

# Admissibility conditions of a constitutional suit in the Islamic judicial system

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## ABSTRACT

A constitutional Suit, like any other Suit, must satisfy certain conditions, and while there are common and general conditions applicable to all types of Suits, there are special conditions that are only relevant to a constitutional Suit due to its special nature. Therefore, this article covers the admissibility conditions of a constitutional Suit in the Islamic judicial system. This article will analyse these conditions in the Islamic judicial system. Furthermore, there are a number of requirements that a plaintiff must establish in order to have standing before courts in the Islamic system, namely, capacity, actuality of plea, and condition of interest.

*Keywords:* constitutional Suit, admissibility condition, capacity, standing, actuality of plea, condition of interest, Islamic judicial system

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## INTRODUCTION

A constitutional Suit, like any other Suit, must satisfy certain conditions. Hence, there are common and general conditions applicable to all types of Suits, and special conditions that are only relevant to a constitutional Suit due to its special nature. Therefore, the main question is: Does the Islamic judicial system recognise the conditions of a constitutional Suit in their present form? To propose an answer to this, the potentiality and availability of the conditions of a constitutional Suit in the Islamic judicial system and civilisation will be studied to determine the most important applications that have taken place in history. This article is limited to the study of the conditions of a constitutional Suit under the Islamic judicial system within Sunni Islamic jurisprudence schools which are the: Hanafi, Hanbali, Shafi'i and Maliki Schools. Judicial judgments and events that took place in Islamic history will also be studied, particularly those during the time of Prophet Muhammad (622–632 C.E.), the Pious Caliphs (632–661), the Umayyad (661–750), 'Abbasids (750–1258), the Ayyubid dynasty (1169–1252) and the Ottoman period (1517–1921). Historical and analytical descriptive methods of study were used to analyse the conditions of a constitutional Suit in Islamic legal systems. The author relied on thematic interpretation, which focuses on understanding the *Qur'an* as thematic units that can be gathered and understood by examining the studied theme throughout the text. The *Qur'an* has a comprehensive view that cannot be grasped through partial readings but rather through thorough investigation of the whole verses related to a certain subject or theme.

## CONDITIONS OF CAPACITY AND STANDING IN THE ISLAMIC SYSTEM

### CONDITION OF CAPACITY

A suit that is filed by a minor<sup>1</sup> himself shall not be accepted, and it shall not be accepted if filed by anyone who has incomplete or defective capacity due to infancy, imbecility, prodigality, or lunacy.<sup>2</sup> In such circumstances, the suit should be filed by the person supervising the incompetent, such as the guardian or custodian, and the same condition applies to the incompetent defendant. The minor may not stand as a litigant until he is proved competent (of full legal capacity).<sup>3</sup> Therefore, soundness of mind is a prerequisite, and this condition is also agreed upon, based on the narration of the Prophet (P.B.U.H.) who said "The Suits of three persons are not recorded (by the Angels): a sleeping person until he is awake, a child until he comes of age and a mad man until he becomes normal."<sup>4</sup>

Capacity to litigate is where the plaintiff and the defendant have the capacity to face the Suit filed by the former against the latter, meaning that each of the litigants should have reached the legal age<sup>5</sup> provided for by the law and jurisprudence. They should also possess full mental capability and must not be declared legally incompetent.<sup>6</sup>

A person is presumed to be of full capacity and mental competency, but if the court notices that the plaintiff or the defendant is in an unusual state, then this matter should be verified through a

<sup>1</sup>Minor: An infant or person who is under the age of legal competence. A term derived from civil law, which describes a person under a certain age as less than so many years. In most states, a person is no longer a minor after reaching the age of 18 (though state laws might still prohibit certain acts until reaching a greater age; e.g., purchase of liquor). Also of less consideration; a person of inferior condition.

<sup>2</sup>Al-Majalla Al Ahkam Al Adliyyah [The Compilation of Principles of Justice], Book Xiii. Admissions. Chapter I. Conditions Governing Admissions. Article 1573.

<sup>3</sup>Abd Allah ibn Ahmad al-Nasafi, *al-Bahr al-Ra'iq: Sharh Kanz al-Daqa'iq* [The Clear Sea in the Commentary on the Treasure of Minutiae], vol. 7 (Cairo: Matba'at Dar al-Kutub al-'Arabiyyah al-Kubra, 1333 H.) at 191. "Kanz contains a tremendous treasure of concise and summarized Fiqhi information, collected like water in the sea." See also, Muhammad ibn Faramuz ibn 'Ali Khusraw, *al-Durrar al-hukkam fi Sharh Ghurrar al-ahkam* [The perfect pearls in explaining ambiguous provisions] vol. 2, (Cairo: Dar al-Sa'adah, (n.d.)), at 330.

<sup>4</sup>Al-Bayhaqi, Ahmad ibn al-Husayn, *al-Sunan al-Kubra* [The Grand Sunan], vol. 10, Hadith no. 16988, (Beirut: Dar al-Fikr, 1980) at 161. Al-Sunan al-Kubra commonly known as Sunan al-Bayhaqi.

