of government over time. Even though Islamic scholars—Shia and Sunni—agree on mandating the highest level of legal knowledge in any member of the Islamic government, they disagree on the legal nature of these members, whether they are judges, or jurists. Shia Islamic scholars adopted the theory of the guardianship of the jurist (Wilayat al-Faqih in Arabic, or Vilayat e-Faqih in Farsi). Unlike Sunni scholars, the Shia has developed a practical approach to apply their theory of government in practice. A prominent example of this theory is the Iranian practice of the Guardianship of the Jurist Theory. Sunni Islamic scholars adopt the theory of government by judiciary (Wilayat Al-Qadi). The assumption of this theory is that members of the government are judges. This is based on the assumption that Prophet Mohamed was a judge with enumerated executive authorities, namely the collection of Sadaqat (state financial revenue), military power, and foreign affairs' representation. This theory has never been in practice since the assassination of the first four successors of the Prophet. This research is divided into three major sections. The first deals with the theory of Sunni-Muslim scholars, which is government by judiciary. The second section presents the theory of Shia-Muslim scholars, which is guardianship of the jurist. The last section deals with the major five distinctions between the two theories.*

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## INTRODUCTION: COMMON THEORETICAL FEATURES

This research argues that Muslim scholars developed two theories of government over time. Even tough Islamic scholars—*Shia* and *Sunni*—agree on mandating the highest level of legal knowledge in any member of the Islamic government,<sup>1</sup> they disagree on the legal nature of these members: whether they are judges or jurists.<sup>2</sup> On one hand, Shia scholars adopted the theory of the guardianship of the jurist (*Wilayat al-Faqih* in Arabic, or *Vilayat e-Faqih* in Farsi).<sup>3</sup> Unlike Sunni scholars, the Shia has developed a practical approach to apply their theory of government in practice.<sup>4</sup> A prominent example of this theory is the Iranian practice of the Guardianship of the Jurist Theory.<sup>5</sup>

On the other hand, Sunni scholars adopt the theory of government by judiciary (*Wilayat Al-Qadi*).<sup>6</sup> Major Sunni scholars like Hasan Al-Basri and Abu Bakr al-Razi adopted such a theory.<sup>7</sup> This theory assumes that members of the government are judges.<sup>8</sup> This is based on the assumption that Prophet Mohamed was a judge with enumerated executive authorities, “namely the collection of *Sadaqat* (state financial revenue),<sup>9</sup> military power,<sup>10</sup> and foreign affairs’ representation.”<sup>11</sup> This theory has never been in practice since the assassination of the first four successors of the Prophet.<sup>12</sup>

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<sup>1</sup> For Shia, see IMAM KHOMENI, ISLAMIC GOVERNMENT, GOVERNANCE OF THE JURIST (VELAYAT E FAQEEH), 50 (2017); for Sunni, see Ersilia Francesca, *The Concept of Sunna in Ibāḍī School, in THE SUNNA AND ITS STATUS IN ISLAMIC LAW: THE SEARCH FOR A SOUND HADITH* 105 (Adis Duderija ed., 2015).

<sup>2</sup> Khomeni, *supra* note 1.

<sup>3</sup> ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] 1368 [1989], pmbl. (Iran).

<sup>4</sup> Sayyid Mohsen Sa’idzadeh, Fiqh and Fiqahat, 1 UCLA J. ISLAMIC & NEAR E.L. 239, 258 & n.xvi (2002); See Abdullahi Ahmed An-Na’im, *Civil Rights in the Islamic Constitutional Tradition: Shared Ideals and Divergent Regimes*, 25 J. MARSHALL L. REV. 267, 284 (1992).

<sup>5</sup> Neil Shevlin, Comment, *Velayat-e Faqih in the Constitution of Iran: The Implementation of the Theocracy*, 1 U. PA. J. CONST. L. 358, 365–67 (1998).

<sup>6</sup> See generally Shams Al Din Al Hajjaji, *Government by Judiciary in Islam: Islamic Theory of Government and Mal/Practice of Muslim Governments (Turkey, Saudi Arabia, Egypt and Morocco)*, 48 CAL. W. INT’L L.J. 283 (2018); see also, SHEHAB AL DIN ABI ISHAQ (ABI AL DAM) KETAB AL QADA, 57 (Mohamed Al-Zehali ed. 1982).

<sup>7</sup> Shams, *supra* note 6.

<sup>8</sup> *Id.* at 285.

<sup>9</sup> SEYED KAZEM SADR, THE ECONOMIC SYSTEM OF THE EARLY ISLAMIC PERIOD 104, 106 (Hossein Askari & Dariush Zahedi eds., 2016); see also Sayyid Tahir, *Fiscal and Monetary Policies in Islamic Economics: Contours of an Institutional Framework*, 21 ISLAMIC ECON. STUD., no. 2, 2013, at 1, 4–5.

<sup>10</sup> AHMAD ATIF AHMAD, ISLAM, MODERNITY, VIOLENCE AND EVERYDAY LIFE 117-119 (2009).

<sup>11</sup> Gavin N. Picken, *The Concept of Sunna in Early Shāfi’ī Madhhab, in THE SUNNA AND ITS STATUS IN ISLAMIC LAW: THE SEARCH FOR A SOUND HADITH* 149 (Adis Duderija ed., 2015).

<sup>12</sup> Shams Al Din Al Hajjaji, *Government by Judiciary in Islam: Islamic Theory of Government and Mal/Practice of Muslim Governments (Turkey, Saudi Arabia, Egypt and Morocco)*, 48 CAL. W. INT’L L.J. 315-18 (2018).

The common Islamic assumption is that the difference between Sunni and Shia is a mere political difference on who is the competent body to hold the position of the Prophet's successor.<sup>13</sup> The comparison between Sunni and Shia theories of government is a valid Islamic comparison. From the prominent Sunni scholars' perspective, there is no prohibition to use Shia jurisprudence, especially Twelver *Imami- - Ja'fari* jurisprudence.<sup>14</sup> Shiekh Mahmud Shaltut (1893–1963), who was the Grand Imam/President of the University of Al-Azhar, issued a famous *fatwa* on Shia jurisprudence.<sup>15</sup> His *fatwa* argued that Twelver *Imami- - Ja'fari* jurisprudence is reliable.<sup>16</sup> Khamenei, Shia Islamic scholar and Supreme Leader of Iran,<sup>17</sup> permits the Shias to pray behind a Sunni Imam.<sup>18</sup> He also issued a famous *fatwa* to end a long debate between the Sunni and Shia about the *Shia's* position from the Prophet's friends and his wife Aisha.<sup>19</sup> Khamenei, as well as the Iranian constitution, banned insult of any Sunni scholars.<sup>20</sup> As a result, there is no religious obstacle to comparing the two theories.

The two theories share three common features. First, the Prophet's main role is the Muslims' supreme judge. The Prophet was not a king with unlimited authorities over Muslims.<sup>21</sup> However, the main role of the Prophet is to resolve disagreements among the Muslims,<sup>22</sup> making him the supreme judge of

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<sup>13</sup> Adam Oler, *A Brief Introduction to the Sunni-Shi'ite Struggle: Six Key Points*, REP., Summer 2008, at 2, 3–4; See also Marzieh Samaei Sahneh Saraei et al., *Shiite and Sunni Political Expediency Position in Jurisprudence: A Case Study of Political Thought of Imam Komeini and Abu Ishaq Shatby*, 9 J. POL. & L. 108, 113, 115–16 (2016).

<sup>14</sup> Rainer Brunner, *Interesting Times: Egypt and Shi'ism at the Beginning of the Twenty-First Century*, 224 IN THE SUNNA AND SHI'A IN HISTORY: DIVISION AND ECUMENISM IN THE MUSLIM MIDDLE EAST, (Ofra Bengio and Meir Litvak eds., 2011); see also, Hamid Enayat, *Shi'ism and Sunnism*, 81 IN SHI'ISM: DOCTRINES, THOUGHT AND SPIRITUALITY, (Seyyed Hossein Nasr, Hamid Dabashi & Seyyed Vali Reza Nasr eds. 1988)

<sup>15</sup> Shultut's *fatwa* believed that Islam did not impost a certain school of jurisprudence to follow. Each Muslim has the right to follow any Islamic school that follows Quran and Sunna. *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Biography of Ayatollah Khamenei the Leaser of the Islamic Revolution*, KHAMENEI.IR, <http://english.khamenei.ir/news/2130/bio>

<sup>18</sup> ELISHEVA MACHLIS, SHI' I SECTARIANISM IN THE MIDDLE EAST: MODERNIZATION AND THE QUEST FOR ISLAMIC UNIVERSALISM 151 (2014).

<sup>19</sup> *Ayatollah Khamenei's Fatwa: Insulting the Mother of the Faithful Aisha is Prohibited*, KHAMENEI.IR (June 11, 2016, 10:48 PM), <http://english.khamenei.ir/news/3905/Ayatollah-Khamenei-s-fatwa-Insulting-the-Mother-of-the-Faithful>.

<sup>20</sup> ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] 1368 [1989], art. 12 (Iran); *No Shia is Allowed to Insult Sunnis: Ayatollah Khamenei*, KHAMENEI.IR (Sept. 20, 2016, 5:22 PM), <http://english.khamenei.ir/news/4164/No-Shia-is-allowed-to-insult-Sunnis-Ayatollah-Khamenei>.

<sup>21</sup> JALAL AL-DIN AL-SUYUTI, MA RAWAH AL-ASADIEN FI A'DAM AL-MAJIE ILA-AL-SALATIN: ZAM ALQADA' WA-TAQOLD AL-AKKHAM, 44 (1991).

<sup>22</sup> The Quran Surat Al-Nisa states, "Indeed, We have revealed to you, [O Muhammad], the Book in truth so you may judge between the people by that which God has shown you. And do not be for the deceitful an

Muslims.<sup>23</sup> The Quran gives several descriptions of the Prophet.<sup>24</sup> Some are exclusive to him,<sup>25</sup> and others are of general characteristics.<sup>26</sup> The former characteristic is the Prophet's divine nature, being the last Prophet, and God's messenger.<sup>27</sup> The later characteristic is his earthly nature.<sup>28</sup> The Prophet, as a supreme judge, enjoyed enumerated executive authorities.<sup>29</sup> They are collection of *Sadaqat* (state financial revenue),<sup>30</sup> military power,<sup>31</sup> and foreign affairs' representation.<sup>32</sup> Hence, the Quran establishes that believing in God is conditional upon the acceptance of the Prophet as a judge, whose judgments are drawn from God's commands.<sup>33</sup>

Second, Islam has a negative view of judicial profession.<sup>34</sup> The Prophet discourages Muslims from being judges,<sup>35</sup> since judges will regret madding certain decisions in the Day of Resurrection.<sup>36</sup> The Prophet distinguishes between three types of judges.<sup>37</sup> Only one among the three will survive the Day of Resurrection.<sup>38</sup> The judge who will eventually go to heaven is the one who is

advocate." *Sūrah an-Nisā'* 4:105 (Saheeh International).

