

THE LEGAL EXPOSITION OF ABU YA'LA ON THE APPOINTMENT OF A QADI

Yusuf Abdul Azeezⁱ, Abdullahi Saliu Isholaⁱⁱ

ⁱ (Corresponding Author), Assistant Professor, College of Law, University of Modern Sciences (UMS), Dubai, U.A.E, a.yusuf@ums.ae

ⁱⁱ Lecturer, Department of Law, College of Humanities, Management and Social Sciences, Kwara State University (KWASU), Malete, Nigeria, abdullahi.ishola@kwasu.edu.ng

Abstract

Abu Ya'la ibn al-Farra' (380-458 A.H / 990-1065 C.E) is regarded as one of the prominent jurists of the Hanbali Madhhab credited to have written many works of erudition in Public Law, Islamic constitutional Law and the Islamic system of politics. His proficiency in jurisprudence, ethics, political science and literature proved useful in securing a respectable career for him not only as a qadi (judge) but also as an excellent author, muhaddith (expert in hadith) and a Qur'anic scientist. The focus of attention of this paper, therefore, is to examine the views and thoughts of this prominent mufti (Islamic legal expert) on the nature of appointments that could be conferred by the imam (leader of the Islamic State) on a qadi. In achieving this notion, attempt is made to examine his exposition on the qualifications of a qadi and the mode of contract of his appointment, validation of his appointment by the imam and the areas of his jurisdiction. Other relevant areas examined in his legal theory, are his fatawa (personal legal opinions) on such appointment of a qadi with a special jurisdiction, appointment of two judges in a city, request for appointment as a qadi, as well as offering of bribes to be appointed as a qadi. It is discovered that some of the legal opinions expressed by Abu Ya'la on each of these matters are guidelines that may be adopted in the contemporary society for the appointment of a credible qadi into any of the judicial positions. The study adopts a descriptive analytical research method whereby references were made to the primary sources containing Abu Ya'la's opinion as well as other secondary literature written by classical and contemporary Muslim and non-Muslim scholars on his life and works. It is, thus, believed that the legal opinions propounded by Abu Ya'la on the appointment of a qadi is not only germane but also contain policies that are relevant to the contemporary judicial institutions.

Keywords: *Abu Ya'la, fatwa (Islamic legal opinion), qadi (judge), Hanbali Madhhab.*

INTRODUCTION

A qadi plays a unique role in the Shar'iah as he is regarded as the unbiased interpreter of al-Ahkam al-Shar'iyyah (the Legal Rules of the Islamic Law). As a dispenser of 'adalah (justice), he is not only expected to be well versed in the Shar'iah, but also expected to act fairly and impartially and render decisions that are independent and based on amanah (trust or good faith). He is responsible for issuing judgments that are enforced by the state of Islam. His jurisdictions extend

to both civil and criminal matters, while his responsibility covers such areas as settling disputes between people, preventing whatever may harm the rights of the ummah (community), settling disputes emanating from maladministration and misconduct in government, hear cases such as those involving mirath (inheritance), waqf (endowment), zawaj and munakahat (marriage), talaq (divorce), and renders decisions based on the provisions of the Shar'iah. Adab al-Qadi (Judicial professional ethics) serves the dual purposes of guiding a qadi in his activities and making the public aware of what to expect from him. Attempt would now be made to examine the views and thoughts of Abu Ya'la on the nature of appointments that may be conferred by the imam on a qadi.

APPOINTMENT OF A QADI

Abu Ya'la in his exposition on the establishment and administration of the judiciary is of the opinion that an appointment to the office of a *qadi* shall not be conferred on a person unless that person fulfills the requirements for the appointment to the office. These requirements, as highlighted by Abu Ya'la, are seven and they are (i) the quality of being a male (*al-dhukuriyyah*); (ii) maturity and sound mind (*al-bulugh wa al-aql*); (iii) freeborn status (*al-huriyyah*); (iv) Islam; (v) righteousness (*al-adalah*); (vi) perfection of the senses of hearing and sight (*al-salamah fi al-sam' wa al-basar*); and, (vii) Knowledge (*al-'ilm*) (Abu Ya'la, 2000, p. 60). He further detailed these requirements as demonstrated below.