<sup>5</sup>Legal age or codified age refers to age at which a person may legally engage in a certain activity. Most frequently, this is the age of majority, the threshold of adulthood as recognized in law.

<sup>6</sup>Abd al-Wahhab Khallaf, *Ilm Usul al-Fiqh wa Khulasat Tarakh al-Tashri al-Islami* [Science of jurisprudence and summary of Islamic legislation history], (Dar al-fikr al-'arabi, 1995) at 127. See also, Muhammad Na'im Yasin, *Nadariyyat al-Da'wa: Bayn al-Shari'ah al-Islamiyyah wa qanun al-murafa'at al-madaniyyah wa al-tijariyyah* [Theory of Suit: Statement of Islamic law and the law of civil and commercial proceedings] (Amman: Dar al-Nafa'is, 2<sup>nd</sup> ed., 2000) at 274.

report of an expert witness (specialist doctor), substantiated by his testimony. If the court finds that litigation by this litigant is not permissible, then it should seek to find out whether the said litigant has a guardian before appointing one for him to litigate on his behalf.<sup>7</sup>

This has been provided for in Article 1616 of the *Mejelle* (Ottoman Civil Code),<sup>8</sup> which states that “The plaintiff and the defendant must be of sound mind. A lunatic and a minor of imperfect understanding<sup>9</sup> may not validly bring a Suit. Their tutors and guardians may act on their behalf in their capacity of plaintiff and defendant.”<sup>10</sup>

### CONDITION OF STANDING<sup>11</sup>

This condition has been defined as “the condition which shows the pertinence of the suit to a particular person, or the existence of an authority for the filing of the suit by a particular person.”<sup>12</sup>

The condition of standing is realised, with regards to the plaintiff, by the filing of the suit by the person who has the right to litigate. This situation would differ where the suit is related to the rights of worshippers or to the right of Allah (S.W.T.). Where the suit is related to the right of a worshipper (man), then the litigator may, by himself, file the suit, or do so through his agent, guardian, custodian, successor or any other person who has the capacity to do so on his behalf and in a legal manner.<sup>13</sup> But, if the suit is related to the rights of Allah (S.W.T.), rights which are contemporarily called public rights or public legal rights, then, any person may file the suit in such standing or capacity. This is regarded as “*amr bi al-ma'ruf wa-nahi 'an al-munkar*,”<sup>14</sup> on the basis of the revelation of Allah (S.W.T.), and called *hisbah* (the Suit or suit) in Islamic law.

The *hisbah* is an institution of the spiritual order directed in the prime of Islam by the heads of the community themselves, and its duty includes enforcing what is legally right (*ma'ruf*) and preventing illegality (*munkar*).<sup>15</sup> The head of the community is only invested with the right of appointing to the office. The overseer of the market (*muhtasib*) must be Muslim, free, of full age<sup>16</sup>

<sup>7</sup>Abd Allah ibn Ahmad Al-Nasafi, *supra* note 3 at 191; *See also*, Muhammad ibn Faramuz ibn 'Ali Khusraw, *supra* note 3 at 330.

<sup>8</sup>The Mecelle (also transliterated *Mejelle*, *Majalla* from Arabic Al-Majalla Al Ahkam Al Adliyyah) was the civil code of the Ottoman Empire in the late nineteenth and early twentieth centuries. It was the first attempt to codify a part of the Sharia-based law of an Islamic state. The code was prepared by a commission headed by Ahmet Cevdet Pasha, issued in sixteen volumes (containing 1,851 articles) from 1869 to 1876 and entered into force in the year 1877. In its structure and approach it was clearly influenced by the earlier European codifications. Covering most areas of civil law, it exempted family law, which remained a domain of religious law. The substance of the code was based on the Hanafi legal tradition that enjoyed official status in the Empire, put into European code-form. However, using the method of preference (*tahayyur*), it also incorporated other legal opinions that were considered more appropriate to the time, including from non-Hanafis.

<sup>9</sup>Al-Majalla Al Ahkam Al Adliyyah, *supra* note 2, which states:

“In order to be able to make a valid admission, a person must be of sound mind and have arrived at the age of puberty. Consequently, an admission by a minor, or a lunatic or an imbecile, whether male or female, is invalid. An admission made against such persons by their tutors or guardians is equally invalid. A minor, however, who is of perfect understanding and has been authorised is regarded as a person who has reached the age of puberty in respect to all acts performed by him which he has been authorised to do”.

<sup>10</sup>Charles A. Hooper, *The Civil Law of Palestine and Trans-Jordan*, vol. 1, (Jerusalem: Azriel Printing Words, 1933).

<sup>11</sup>In law, standing or *locus standi* is the term for the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case. While the law of evidence encompasses the rules and legal principles that govern the proof of facts in a legal proceeding. These rules determine what evidence must or must not be considered by the trier of fact in reaching its decision and, sometimes, the weight that may be given to that evidence. The law of evidence is also concerned with the quantum (amount), quality, and type of proof needed to prevail in litigation.