<sup>23</sup> *Id.*

<sup>24</sup> The Quran reiterates the human nature of the Prophet in several verses. QURAN, *Surah Al-Kahf* 8:110 ("Say, 'I am only a Human like you, to whom has been revealed that your god is one God. So whoever would hope for the meeting with his Lord—let him do righteous work and not associate in the worship of his Lord anyone.'").

<sup>25</sup> QURAN, *Surah Al-Ahzab* 33:40 ("Muhammad is not the father of [any] one of your men, but [he is] the Messenger of Allah and last of the prophets. And ever is Allah, of all things, Knowing.").

<sup>26</sup> QURAN, *Surah Al-Kahf* 8:110.

<sup>27</sup> *Id.*

<sup>28</sup> QURAN, *Surah Fussilat* 41:6 ("Say, O [Muhammad], 'I am only a human like you to whom it has been revealed that your god is but one God; so take a straight course to Him and seek His forgiveness.' And woe to those who associate others with Allah.").

<sup>29</sup> Shams, *supra* note 6, at 2856.

<sup>30</sup> SEYED KAZEM SADR, *THE ECONOMIC SYSTEM OF THE EARLY ISLAMIC PERIOD* 106 (2016); *see also* Sayyid Tahir, *Fiscal and Monetary Policies in Islamic Economics: Contours of an Institutional Framework*, 21 ISLAMIC ECON. STUD. 1, 4–5 (2013).

<sup>31</sup> *See* AHMAD ATIF AHMAD, ISLAM, MODERNITY, VIOLENCE AND EVERYDAY LIFE 123 (2009).

<sup>32</sup> Gavin N. Picken, *The Concept of Sunna in Early Shafi'i Madhhab*, in *THE SUNNA AND ITS STATUS IN ISLAMIC LAW: THE SEARCH FOR A SOUND HADITH* 140, 149 (Adis Duderija ed., 2015).

<sup>33</sup> QURAN, *Surah Al-Ma'idah* 5:48 ("And We have revealed to you, [O Muhammad], the Book in truth, confirming that which preceded it of the Scripture and as a criterion over it. So judge between them by what Allah has revealed and do not follow their inclinations away from what has come to you of the truth.").

<sup>34</sup> The Adoption of A Middle Course, SUNNAH, <https://Sunnah.com/bukhari/81/56>

<sup>35</sup> Abu Hurairah, *The Chapters on Judgment from the Messenger of Allah*, SUNNAH, <https://Sunnah.com/tirmidhi/15/5> ("Whoever takes the responsibility of judge, or is appointed as judge between the people, then he has been slaughtered without a knife.").

<sup>36</sup> Aishah (RA), *Judgments*, SUNNAH, <https://Sunnah.com/bulugh/14/12> ("[T]he just judge will be called (forth) on the Day of Resurrection and he will wish he had never given judgement even between two men throughout his life, due to the severity of the account he will face.").

<sup>37</sup> PATRICK SOOKHDEO, *UNDERSTANDING ISLAMIC THEOLOGY* 333, n.595 (2013).

<sup>38</sup> *Id.*

sure of the right thing, and makes his judgment accordingly;<sup>39</sup> but the judge who knows what is right, and acts tyrannically in his judgment is doomed to Hell;<sup>40</sup> and a person who gives judgment for people when he/she is ignorant, will also be doomed to Hell.<sup>41</sup> As a result, Muslims should avoid the judicial profession as a career.

Third, Islam distinguishes between two levels of judicial legitimacy.<sup>42</sup> The first level is the Prophet's legitimacy, and any other senior/supreme judge.<sup>43</sup> God chose the Prophet as be the supreme judge to Muslims.<sup>44</sup> If a certain person wants to believe in Islam, such person has to recognize the Prophet as the supreme judge.<sup>45</sup> Otherwise, the person is free to choose his/her judge.<sup>46</sup> The second level is legitimacy of the senior, and junior judges.<sup>47</sup> According to the Quran, people are the source of legitimacy.<sup>48</sup> If Muslims agree on a certain person, then it is consensus *Ijma* on such person.<sup>49</sup> However, Muslims' consensus is limited to the senior judge.<sup>50</sup> In *Sunna*, God chose the Prophet, and the Muslims agreed to the God's choice.<sup>51</sup> Yet, the Prophet used to appoint junior judges, like Mo'az ibn Jabal, and Ali ibn Abi Talib, without the people's consent or consensus.<sup>52</sup> The aim of the distinction between the two ranks of judges is twofold. First, it aims to protect junior judges from the risk of engaging in the political process.<sup>53</sup> Second, it aims to choose the best-qualified junior judge irrespective of political factors that may affect the appointment process.<sup>54</sup>

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> MOHAMED MAHED JASEM, AL-QADA FI-AL-A'SER AL-UMAYI 33–44 (2009).

<sup>43</sup> *Id.*

<sup>44</sup> QURAN, *Surah Al-Nissa*, 4:65.

<sup>45</sup> *Id.*

<sup>46</sup> QURAN, *Surah Al-Ma'idah* 5:42–52.

<sup>47</sup> JASEM, *supra* note 42.

<sup>48</sup> QURAN, *Surah An-Nusa* 4:115 (“And whoever opposes the Messenger after guidance has become clear to him and follows other than the way of the believers – We will give him what he has taken and drive him into Hell, and evil it is as a destination.”).

<sup>49</sup> ANN BLACK, HOSSEIN ESMAEILI & NADIRSYAH HOSEN, MODERN PERSPECTIVES ON ISLAMIC LAW, 43–44 (2013).

<sup>50</sup> JASEM, *supra* note 42.

<sup>51</sup> *Id.*

<sup>52</sup> The Office of the Judge (Kitab Al-Aqdiyah), *Struggling for an Opinion When Passing Judgements*, Sunan Abi Dawud 3592, Book 25, Hadith 22, SUNNAH, <https://Sunnah.com/abudawud/25/22>; The Office of the Judge (Kitab Al-Aqdiyah), *How to Judge*, Sunan Abi Dawud 3582, Book 25, Hadith 12, SUNNAH, <https://sunnah.com/abudawud/25/12>.

<sup>53</sup> To read about corruption in judicial election, see Teresa Nesbitt Cosby, *Picking the Supremes: The Impact of Money, Politics and Influences in Judicial Elections*, 4 FAULKNER L. REV. 73, 100–13 (2012–13).

<sup>54</sup> Edward J. Jr Fox, *Judges and Politics*, 27 TEMP. L. Q. 1, 3 (1953) (supporting elected judges' prohibition from taking part in any political campaign or making any contribution directly or indirectly to any

Hence, the legitimacy of judges in Islam is different, based on the rank of the judge.

This Article is divided into three major sections. Section II deals with the theory of *Sunni*-Muslim scholars, which is government by judiciary. This section tackles the power (executive and judicial) of the senior judge, and the appointment methods of the senior/junior judge. Section III presents the theory of *Shia*-Muslim scholars, which is guardianship of the jurist. It shows the distinguishing features of the theory. Moreover, Section III highlights on the Iranian practice of the principle of *Imamah* (Leadership) and the *Imam* (Leader). Lastly, Section IV deals with the major five distinctions between the two theories.

## I. FIRST THEORY: THE GOVERNMENT BY JUDICIARY (*WILAYAT AL-QADI*)

Government by judiciary does not have any contemporary application. This section deals only with the theoretical aspect of the theory without any presentation of a modern understanding to its application. This section tackles two issues. The first is the executive authorities of the senior judge, and the second is juridical appointment power, or authority of appointment of the senior judge or supreme council.

### A. *Executive Authorities of the Senior Judge: Enumerated Authorities*

The Quran gives several descriptions of the Prophet. Some are exclusive to the Prophet, and others are general characteristics.<sup>55</sup> The major description of the Prophet is the supreme judge, who rules over Muslims following principles of the Quran.<sup>56</sup> God is the ultimate judge and ruler,<sup>57</sup> and he delegated his power to the Prophet.<sup>58</sup> God sent his messengers to rule by the Book (the Torah,<sup>59</sup> the

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political party or organization).

<sup>55</sup> QURAN, *Surat Yunis* 10:2.

<sup>56</sup> QURAN, *Surat Al-Ma'idah* 5:49 ("And judge, [O Muhammad], between them by what God (Allah) has revealed and do not follow their inclinations and beware of them, lest they tempt you away from some of what God (Allah) has revealed to you.").

<sup>57</sup> QURAN, *Surat Hud* 11:45 ("You (God) are the most just judges!").

<sup>58</sup> QURAN, *Surat Al-Hadid* 57: 25 ("We have already sent Our messengers with clear evidences and sent down with them the Scripture and the balance that the people may maintain [their affairs] in justice.").

<sup>59</sup> QURAN, *Surat Al-Ma'idah* 5:44 ("Indeed, We sent down the Torah, in which was guidance and light. The prophets who submitted [to God ] judged by it for the Jews, as did the rabbis and scholars by that with which they were entrusted of the Scripture of God (Allah), and they were witnesses thereto.").

Bible,<sup>60</sup> and the Quran).<sup>61</sup> Moreover, the Quran establishes that believing in God is conditioned upon accepting the Prophet as a judge,<sup>62</sup> who rules under God's command.<sup>63</sup> A person cannot rightfully embrace Islam without believing in God, and fully submitting to his Messenger's ruling.<sup>64</sup> Thus, the Quran directs Muslims to seek the Prophet's judgment to settle their disputes.<sup>65</sup>

The Prophet, as a senior judge, had very limited executive authorities over early Muslims.<sup>66</sup> These authorities were military power,<sup>67</sup> the *Zakat* collection (the Islamic form of paying taxes),<sup>68</sup> and foreign affairs.<sup>69</sup> The following section tackles the three executive powers of the Prophet.

The first is the Prophet's military power. It was limited and restricted to specific circumstances.<sup>70</sup> The Quran identifies and regulates two types of wars. The first type is civil wars among Muslims.<sup>71</sup> This occurs when a disagreement arises between two groups of Muslims, who are unable to solve their disputes peacefully.<sup>72</sup> The Prophet has demonstrated some successful examples of resolving disputes peacefully.<sup>73</sup> For example, the *Banu Aws* and *Khazraj*, two

<sup>60</sup> QURAN, *Surat Al-Ma'idah* 5:46 ("And We sent, following in their footsteps, Jesus, the son of Mary, confirming that which came before him in the Torah; and We gave him the Gospel, in which was guidance and light and confirming that which preceded it of the Torah as guidance and instruction for the righteous.").

<sup>61</sup> *Id.*

<sup>62</sup> QURAN, *Surat Al-Ma'idah* 5:48.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> "But no, by your Lord, they will not [truly] believe until they make you, [O Muhammad], judge concerning that over which they dispute among themselves and then find within themselves no discomfort from what you have judged and submit in [full, willing] submission." QURAN, *Sūrah al-Nisā'* 4:65.

<sup>66</sup> Shams, *supra* note 6, at 2856.

<sup>67</sup> QURAN, *Surat An-Nisa* 4:84 ("So fight, [O Muhammad], in the cause of God ; you are not held responsible except for yourself. And encourage the believers [to join you] that perhaps Allah will restrain the [military] might of those who disbelieve. And Allah is greater in might and stronger in [exemplary] punishment.").