QUALIFICATION OF A QADI

Abu Ya'la is of the candid opinion that a person shall not be appointed as *qadi* unless he fulfills the above mentioned requirements in accordance with the following criteria:

- i. Maleness: As for the quality of being a male, he says that a *qadi* must be a man and not a woman because a woman in her nature is not bestowed with complete authorities (*kamal al-wilayat*). In addition, testimony given by a woman alone is not as complete as that of a man;
- ii. Maturity and sound mind: As for the qualities of maturity and sound mind, Abu Ya'la holds the view that if it is not permitted for either child or slave to administer their private affairs, then it is more appropriate that they should not be entrusted with the affairs of other people, and more so when both are incapable of discretionary power on matters of decisive adjudication even in common matters;
- iii. Free status: As for the quality of being freeborn, Abu Ya'la is of the view that this quality is essential on the basis that a slave is not considered eligible to hold authoritative posts and does not possess the fullness of social status that enables them to testify in courts of law;

- iv. Islam : As for the quality of being a Muslim, Abu Ya'la is of the view that if it is not permitted to appoint a *fasiq* (dissolute) as *qadi*, then it is more proper that a *kafir* also must not be appointed;
- v. Righteousness: As for the quality of righteousness, Abu Ya'la is of the opinion that if a person can become a *fasiq* in the practice of his religion, it is more proper to say that such a person must not be appointed to serve as *qadi* because the act of passing judgment requires that a person must be trustworthy and of sound character;
- vi. Perfection of the senses of hearing and sight: As for the quality of perfection of the senses of hearing and sight, Abu Ya'la affirms that this enables such a person to differentiate between the plaintiff and the defendant. Therefore, this ability, as maintained by Abu Ya'la would be difficult for a blind or deaf person. Abu Ya'la also holds the view that the perfection of the limbs is not considered a requirement for the appointment of a *qadi* unlike the case of the post of *al-imamah al-kubra* (the grand imamate) where it is considered part of the requirements because defects in the limbs will definitely affect the ability of the *imam* to carry out his duties.
- vii. Knowledge: As for the possession of knowledge, Abu Ya'la asserts that it is compulsory for a person appointed as *qadi* to have the knowledge of *al-Ahkam al-Shar'iyah* (Abu Ya 'la, p. 60-61). This quality, as mentioned by Abu Ya'la, is that such a person must possess knowledge of the four principal sources of the *Shari'ah*. These are:
 - (a) He must have some knowledge about *Kitab Allah* (the *Qur'an*) in such a way that he is able to identify and understand the rules of the law contained in it such as ordinances concerning: 1) abrogating (*nasikhkan*) and abrogated (*mansukhan*); 2) the precise (*muhkaman*) and ambiguous (*mutashabihan*); 3) general (*umuman*) and particular (*khusus*); 4) epitomized (*mujmalan*) and detailed one (*mufassaran*);
 - (b) He must have knowledge of the *Sunnah* (Traditions of the Messenger of Allah) (P.B.U.H) that were derived from his actions and sayings and the manner in which they have been transmitted either by way of *al-tawatatur* (multiple chains of transmission) or by way of a single individual transmission (*al-Ahad*); and furthermore, he must be able to determine whether a particular transmission is authentic or invalid, and whether such a *Sunnah* is applicable to a specific situation or to all circumstances similar to it;
 - (c) He must have knowledge of the opinions of earlier scholars (*aqwal al-salaf*) regarding what they might have agreed or disagreed on so as to follow the consensus of their opinions by which he must strive to apply his own intellectual reasoning where there are differences of opinion;
 - (d) He must have the essential knowledge of *qiyas* (analogical deduction) that will enable him to trace and compare a matter in which the law is

silent to that of an original similar matter in which applicable laws might have been clearly formulated and agreed upon by the majority of the scholars (Abu Ya'la, 2000).

Abu Ya'la further affirms that if a person appointed as a *qadi* possesses the knowledge of the four sources of the *Shari'ah* as mentioned above, such a person automatically becomes a *mujtahid* (an expounder of Islamic law). He is, therefore, qualified to give *fatwa* (personal legal opinion) and to pass judgments. If, however, such a person is found to be deficient in the knowledge of the sources of the *Shari'ah* as described above, he should not be regarded as a *mujtahid*. Hence, it is not permissible for him to give *fatwa* or pass judgment. In a situation whereby such a person is appointed as a *qadi*, his judgments, even if they are correct and right shall be regarded as invalid because he does not fulfill the requirements supposed to be possessed by a person appointed to the office. Abu Ya'la then adds that a *mujtahid* can also be identified through the acquaintance of the people with him or by putting him to test (*ikhtibar*) or by interrogation (*mas'alahi*). Abu Ya'la then substantiates his claim with one *Hadith* narrated by Abu Dawud in his Book: *Sunan Abi Dawud* and transmitted by Hanash from Ali, wherein the Messenger of Allah (P.B.U.H) appointed Ali to serve as a *qadi* in Yemen and he was not put to test because the Messenger of Allah knew that he had the knowledge of the *Shari'ah* and therefore the Messenger of Allah implicitly made it known to Ali through his words that: "If any two disputing parties (*khasman*) present themselves before you to adjudicate in their matter, do not pass a judgment in favor of one over the other until you have listened to the other party." It was reported later that Ali says: "Since then, there was not any matter of dispute that was difficult for me to solve." Abu Ya'la, however, adds that when the Messenger of Allah (P.B.U.H) sent Mu'adh ibn Jabal to serve as a *qadi* in a particular territory in Yemen, the Messenger of Allah (P.B.U.H) put him to test by asking him: "By what are you going to judge if a case is brought before you? Mu'adh ibn Jabal replied: "I will judge by the Book of Allah." The Prophet then asked him: "What would you do if you do not find your judgment there?" Mu'adh ibn Jabal replied: "I will judge by the *Sunnah* of the Messenger of Allah." The Prophet then asked him: "What would you do if you cannot find it there?" Mu'adh ibn Jabal replied that: "I will then strive to come to decision with my own sense of judgment."

