

ISLAMIC LAW OF PROCEDURE: An Analysis of *Kitâb al-Qâdhî ila al-Qâdhî* in Islamic Legal Literature

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Abstract: It has been commonly accepted amongst some scholars that Islamic law lacks of procedure and that it had indebted greatly to the system known in the secular system of law. This essay attempts to analyze the origin of the idea of the law procedure by tracing the very early concept found in the genre of *Kitâb al-Qâdhî ilâ al-Qâdhî* (a letter form one judge to another judge) incorporated in the legal literature of *fuqahâ'* or Islamic jurists. The study is a qualitative research by in depth analysis on legal materials on the letter of a judge to another judge found in the works of various Islamic law scholars. The finding of this study implies that despite the over-simplification of some scholars on the Islamic law of evidence, there exist a very complex discussion of the issue in the works of Islamic law scholars. It is conceivable to assert that this historical record of law of evidence in Islam had become an integral part of the social and legal practices of the early time that could be regarded as the early inception of law of evidence in Islam.

Keywords: Islamic law, procedure, evidence, documentary, legal history

Introduction

The debate on the existence of Islamic law of procedure has become one of the most interesting issue in the legal discourse (Syahnan, 1995). On the main, the primary reason for this since Islamic law is God given and ordained from the Command of God as enshrines in the Holy Qur'an and the Prophetic Traditions, it lacks of *modus operandi* as a guideline how to operate the written law in the real life of the Muslim society (Hallaq, 1995; Schacht, 1964). It is undeniable that apart from numerous contemporary studies and researches, medieval Muslim legal scholars wrote a number of treatises on the administration of justice (Humphreys, 1991). The discussion on *Kitâb al-qâdhî ilâ al-qâdhî* is treated primarily in the realm of *Adab al-Qâdhî* genre. Of the numerous *ouvres* on the issue, the most important of those worthy of mentioning are the works of Abi Muḥammad Maḥmûd b. Aḥmad al-'Aini, *Al-Binayah fi Sharh al-Hidayah* (Beirut: Dâr al-Fikr, 1990), 40-65; Aḥmad b. 'Amr al-Khassâf, *Âdâb al-Qâdhî*, with a commentary by Aḥmad b. 'Ali al-Jassâs. Ed. Farhat Ziadeh (Cairo, 1400/1979), 409-449; Abi al-Ḥasan 'Ali b. Muḥammad b. Ḥabl b. al-Mawardi, *Âdâb al-Qâdhî*. Ed. Muhyi Hilal al-Sarhan (Baghdad: Ri'asat Diwan al-Awqaf, 1392/1972), 89-169. Given the extensive discussion on the issue of *Kitâb al-qâdhî ilâ al-qâdhî* genre in the works of the jurists, this essay will primarily focuses on the works of al-Mawardi and al-Khassaf, representing the Shâfi'i and the Hanifa school of legal thought respectively. While looking at similarities and differences of the views and practice recorded in individual scholar, the dynamics of the administration of justice will also be analyzed. The primary reason of taking these two distinctive groups of scholars into the object of discussion is because the former being in support of the *qâdhî*'s letter as an evidence in the proof, whereas the latter is against the view of the former.

The Nature of the Letter

In Islamic law, the discussion of a letter of one *qâdhî* to another *qâdhî* is treated mainly in connection with the discussion of the witnesses (*shahâdah*) since written testimony never could by itself make and meet the requirement as proof. As such this is the reason why all legal documents, whether private or

notarized, also had to be witnessed by at least two persons, and judgement too had to be witnessed (Khadduri & Liebesny, 1955; Wakin, 1972). In order to define the term letter in the perspective of legal document, it is important to establish the difference between “a record” and “a *qâdhî*’s letter”. In the situation where witnesses exhibit evidence against a defendant before a *qâdhî* and the subject of the suit being absent, the *qâdhî* may pass a decree or legal ruling upon such testimony, because it establishes proof. This decree is in the written down formula which is then termed a *sijil* or judicial record, and is not considered the letter of one *qâdhî* to another (Ziadeh, 1979; al-‘Ain, 1990).