<sup>12</sup>Muhammad Na'im Yasin, *Nadariyyat al-Da'wa: Bayn al-Shari'ah al-Islamiyyah wa qanun al-murafa'at al-madaniyyah wa al-tijariyyah* [Theory of Suit: Statement of Islamic law and the law of civil and commercial proceedings] (Amman: Dar al-Nafa'is, 2<sup>nd</sup> ed., 2000) at 278.

<sup>13</sup>*Id.*

<sup>14</sup>*Qur'an*, 3:104.

<sup>15</sup>Ibn Taymiyyah, Ahmad ibn 'Abd al-Halim, *al-Hisbah fi al-Islam* [al-Hisbah in Islam], (Beirut: Dar al-Katib al-'Arabi, 2004) at 30-35. *See also*, Al-Mawardi, *Al-ahkam al-sultaniyyah wa al-wilayat al-diniyyah* [The Ordinances of Government] (Cairo: Matba'at Mustafa al-Halabi, 1973) at 299-314.

<sup>16</sup>Definition of full age: mature age or legal majority; *specifically*: the time of life at which one attains full personal rights and capacities, which under common law is attained upon the last day of completing 21 years or specifically on the first instant of the day preceding the 21st birthday and under civil law is attained upon completing 25 years, and which in some states is attained by women upon completing 18 years.

and understanding, competent to act as a witness (*ʿAdl*), in possession of all his faculties and be capable of *ijtihad* (brainstorming process) in matters of *ʿUrf* (custom) but not in those of *Shariʿah*.<sup>17</sup>

The duties of the *muhtasib* were divided among the *muhtasib* himself, the judge of the court of the first order (*qadi*) and the judge of the Supreme Court or Judge of Grievances (*Sahib al-dar fi ʿal-Madalim*).<sup>18</sup> The judge had to deal with religious cases in general, the *muhtasib* with cases connected with public order, and sometimes with charges which demanded immediate decision, and the Judge of Grievances with cases in which the judge and the *muhtasib* were incompetent.<sup>19</sup>

The functions of the judge and *muhtasib* were sometimes combined and confided to one person, despite the differences between the significant duties of each of these dignitaries. This was due to the fact that the work of the judge was based upon investigation and deliberate Suit, while those the *muhtasib* relied on demanded prompt decision.<sup>20</sup> Hence, if a person hears another divorcing his wife three times, and finds that that person is living with the divorcee in matrimonial life, then he and everyone who heard that man may go to court and litigate for the public right, because the continuance of the matrimonial life after the occurrence of irrevocable divorce is prohibited and related to a right of Allah (S.W.T.). The suit in this case is filed as a *hisbah*.<sup>21</sup>

There is an issue when the rights of God and rights of men are combined, but the latter preponderate.<sup>22</sup> Retaliation<sup>23</sup> (*qisas*), which is the punishment for wilful homicide or voluntary hurt, is a right which illustrates this. The enforcement of retaliation prevents violation of law and order and breach of the peace and promotes protection of human life, as Allah says: “And there is (saving of) life for in retaliation, O men of understanding, that you may restrain yourself.”<sup>24</sup>

The right of an individual or private right to retribution arises from the fact that the offence causes loss and sorrow to the heirs of the person killed in the case of homicide, and it causes pain and injury to the person injured. This punishment is designed to console and conciliate the aggrieved party, and in doing so protects the right of the individual. The heirs of a murdered person have the right to pardon the offender or accept blood money, and any punishment is inflicted with their consent.<sup>25</sup>

The Suit of *hisbah* is referred to at this juncture in order to distinguish between it and a constitutional Suit, especially because either Suits or suits have a substantive nature. The defendant would have capacity where he is a principal or an agent such as an attorney, guardian, custodian, heir or any universal successor as prescribed by law. The acceptance of the litigation by the guardian or custodian of a minor is considered an exception from the general rule, and thus the acknowledgement of the custodian or guardian would not have full effect as to what is under his guardianship.<sup>26</sup>

Finally, the defendant must be capable of filing the suit himself, as in being capable of the absolute disposition of whatever he claims, whether for his own benefit or for the benefit of any other person over whom he has guardianship or power of agency, and this requires that the defendant should abide by the rules of the *Shariʿah*.

In summary, the condition of capacity is essential and a prerequisite for both the plaintiff and the defendant when filing a suit. In other words, the suit must be brought by a person with capacity against another person with capacity.

<sup>17</sup>Ibn al-Ukhuwah, Muhammad ibn Muhammad ibn Ahmad Abi Zayd al-Qurashi, *Maʿilim al-Qurbah fi Ahkam al-Hisbah* [Rules of accountability and public duties] (Beirut: Dar al-Kutub al-ʿIlmiyah, 2001) at 13–20.

<sup>18</sup>Al-Mawardi, *supra* note 15.

<sup>19</sup>Ibn Tayyimiyyah, Ahmad ibn ʿAbd al-Halim, *supra* note 15; See also, Al-Mawardi, *supra* note 15.

<sup>20</sup>*Id.*

<sup>21</sup>Al-Mawardi, *supra* note 15.

<sup>22</sup>Al-Mawardi, *supra* note 15, at 303–305.