Abu Ya'la, however, adds that some *Ulama'* (scholars) may not accept the use of *qiyas* (analogy) to determine cases brought before them if they are appointed to serve as *qudah*. These types of *Ulama'*, as mentioned by Abu Ya'la (2000, p. 52-63), are as follow:

- i. Those who reject the use of *qiyas*, accept unequivocal meanings of the text (*zahir al-nass*) from original sources and the opinions of earlier scholars of their *madhhab* over matters for which texts are not available, and abandon the use of *ijtihad* (expansion of law through the use of a personal sense of discretion), and refrain from the use of the personal opinion and analogical

deduction. Such people, in the view of Abu Ya'la, may not be appointed to the judiciary because they lack the basic methods to make rules. This opinion is based on the view of al-Imam Ahmad ibn Hanbal as reported by Bakr ibn Muhammad ibn al-Hakam that it is part of the duties of both the *imam* and the *hakim* (governor) to take care of the affairs of the people and to create avenues for people to acquire this kind of a knowledge, and that it is also compulsory for both to use the method of analogical deduction in order to solve problems when the need arises. Therefore, if it is necessary for the *imam* and the *hakim* to have knowledge of *qiyas*, then it is more appropriate to say that a *qadi* must also have it. This requirement, as mentioned by al-Imam Ahmad ibn Hanbal is found in the letter of Caliph Umar ibn al-Khattab to Shurayh that he should revert to the use of *qiyas* in the absence of clear textual instructions from the *Qur'an*, the *Sunnah* and the *Ijma'* (Consensus opinion of the scholars);

- ii. Those who reject the use of *qiyas* and exert their senses of discretion in the matters of law according to the contents and implication of a statement just in the same way as the *ulama'* of the *Zahiri madhhab* prohibit the passing of judgments in accordance with equivocal meanings of the text and permit the passing of judgment in accordance with the implication of the words. Such people, in the view of Abu Ya'la, may not be appointed to the judiciary because they lack the basic methods to make rules. This opinion, as mentioned by Abu Ya'la, is based on the view of al-Imam Ahmad ibn Hanbal when he says that: "It is compulsory for a *qadi* to exert his sense of discretion in solving the cases brought to him for adjudication". Abu Ya'la, however, adds that such kind of people may be appointed to serve in the judiciary because they accept the use of unequivocal meanings of the text of the original sources and the clear meanings of the words (*wadih al-ma'ani*) even though they reject the use of implicit analogy (*khafiyy al-qiyas*).

Abu Ya'la further adds that it is permitted for someone who belongs to the Hanbali *Madhhab* to appoint a person who belongs to the Shafi'i *Madhhab* as a *qadi* because a *qadi* is requested to exert his sense of discretion in solving cases and it is not compulsory for him to follow opinions from a particular *Madhhab* in assessing details of cases or in applying appropriate judgments to cases brought before him. In a situation where a *qadi* passes judgment on a case and a similar case comes up later, the opinion of Abu Ya'la is that this *qadi* should strive to make another *ijtihad* on the matter before he passes judgment and in accordance with what his new *ijtihad* may lead him to even if his new judgment is different from his previous one. This is because Umar ibn al-Khattab (may Allah be pleased with him) passed a judgment in a particular year that certain relatives are eligible to inherit but he later excluded them in another year. When he was told that: "This was not the way you passed your judgment in the previous year, he replied: "That previous judgment was in accordance with what we decided then and this is what we have

just decided now.” If a person who appoints a *qadi* makes it a condition that he should pass judgments according to the view of his own *Madhhab*, the opinion of Abu Ya’la is that such a condition shall be considered invalid while the appointment itself shall be investigated. If the one who made the appointment did not make that condition part of the requirements for appointment but rather includes that condition in the form of *amr* (an order) or as *nahy* (a prohibition) by saying: “I have appointed you to the office of a *qadi*, so judge in accordance with Ahmad ibn Hanbal’s *Madhhab*” or by way of prohibition that: “do not judge according to Abu Hanifah’s *Madhhab*,” the view of Abu Ya’la is that the appointment is valid while the condition attached to it is invalid. If on the other hand, the person who appoints a *qadi* makes that condition part of the requirements for appointment by saying: “I have appointed you as a *qadi* on condition that you pass your judgment in accordance with Ahmad ibn Hanbal’s *Madhhab*,” the view of Abu Ya’la is that it is obvious that such a contract of appointment is based on an invalid condition. However, there are two reports as to whether the appointment itself is valid. The first report is that the appointment is invalid because it is based on an invalid condition, while the second report says that the appointment is valid and the condition attached to it is invalid. Abu Ya’la then says that such a condition must also be investigated in order to determine whether it is specifically meant for a particular case or a judgment or whether it is an *amr* or a *nahy* that may be carried out or not, or whether that condition affects the validity of the appointment:

- i. In a situation where such a statement is not specified as a requirement in the contract of appointment but was just in form of an *amr* such as by saying: “Take vengeance by killing a person of free status for killing a slave and by killing a Muslim for killing a *kafir*.” This type of condition, in the view of Abu Ya’la, is invalid while the appointment is valid.
- ii. In a situation where such a statement is specified as a requirement in the contract of appointment, Abu Ya’la says that there are two views:
 1. The first is that if the statement given by a person who makes the appointment comes in form of *nahy* by forbidding the person appointed as a *qadi* not to kill a person of free status for killing a slave or not to kill a Muslim for killing a *kafir* or not to pass a judgment that may lead to the execution of a *qisas* punishment” then this type of a condition, according to Abu Ya’la, is valid because the person who made the appointment only limits the jurisdiction of the appointee to the areas which are not mentioned in his statement of appointment.
 2. The second is a situation where the person who makes the appointment does not forbid the person appointed as *qadi* to kill a person of free status for killing a slave or to kill a Muslim for

killing a *kafir* but forbids the appointee to pass judgments that may lead to the execution of a *qisas* punishment." This condition, according to Abu Ya'la, may probably mean that such a prohibition does not grant the appointee the authority to pass judgment in all the cases mentioned above, so, the appointee may not pass any judgment in any matter relating to *qisas* crimes. Abu Ya'la, however, adds that such a *nahy* probably means that the appointee is not necessarily prevented from passing judgments on those matters. Therefore, the statement of the person who made the appointment would be taken as if he had authorized the appointee to kill a person of free status for killing a slave or to kill a Muslim for killing a *kafir*. Hence, that condition, in the opinion of Abu Ya'la, is invalid while the appointment is valid and the appointee has the right to pass judgments in all matters relating to *qisas* crimes in accordance with what his *ijtihad* may lead him to decide (Abu Ya'la, 2000, p.63).

CONTRACT OF APPOINTMENT OF A QADI

Abu Ya'la is of the opinion that the contract for the appointment of a *qadi* may be made by verbal expression (*al-mushafahah*) if the person appointed is present or by correspondence (*al-murasalah*) or by writing (*al-mukatabah*) if the person appointed is absent. He adds that the verbal contract may be done in two ways: The first one is by way of a clear declaration (*sarih*) while the second may be done in an equivocal manner (*kinayah*). He then goes to say that a clear declaration is an expression where clear terms are used explicitly to indicate that the appointment is conferred on a particular person. This, as mentioned by Abu Ya'la, may be done in the following four ways: (i) "I have appointed you." (*qad wallaytuk*); (ii) "I have conferred upon you" (*qalladtuk*); (iii) "I have chosen you as my representative." (*istakhlaftuk*); (iv) "I have chosen you as my deputy." (*istanabtuk*). Abu Ya'la then maintains that if any one of these expressions is used, the appointment to the office of a *qadi* or to any other authoritative offices is assumed to have been made and there would be no need for additional supportive evidence. As for an equivocal expression, Abu Ya'la says that it is the use of an implicit expression to indicate that an appointment to the office of a *qadi* has been conferred on a person and this may be done in the following seven ways: (i) "I relied on you." (*i'tamadtu alayk*); (ii) "I depended upon you." (*'awwaltu alayk*); (iii) "I referred to you." (*radadtu ilayk*); (iv) "I handed over to you." (*ja'ltu ilayk*); (v) "I delegated to you." (*fawwadtu ilayk*); (vi) "I entrusted to you." (*wakkaltu ilayk*); (vii) "I ascribed to you." (*asnadtu ilayk*). He further adds that it is obvious that all of these expressions are ambiguous. It is therefore recommended that they should be accompanied with a specific clear term that would remove the ambiguity surrounding any of these expressions whenever an appointment is conferred through any of them because the inclusion of a specific clear term would definitely transform an appointment

to one based on a clear declaration. Examples are: “Look at what I entrusted to you” (*fanzur fi ma wakkaltuhu ilayk*) or “Pass judgment on those matters which I entrusted to you” (*wahkum fi ma i'tamadtu fihilayk*). Abu Ya'la further adds that if the appointment is conferred by a verbal expression, the acceptance of the appointee must also be by an immediate verbal reply, but if the appointment is conferred by correspondence or by writing then it is permissible for the appointee to delay his vocal acceptance. In a situation where the appointee does not declare his vocal acceptance verbally and he embarks on the duty, the opinion of Abu Ya'la is that his action to embark on such a duty may not be taken as his verbal expression because embarking to discharge the duty of an office is a separate action of its own in a contract of appointment, therefore, there is no way it could stand as vocal acceptance (Abu Ya'la, 2000).