However, if the evidence is given in the absence of the defendants, the *qâdhî* must not pass a decree, as it is unlawful to do so in the absence of the person whom it affects. He must take down the evidence in writing, in order that the *qâdhî* to whom such writing shall be addressed may use it as evidence. This writing is termed *Kitâb al-hukm*, or the letter from one *qâdhî* to another, and is a transcript of real evidence (Hallaq, 1990).

The Basis for Writing the Letter

The basis for this understanding of the *qâdhî*’s letter subject matter is that the *Kitâb* (al-Qur’an) represents the address (*khitâb*) of God to the Prophet regarding commands, prohibitions and other matters. Similarly, the message from the Prophet to his *ummah* and to the kings in Persia and the Roman emperor represent his address to them. Based on this, al-Khassaf argues that the letter from one *qâdhî* to another should stand as the address of one to another, on the grounds that they have testified against such and such a thing, and thus based on this it is acceptable valid to become as evidence (Al-Khassaf, 1979).

The same position is taken by al-Mawardi, but in a more elaborate manner. To support his argument, he uses the verse of the Qur’an which mentions the letter of Solomon to the queen of Bilqis. Al-Mawardi, points out to Qur’an that reads “Go thou, with this letter of mine, and deliver it to them, then draw back from them, and (wait to) see what answer they return,” (The Queen) said:

Ye chiefs! Here is-delivered to me a letter worthy of respect. "It is from Solomon, and is (As follows): in the name of Allah, Most Gracious, Most Merciful. Be ye not arrogant against me, but come to me in submission (to the true religion) (the English translation of Qur'anic text is adapted from Ministry of Hajj and Endowment, the KSA. 1410 H.). In his letter, according to exegetes, Solomon expressively starts with distinctive description and approach of the true and universal religion unity, calling for the true faith the new people with whom he establishes honorable relations, solely for the purpose of spreading of the Light of Allah rather than for worldly conquest. This letter is the first to begin with "in the Name of Allah" *bismillâhi al-rahmâni al-rahîm*. After the verse was revealed to the Prophet, he begins his letter with *bismillâh* (al-Mawardi, 1972).

In addition, to support his argument further, al-Mawardi also points out to the circumstances in which the Prophet Muhammad pbh. wrote to such rulers and kings as Heraclius, the Roman Emperor, the Kings of Iran, Negus, the King of Abyssinia and the King of Egypt inviting them to submit in the oneness of God and that the Prophet Muhammad is His messenger. This plan was put into effect upon his return from Hudaibiyah agreement that underpinned for spreading the universal teaching he brought. Envoys of the Prophet were also sent to several Chiefs like Munzhir Taimi of Bahrain, Chief of Yamama, Chief of Hadrami tribe as well as to Governors and also 'Amr ibn Hazm concerning zakat and *diyât* (blood money). Similarly, *Khulafâ' al-Rashidûn* wrote to their administrators and *qâdhîs* on matters of religion and politics, social (al-Mawardi, 1972). It is worthy of note that as previously stated above, all letters of the Prophet always begin with "In the name of Allah, the Gracious, the Merciful" which then followed by identification of the sender of letter and to whom it is addressed. The primary message of the letter was thoroughly delivered in the main body as well as the consequences inherent there in. It is also important to note that those letters marked the beginning of the use of a seal attached on which engraved the words "Muhammad Rasûlullâh." Thanks to the companion who are familiar with the customs and traditions practiced in their contemporary courts of kings and told the Prophet that any letters that did not bear the seal of the senders would not be entertained. These traditions justify the acceptance

of judicial letters, and the exigencies/necessities of the arbitrator is required in order to protect rights.

In contrast to al-Mâwardî, al-Marghinânî maintains that the basis for the writing is the necessity (*hâjah*) of the community, and he make no elaboration what so ever on this matter (al-'Aini, 1990). On the whole, however, their views perceive the same outcome as that extracted from the analogy.