<sup>23</sup>Retaliation: to do something in response to an action done to oneself or an associate, especially to attack or injure someone as a response to a hurtful action.

<sup>24</sup>*Qurʿan*, 2:179.

<sup>25</sup>*Id.*

<sup>26</sup>Al-Mawardi, *supra* note 15, at 303–305.

## CONDITION OF ACTUALITY OF PLEA

There must be an actual dispute between the litigants to the dispute. Thus, if there were no actual dispute or litigation, then the Suit would not be valid and may not be accepted.

## CONDITION OF ACTUALITY OF PLEA IN THE ISLAMIC SYSTEM

The *Shari'ah* requires the existence of a number of general and fundamental conditions for the acceptance of suits. These conditions must be present in any suit brought before the judiciary as the suit cannot be accepted or heard without them.

If there were no actual dispute or litigation, but rather a quarrel between the litigants, which is considered an apparent quarrel with the intention to deceive, get to the judiciary, and achieve a goal that is outside the subject of the suit, then the suit would not be valid and may not be accepted.<sup>27</sup>

Therefore, the Islamic system<sup>28</sup> is not different from the positive law systems<sup>29</sup> in requiring the presence of an actual dispute or an actuality of the plea for a constitutional suit or any other suit to be accepted.<sup>30</sup>

Some jurists require that the statements and expressions of the suit be assertive, definite and incapable of being doubted. Thus they do not consider the suit as being valid if there is a possibility of doubt or suspicion and cause the judge to fall into a state of mere illusion. Imam Ja'far al-Sadiq also emphasised this point by stating that the suit would not be heard if the subject of the dispute was probable or assumed.<sup>31</sup>

In addition, the Maliki jurists have asserted that one of the conditions of the suit is that it should be of legal value, as a suit is not valid when its value is insignificant because no legal benefit can follow from it.<sup>32</sup> Therefore, the suit must be fruitful and necessary, and it would not be heard if it were unfruitful, such as in the case where two persons dispute over the size of the earth or the sun.<sup>33</sup>

It may be understood from this condition that no value is given to a suit which lacks significant or considerable result or one which aims at wasting time or which is of no avail. The *Shari'ah* requires this condition in order to prevent individuals the chance from flooding the court with malicious or unreal suits which could have dangerous repercussions, since they disrupt the work and function of the court from hearing actual suits and disputes between individuals. When such acts obstruct and delay the course of justice in the Islamic system, the result is a loss of the rights and interests of individuals, and the judicial system in the Islamic State is threatened and endangered, resulting in the spread of corruption, bribery and the destruction of morals and values.

For these reasons, this condition is considered important in order to preserve justice and the judiciary, and their development, through the settlement of disputes and suits without delay, and to give the people their respective rights, helping to safeguard the system and spread the principle of equality among all individuals in the state.

If this condition is considered fundamental with regards to litigation before the normal judiciary, it would, *a fortiori*,<sup>34</sup> be required and provided for in the constitutional judiciary, which is considered more crucial than the normal judiciary with regards to its effects. This is because a

<sup>27</sup>*Id.* at 421.

<sup>28</sup>Mohamed S. El-Awa, *On the Political System of the Islamic State* (Indiana: American Trust Publications, 1993) 97–112.

<sup>29</sup>The concept of positive law is distinct from “natural law,” which comprises inherent rights, conferred not by act of legislation but by “‘God, nature or reason.’ Positive law is also described as the law that applies at a certain time (present or past) at a certain place, consisting of statutory law, and case law as far as it is binding.” More specifically, positive law may be characterized as “law actually and specifically enacted or adopted by proper authority for the government of an organized jural society.”

<sup>30</sup>T.W. Arnold, *The Preaching of Islam: A History of the Propagation of the Muslim Faith*, (London: Constable & Company Ltd., 2<sup>nd</sup> ed., 1913) 423.

<sup>31</sup>Muhammad Jawad Maghniyah, *Fiqh al-Imam Ja'far al-Sadiq*, [The Jurisprudence of Imam Jafar Sadiq] vol. 6 (Beirut: Dar al-Jawad, 5<sup>th</sup> ed., 1984) at 77–80.

<sup>32</sup>*Id.*

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

<sup>34</sup>Definition of *Fortiori*: An *a fortiori* argument is an “argument from a yet stronger reason.” (The phrase *a fortiori* is Latin for “from (something) stronger”). See James Morwood, *A Dictionary of Latin Words and Phrases*. (Oxford: Oxford University Press, 1998) pp. x–xii.

dispute under the constitutional judiciary is related to, and connected with, various texts, whether constitutional, legislative, regulatory or relating to orders, which are in contravention of texts from the *Qur'an*, *Sunnah*, the Consensus, or the Islamic legal principles or goals. Therefore, the results, effects or consequences in this situation would be more serious and crucial, not only with regards to the rights and freedom of individuals, but also the principles of the *Shari'ah* itself (*Maqasid al-Shari'ah*).

It must also be noted that there is a connection between the condition of interest and the condition of actual dispute (actuality of the plea), as it is settled and established that the petitioner should have a direct, personal and actual interest in order to implement the judicial control over the constitutionality of law.