VALIDATION OF THE APPOINTMENT OF A QADI

Abu Ya'la is of the opinion that the appointment of a *qadi* shall be conferred on a person through the above mentioned clear verbal declarations and that, in addition, such an appointment shall not be considered valid one unless it fulfills the following four requirements:

- i. The appointing authority must know that the person appointed possesses the qualities required for appointment to the office. In a situation where the appointing authority does not know whether the appointee possesses qualities required for appointment, such an appointment, in the view of Abu Ya'la, shall be considered invalid. If the appointing authority confirmed that the appointee possesses the qualities required for appointment to the post after the appointment has been conferred, then the appointing authority shall consider the appointment as taking effect from the date it is known that the appointee possess the required qualities while all actions that may have been taken by appointee from the date of the initial appointment to that period shall be considered invalid;
- ii. The appointing authority must ensure that the appointee is entitled to the appointment by virtue of his characters and qualifications;
- iii. The appointing authority must specify the type of appointment conferred on such a person as to whether the appointment is that of a *qadi* or that of an *amir* or that of a collector of *kharaj*, as this clarification enables the appointee to know his area of jurisdiction;
- iv. The appointing authority must specify the territory (*al-bilad*) for which the appointment is made and the appointment shall be considered invalid if the territory where the appointee is expected to carry out his duties is not known (Abu Ya'la, 2000, p. 65).

Abu Ya'la is also of the opinion that in addition to the above requirements, the appointing authority must make the appointment of such a person known to the people in the territory where he is expected to carry out his duties so as to

enable them to abide by his rules. This requirement, as emphasized by Abu Ya'la, is for the purpose of seeking the loyalty of the people in that territory to the person appointed and not for the purpose of carrying out the duties of that office. The appointment shall, therefore, be considered to be valid once all the above mentioned requirements are met. The appointing authority and the appointee shall both be considered representatives of each other. It is not, however, compulsory on the appointing authority to abide by this regulation because he has the right to remove the appointee whenever he likes. On the other hand, the appointee has the right to resign whenever he wishes.

However, the appointee may not be removed by the appointing authority without any reason and the appointee may not tender his resignation without any excuse. This is due to the interests of Muslims affected by the appointment. It is also said that the appointing authority does not have the right to remove the appointee from the office as long as the appointee performs his duties diligently. This is due to the fact that the appointment was conferred on the appointee initially for the interests of Muslims and not because of the interest of the *imam*. Abu Ya'la also affirms that this type of appointment is different from that of contract of *al-wakalah* (agency) where it is compulsory for the agent to serve the interest of the person who might have appointed him.

As a result, the agent may be dismissed at any time if the person who appoints the agent discovers that the agent is not serving his interest. He then adds that if a *qadi* is removed from the office or resigns, his removal or resignation should be made known to the public in the same manner that his appointment was made known to the public when first appointed so that he will not continue passing judgments, and disputing parties, on the other hand, the public will not continue to take their cases to him after his removal from office. If a *qadi* passes a judgment after he has been removed from the office and he is aware that he has been removed from the office, the opinion of Abu Ya'la is that such a judgment shall not be executed. However, if he passes a judgment without knowing that he had been removed from office, the view of Abu Ya'la is that the execution of the judgment of such a *qadi* shall be based on the opinion of the majority of scholars – as expressed on the contract of *al-wakalah* – that it is an invalid action for a *wakil* (agent) to act on behalf of the person who appoints him after he might have been suspended. However, the action of a *wakil* on behalf of the person who appointed him shall be considered valid if taken before it becomes known to him that he has been removed (Abu Ya'la, 2000).