<sup>68</sup> QURAN, *Surat At-Tawbah* 9:103 ("Take, [O, Muhammad], from their wealth a Sadaqah by which you purify them and cause them increase, and invoke [God 's blessings] upon them. Indeed, your invocations are reassurance for them. And God is Hearing and Knowing.").

<sup>69</sup> QURAN, *Surat Yunus* 10:2 ("Have the people been amazed that We revealed [revelation] to a man from among them, [saying], 'Warn mankind and give good tidings to those who believe that they will have a [firm] precedence of honor with their Lord'? [But] the disbelievers say, 'Indeed, this is an obvious magician.'").

<sup>70</sup> QURAN *Surat Al Baqarah* 2:190 (Fight in the way of God those who fight you but do not transgress. Indeed, God does not like transgressors)

<sup>71</sup> QURAN, *Surat Al-Hujjrat* 49:9 ("And if two factions among the believers should fight, then make settlement between them. But if one of them oppresses the other, then fight against the oppressor they return to the ordinance of Allah. If the oppressor maintains aggression, then settle their disputes in justice, and be fair.").

<sup>72</sup> *Id.*

<sup>73</sup> *Introduction to Islamic Archaeology 2011: Aws and Khazraj*, JOUKOWSKY INST. FOR ARCHAEOLOGY, [https://www.brown.edu/Departments/Joukowsky\\_Institute/courses/islamicarch2011/14180.html](https://www.brown.edu/Departments/Joukowsky_Institute/courses/islamicarch2011/14180.html) (last visited Feb. 1, 2019).



Muslim tribes, fought during the Prophet's era.<sup>74</sup> When the Prophet received news of the fight, he went to reconcile the two tribes.<sup>75</sup> The reconciliation process was successful since the Prophet did not resort to the use of power against the aggressor.<sup>76</sup>

The second type of war is between Muslims and non-Muslims, an international form of war.<sup>77</sup> The Prophet went into several international wars against non-Muslims.<sup>78</sup> In these wars, the Quran made sure that Muslims fought only transgressors.<sup>79</sup> It only permitted two types of wars: retaliation or self-defense wars. For the first type, it was always connected to a legal question that Muslims raised to the Prophet.<sup>80</sup> The answer to their question came in the form of using power.<sup>81</sup> One such question was the legality of retaliation against infidels, who persecuted and confiscated Muslims' properties.<sup>82</sup> As for the defense wars, their purpose was to protect Muslims' dominance and integrity.<sup>83</sup> Defense wars were started as a response to aggression by non-Muslims over Muslims' territories and possessions.<sup>84</sup> The non-Muslims initiated such wars for two reasons.<sup>85</sup> First, they wished to annihilate Islam and Muslims, like in the Battle of *Khandaq* (Trench).<sup>86</sup> Second, they fought Muslims to compensate for their losses in previous battles, like in the Battle of *Uhud*.<sup>87</sup> After the Muslims won their first Battle of *Badr*, the infidels decided to retaliate, and reclaim their

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Ali Mohamed Al-Salabi, *GHAZAWAT ALRASUL SALAA ALLAH EALAYH WASALAM DURUS W EABR W FAWAYID*, 7 (2007).

<sup>78</sup> QURAN, *Surah At-Tawbah* 9:36 (citing "And fight against the disbelievers collectively as they fight against you collectively. And know that Allah is with the righteous [who fear Him].").

<sup>79</sup> QURAN, *Surat Al-Baqarah* 2:190 (citing "Fight in the way of Allah those who fight you but do not transgress. Indeed, Allah does not like transgressors.").

<sup>80</sup> QURAN, *Surat Al-Haj* 22:38–41.

<sup>81</sup> *Id.*

<sup>82</sup> QURAN, *Surat Al-Baqarah* 2:190 (citing "Fight in the way of Allah those who fight you but do not transgress. Indeed, Allah does not like transgressors.").

<sup>83</sup> M. Cherif Bassiouni, *Evolving Approaches to Jihad: From Self-Defense to Revolutionary and Regime Change Political Violence*, 8 CHI. J. INT'L L., 119, 120–21 (2007).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Sohail H. Hashmi, *Political Boundaries and Moral Communities Islamic Perspectives*, in STATES, NATIONS AND BORDERS: THE ETHICS OF MAKING BOUNDARIES 22 (Allen Buchanan & Margaret Moore eds., 2003).

<sup>87</sup> Abdul Ghafur Hamid & Khin Maung Sein, *Islamic International Law and the Right of Self-Defense of States*, 2 J.E. ASIA & INT'L L. 67, 85–86 (2009).

losses.<sup>88</sup> The following year, they decided to fight the Muslims at *Uhud*. These were examples of defense wars.<sup>89</sup>

The second power is the Prophet's power to collect *Zakat*.<sup>90</sup> The Quran did not impose any form of tax or royalties on Muslims.<sup>91</sup> However, it did ask Muslims to pay *Sadaqat*, which comes from the word *Sadq*, meaning truth.<sup>92</sup> Neither the Prophet nor any of his kinship (*Ahl al-Bayt*) were allowed to receive money from the *Zakat*'s treasury for any public work they performed.<sup>93</sup> They were not allowed any remuneration for their work.<sup>94</sup> When Al-Hassan, the grandson of the Prophet, was a small child, he took a date, collected as *Zakah*, to eat.<sup>95</sup> The Prophet took it from him and returned it.<sup>96</sup> He said to him "Do you not know that we do not eat from *Sadaqat*."<sup>97</sup> The Prophet died without having any money, even his daughter's small ranch was taken away from her.<sup>98</sup> Abu Bakr, the first successor, and Omar requested her to return it to the public treasury.<sup>99</sup> They based their judgment on the Prophet's *Sunna*.<sup>100</sup> The Prophet stated, "we are not inherited. Whatever we leave is *Sadaqah*."<sup>101</sup> He also said "Prophets leave neither dinar nor dirham (name of old currencies), [they leave] only knowledge."<sup>102</sup> So, Abu Bakr refused to grant her the right over such property.<sup>103</sup>

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Dr Anwar & Mlia Saputra, *The Empowerment of Zakah According to Islamic Law*, 8 J. ISLAMIC ST. PRAC. INT'L L. 69, 70, 72 (2012); see also QURAN, *Surat Al-Tawbah* 9:104.

<sup>91</sup> See Anwar & Saputra, *supra* note 90, at 74.

<sup>92</sup> Ahmed Rada, MA'JAM AL-LOGHA: MAWSOW'AH LAGHAYAHA HADITHA, 434 (1959).

<sup>93</sup> QURAN, *Surat Ash-Shuraa* 42:23 (citing "Say, [O Muhammad], "I do not ask you for this message any payment [but] only good will through kinship.").

<sup>94</sup> *Id.*

<sup>95</sup> Al-Bukhari and Muslim, *The Book of Miscellany*, Book 1, Hadith 298, SUNNAH, <https://sunnah.com/riyadussaliheen/1/298>.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Sunan Abi Dawud, *Tribute, Spoils and Rulership (Kitab Al Kharaj, Wala-fai' Wal Ijarah, Chapter Regarding Allocating A Specail Portion For the Messenger of Allah (Saws) From Wealth*, Book 20, Hadith 41, SUNNAH, <https://sunnah.com/abudawud/20/41>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Kathir ibn Qays, *26 Knowledge (Kitab Al-Ilm)*, Book 26, Hadith 1, SUNNAH, <https://sunnah.com/abudawud/26/1>.

<sup>103</sup> See generally, Ahmed Souaiaia, *On the Sources of Islamic Law and Practices*, 20 J. L. & RELIGION 123, 137-38 (2004-05).

The third power is the Prophet's power to represent Muslims in front of non-Muslims.<sup>104</sup> This power is very limited: it only includes inviting people to embrace Islam and signing peace treaties with non-Muslims.<sup>105</sup> Foreign affairs during the Prophet's time consisted of two forms.<sup>106</sup> The first was sending messengers to rulers, kings, and emperors to invite them to embrace Islam.<sup>107</sup> For example, after residing in Madinah, the Prophet sent six messengers to Heraclius (the Byzantine emperor), Negus (the King of Abyssinia), Chosroes II (the Emperor of the Persian Empire), Muqawqis (the Ruler of Egypt), Gassani (the Governor of Syria), and Al-Mundhir bin Sawa (the Ruler of Bahrain).<sup>108</sup> The second form of the Prophet's foreign affairs authority involved signing peace treaties with non-Muslims.<sup>109</sup> The Prophet signed many treaties, three of which are the most renowned.<sup>110</sup> The first treaty was with the Christians of Najran,<sup>111</sup> The second treaty was with the infidels, resulting in the Truce of *Al Hdaybiyyah*,<sup>112</sup> which lasted for a few years.<sup>113</sup> The third treaty was with the Jews,<sup>114</sup> who resided in Medina before the Prophet's arrival.<sup>115</sup>

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<sup>104</sup> Anowar Zahid & Rohimi Shapiee, *Customs as a Source of Siyar and International Law: A Comparison of Qualifying Criteria*, 8 INT'L J. CIV. SOC'Y L. 36, 54 (2010).

<sup>105</sup> 'Abdullah bin 'Abbas, 95 *Accepting Information Given by a Truthful Person*, Book 95, Hadith 18, SUNNAH, <https://sunnah.com/bukhari/95/18> (last updated Sept. 20, 2016) ("The Prophet (saws) Used to Send Commanders and messengers one after another."); Aibek S. Ahmedov, *Organs of Law of Religious Minorities in Islam: Evolution of Concept of Dhimmi as Portrayed in Early Sources*, 3 J. ISLAMIC ST. PRAC. INT'L L. 23, 28 (2007).

<sup>106</sup> Shams, *supra* note 6, at 2856.

<sup>107</sup> Nowar Zahid & Rohimi Shapiee, *Customs as a Source of Siyar and International Law: A Comparison of Qualifying Criteria*, 8 INT'L J. CIV. SOC'Y L. 36, 53–54 (2010); *Prophet Muhammad's Letters to Kings (628 CE)*, ISLAMIC CIVILIZATION, <http://www.cyberistan.org/islamic/letters.html> (last updated May 19, 2018).

<sup>108</sup> *Prophet Muhammad's Letters to Kings (628 CE)*, ISLAMIC CIVILIZATION, <http://www.cyberistan.org/islamic/letters.html> (last updated May 19, 2018).

<sup>109</sup> Ahmedov, *supra* note 105, at 28.

<sup>110</sup> *Id.* at 28–29; John Hursh, *The Role of Culture in the Creation of Islamic Law*, 84 IND. L.J. 1401, 1410–11 (2009).

<sup>111</sup> Ahmedov, *supra* note 105, at 28.

<sup>112</sup> Hursh, *supra* note 110, at 1410.

<sup>113</sup> *Id.*

<sup>114</sup> Ahmedov, *supra* note 88, at 24–27; *Prophet Muhammad's Treaty with Jews (622 C.E.)*, ISLAMIC CIVILIZATION, <http://www.cyberistan.org/islamic/treaty22.html> (last updated June 26, 2018).