### CONDITION OF INTEREST

Interest is the origin of the Suit and its main pillar. Thus some jurists have stated that where the interest is absent there would be no Suit, and that the interest is the cause or source of the Suit. Some also consider interest as the only condition for accepting a suit, while the other conditions stated by jurists are merely forms of interest.

### POSSIBLE OR PROBABLE INTEREST

The principle in normal suits is the condition that the person filing it should have a certain and immediate interest. Thus, there is no significance to a probable interest in normal suits under the Egyptian Procedures Law<sup>35</sup> except as a precaution for repelling an impending harm or for ascertaining a right, the proof of which is feared of being lost. However, the situation is different with regards to constitutional suits, as the constitutional judiciary is satisfied with the mere presence of probable interest in order to accept the suit.<sup>36</sup> The reason for expanding such an exception is that a constitutional suit is considered as being within judiciary in kind, which aims at protecting constitutional legitimacy. Another reason is that the period allowed for filing a constitutional suit is short and it is feared that if the petitioner waited until his interest becomes immediate and certain, the time period would lapse without him being able to file the suit.<sup>37</sup>

### PROCEDURES

A constitutional Suit under the Islamic system is settled by following the same procedures and steps for the settlement of normal cases and disputes. Hence, after the court or judge specifies the constitutional issue raised through the challenged text, the court embarks on examining the subject of the suit by examining the compatibility or conformity of the challenged text, (whether constitutional, legislative or regulatory), with the texts of the *Qur'an* and *Sunnah*. The challenged text would also be examined as to its conformity with the principles and aims of the *Shari'ah* (*Maqasid al-Shari'ah*).<sup>38</sup>

If the court finds the said texts to be in conformity with the *Qur'an* and *Sunnah*, then the court must not accept the suit. But if the court finds these texts to be contradictory to or in contravention of the texts of the *Qur'an* or *Sunnah* or the aims and general principles of the *Shari'ah*, then it must give a ruling as to the nullity of the contravening text due to its contravention of the *Shari'ah*.<sup>39</sup> Thus, under *Shari'ah*, the government of the state, as well as its jurists and scholars, while passing legislation, whether constitutional, legislative or regulatory, must

<sup>35</sup>Abd al-Basit Jumay'i, *Sharh Qanun al-Ijra'at al-Madaniyyah* [Explanation of the Code of Civil Procedure] (Cairo: Dar al-Fikr al-Arabi, 1966) 249.

<sup>36</sup>Case No.131, Year 6 session of 6 May 1978, Majdi Mitwalli, *Mabadi' al-Qada' al-Misri* [The Principles of the Egyptian Judiciary] (Cairo: al-Hay'ah al-Misriyyah al-'Ammah li al-Kitab, 1996) 51.

<sup>37</sup>Abd al-Basit Jumay'i, *supra* note 34.

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

<sup>39</sup>Hasan al-Labidi, *Da'awa al-Hisbah* [Hisbah Suit] (Egypt: Jami'at Asyut, 1983) 100; Ibn al-Athir al-Jazari, *al-Kamil fi al-Tarikh* [The Complete History] vol. 4 (Beirut: Dar Sadr, 1982) 100. *See also*, Yasin 'Umar Yusuf, *Istiqlal al-Sultah al-Qadha'iyyah (fi al-nithamayn al-wadh'i walislami)* [Independence of the judiciary in the Islamic and Positive Systems: A comparative study] (Beirut: Dar Maktabat al-Hila, 1995) at 19. *See also*, Mustafa Kamal Wasfi, *Musannafat al-Nudum al-Islamiyyah: al-Dusturiyyah, wal-Dawliyyah, wal-idariyyah, wal-iqtisadiyyah wa al-ijtima'iyyah* [Islamic Classified Systems: Constitutional, International, Administrative, Economic and Social] (Cairo: Maktabat Wahbah, 1<sup>st</sup> ed., 2009) at 173-176.

not exceed the scope of the eternal rulings which have been established in the *Qur'an* and *Sunnah*.<sup>40</sup>

### CONDITION OF INTEREST IN THE ISLAMIC SYSTEM

Interest in Islamic law is the basis of a suit and its first pillar. Some jurists have stated that, where interest is absent, there would be no suit, and that interest is the cause or source of a suit. Others consider interest as the only condition for accepting a suit, while the other conditions stated by jurists are merely forms of interest.<sup>41</sup>

In Islamic jurisprudence, the condition of interest can be derived from the definition of Suit. A suit can be defined as, “a legal method by which a person asks from the judiciary the ascertainment of a right or its protection.<sup>42</sup> Therefore all that can be said regarding a lawsuit could be said about the defence or defences that the defendant presents to defend his right,” and rights are fields acknowledged by the legislator and protected by him. The legislator also acknowledges the interests of people and these interests are everything that helps in the preservation of the five pillars or goals of the *Shari'ah*: religion, mind, body (health), offspring and property.