DUTIES OF A QADI

Abu Ya'la says that there are ten duties that must be performed by a *qadi* after he has been duly appointed. These duties are to:

- i. Resolve disputes and conflicts and put an end to quarrels and feuds that arise either by means of reconciliation or the passing of a decisive legal judgment (*hukm bat*) on the matter;
- ii. Ensure that claims are duly retrieved from those who have refused to pay what is due and to ensure that claims duly paid to those entitled to it has been established through *al-iqrar* (self-confession) or *al-bayyinah* (proof), and not through the *qadi*'s personal knowledge about the case.
- iii. Establish a *wilayah* (guardianship) over people who are not legally permitted to exercise rights over their wealth either due to insanity (*junun*) or minority age (*sighar*), and to impose restrictions on those who do not have the legal capacity to act over their wealth on account of imbecility (*safh*) or bankruptcy (*fals*) so that the wealth is preserved for those entitled to it by law;
- iv. See to the administration of the affairs of *al-awqaf* (the endowments) through the preservation of its capital base and the proceeds of any business attached to it. A *qadi* shall also be responsible for the collection of profits and proceeds realised from the *awqaf* and he must ensure that the income generated from it is spent appropriately. Abu Ya'la adds however, that if there is someone permitted by law to oversee the affairs of the *awqaf*, then such a person must ensure that the affairs of the *awqaf* are properly administered, but if there is no one in charge of the *awqaf*, the *qadi* should take responsibility for the administration of the *awqaf*;
- v. Execute the *wasaya* (bequests) according to the wishes of the testator as long as it is in line with what the *Shari'ah* permits. If the testator says that the *wasiyyah* (bequest) should be given to certain people, then the *qadi* must ensure that the *wasiyyah* is executed accordingly. However, if the beneficiaries are not specified in the *wasiyyah*, the *qadi* must determine those who are to benefit from it through his *ijtihad*;
- vi. Give single women either divorced or widowed (*al-ayyama*) in marriage to men who are compatible with them (*al-akiffa'*) according to the level of their status if they do not have guardians (*al-awliya'*) who have the right to give them out in marriage;
- vii. Carry out *hudud* punishments on those who deserve to be punished through any of them. If the case involving the execution of *hudud* punishments is a matter relating to the rights of Almighty Allah (*huquq Allah*), the *qadi* must voluntarily carry out such punishments without waiting for anyone to instigate the case as far as the punishments have been established either through *al-iqrar* or through *al-bayyinah*. However, if the case is one that has to do with the rights of the human beings (*huquq al-Adamiyyin*), then the execution of *hudud* punishment on such a matter must be subjected to the petition lodged by the victim;
- viii. See to the matters having to do with the interest of the public in his area of jurisdiction by taking necessary measures to prevent acts of trespass (*al-*

ta'ddi) on roads (*al-turuqat*) and courtyards (*al-afriyah*), and the removal of illegal structures (*al-ajnihah*) and buildings (*al-abniyah*) from inappropriate positions. The *qadi* may voluntarily take up all the above mentioned matters even if disputing parties fails to report them;

- ix. Carefully examine witnesses (*shuhudihi*) and trustees (*umana'ih*), and to examine the activities of his officers and agents so that he may put his trust in them and rely on them if they are proven to be men of integrity and unimpeachable character. He may also change or replace them if they are found inefficient or if they commit offences or betray the trust placed on them. Whoever is found inefficient among them may be dealt with in the following two ways: (a) they may be replaced with those who are more efficient; (b) they may be joined with the officers who are more efficient and effective. Abu Ya'la adds that the *qadi* has the right to cross-examine activities of officers or agents attached to him. This is based on the view of al-Imam Ahmad ibn Hanbal that: "It is compulsory for a person to cross examine the activities of his witnesses (*shuhudihi*) because a man, by nature, can change at any time;"
- x. Judge with equity between the strong (*al-qawiyy*) and the weak (*al-da'if*), and between the noble (*al-sharif*) and the subordinate (*al-mashruf*), and he must not follow his desires in such judgments. Abu Ya'la substantiates his claim with a report narrated by Shurayh that there was a time when the *Amir al-Mu'minin* (Commander of the Faithfuls) Ali ibn Abi Talib lost his coat of armour and later found it with a *Yahudi* (Jew). Ali ibn Abi Talib then told the *Yahudi* that: "O you *Yahudi*! That coat of armour which is found with you fell from me one night but I prefer to take it from you legally. The *Yahudi* then answered that this armour coat which you see with me is mine and that is the reason why I am holding to it. Ali ibn Abi Talib then brought the matter to Shurayh for adjudication. At a point in time Ali came to realise his position as the *Amir al-Mu'minin* and decided to withdraw his case against the *Yahudi*. He then told Shurayh that "if not for the fact that the *Yahudi* is a *dhimmi*, I should have continued to contest the case with him (Abu Ya'la, 2000).