<sup>115</sup> *Prophet Muhammad's Treaty with Jews (622 C.E.)*, *supra* note 98.

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

### 1. *Judicial Appointment Authority of the Senior Judge: Special Status of the Prophet*

Islam distinguishes between the authority of appointment of the Prophet and the authority of appointment of any other senior judge.<sup>116</sup> For the Prophet, both God and the people appointed him.<sup>117</sup> Initially, God chose the Prophet to be the supreme judge of Muslims.<sup>118</sup> Otherwise, Islam is based on legal pluralism, which gives the right to every person to choose his or her preferable law and judge.<sup>119</sup>

The role of the people in choosing the Prophet as a supreme judge takes two forms.<sup>120</sup> The first is through a formal process of giving the Prophet a pledge either individually, or in a group pledge.<sup>121</sup> The individual pledge occurs when a person went to the Prophet to convert to Islam.<sup>122</sup> Converting to Islam means that the person joined a new congregation, which is the Muslim nation, or *Umat Al-Islam*.<sup>123</sup> The group pledge happened twice in the two Pledges of Al-Aqabah.<sup>124</sup> The representatives of the two major tribes of Madinah announced their pledge to the Prophet.<sup>125</sup> This Pledge was the main reason that the Prophet immigrated to Madinah.<sup>126</sup>

The second form is through a tribal agreement, as in case of the *Madinah* Constitution.<sup>127</sup> When the prophet immigrated to *Madinah*, a legal question was

<sup>116</sup> JASEM, *supra* note 42.

<sup>117</sup> QURAN, *Sūrah al-Fateh*, 4:49 (citing “Indeed, those who pledge allegiance to you, [O Muhammad] - they are actually pledging allegiance to Allah. The hand of Allah is over their hands. So he who breaks his word only breaks it to the detriment of himself. And he who fulfills that which he has promised Allah - He will give him a great reward.”)

<sup>118</sup> See QURAN, *Sūrah al-Nisā* 4:105 (Saheeh International).

<sup>119</sup> Sherman A. Jackson, *Legal Pluralism Between Islam and the Nation-State: Romantic Medievalism or Pragmatic Modernity?*, 30 FORDHAM INT’L L.J. 158, 166–68 (2006).

<sup>120</sup> See AKRAM D. UMARI, *MADINAN SOCIETY AT THE TIME OF THE PROPHET* 112 (Huda Khattab trans., 1992); see also Anver Emon, *Reflections on the “Constitution of Medina”: An Essay on Methodology and Ideology in Islamic Legal History*, 1 UCLA J. ISLAMIC & NEAR E. L. 103, 105 (2001).

<sup>121</sup> UMARI, *supra* note 120, at 112.

<sup>122</sup> OUSSAMA ARABI, *STUDIES IN MODERN ISLAMIC LAW AND JURISPRUDENCE* 23 (2001).

<sup>123</sup> *Id.* at 33.

<sup>124</sup> Adam Walker, *Pledge of Allegiance (Bay’ah)*, AL ISLAM, <https://www.alislam.org/topics/khilafat/Pledge-of-Allegiance.pdf> (last visited Feb. 8, 2019); see also Matthew L. Vanauker, *The ‘Aqaba Pledge: A Reconsideration of the ‘Ansar’s Subscription to the Pledge* (2016) (unpublished M.A. thesis, University of Georgia).

<sup>125</sup> Walker, *supra* note 124.

<sup>126</sup> *Id.*

<sup>127</sup> Emon, *supra* note 120, at 105.

raised about the status, and the relationship with non-Muslims.<sup>128</sup> Before Islam, the city of *Madinah* (Yathrab) consisted of two major Arabian tribes, and three major Jewish tribes: Banu Qaynuqa, Banu Nadir, and Banu Qurayza.<sup>129</sup> When the two Arab tribes gave the prophet the Pledge in *Al-Aqabah*, the Prophet immigrated from Makkah to Madinah.<sup>130</sup> The Jewish tributes did not give the Prophet their pledge as did the Muslims.<sup>131</sup> Rather, they engaged with him in an agreement of mutual defense, which is called the Constitution of Madinah.<sup>132</sup> The constitution instated the Prophet an arbitrator for any dispute that arose from violation of any of the provisions of the Constitution.<sup>133</sup> Hence, the Prophet's authority as a judge includes both Muslims and non-Muslims, who live in a Muslim majority territory.

## 2. *Judicial Appointment Authority of any Supreme/Senior Judge (Council)*

As for any other senior judge, Islam did not have a formal procedure to get the people's consent on the character of the following senior judge.<sup>134</sup> The divine character of legitimacy ended with the prophet's death.<sup>135</sup> The remaining factor of legitimacy is the People,<sup>136</sup> which occurs on the Muslim consensus on certain issue, or person.<sup>137</sup> The People played a vital role in the legitimacy of the senior judge, whether it was a person, or council.<sup>138</sup> Hence, the appointment of a senior judge or council is left to the determination of the people.

People's consensus took three methods from the period of the Prophet's death and Ali ibn Abi Talib assassination. The first method was public consultation to choose the best candidate (direct democracy).<sup>139</sup> When the

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<sup>128</sup> *Id.* at 103–05.

<sup>129</sup> FAIZUL KHAN, *PROPHET MUHAMMAD: HISTORY AND CHARACTER OF HIS LIFE* 41 (1998); *see also* Emon, *supra* note 120, at 115 n.45.

<sup>130</sup> KHAN, *supra* note 129, at 41–42.

<sup>131</sup> Emon, *supra* note 106, at 106–08.

<sup>132</sup> Robert Louis Martinez, *Ibn Isha's Record of the Constitution of Medina*, <http://www.rogerlouismartinez.com/wp-content/uploads/2015/01/Constitution-of-Medina.pdf> (last visited Feb. 8, 2019).

<sup>133</sup> *Id.*

<sup>134</sup> QURAN *Surah Ash-Shuraa* 42:38 (“And those who have responded to their lord and established prayer and whose affair is [determined by] consultation among themselves, and from what We have provided them, they spend.”). The Quran states only on the Principle of *Shura* or consultation without any formal procedures on how to do the consultation, *id.*, and makes it clear that the Quran left the procedures to the People to determine, *id.*

<sup>135</sup> Chase F. Robinson, *The Rise of Islam 600-705*, in *THE NEW CAMBRIDGE HISTORY OF ISLAM* 173, 195 (2011).

<sup>136</sup> *Id.* at 203, 215.

<sup>137</sup> *Id.*

<sup>138</sup> QURAN, *Surat Ash-Shuraa* 42:38.

<sup>139</sup> AHMED AL-DAWOODY, *THE ISLAMIC LAW OF WAR: JUSTIFICATION AND REGULATIONS* 148 (2011).

Prophet passed away, Muslims met at *Saqifah bani Sa'idah's* to choose a person to be a successor to the Prophet.<sup>140</sup> In the debate, no one claimed a divine right to take over the position.<sup>141</sup> On the contrary, the debate was based on their personal and tribal merits.<sup>142</sup> The people of *Al-Madinah* (Ansar) claimed that they supported the prophet and the people of *Makkah*, when they were weak.<sup>143</sup> On the other hand, the people of *Makkah* (*Muhajreen*) claimed that they are more competent as they are the next of kin to the Prophet.<sup>144</sup> After a long debate, they chose Abu Bakr Al-Siddiq (*Muhajreen*) to be the successor to the Prophet.<sup>145</sup>

The second method is consulting individual Muslim jurists.<sup>146</sup> When Abu Bakr, who ruled for only two years, felt that his life is coming to an end, he gathered all the prophet's friends to decide on the issue of succession.<sup>147</sup> However, they delegated their power to him to choose whoever he considered the best candidate.<sup>148</sup> Abu Baker started to meet with them individually to ask them about Omar Ibn el-Khattab.<sup>149</sup> After long and careful consideration, Abu Bakr announced that he appointed Omar as his successor.<sup>150</sup> Then, he dictated a letter to the people.<sup>151</sup> He said, "I have appointed after me as Caliph over you Omar ibn al-Khattab, so listen to him and obey him."<sup>152</sup>

The third method was to choose a committee to appoint the senior judge.<sup>153</sup> Omar Ibn Al-Kahatab succeeded Abu Bakr as *Amir al-Mu'minin*.<sup>154</sup> Omar ruled for ten years until his assassination.<sup>155</sup> On his deathbed, he chose six from the Prophet's friends to form an Appointment Committee.<sup>156</sup> The role of the

<sup>140</sup> *Id.* at 147.

<sup>141</sup> WILFERD MADELUNG, *THE SUCCESSION TO MUHAMMAD: A STUDY OF THE EARLY CALIPHATE* 39–40 (1997).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 31.

<sup>145</sup> *Id.*

<sup>146</sup> MAHMOUD SHAKER, *AL TARIKH AL-ISLAMY*, 95–100 (2000); *see also*, ABI JAFAR IBN JARIR AL TABARI, *TARIKH AL-ROSUL WE-AL-MULOK* 428–34 (Third Book, Mohamed Abu Al Fadel Ibrahim ed., 1969).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> I.M.N. AL-JUBOURI, *ISLAMIC THOUGHT FROM MOHAMMED TO SEPTEMBER 11, 2001*, 59 (2010).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> ABU AL HASSAN, ALI IBN ABI AL-KARM MOHAMED AL SHIBANI (IBN AL ATHIR), *AL KAMAL FI-AL-TARIKH* 447–49 (Second Book, 1987)

<sup>154</sup> *Id.*

<sup>155</sup> A Sassanid spy/solider/slave—Abu Lu'lu'ah al Majusi (Arabic name) or Pirzu Nahavandi (Persian name)—killed him while Omar ibn Al-Katatab was leading the prayers in the Madinah Mosque. MADELUNG, *supra* note 141, at 68, 73.

<sup>156</sup> *Id.* at 68.

Committee was to choose one among them to be the next successor.<sup>157</sup> Members of the committee were Ali ibn abi Talib, Othman ibn Abi Affan, Talha ibn Ubayd Allah, Al Zubair ibn Al-awam, Sa'd Ibn Waqqas, and Abdel Rahman Ibn Awf.<sup>158</sup> Three of the Committee members withdrew, as they did not wish to be the next successor.<sup>159</sup> The three were Talha, Al Zubair, and Sa'd.<sup>160</sup> Abdel Rahman also did not want to be the next successor.<sup>161</sup> Yet, he proposed to Ali and Othman that he can choose the best of them after consulting with the rest of the Muslims.<sup>162</sup> Abdel Rahman went to ask the people how they felt about the two (Ali and Othman).<sup>163</sup> After consultation with the people, Adel Rahman announced Othman as the next successor and *Amir al- Mu'minin*.<sup>164</sup>

A judge's legitimacy is based on the consent and the consensus of the people.<sup>165</sup> Even though the role of the people is indispensable in Islamic jurisprudence, the previous methods were personal endeavors of the Prophet's friends to acquire the people's consent on public administration.<sup>166</sup> Judges play a major role in developing Islamic rules, which affect both the life and after life of Muslims.<sup>167</sup> Therefore, they have to be chosen by the community they serve, based on consent and consensus.