Everything that helps the legislator in the preservation of these pillars has been acknowledged and protected by him (legislator), including the right of litigation or resorting to the judiciary to prevent any violation of rights.<sup>43</sup> Therefore, the basis for accepting a suit is that the subject of the suit should be an interest recognised by the legislator, an interest which has been violated. In this respect, there are three conditions of interest in Islamic jurisprudence:

- (1) The interest claimed must be connected to any of the five pillars mentioned earlier in order for it to be a recognised interest, whether for defending them against any violation or for bringing about a certain benefit, and all types of interests are equal in this regard whether they are material or literary interests.<sup>44</sup>
- (2) It must be a legal interest (i.e., an interest protected by the legislator), meaning that it is based on a certain legal right or position, where the purpose of the suit would be to protect this legal right or position if violated, and in this way the judiciary would have stipulated a punishment for its violation.<sup>45</sup>
- (3) The plaintiff, or the person filing the suit, would have a certain benefit from his claim for the interest which is acknowledged and protected by the legislator.<sup>46</sup>

Once these conditions are met, the suit can be accepted by the judiciary.

Article 1630 of the *Mejelle* (Ottoman Civil Code) stated that “if the Suit is proved, judgment must be given against the defendant in respect to some particular thing.”<sup>47</sup> This means that if a person files a suit against another, the judge would see if the suit would place an obligation upon the defendant, and if no such obligation can be placed, then the suit would be rejected due to the absence of the condition of interest.<sup>48</sup>

What must be noted here, is that the existence of the condition of interest in a civil suit relates to a limited interest, meaning that it is an interest related to the plaintiff himself, and he should *a fortiori* prove such interests. Where the petitioner acts as an agent, guardian or a representative

<sup>40</sup>Munir Hamid al-Bayati, *Al-Nidham al-Siyasi fi al-Islam, Muqaran bi al-dawla al-qanuniyyah* [Political systems in Islam, comparing with the position states] (Amman: Dar al-Nafaes, 2<sup>nd</sup> ed., 2011) at 283. See also, Arif Khalil Abu 'Aiyd, *Nidham al-Hukm fi al-Islam* [The system of government in Islam] (Beirut: Dar al-Nafaes, 1995) at 100. See also, Mustafa Kamal Wasfi, *supra* note, 39 at 180.

<sup>41</sup>Abd al-Basit Jumay'i, *supra* note 345 at 223. See also, Ramzi Sayf, *Al-Wasit fi Sharh Qanun al-Murafa'at al-Madaniyyah wa al-Tijariyyah* [Explanation of the Civil and Commercial Procedures Law] (Cairo: Dar alnahda, 1957) 135.

<sup>42</sup>Muhammad Na'im Yasin, *supra* note 6, at 304.

<sup>43</sup>Ibrahim Al-Shatbi, Abu Ishaq, *Al-Muwafaqat fi Usul al-Shari'ah* [The reconciliation of the fundamentals of Islamic law] vol. 1 (Beirut: Dar al-Ma'arif, 1999) 335.

<sup>44</sup>*Id.* at 325.

<sup>45</sup>Muhammad Na'im Yasin, *supra* note 6, at 304.

<sup>46</sup>Muhammad Na'im Yasin, *supra* note 6, at 304.

<sup>47</sup>Hooper, *supra* note 10.

<sup>48</sup>Muhammad Na'im Yasin, *supra* note 6, at 304.

of another person, then he has to show the personal interest of his client in the suit, and that is why the interest in suits other than those of constitutional law is a limited one, whether material or literary.<sup>49</sup>

Interest is a primary condition which all legal systems have provided for, and is in all civil, criminal, administrative and constitutional suits. Many constitutional systems, like American<sup>50</sup> and Egyptian systems, have provided that interest be the cause or source of the suit, (in other words, there is no suit without interest), and therefore this condition must be met for the suit to be accepted before the judiciary.<sup>51</sup>

Islamic jurisprudence requires the existence of interest in a constitutional suit and considers it a fundamental condition for the acceptance of a suit. This can be observed from some practical cases in the history of the Islamic judiciary, even though this condition was not stipulated explicitly, and that it must be a direct personal interest. A direct interest is that which gives the right to challenge the constitutionality of laws. It must relate to an actual harm which befalls a petitioner or the person filing the suit and which results from the application of the unconstitutional law, regulation or order. The harm may have already taken place or is about to take place in a way that makes its occurrence certain.

Moreover, the interest in a constitutional suit in the Islamic system surpasses the mere material interest in which the civil suit is based, to a close relationship with a constitutionally-acknowledged right, (the protection of which is a goal), regardless of what could result from this right in terms of material interest, or where its violation could result in any type of harm. In other words: "plaintiffs must demonstrate not only that they were injured by the challenged legislation, but must also show a nexus between that injury and the constitutional violation claimed."<sup>52</sup>

The best example where the *Shari'ah* applied the condition of interest in a constitutional suit is the case of the conquest of the city of *Samarqand*, where the Islamic judiciary allowed the case to be brought before it by the people of the city. The petition included the condition of interest, which was a direct personal one, and this interest guaranteed them the right to challenge the legality of the conquest of their city.