Conditions of the Transmissibility of the Letter

It is important to note that the transmission of letters from one *qâdhî* to another is restricted to several conditions, and that the legality of it is on the principle of necessity, since it may be impossible for the plaintiff to bring the defendant and the evidence together in one place. Therefore, the letter of one *qâdhî* to another is, as it were, the evidence of evidence (*al-shahâdah 'alâ al-shahâdah*), like the branch of a tree, as a brunch from the trunk. With regard to rights (*hukuk*) in relation to *qadfs* letter, al-Marghinani maintains that the term right debts, and also marriage dowers, portions of the heirs usurpation's, contested deposits, or *mudaraba* stock denied by the manager (al-'Aini, 1970) because all these are equivalent to debt, and capable of ascertainment by description, without the necessity of actual exhibition.

Letters from one *qâdhî* to another are also admissible in the case of immovable property, because it is capable of ascertainment by a description of its boundaries. However, they are not admissible in regard to movable property (al-'Aini, 1970) because in that case, there is a necessity for actual exhibition. It is ascribed to the opinion held by Abu Yusuf, that letters from one *qâdhî* to another are admissible with respect to a male slave, but not with respect to a female slave, because the probability of escape is stronger in the former than in the latter, it is also related to his opinion that they are admissible with respect to both male and female slaves, but the particular conditions are necessary to establish their admissibility. It is related as/a opinion of Muhammad, that the letters of a *qâdhî* are admissible with respect to every species of movable property, an

opinion which has been adopted by later jurists (al-'Ainî, 1970; Ziadeh in ed. Heer, 1990).

The Testimony Necessary for Authentication

Integrity (*'adâlah*) is a condition for a witness to give his/her testimony. The letters of *qâdhîs* are not admissible unless authenticated by the testimony of two male witnesses, with the possible substitution of two females for one male witness (Ziadeh in ed. Heer, 1990) because there is a similarity between all letters, and it is therefore necessary to establish their authenticity by complete proof, that is by evidence. The basis for evidence that these letters are binding in their nature and therefore it is necessary that their validity is pre-conditionally to be verified. Thus, it is not admissible with respect to the message of a *qâdhî* to a perjurer of a witness, or with respect to a perjured message to the *qâdhî*, for such messages have no binding force, being considered as a forged message and are merely corroboration to the testimony of witnesses.

The Contents must be Previously Explained to the Authenticating Witnesses

It is incumbent on the *qâdhî* to read his letter in the presence of the witnesses who are to authenticate it, or to explain the contents of it to them, in order that they may have a knowledge of it; this is because evidence cannot be given without knowledge. When finished he must close the letter, and affix his seal to it in their presence, and then consign it to them. They are then assured that there can be no possibility of alteration of the contents of it. This is according to Abu Hanifa and Muhammad (al-'Ainî: 1990). The reason is, that a knowledge of the subject of the letter, and evidence of the affixture of the seal, are indispensable requisites. In the same manner, a remembrance of the contents is also requisite; when this is so, the *qâdhî* must furnish them with an open copy of the letter, which they may use to refresh their memories.

It is, however, related as the contrast opinion of Abu Yusuf that none of these particulars is required; it is being sufficient to attest that this is the letter and this the seal of the *qâdhî*, and it is also reported that the affixture of the

seal is not necessary (al-'Ainî: 1990). Hence, it appears that, after attaining the dignity of the *qâdhî*, he considered this matter of little consequence; his opinions are of great weight, since those that only hear are not as competent to determine as those who see.

When a letter from the *qâdhî* arrives, the *qâdhî* to whom it is addressed ought not to receive it unless he is in the presence of the defendant. Since such letter is equivalent to an exhibition of evidence, the presence of the defendant is therefore indispensable. The other *qâdhîs* hearing of the evidence, was done merely with a view to transmit it and not pass execution upon it.

Forms to be Observed in the Reception of the Letter

According to Abu Hanifa and Muhammad, when the witness brings the letter to the *qâdhî* to whom it is addressed, the *qâdhî* must first look at the seal and after hearing testimony that this is the letter of a particular *qâdhî*. The witness then deliver the letter to them in his court of judgment, and read that he read it in their presence, and his seal affixed to it before them. He then should open and read it in the presence of the defendant, and pass a decree on the contents. Abu Yusuf, however, maintains that it is sufficient for the witnesses to attest that "this the letter and the seal of such a good condition (al-'Ainî: 1990).