### 3. *Judicial Appointment Authority of Junior Judges*

Islam balances between two contradictory interests.<sup>168</sup> The first is the Prophet's banning of Muslims from accepting any judicial position.<sup>169</sup> The Islamic history did not recognize any formal process to apply for junior judge position.<sup>170</sup> The senior judge is responsible for soliciting the best jurists to be

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 71.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> The Prophet said that "my nation will not unite on misguidance, so if you see them differing, follow the great majority." Tribulation, (8) Chapter: The Great Majority, Grade; Da'if (Darussalam), Sunan Ibn Majah 3950, SUNNAH, <https://Sunnah.com/ibnmajah/36/25>.

<sup>166</sup> Gamal M. Badr, *A Survey of Islamic International Law*, 76 AM. SOC'Y INT'L L. PROC. 56, 56 (1982).

<sup>167</sup> Wael B. Hallaq, AN INTRODUCTION TO ISLAMIC LAW, 8 (2009).

<sup>168</sup> Wael B. Hallaq, AN INTRODUCTION TO ISLAMIC LAW, 1, 7-13 (2009).

<sup>169</sup> QURAN, *Surah Al-Ma'idah*, *supra* note 35.

<sup>170</sup> Jami at-Tirmidhi, *The Chapters on Judgements From The Messenger of Allah*, Book 15, Hadith 4, SUNNAH, <https://Sunnah.com/tirmidhi/15/4> (statement of Prophet) ("Whoever seeks to be a judge, and asks others to intercede for him with it, then he will be left on his own. And whoever is coerced into it, Allah sends an angel down to him so that he can be correct.").

junior judges.<sup>171</sup> Senior judges have to identify suitable candidates without any request from the jurists.<sup>172</sup> Furthermore, a person, who requests to be appointed as a judge, should be banned from holding such a position.<sup>173</sup> The Prophet used to refuse to appoint anyone who requested him to be appointed, or assigned to any public task, like Al-Abbas and Abu Dhār al-Ghifari.<sup>174</sup> Therefore, the senior judge or council enjoys complete discretion in the appointment of junior judges.

The second interest is that junior judges will not accept to work under any tyrant.<sup>175</sup> Junior judges are partners—not followers—to the senior judge.<sup>176</sup> In Islamic legal history, many prominent Islamic scholars refused to be judges under tyrant *Calipha*.<sup>177</sup> Abu Hanifa al Numan, the founding father of Hanafi School of Islamic jurisprudence, refused to be a judge during the Abbasid era.<sup>178</sup> In Abu Hanifa's last days, *Calipha* Abu Ja'far al-Mansur requested him to be the chief judge of Baghdad.<sup>179</sup> However, Abu Hanifa refused to work as a judge under al- Ja'far's rule.<sup>180</sup> He firmly believed that Ja'far was a tyrant with a cruel nature.<sup>181</sup> He even killed many of his army leaders, whom he suspected to be a potential threat to his throne, like Abu Muslim Khorasani.<sup>182</sup> When Abu Hanifa refused to be a judge, Ja'far ordered to put him in jail, where he was whipped to death.<sup>183</sup>

#### 4. *The Appointment Qualification in Islam*

Islamic scholars identified five qualifications that qualify a person to hold a judicial post.<sup>184</sup> First, the candidate must possess the highest legal and Islamic

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<sup>171</sup> JALAL AL-DIN AL-SUOTI, ZAM AL-QADA WA-TAQALAD AL-AKHAM 79 (1991).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> ABI AL-HASSAN AL-MAWARDI, AL-AKHAM ALSUTANIYAH WA-AL-WALAYAT AL-DAYNYAH 29 (2000).

<sup>176</sup> *Id.*

<sup>177</sup> Robert Hefner, *Islam Matters: Culture and Progress in the Muslim World*, in DEVELOPING CULTURES: ESSAYS ON CULTURAL CHANGE 266 (Lawrence Harrison et al. eds., 2006).

<sup>178</sup> *Abu Hanifah*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Abu-Hanifah> (last visited Feb. 22, 2019).

<sup>179</sup> CHANDRA MUZAFFAR, RIGHTERS, RELIGION AND REFORM: ENHANCING HUMAN DIGNITY THROUGH SPIRITUAL AND MORAL TRANSFORMATION 198 (2002).

<sup>180</sup> *Id.*

<sup>181</sup> *Persecution of the Hsia by the Abbasid Kings*, AL-ISLAM, <https://www.al-islam.org/the-hidden-truth-about-karbala-ak-ahmed/part-c-persecution-shia-abbasid-kings>.

<sup>182</sup> *Abu Mulim*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Abu-Muslim> (last visited Feb. 22, 2019).

<sup>183</sup> *Why Imam Abu Hanifah (RH) Was Whipped by Caliph Al-Mansur*, THE REVIVERS (June 22, 2015), <https://revivers.wordpress.com/2015/06/22/why-imam-abu-hanifah-rh-was-whipped-by-caliph-al-mansur/>.

<sup>184</sup> ABU AL ABAS AHMED AL TABARI, ADAB AL QADA, 98 (Hussien Khali ed, 1989).



knowledge.<sup>185</sup> This requirement does not mandate holding a degree;<sup>186</sup> it only requires legal knowledge.<sup>187</sup> The Prophet himself was illiterate, but he was a wise person.<sup>188</sup> Moreover, the level of legal knowledge changed overtime. During the Prophet's time, the legal knowledge was based only on the Quran, the Sunna, Customs,<sup>189</sup> and *ijtihad*.<sup>190</sup> When the Prophet intended to send Mu'adh ibn Jabal to the Yemen as a judge, he said:

How will you judge when the occasion of deciding a case arises?  
Mu'adh replied: I shall judge in accordance with Quran. The Prophet then asked: (What will you do) if you do not find any guidance in Quran? Mu'adh replied: (I shall act) in accordance with the Sunnah. He asked: (What will you do) if you do not find any guidance in the Sunnah and Quran? He replied: I shall do my best to form an opinion and I shall spare no effort.<sup>191</sup>

After the Prophet and his four successors, Islamic jurists introduced several sources to Islamic jurisprudence, such as consensus, analogical reasoning, juristic preference, public interest, as well as inference.<sup>192</sup> At a later stage, judges' legal knowledge was based on mastering the knowledge of at least one of the four major Islamic schools of thought.<sup>193</sup> For example, if the Egyptian senior judge follows the Hanafi School, the junior judge must be specialized in *Hanafi* jurisprudence.<sup>194</sup>

Second, the candidate to a judicial post must be a jurist and able to write a *fatwa*.<sup>195</sup> A *fatwa* is a respected legal opinion that is not legally binding.<sup>196</sup> The legal power of a *fatwa* comes from its power to convey a certain message to the

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> QURAN, *Surat al-A'raf*, 7:157.

<sup>189</sup> QURAN, *Surah Al-A'raf* 7:199. ("Show forgiveness, enjoin the customs, and turn away from the ignorant." It has to be noted that customs shall not violate a clear verse in the Quran or Sunna. Nonetheless, Customs come as a secondary resource after these two primary sources").

<sup>190</sup> Mu'adh ibn Jabal, *Struggling for an opinion when passing judgments*, Book 25, Hadith 22, SUNNAH, <https://sunnah.com/abudawud/25/22>.

<sup>191</sup> *Id.*

<sup>192</sup> M. Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E.L. 135, 140-147 (2002).

<sup>193</sup> HALLAQ, *supra* note 150, at 37.

<sup>194</sup> *See id.* at 80.

<sup>195</sup> *See id.* at 9-10 ("The measure of a leading jurist was, among other things, the quality of his writings and *fatwas*").

<sup>196</sup> *Id.* at 9.

public.<sup>197</sup> If a *fatwa* obtains a “universal consensus” among Muslim scholars, it will be *ij’ma*.<sup>198</sup> Otherwise, it will be considered only a juristic preference.<sup>199</sup>

Third, a candidate to a judicial post must be Muslim.<sup>200</sup> Islam depends profoundly on the idea of freedom of religion and legal pluralism.<sup>201</sup> Judges, along with independent jurists, play a major role in developing the legal rules in Islam.<sup>202</sup> Islam depends profoundly on ideas of religious freedom and legal pluralism, and thus does not mandate enforcing its rules on non-Muslims.<sup>203</sup> Similarly, the Quran gives Muslim the right to rule among non-Muslims only, if they so request.<sup>204</sup> Each religion is free to apply its rules on its followers.<sup>205</sup> Islam does not give a Muslim the right to rule among non-Muslims, unless non-Muslims specifically makes this request.<sup>206</sup> Each religion is free to apply its own rules to its followers. As a result, Muslim judges rule in Muslim cases, while non-Muslim judges rule in non-Muslim cases.

Four, Islamic scholars mandate the judge to be an adult.<sup>207</sup> They distinguished between a senior judge, and a junior judge. For senior judges, the minimum age is forty, which is the age of maturity.<sup>208</sup> As for junior judges, the minimum age is determined based on customs of each country.<sup>209</sup> The adult age in Yemen is fourteen years,<sup>210</sup> while in Egypt it is twenty-one years old.<sup>211</sup>

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<sup>197</sup> MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 315, 322 (Islamic Texts Soc’y 3d ed. 2003).

<sup>198</sup> *Id.* at 228.

<sup>199</sup> *See id.* at 322.

<sup>200</sup> AL-MAWARDI, *supra* note 175, at 98–99.

<sup>201</sup> QURAN, *Surat al-Baqarah* 2:256.

<sup>202</sup> Muhammad Khalid Masud et al., *Qādīs and Their Courts: An Historical Survey*, in DISPENSING JUSTICE IN ISLAM 2–4 (Muhammad Khalid Masud et al. eds. 2006).

<sup>203</sup> Quran states “and Allah will not grant the disbelievers a way to prevail against the believers.” QURAN, *Surah al-Nisa* 4:142.

<sup>204</sup> *See id.* at 4:141.

<sup>205</sup> *Id.*

<sup>206</sup> Quran states, “So if they [Jews] come to you, (O Mohammad), judge between them or turn away from them. And if you turn away from them – never will they harm you at all. And if you judge, judge between them with justice. Indeed, Allah loves those who act justly.” QURAN, *Surah al-Ma’idah* 5:42.

<sup>207</sup> AL-MAWARDI, *supra* note 175.

<sup>208</sup> QURAN, *Surah al-Ahqaf* 46:15.

<sup>209</sup> Quran states, “Show forgiveness, enjoin the customs, and turn away from the ignorant.” It must be noted that customs shall not violate a clear verse in the Quran or Sunna. Nonetheless, Customs come as a secondary resource after these two primary sources. QURAN, *Surah al-A’raf* 7:199.