The Islamic system has also taken probable interest into consideration, where it acknowledges the right to challenge the constitutionality of a text which is in contravention of the constitution, even if the petitioner does not suffer a material injury or harm, as long as it is probable that the injury or harm would occur either immediately or in the future.<sup>53</sup>

Also, a constitutional suit can be filed or accepted under the Islamic system on an ethical or moral basis, especially since the Islamic system (*Shari'ah*) has established ethics and morals in an obligatory way. An example of this is the legislation promulgated by Caliph al-Ma'mun, acting as the head of the executive authority, when he permitted temporary marriage, and the material, ethical and moral harm which could have been caused by this legislation which contravenes *al-Qur'an* and *Sunnah*.<sup>54</sup>

The interest in a constitutional suit in the Islamic system is not less prioritized than the interest in the positive law system. Indeed, it is more important in the Islamic system, primarily because it is a Divine system which pays attention to the interests of the people as long as they are not in conflict with the principles of Islamic legality as stipulated by the *Shari'ah*.

Among the cases in the Islamic system (which can be used as an example for the application of the condition of direct personal interest), and the application of the principle of religious tolerance, (which allows personal freedom in choosing the religion or belief which a person chooses without

<sup>49</sup>Muhammad 'Abd al-Salam Mukhlis, *Nadhriyyat al-Maslahah fi Da'wa al-Ilgha'* [Theory of interest in cancellation suits] (Cairo: Dar al-Fikr al-a'rabi, 1981) 260.

<sup>50</sup>Chester James Antieau, *Adjudicating Constitutional Issues*, (Oceana Publications, 1985) 23. See also, Louis Fisher, *American Constitutional Law*, 83 (1985). See also, Stephen P. Elliott, A Reference Guide to the United States Supreme Court (New York: Facts and File Publication, 1986) 32–33. See also, *Wrath v. Seldin*, 422 U.S. 490, 498 (1975).

<sup>51</sup>Muhammad Abd al-Salam Mukhlis, *supra* note, 49 at 250. See also, Awad Mohammad el-Morr, The Supreme Constitutional Court of Egypt and the Protection of Human and Political Rights, in Chibli Mallat (ed.), *Islamic and Public Law*, (London: Graham & Trotman, 1993) 231–233.

<sup>52</sup>Yasin 'Umar Yusuf, *supra* note 39, at 334.

<sup>53</sup>Ibn al-Athir al-Jazari, *supra* note 39, at 571–575. See also, Al-Tabari, *Tarikh al-Rusul wa al-Muluk* [History of the Prophets and Kings] vol. 6 (Cairo: Dar al-Ma'arif, 1962) 567.

<sup>54</sup>Ibn Khallikan: *Wafayat al-A'yan wa Abnā Abnā al-Zaman* [Deaths of eminent men and history of the sons of the Epoch] (Beirut: Dar Sader, 1972) at 122–123. See also, Al-Khatib Al-Baghdadi, al-Hafid Abi Bakr, *Tarikh Baghdad* [The history of Baghdad] (Beirut: Dar al-kotob al-ilmiyah, 1997) 202–203.



compulsion), is a case which took place during the rule of the Ottoman Sultan, Selim I (1512 – 1520).<sup>55</sup>

In this case, some groups of Jews and Christians stirred up disorder and aided the crusades which were attacking some parts of the Ottoman state such as Jordan, Egypt, Palestine, and Syria. At the same time, the Spanish expelled the Arabs and Muslims from Andalusia. Therefore, Sultan Selim I decreed the expulsion of the Jewish and Christian subjects of the state. However, this decree was cancelled and annulled by Shaykh al-Islam and the leading jurists at that time as it was in contravention of the rules and principles of the *Shari'ah*, which considered the principle of tolerance as one of the most important constitutional principles.<sup>56</sup>

The case points out another principle of the *Shari'ah*, which is fundamental, and that is, there is no compulsion in religion,<sup>57</sup> (the freedom of religion), as Allah (S.W.T.) revealed: “Let there be no compulsion in religion . . . ”<sup>58</sup>. An application of this principle can be found in the following case which took place during the rule of the *Muwahhidin* state in Andalusia and the rule of Salah al-Din in Egypt and Syria (1169 – 1198).<sup>59</sup>

The passages in the *Qur'an* that forbid forced conversion and enjoin preaching as the sole legitimate method of spreading the faith have already been quoted above and the same doctrine is upheld by the decision of the Muslim jurists.<sup>60</sup> Under the fanatical rule of *Muwahhidin*, Musa ibn Maymun (also known as Maimonides) feigned conversion to Islam then fled to Egypt and declared himself to be a Jew. A Muslim jurist-consult from Spain denounced him for his apostasy and demanded that the extreme penalty of the law be inflicted on him for this offence. However, the case was quashed by al-Qadi al-Fadil, 'Abd al-Rahim ibn 'Ali, one of the most famous of Muslim judges and the prime minister of the great Sultan, who authoritatively declared that a man who had been converted to Islam by force could not be rightly considered to be a Muslim.<sup>61</sup>

Through this case, it is obvious that the judge had accepted the appeal filed by Musa ibn Maymun on the basis that the latter was forced or compelled under threat into becoming a Muslim and found that this compulsion was inconsistent with the freedom of belief stipulated for in many verses and narrations of *al-Qur'an* and *Sunnah*, as well as the general principles of the *Shari'ah*, and in the Holy *Qur'an* where Allah (S.W.T.) revealed: “Let there be no compulsion in religion . . . ”.<sup>62</sup>

Hence, control over the constitutionality of law was applied, and it was clear in this case. This story also demonstrates the early Muslims' understanding of the principle of control over the constitutionality of law in all its forms.