Abu Ya'la further adds that a *qadi* appointed with general authority is not permitted to collect the *kharaj* because the distribution of the *kharaj* is dependent on the opinion (*ra'y*) of the commanders of the armies (*wulat al-juyush*). The wealth of the *sadaqat* which is put under the management of a trustee shall not considered part of a *qadi* jurisdiction, but if it is not placed under the management of a trustee, Abu Ya'la says that some scholars are of the view that it may be put under the supervision of a *qadi* appointed with general authority because the distribution of the *zakah* is one of the rights of Allah regarding those whom He has specified as entitled to it. Some scholars, on the other hand, are of the opinion that the management of the wealth of the *zakah* shall not be put under the jurisdiction of a *qadi* because it is wealth that requires the discretion of the *a'immah* (leaders of

prayers). The leaders of prayers, in addition to that, shall also be responsible for the supervision of the affairs of the leadership of the *Salat al-jumu'ah* and the feast (*imamat al-jumu'ah wa al-a'yad*). In a situation where the appointment of a *qadi* is conferred with limited authority, the jurisdiction of such a *qadi* shall be restricted to the areas specified in his contract of appointment such as: (1), passing judgments only on matters of *al-iqrar* and not on matters of *al-bayyinah* or (2), passing judgments only on matters of debts (*al-duyun*) and not on matters of *al-manakih* (marriages) or (3), judgments on matters involving certain amounts of money and not on matters above the specified limit.

Abu Ya'la further says that all the above mentioned opinions are based on the views of al-Imam Ahmad ibn Hanbal who says that it is permissible to limit the jurisdiction of a *qadi* to certain areas and restrict his jurisdiction to certain matters. This is based on a report transmitted by Ahmad ibn Nasr (Shams al-Din al-Dhahabi, 2001) that al-Imam Ahmad ibn Hanbal reported a case where a man gave evidence on a case involving an amount of one thousand dirhams before a *qadi* and the *qadi* told the man that his jurisdiction does not cover that amount of money as he was only authorised to look into the cases for amounts between one hundred to two hundred dirhams. Abu Ya'la buttresses his view with a similar report narrated by al-Hasan ibn Muhammad (Abu al-Husayn, 1350 A.H) from al-Imam Ahmad ibn Hanbal that a man gave evidence on a matter involving one thousand dirhams and the *qadi* looking into the case said that he did not have the jurisdiction to look into cases involving such an amount as he was only authorised to look into the cases disputing not more than one hundred dirhams. It is also the opinion of Abu Ya'la that it is not permissible for a *shahid* (witness) to give two testimonies in a single case involving an amount of money which is twice the amount of money authorised for a *qadi* to look into because testimony is not allowed to be divided or halved under the law. For example, an amount involving one thousand dirhams and the person giving evidence gives testimony for five hundred dirhams in front of a *qadi* and this same person then goes to another *qadi* on the same issue to give further testimony on the remaining five hundred dirhams. Abu Ya'la says that this type of testimony is not acceptable as it may lead to misunderstanding between those involved in such cases because it may be that the disputing party or the person giving two different testimonies over a single case is doing so out of fear or favor and may also claim that his second testimony in front of another *qadi* is based on the same first five hundred dirhams and not on another five hundred dirhams. Abu Ya'la then submits that in a situation where it becomes necessary to determine this type of a case, one of the two testimonies given to two different judges would be regarded valid and the other as invalid. This position, as maintained by Abu Ya'la, is based on the verse of the Glorious *Qur'an* in which Almighty Allah says: "That should make it closer (to the fact) that their testimony would be in its true shape (and thus accepted) or else they would fear that (other) oaths would be admitted after their oaths" (*Qur'an* 5: 108).

Appointment of a *Qadi* With Special Jurisdiction

Abu Ya'la emphasises that it is permissible for the *imam* to appoint a *qadi* and restrict his area of jurisdiction to a special matter or certain territory. Therefore, the duty of a *qadi* appointed with general authority in a special area of jurisdiction is to pass the judgment in all cases covered by that authority or to pass judgment in all the cases in his territory of restriction. Hence, the judgments of such a *qadi* shall be executed only if the cases are within his area of jurisdiction or within the territory assigned to him.

Abu Ya'la is also of the opinion that if the authority of a *qadi* is restricted to a particular territory, such a *qadi* shall be responsible to pass judgment in all matters that involve permanent and temporary residents of that particular territory. This, according to Abu Ya'la, is due to the fact that when it comes to matters of adjudication, temporary residents shall be considered as permanent residents unless it is stated otherwise that the nature of the authority conferred on him is restricted to cases that involve only permanent residents and not temporary residents. In such a situation, a *qadi* with this type of appointment shall not go beyond the limit of the area of jurisdiction assigned to him. This position, as maintained by Abu Ya'la, is based on the opinion of al-Imam Ahmad ibn Hanbal, in that: "It is permissible for the *imam* to appoint a *qadi* with a general authority and restrict his area of jurisdiction to a certain territory".

Abu Ya'la also maintains that a *qadi* appointed by the *imam* to a certain territory may appoint another *qadi* to pass judgment on his behalf if it is within the same territory of his jurisdiction because the first appointment is made in the general interest of Muslims and not because of the interest of the *imam*. Therefore, it is not necessary for such a *qadi* to seek the consent of the *imam* if the appointment made by him is meant for the general interest of Muslims because this is already assumed and the authority of the *imam* covers the entire territory falling under the jurisdiction of the *qadi* appointed by him. Hence, such a *qadi* may appoint another *qadi* to pass judgement on his behalf within the territory assigned to him by the *imam*.