<sup>210</sup> Article 133 of the Rights of the Child Act states, “A Child of working age means any persons over [forteen] years of age.” The Rights of the Child Act, art. 133 (Yemen)

<sup>211</sup> Law No. 131 of 1948 (Civil Law), *al-Juridah al-Rasmiyah*, 16 July 1948, art. 44/2 (Egypt).

Five, Muslim jurists disagreed on the gender issue.<sup>212</sup> Ibn Hazm Az-Zahiri Al-Andalusia, a Spanish Islamic scholar, sustained that women can be judges.<sup>213</sup> However, three schools of Islamic Jurisprudence sustained the banning of women from being judges.<sup>214</sup> These schools are Hanbali, Malaki and Sha'ai.<sup>215</sup> The fourth major school, the Hanafi School, allows women to be appointed as judges, except in criminal cases.<sup>216</sup> The exception is based on the nature of punishment in the Quran, which indicates non-custodial punishments,<sup>217</sup> like the death penalty (homicide), flogging (adultery), and exile (terrorism).<sup>218</sup> The Hanafi School argues that women can get emotional about some types of crimes and punishments.<sup>219</sup> As a result, there was a lack of consensus among scholars on the gender issue.<sup>220</sup>

## II. SECOND THEORY: THE GUARDIANSHIP OF THE JURIST THEORY (*WILAYAT AL-FAQIH*)

This Section deals with the counter theory of “government by judiciary,” which is the Guardianship of the Jurist Theory. The active application of the theory of government by jurisprudent *Welayat e-Faqih* was initially adopted in Iran.<sup>221</sup> The difference between the theory of “government by judiciary” and “government by jurisprudence” raises three questions. The first is the historical foundation of the *Imamah* principle, which is considered the core concept of *Welayat e-Faqih*. The second is the Iranian practice of the *Imamah* principle and the *Khomeini*'s theory of *Wilayat Al-Faqih*. The third is the distinction between the two theories with respect to judicial power.

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<sup>212</sup> The Quran is neutral on the issue of the woman appointment. QURAN, *Surah al-Naml* 27:34.

<sup>213</sup> NIK NORIANI NIK BADLISHAH AND YASMIN MASIDI, WOMEN AS JUDGES 3–4 (2009). See also, Karen Bauer, *Debates on Women's Status as Judges and Witnesses in Post-Formative Islamic Law*, 130 J. AMERICAN ORIENTAL SOC. 1, 4–8 (Jan.–Mar. 2010).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW 100 (1981).

<sup>218</sup> *Id.*

<sup>219</sup> ARNOWS, *supra* note 168.

<sup>220</sup> *Supra* note 213

<sup>221</sup> ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] 1989 (IRAN), art. 4.

A. *The Historical Foundation of the Guardianship of the Jurist Theory: Imamah Principle*

In *Sunni* understanding, God intervened directly only once to choose the Prophet,<sup>222</sup> and indirectly to choose other leaders.<sup>223</sup> The *Shia* believe that God chose the Prophet as well as the Twelver to lead the Muslims,<sup>224</sup> though the Prophet (*Nabi*) and his Prophecy (*Nubuwwah*) came in a higher level than the Twelver (*Imam*), and their leadership (*Imamah*).<sup>225</sup> The *Imamah* principle comes from the word *Imam*, which means leader, or a role model for the righteous.<sup>226</sup> So, while the *Sunni* believe only in *Nubuwwah*, the *Shia* believe in both *Nubuwwah*, and *Imamah*.<sup>227</sup>

The *Imamah* principle establishes the authority of the Muslims in Twelve *imam*, which is called the Twelver.<sup>228</sup> It is limited to Ali and eleven of his decedents, as shown in Graph (1).<sup>229</sup> The Twelver are the Prophet's grandsons, except Ali, who was his cousin and son in law.<sup>230</sup> They are *Amir Al-Mo'minin* Ali ibn Talib, *Amir Al-Mo'minin* Al-Hasan ibn Ali, Al-Hasyn ibn Ali, Ali ibn Husayn, Muhammad ibn Ali, Ja'afar ibn Muhammad, Musa ibn Ja'afar, Ali ibn Musa, Muhammad ibn Ali, Ali ibn Muhammad, Hasan ibn Ali, and Muhammad ibn al-Hasan (al-Mahdi).<sup>231</sup>

According to the Quran, Allah appointed Ali Ibn Abi Talib as *Amir Al-Mu'minin* as a successor to the Prophet.<sup>232</sup> Ali, was the most qualified candidate, especially that he was among the appointment committee that Omar ibn Al-Khatib formed while on his deathbed.<sup>233</sup> The death of Othman triggered great rage among Muslims.<sup>234</sup> Mua'wiya Ibn Abi Soufiane, among other relatives of

<sup>222</sup> Quran Surat Al-Ahzab states, "Muhammad is not the father of [any] one of your men, but [he is] the Messenger of Allah and last of the prophets. And ever is Allah, of all things, Knowing." QURAN, *Surah al-Ahzab* 33:40, *See also*, QURAN, *Surah Yunus* 10:1.

<sup>223</sup> QURAN, *Surah Ali-Imran* 3:25.

<sup>224</sup> HAMID MAVANI, RELIGIOUS AUTHORITY AND POLITICAL THOUGHT IN TWELVER SHI'ISM FROM ALI TO POST-KHOMEINI, 152 (2013).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> MOOJAN MOMEN, AN INTRODUCTION TO SHI'I ISLAM, 11–45 (1985).

<sup>228</sup> Vivienne Angeles, *The Development of the Shi'a Concept of the Imamate*, 21 ASIAN STUD. 148, 149–50 (1983).

<sup>229</sup> *Id.* at 150.

<sup>230</sup> HAMID DABASHI, AUTHORITY IN ISLAM: FROM THE RISE OF MUHAMMAD TO THE ESTABLISHMENT OF THE Umayyad's, 102 (1989).

<sup>231</sup> *Id.*

<sup>232</sup> HASSAN NAHIM, THE DIVISION AFTER PROPHET MUHAMMAD, 11 (2012).

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

Othman, requested that Ali should take revenge against those who were charged with killing Othman.<sup>235</sup> Ali requested them to give him their pledge to be able to judge these aggressors.<sup>236</sup> Yet, Mua'wiya, as well as others, refused to give him such a pledge.<sup>237</sup> As a result, a civil war broke between *Amir Al-Mu'minin* Ali ibn Abi Talib, and Mua'wiya.<sup>238</sup>

The first Great Muslim Civil War lasted for approximately five years.<sup>239</sup> After the assassination of *Amir Al-Mu'minin* Ali ibn Abi Talib, his supporters chose his son, Al-Hasan ibn Ali, to be the next *Amir Al-Mu'minin*.<sup>240</sup> Al-Hasan was the first grandson of the Prophet, the son of the Prophet's most beloved daughter Fatmah, and the Prophet's preferred grandson.<sup>241</sup> Al-Hasan's supporters wished to continue the war with Mua'wiya. However, *Amir Al-Mo'minin* Al-Hasan ibn Ali wished to end the bloodshed among Muslims.<sup>242</sup> Al-Hasan agreed to stop the Great Civil War after six months from his father's assassination.<sup>243</sup> One of the terms of the reconciliation was that Mua'wiya became the Muslims' ruler, taking Al-Hasan to be his successor, who was more popular than him.<sup>244</sup>

Approximately ten years later, Al-Hasan's wife poisoned him, according to both *Shia* and *Sunni* historical books.<sup>245</sup> After the assassination of Al-Hasan, Mua'wiya abolished the traditions of the Prophet, and his four successors.<sup>246</sup> Before his death, Mua'wiya wished to hand down the

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<sup>235</sup> *Muawiyah*, NEW WORLD ENCYCLOPEDIA, <http://www.newworldencyclopedia.org/entry/Muawiyah> (last visited May 1, 2019).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> Jacob Lassner, *Responses to Unwanted Authority in Early Islam: Models for Current Shi'i and Sunni Activists*, 22 *IN THE SUNNA AND SHIA IN HISTORY DIVISION AND ECUMENISM IN THE MUSLIM MIDDLE EAST* (Ofra Bengio and Meir Litvak eds., 2011).

<sup>240</sup> TABARI, *THE HISTORY OF AL-TABARI VOL. 17: THE FIRST CIVIL WAR*, 247 (G.R. Hawting trans. 1996).

<sup>241</sup> ALI M. SALLABI, *AL-HASAN IBN ALI HIS LIFE AND TIME*, 45–47 (2004).

<sup>242</sup> *Companions of the Prophet*, 22 *The Merits of Al-Hasan and Al-Husain*, Book 62, Hadith 93, SUNNAH, <https://Sunnah.com/bukhari/62/93> (stating while Al-Hasan was sitting beside the Prophet (when he was kid), and the Prophet was once looking at the people and at another time Al-Hasan, and saying, "This son of mine is a Master and perhaps God will bring about an agreement between two sects of the Muslims through him.").

<sup>243</sup> Jacob Lassner, *Responses to Unwanted Authority in Early Islam: Models for Current Shi'i and Sunni Activists*, 22, *IN THE SUNNA AND SHIA IN HISTORY DIVISION AND ECUMENISM IN THE MUSLIM MIDDLE EAST* (Ofra Bengio and Meir Litvak eds., 2011).

<sup>244</sup> *Id.* at 26–27.

<sup>245</sup> SHAMS AL DIN MUHAMED AHMED OTHMAN AL ZAHABI, *SAYAR A'LAM AL-NOBALA*, BOOK 3, 270–75 (1981); see also, Nicole Burke et al., *A Forensic Hypothesis for the Mystery of al-Hasan's Death in the 7<sup>th</sup> Century Mercury (i) Chloride Intoxication*, 56(3) *MED. SCI. L.* 167, 168 (2016).

<sup>246</sup> AL ZAHABI, *supra* note 245.

government to his son, Yazid.<sup>247</sup> This was a major turning point of a true Islamic government, as neither the prophet, nor any of his followers handed down Islamic rule to their next of kin, or siblings.<sup>248</sup> The Prophet left the role of the government and administration to Muslims, especially Muslim jurists,<sup>249</sup> to determine the best form of government based on their own understanding of the Quran and the Prophet's tradition.<sup>250</sup> As a result, it was at that time that the ruling system changed from *Shura* (consultation, and public participation), to a theocratic regime.<sup>251</sup>

Al-Husayn ibn Ali ibn abi Talib, brother of Al-Hasan, disagreed with Mua'wiya's decision to hand over the government to Yazid.<sup>252</sup> Many Muslims, who disagreed with Mua'wiya's decisions, went to Al-Husayn to ask him to be the following leader.<sup>253</sup> Most of the supporters were in Kufa, Iraq.<sup>254</sup> Al-Husayn decided that he should move from *Al Madinah* to *Kufa*, to meet his supporters in order to resist Yazid.<sup>255</sup> Al-Husayn moved with a few of his supporters to *Al Madinah*.<sup>256</sup> When he reached *Kufa*, his supporters abandoned him.<sup>257</sup> He was left alone with very few supporters from *Madinah*.<sup>258</sup> Meanwhile, he was ambushed by Yazid's soldiers.<sup>259</sup> The soldiers requested Al-Husayn to surrender; he refused even though he was outnumbered.<sup>260</sup> As a result, he and his supporters were massacred in Karbala, Iraq.<sup>261</sup>

After the massacre of Al-Husayn, none of *Ahl al-Bayat*,<sup>262</sup> including the Imams, sought any leadership role within the Muslim community.<sup>263</sup> They have

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<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> See QURAN, *Surat Al Nahl* 16:43 ("And We Sent not before you except men to whom We Revealed (our message). So ask the people of the knowledge if you do not know.").