In contrast to Abû Yûsuf, al-Khassâf argues that the proof of the integrity of the witnesses (al-'Ainî: 1990) prior to the opening of the letter is made a condition. There may eventually be a necessity to recur to other evidence. In case of a lack of proof as to the integrity of those who brought it, it would be impossible for any others to give their testimony unless the seal still remained intact. Thus, it is absolutely necessary for the *qâdhî* to refrain from breaking the seal of the letter until the integrity of the bearers is proven.

Another condition for the admissibility of the transfer of the *qâdhî's* letter is that the *qâdhî* that wrote it was, at the time, still in office (al-Mâwardî: 1972; al-'Ainî: 1990). In circumstances where prior to the acceptance of the letter, the *qâdhî* who wrote it may have been dismissed from his office, or

disqualified from the duties of if (from apostasy or insanity, or from having suffered punishment for slander), the *qâdhî* to whom the letter is addressed must then reject it; because the author of it has been reduced to the level of the common people. Any information from him is not admissible.

Likewise, if the *qâdhî* to whom the letter is addressed has died, another *qâdhî* must not open it, unless the address includes the phrase “to the son of ... *qâdhî* of the city of...,” or “to whatever *qâdhî* it may concern this letter” in which case another *qâdhî* may receive it, because he is identified in the address from the specification of his office and city. If the address, however, be merely, “To whatever *qâdhî* it may concern,” he is not entitled to open it, from the uncertainty of the address. If the defendant dies before the arrival of the letter to the *qâdhî*, judgment must be passed upon it in presence of his heir.

Al-Mawardi maintains that there is a divergence of opinions of the jurists as to the validity of the letter if the *qâdhî* writing it either dies or is suspended. According to Shafiite school his letter is still valid and therefore it is obligatory to accept it. However, Hanafite scholars hold that the change of the state of the writing *qâdhî* caused his letter to become null and void regardless of the time that the letter was issued. If his state changed prior to the time the letter was issued, it is considered void, but if the change happened after issuing the letter, the letter is still valid (Ziadeh, 1979).

It appears that their differences lie on the fact that they see the function of the proof. Abu Hanifa treats the letter for the ruling of secondary (*far'*), regarding the *qâdhî* as a person giving testimony. Whereas, al-Shâfi'i treats it as the ruling of primary (*ashl*) (Al-Mawardi, 1972), considering the *qâdhî* as the person who testified the letter for himself. A letter from one *qâdhî* to another is not valid in cases of retaliation or punishment, in such a letter there exists a semblance of substitution (al-'Ainî: 1990; Ziadeh: 1990) for the letter is not itself evidence but merely a substitute for evidence). It is therefore equivalent to evidence upon evidence; as secondary testimony (*shahada ala al-shahada*) is not admitted in these cases, the letter of the *qâdhî* cannot be admitted.

Conclusion

From the discussion above some conclusion and implication can be drawn. In the Islamic legal history of procedure specifically on evidence, communication of the *qâdhîs* of different locale in what is the popularly known in the ouvres of the Islamic jurists as *Kitâb al-qâdhî ila al-qâdhî* represent the dynamics of academia and practice of the 10th and 11th century Islam. On the one hand, al-Khassâf admitted the letter as the proof in adjudication, while Hanafite rejected the letter to be as proof but rather it has to be authenticated by witnesses. It seems that their contrasting views stem from different platform on which they stand in looking at *Kitâb al-qâdhî ila al-qâdhî* with the spectrum of the function of the proof. While Abu Hanifa treats the letter for the ruling of secondary (*far'*), regarding the *qâdhî* as a person giving testimony, on the contrary al-Shâfi'i treats it as the ruling of primary (*ashl*). Nonetheless only by understanding the law of Islam and the legal structure of its institutions, can we better appreciate the classical structure of Islamic society and on how that society perceives itself.

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