## CONCLUSION

The constitutional Suit must satisfy certain conditions. Hence, there are common and general conditions applicable to all types of Suits, and there are special conditions that are only relevant to the constitutional Suit due to its special feature. These have been analysed in detail, and supported by cases as well as legal and jurisprudential opinion. The conditions of a constitutional Suit in the Islamic system dealing with the conditions of interest, capacity and the actuality of plea, have been addressed as these conditions are general and applicable to all Suits.

<sup>55</sup>Selim I (Ottoman Turkish: Modern Turkish: *I.Selim* or *Yavuz Sultan Selim*), nicknamed Yavuz (traditionally translated as “grim,” but closer to “stern” or “implacable” in meaning) (October 10, 1465/1466/1470 – September 22, 1520), was the Sultan of the Ottoman Empire from 1512 to 1520. His reign is notable for the enormous expansion of the Empire, particularly his conquest between 1516 and 1517 of the entire Mamluk Sultanate of Egypt, which included all of Sham, Hejaz, Tihamah, and Egypt itself.

<sup>56</sup>T.W. Arnold, *supra* note 30.

<sup>57</sup>(There is no compulsion in religion), meaning:

“Do not force anyone to become Muslim, for Islam is plain and clear, and its proofs and evidence are plain and clear. Therefore, there is no need to force anyone to embrace Islam. Rather, whoever Allah directs to Islam, opens his heart for it and enlightens his mind, will embrace Islam with certainty. Whoever Allah blinds his heart and seals his hearing and sight, then he will not benefit from being forced to embrace Islam.”

<sup>58</sup>*Qur'an*, 2:256.

<sup>59</sup>T.W. Arnold, *supra* note 30.

<sup>60</sup>*Id.*

<sup>61</sup>T.W. Arnold, *supra* note 30.

<sup>62</sup>*Qur'an*, *supra* note 57.

It is observed that the Islamic legal system recognised the conditions of the constitutional Suit, and that these conditions were applied in a number of cases that had been stated earlier in this article, even though these conditions have not been legally codified or given their proper titles.

### LIST OF ABBREVIATIONS

S.W.T.	<i>Subhanahu wa ta'ala</i> (an Arabic phrase) (Praise be to Allah, the Most High)
P.B.U.H	Peace be upon him
C.E.	Common Era, Christian Era, or Current Era

### GLOSSARY

Mejelle	Ottoman Civil Code
<i>Ulema</i>	<i>Scholars of Shari'ah</i>
<i>Sunnah</i>	Tradition of the Prophet
<i>Qadi</i>	Judge
<i>Qadiship</i>	Judiciary
<i>Madalim</i>	Judicial-administrative organ
<i>Muhtasib</i>	The office of market
<i>Al-ahkam-al-khamasah</i>	The five legal values
<i>Mudda'i</i>	The plaintiff
<i>Mudda'i 'alayh</i>	The defendant
<i>'urf</i>	Custom
<i>Al-ráy</i>	Personal discretion
<i>Qiyas</i>	Analogy
<i>Shura</i>	Consultation
<i>Ijtihad</i>	Independent judgment
<i>Ijma'</i>	Consensus of opinion
<i>Fiqh</i>	Jurisprudence
<i>Amir al-Mu'minin</i>	Commander of the Faithful
<i>Hudud</i>	Punishments
<i>Qadi al-qudah</i>	The first chief judge
<i>Hakim</i>	Ruler
<i>Muwaddaff of al-qudah</i>	Officer of judiciary
<i>Zawaj al-mut'ah</i>	Temporary marriage
<i>Zina</i>	Fornication
<i>Hukam</i>	Judgment
<i>Shuhud</i>	Witnesses
<i>Hawa</i>	Desire or passion
<i>Mufti</i>	Jurisconsult
<i>Imam</i>	Leader
<i>Fisq</i>	Act of hostility
<i>Maslahah 'Ammah</i>	Public interest
<i>Haqq</i>	The right
<i>Dhimmi</i>	People of the Book
<i>Munkar</i>	Preventing illegality
<i>'Adl</i>	Just, justice, balance
<i>Muhtasib</i>	One who exercise independent judgment
<i>Qisas</i>	Retaliation
<i>Masalih al-'ibad</i>	Human good, Public interest
<i>Mafsada</i>	Opposite of <i>Maslahah</i>
<i>Maqasid al-Shari'ah</i>	Goals of the <i>Shari'ah</i>
<i>Fatawa</i>	Giving legal opinions