<sup>250</sup> QURAN, *Surat Al-An'am*, 6:165 ("And it is He who has made you successors upon the earth and has raised some of you above others in degrees [of rank] that He may try you through what He has given you. Indeed, your Lord is swift in penalty; but indeed, He is Forgiving and Merciful").

<sup>251</sup> AL ZAHABI, *supra* note 245.

<sup>252</sup> MATTHEW GORDON, *THE RISE OF ISLAM* 40-42 (2005).

<sup>253</sup> *Id.*

<sup>254</sup> IAN RICHARD NETTON, *ENCYCLOPEDIA OF ISLAMIC CIVILIZATION AND RELIGION* 241 (2005).

<sup>255</sup> Hosayn B. 'Ali i. *Life and Significance in Shi'ism*, *ENCYCLOPAEDIA IRANICA*, <http://www.iranicaonline.org/articles/hosayn-b-ali-i> [*On Hosayn B. 'Ali*]

<sup>256</sup> *Id.*

<sup>257</sup> IBN EL-NEIL, *THE TRUTH ABOUT ISLAM* 205-07 (2008).

<sup>258</sup> *On Hosayn B. 'Ali*, *supra* note 255.

<sup>259</sup> *THE ENCYCLOPAEDIA OF ISLAM* 421 (C. E. Bosworth eds., Volume IX 1997).

<sup>260</sup> *Id.*

<sup>261</sup> *On Hosayn B. 'Ali*, *supra* note 255.

<sup>262</sup> *Ahl-Al-Bayat*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/topic/Ahl-al-Bayt>.

<sup>263</sup> *Id.*

dedicated their life to knowledge, as they were all jurists.<sup>264</sup> Nonetheless, the ruling members, during either the *Umayyad* or *Abbasid era*, were in a continuous fear of the *Imams'* popularity.<sup>265</sup> Even though the *Imams* were distant from politics, they were all assassinated.<sup>266</sup> The only exception was the last *Imam*, Mohamed ibn al-Hasan (al-Mahdi).<sup>267</sup> To avoid being killed as his ancestors, *Imam* al-Mahdi went under cover, and his location was never disclosed until the present day.<sup>268</sup> It is widely believed among the *Shia* that *Imam* al-Mahdi will return one day to spread justice among the people.<sup>269</sup>

*B. The Iranian Form of Imamah Principle: Imam's legitimacy and the Role of the People*

After *Imam* al-Mahdi disappeared, a problem arose regarding his successor. He disappeared before choosing or recommending anyone as his successor.<sup>270</sup> This problem persisted after *Imam* al-Mahdi's disappearance, or the absence of the *Imam*.<sup>271</sup> Hence, their theory of *Imamah* faced a dilemma on the succession of the *Imam* al-Mahdi.

The current Iranian constitution presents a solution to the previous dilemma.<sup>272</sup> The solution was the Iranian people's consensus to appoint the Khomeini as a leader and *Imam*.<sup>273</sup> According to Article 107 of the Constitution, the appointment of the Grand Ayatollah *Iman* Khomeini as a leader was acknowledged and accepted by the majority of the people.<sup>274</sup> Khomeini's legitimacy, according to the Constitution, comes from the people's consent for

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<sup>264</sup> Michael Bonner, *The Waning of Empire*, In THE NEW CAMBRIDGE HISTORY OF ISLAM, 326 (Chase F. Robinson ed., 2011).

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> AYATULLAH IBRAHIM AMINI, AL-IMAM AL-MAHDI, THE JUST LEADER OF HUMANITY 73 (Abdulaziz Sachedina trans. 2015).

<sup>268</sup> *Id.*

<sup>269</sup> AYATULLAH IBRAHIM AMINI, *supra* note 267.

<sup>270</sup> *Id.* at 97.

<sup>271</sup> *Id.* at 91; see ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] 1368 [1989] (Iran), at 5.

<sup>272</sup> ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] 1368 [1989] (Iran) at art. 5, 6.

<sup>273</sup> Koh Nakata, *Wilayah Faqih, Sovereignty, and Constitution: Political Theories in Post-Khumaini-Era Iran*, 1, 7 (2000), [https://www.jstage.jst.go.jp/article/orient1960/35/0/35\\_0\\_1/\\_pdf](https://www.jstage.jst.go.jp/article/orient1960/35/0/35_0_1/_pdf).

<sup>274</sup> ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] 1368 [1989] (Iran), art. 107. It states "Imam Khom[e]ini, may his noble character be sanctified, who was acknowledged and accepted by the undisputed majority of the people as the marja' and the leader, the responsibility for designating the leader shall be with the Experts who are appointed by the people."

him to lead the country after ousting the Pahlavi's regime.<sup>275</sup> As a result, this approach represents the Khomeini's theory of *Wilayat al-Faqih*.<sup>276</sup>

Even though the Iranian constitution derived legitimacy of the Khomeini from the people's consent, it made a distinction in the appointment process between the Khomeini, and any other *Faqih* or Imam.<sup>277</sup> For Ayatollah *Imam* Khomeini, the Iranian Constitution established the legitimacy of the Leader/*Faqih* directly from the people.<sup>278</sup> Khomeini was chosen after the Islamic revolution in Iran, and the acceptance of the Iranian people with 98.2% of votes.<sup>279</sup> As for any other successor to the *Faqih*, the constitution gives an indirect role to the people in the appointment process.<sup>280</sup>

The Iranian Constitution shares the appointment process of the future leader with four entities. They are the current Leader, the Guardian Council, the People, and the Council of Experts, as shown in Graph (1). The first entity is the current Leader,<sup>281</sup> who is responsible for choosing half of the members of the Guardian Council.<sup>282</sup> The second half is chosen by the head of the judiciary to the Islamic Consultative Assembly, and is selected by the vote of the Assembly.<sup>283</sup> The second entity is the Guardian Council, which is responsible for determining the qualifications, and the procedures to select the Council of Experts.<sup>284</sup> It is also responsible for supervising the election of the Council of Experts.<sup>285</sup> The third entity is the People, who elect members of the Council of Experts through a direct, secret ballot.<sup>286</sup> The last entity is the Council of Experts<sup>287</sup> that consists of eighty-weight members. The main task of which is to choose the next leader, or *Faqih*.<sup>288</sup> Hence, there is a distinction between the first, and other *Faqih*s/Leaders.

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<sup>275</sup> *Id.*

<sup>276</sup> *Supra* note 280.

<sup>277</sup> ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] 1368 [1989] (Iran), arts. 107, 109.

<sup>278</sup> *Id.*, art. 1.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*, art. 6.

<sup>281</sup> *Id.*, art. 91.

<sup>282</sup> *Id.*, art. 91.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*, art. 108.

<sup>285</sup> *Id.*, art. 99.

<sup>286</sup> Executive Bylaws for the Election of the Assembly of Experts of the Leadership, 1982 modified in 2006, (Iran), art. 2.

<sup>287</sup> Emma Borden, *Everything You Need to Know About Iran's Assembly of Experts*, BROOKINGS (Feb. 9, 2016), <https://www.brookings.edu/blog/markaz/2016/02/09/everything-you-need-to-know-about-irans-assembly-of-experts-election/>.

<sup>288</sup> ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] 1368



Graph (1): The Process of Appointing a New Leader, or *Faqih*

### C. *The authorities of the Imam: Judicial and Executive Authorities of the Faqih*

The authorities of the *Faqih* are unlimited, either on judicial or executive powers.<sup>289</sup> For the judiciary, the *Faqih* is considered as a supreme judge, who is the competent authority to appoint or dismiss the “highest judicial authority.”<sup>290</sup> The *Faqih* appoints a jurist to administer the judicial power as the Head of the Judiciary.<sup>291</sup> The Head of the Judiciary appoints the head of the Supreme Court, and the Chief Public Prosecutor.<sup>292</sup> They are appointed for a period of five years.<sup>293</sup> The system of appointment of junior judges and prosecutors is centralized.<sup>294</sup> The Head of the Judiciary appoints all the judicial positions.<sup>295</sup>

Additionally, even though the *Faqih* is the Supreme judge, he does not issue judgments—only religious rulings (*fatwas*).<sup>296</sup> However, the *fatwa* of the *Faqih*

[1989] (Iran), art. 107.

<sup>289</sup> See generally Seyed Mohammad Reza Ayati & Mahdi Moghaddasi, *A Comparative Study of the Extent and Scope of Absolute Guardianship of the Islamic Jurist (Vilayat-e Faqih) from the Perspective of Shiite Jurists; and the Rashidun Caliphate in the View of Sunni Scholars*, 9 J. POL. & L. 247 (2016) (explaining that, under the Shia jurisprudence, the Faqih enjoys the ultimate authorities that was given to the Prophet and his successor from God, which is unlimited authorities.)

<sup>290</sup> ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] 1368 [1989] (Iran) at art. 157.

<sup>291</sup> *Id.*

<sup>292</sup> Omar Sial, *A Guide to the legal System of the Islamic Republic of Iran*, HAUSER GLOBAL LAW SCHOOL PROGRAM, (March 2006), <http://www.nyulawglobal.org/globalex/Iran.html>.

<sup>293</sup> ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION], 1368 [1989] (Iran).

<sup>294</sup> Anoushiravan Ehteshami, AFTER KHOMEINI: THE IRANIAN SECOND REPUBLIC, 41 (1995).

<sup>295</sup> *Id.* at 41.

<sup>296</sup> ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] 1368 [1989] (Iran), art. 109.

is a legal source, unlike the regular forms of *fatawa*.<sup>297</sup> Judges issue their judgements based on the codified law.<sup>298</sup> In the case of the absence of a legal rule, the judge must resort to “reputable Islamic sources, or religious rulings (*fatawa*).”<sup>299</sup> Hence, the concept of the *Faqih’s fatwa* is a unique aspect of the theory of *Wilayat Al-Faqih*.

As for the executive authority, the *Faqih* enjoys unlimited executive authorities. He is responsible for determining and supervising overall policies of the state.<sup>300</sup> The *Faqih* commanded the armed forces,<sup>301</sup> declared war,<sup>302</sup> issued referendums,<sup>303</sup> and coordinated the relationship among the three branches (executive, legislative, and judicial powers).<sup>304</sup> Furthermore, the *Faqih* holds unlimited appointment powers within various authorities in Iran.<sup>305</sup> One of the major appointment powers of the *Faqih* is to appoint the Jurists of the Guardian Council.<sup>306</sup> This Council is responsible for many aspects of the Iranian legal system.<sup>307</sup> The Council acts mainly as a guardian to the legislative authority to ensure its compliance with Islamic standards.<sup>308</sup> The Council is also responsible for the election of the legislative authority.<sup>309</sup> As a result, the *Faqih* monopolized the administration of the Islamic Republic of Iran.

The meaning of guardianship in Quran is exclusive to God and the Prophet in all religious matters.<sup>310</sup> The Prophet did not have a guardianship over the people, and Muslims in their daily life matters.<sup>311</sup> On the contrary, the Khomieni theory of *Wilayat al-Faqih* uses the term of *Wilayah* as guardianship of the *Faqih* over the people in state administration.<sup>312</sup> This portrays the authorities of the

<sup>297</sup> *Id.* at 167.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI, [AMENDMENT TO THE CONSTITUTION], 1368 [1989] (Iran), art. 110.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> See generally ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI, [AMENDMENT TO THE CONSTITUTION], 1368 [1989] (Iran).

<sup>308</sup> *Id.*, art. 94.

<sup>309</sup> *Id.*, art. 99.

<sup>310</sup> See QURAN, *Surat Al-Baqarah* 2:257. “God is the (wally) ally of those who believe. He brings them out from darkness into the light. And those who disbelieve – their allies are *Taghut*. They take them out of the light into darkness. Those are the companions of the Fire; they will abide eternally therein.” *Id.*

<sup>311</sup> See QURAN, *Surat Al-An'am* 6:107. “But if God had willed, they would not have associated. And We have not appointed you (O Muhammed) over them as a guardian, nor are you a manager over them.” *Id.*

<sup>312</sup> See generally ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI, [AMENDMENT TO THE

Faqih as the guardian of the People.<sup>313</sup> The unlimited executive authorities, the appointment of the higher judicial post, and guardianship council role over the legislative authority represent the philosophy of the Faqih as guardian over the people.<sup>314</sup> As a result, there are several discrepancies between the two theories of Wilayat Al Faqih, and Wilayat Al-Qadi.<sup>315</sup>

#### IV. THE DISTINCTION BETWEEN THE TWO THEORIES

There are five distinctions between *Wilayat Al Faqih*, and *Wilayat Al-Qadi*.

##### A. *The Legal Nature of the Leader*

While *Wilayat Al Faqih* sustains that the leader must be a Jurist (*Faqih*),<sup>316</sup> *Wilayat Al-Qadi* maintains that the leader must be a judge (*Qadi*).<sup>317</sup> The difference between *Faqih* and *Qadi* lays in four areas. First, every judge has to be a jurist, while not every jurist is a judge.<sup>318</sup> If the judge does not have the jurist's qualifications, the judge is not competent to hold a judicial position.<sup>319</sup> Second, while judges issue a binding judgement (*Hukm*), the jurist writes non-binding legal opinion (*Fatwa*).<sup>320</sup> Even though the *Faqih* in Iran issues *Fatwa*, it holds a secondary legal nature.<sup>321</sup> Third, judges deal with specific incidents, while jurists deal with abstract theories. Fourth, the judgement has a very limited purpose. It is only limited to specific lawsuits, except precedents of the Supreme Court. A jurist's legal opinion has unlimited purpose. Scholars, judges, and legislators can use it.

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CONSTITUTION], 1368 [1989] (Iran).

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> JOHN L. ESPOSITO AND JOHN O. VOLL, ISLAM AND DEMOCRACY 63 (1996)

<sup>317</sup> Abu Al Hassan, *supra* note 153.

<sup>318</sup> *Id.*

<sup>319</sup> Cherif Bassiouni & Badr, *supra* note 176 at 175.

<sup>320</sup> Abu Al Hassan, *supra* note 153.

<sup>321</sup> ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] 1368 [1989] (Iran), art.167:

The judge must try to base the verdict of each dispute on the codified laws. If his attempt fails, he should issue the verdict on the case by referring to reputable Islamic sources or religious rulings (fatwas). He cannot refrain from issuing a verdict under the pretext of silence, deficiency, brevity, or inconsistency in the laws[.]

*Qadi versus Faqih*

Aspects	Judge ( <i>Qadi</i> )	Jurist ( <i>Faqih</i> )
Person	Judge (has to be a scholar)	Scholar (not necessary a judge)
Outcome	Binding Judgements ( <i>Hukm</i> )	Non-Binding <i>Fatwas</i>
Scope	Cases	Incidents
Purposes of the Outcome	Limited purpose (exception: senior judges, precedent)	Unlimited purpose

*B. The Role of God in the Appointment of the Jurist, or the Judge*

According to *Wilayat al-Qadi*, the role of God is limited to the Prophet only.<sup>322</sup> No Muslim can claim a divine nomination to the position of the senior judge.<sup>323</sup> In *Wilayat al-Faqih*, the Twelver enjoy the same source of legitimacy from God, though the Twelver are in a lower status than the Prophet.<sup>324</sup> This does not extend a divine nature to any person beyond the Twelver, especially after the disappearance of the Imam Mohamed ibn Hasan (Al-Mahdi).<sup>325</sup> In the Iranian practice, the constitution gives the Leader/*Faqih* a popular legitimacy, which is not part of the theory.

*C. The Role of the People in Choosing the Faqih, or the Judge*

In *Wilayat Al-Qadi*, The Prophet got the Muslims' pledge either individually, or collectively (the pledge of *Aqaba*).<sup>326</sup> In theory, people are on an equal footing with the senior judge. The Prophet did not have any authority over the people, except what they were willing to offer.<sup>327</sup> As for the theory of

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<sup>322</sup> "And who is more unjust than one who invents a lie about God or says, 'It has been inspired to me,' while nothing has been inspired to him, and one who says, 'I will reveal [something] like what God revealed.'" QURAN, Surat Al-An'am 6:93; QURAN, Surat Al-Ahzab 33:39 States ("Muhammad is not the father of [any] one of your men, but [he is] the Messenger of God and last of the prophets[.]").

<sup>323</sup> QURAN, Surat Al-Nisa 3:65 ("But no, by your Lord, they will not [truly] believe until they make you, [O Muhammad], judge concerning that over which they dispute among themselves and then find within themselves no discomfort from what you have judged and submit in [full, willing] submission.").

<sup>324</sup> *Id.* at 143.

<sup>325</sup> *Id.*

<sup>326</sup> MOHAND MAHER GASSEM, *AL-QADA FI-AL-A'SAR AMAWYI*, 33-44 (2009).

<sup>327</sup> QURAN *Surat Al-A'la* 88:22-23 ("Remind, O Muhammad, your role is to remind the people, not control them.").

*Wilayat Al Faqih*, it does not recognize the pledge as a practice, as God already chose his Prophet and Twelver.<sup>328</sup> The people's pledge will not change this Islamic fact.<sup>329</sup> This leads the Iranian Constitution to set the *Faqih* and his delegates as real guardians over the people's will.<sup>330</sup>

#### D. The Judicial Authority of the Faqih and the Judge

While both theories give the *Faqih*/Judge judicial authority, he preserves the juristic nature of not dealing with cases. The Prophet used to issue judgements that are called *Sunna* (precedents for all Muslims).<sup>331</sup> Ali ibn Abi Talib (the first *Imam*) used to issue judgements.<sup>332</sup> His judgements, during the prophet's time, are considered a reliable source of precedents to all Muslims.<sup>333</sup>

#### E. The Executive Authority of the Faqih and the Judge

The senior judge enjoys very limited executive authorities over Muslims.<sup>334</sup> These authorities were military power,<sup>335</sup> the *Zakat* collection (the Islamic form of paying taxes),<sup>336</sup> and foreign affairs.<sup>337</sup> The theory of *Wilayat Al-Faqih* is not different from the *Wilayat Al-Qadi*. Nonetheless, the Iranian practice is different. The *Faqih* enjoys unlimited authorities. He is the supreme judge, the absolute executive and unrestrained policy maker.<sup>338</sup> Table 4 summarizes the difference between the theory of *Wilayat Al Faqih*, *Wilayat Al-Qadi*, and the Iranian practice of *Wilayat Al-Faqih*.

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<sup>328</sup> MOMEN, *supra* note 227.

<sup>329</sup> *Id.*

<sup>330</sup> ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] 1368 [1989] (Iran), art. 57.

<sup>331</sup> GASSEM, *supra* note 326.

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> Shams, *supra* note 6.

<sup>335</sup> QURAN, *Surat An-Nisa* 4:84.

<sup>336</sup> QURAN, *Surat At-Tawbah* 9:103 ("Take, [O, Muhammad], from their wealth a Sadaqah by which you purify them and cause them increase, and invoke [God 's blessings] upon them. Indeed, your invocations are reassurance for them. And God is Hearing and Knowing.").

<sup>337</sup> QURAN, *Surat Yunus* 10:2 ("Have the people been amazed that We revealed [revelation] to a man from among them, [saying], "Warn mankind and give good tidings to those who believe that they will have a [firm] precedence of honor with their Lord"? [But] the disbelievers say, "Indeed, this is an obvious magician.").

<sup>338</sup> *Id.*

IV. THE DISTINCTION BETWEEN *WILAYAT AL FAQIH* VERSUS *WILAYAT AL-QADI*

Aspects	Theory of <i>Wilayat Al-Qadi</i>	Theory of <i>Wilayat Al Faqih</i>	Iranian Practice of <i>Wilayat Al-Faqih</i>
Authority of Appointment of the Prophet	God and the People	God	-
Authority of Appointment of the Twelver	-	God	God
Authority of Appointment of Senior Judge	People	God	People
Authority of Senior Judge/ <i>Faqih</i>	Judge with Enumerated Executive Authorities	<i>Faqih</i> with Enumerated Executive Authorities	<i>Faqih</i> /Leader with non-Enumerated Executive Authorities
Judicial Authorities of the Senior Judge/ <i>Faqih</i>	Senior Judge	Senior Judge	Leader is the Supreme judge. However, he does not issue judgements. Instead, he issues <i>Fatwas</i>
Outcome of Decisions	Precedents	Precedents	Unbinding <i>Fatwas</i> that come third in hierarchy of law sources
Independence	Independent Judge	Independent <i>Faqih</i>	Independent Leader

## CONCLUSION

This Article refines the theory of judicial power in Islam. This research uses the two major Islamic sources, which are the Quran and *Sunna*. The theory of judicial power in Islam is based on three assumptions. These assumptions are

the legal nature of the Prophet as a Supreme Judge, the prophet's caution to hold a judicial position, and that people are the ultimate source of the judges' legitimacy with only one exception: the Prophet. Additionally, the Islamic theory of judicial power has three core elements. First, the appointment process is a cornerstone in the Islamic jurisprudence. The Islamic theory is based on the concept of 'prevention is better than cure.' Major thrust is given to the method of choosing the supreme/senior judge or council.

Judges get their legitimacy directly from the people. They are similar to the executive, and the legislative authorities. Second, Islam has indicated a clear divide between inappropriate interference in judicial matter on one hand, and the mandate on judges to seek the help of experts. The Prophet used to ask his friends about new issues that he possessed no experience about. Third, while Islam gives little emphasis on judicial accountability, it recognizes the accountability of all public officials, including judges.