Abu Ya'la then emphasises that this type of appointment, in the first instance, is different from the contract of *al-wakalah* where a *wakil* is expected to serve the interest of the person who appoints him as a *wakil*. In addition to that, Abu Ya'la says that a person who appoints a *wakil* has the right to remove his *wakil* at any time whereas the *imam* may not remove a *qadi* who is originally appointed by him or remove a *qadi* who is appointed by the one he appoints as long as that *qadi* himself fulfils all the necessary requirements as earlier mentioned. Abu Ya'la goes on to add that if the jurisdiction of a *qadi* covers the whole city or territory assigned to him, such a *qadi* has the right to pass judgment wherever he wishes as long as it is within the city or the territory assigned to him. If it is specified in his condition of appointment that he is to exercise his authority in a particular area of a city either in his house or his mosque for example, then such an appointment, in the view of Abu Ya'la, is invalid because it is not permissible to restrict the place

of judgment of a *qadi* to a particular location if his authority is general and over whole city or territory assigned to him. However, if the nature of the authority granted to such a *qadi* is to pass judgment between those who may come to him in his house or mosque, then his appointment would be valid and he may not pass judgment outside his house or mosque because the condition of his appointment restricts his judgment to those who may come to his house or mosque alone, and it would not be possible for him to identify such people unless when they come to his house or mosque for adjudication (Abu Ya'la, 2000).

Appointment of Two Judges in a City

Abu Ya'la says that it is permissible to appoint two judges in a city if the authority granted to either of them falls in the following categories:

- i. if one of them is put in charge of a location and the other is put in charge of another location within the same territory, then such an appointment shall be considered valid provided that each restricts the exercise of his authority to the area or the locality assigned to him;
- ii. if one of them is assigned to look into specific cases different from those assigned to the other *qadi*, such as the allocation of debt recovery to one and the allocation of cases of marriages to the other. Then this type of appointment may be considered valid provided that each of them restrict the exercise of his authority to the cases assigned to him in that same territory; and,
- iii. if both are empowered to look into all cases that arise in that same territory, Abu Ya'la says there are two views on this;
 - (a) the first is that some scholars consider such appointment as invalid because it may lead to conflicts of interest between the disputing parties as it is possible for either of them to insist that his case be looked into by a *qadi* of his own choice;
 - (b) the second view expressed by other scholars is that this type of appointment is valid because the authority exercised by either is regarded as delegated from the person who appointed both of them just as it may be found in the contract of *al-wakalah*. Therefore, if there is a disagreement between two disputing parties over the choice of a *qadi* to look into their case, the request of the plaintiff shall be granted and not that of the defendant but in a situation where each of the two disputing parties insists to present his case to the *qadi* of his choice, the opinion of Abu Ya'la is that the *qadi* nearer to the place of the dispute shall be given preference to look into such a case. If, however, the two judges are at an equal distance from the city where the dispute takes place, then lots shall be drawn between the two disputing parties in order to determine the appropriate *qadi* who will look into the matter. Some scholars,

according to Abu Ya'la, however, hold the view that the two disputing parties should be urged to agree on one of the two judges (Abu Ya'la, 2000).

Abu Ya'la then submits that the first view which gives preference to the request of the plaintiff is more acceptable to him than the second opinion which says that the case of a disagreement between the two disputing parties as to who should look into their case among the two appointed judges should be determined by casting of the lots or by considering the *qadi* who is nearer to the place of the dispute. He further goes on to add that it is also permissible to restrict the area of jurisdiction of a *qadi* to a special case between two disputing parties but such a *qadi* may not decide any other case in which the same two disputing parties may be involved or any other case that involves the same two parties with a third party.

Therefore, a *qadi* who is granted this type of authority shall continue to exercise his jurisdiction over that particular case between that two disputing parties as long as the dispute in question remains between the two parties concerned. However, if another dispute arises between the same two disputing parties, that *qadi* may not be allowed to investigate the new case which arises between that parties unless a new authority is granted to him to look into that case. In a situation where the nature or type of disputing parties are not specified in the authority granted to a *qadi*, and the authority granted to him restricts his jurisdiction to certain days as it may be found in a situation where a *qadi* may be told: "You have been appointed to settle the disputes between the litigants on a particular Saturday," the opinion of Abu Ya'la is that this type of appointment is valid and that such an appointment shall start and end on the specified Saturday.

In a situation where a *qadi* is appointed to judge every Saturday, Abu Ya'la is of the view that this appointment is also permissible as that *qadi* is only authorised to look into cases of disputes on Saturdays and not on any other day. In a situation where the *imam* who appoints the *qadah* does not specify any *qadi* but says that: "Whoever passes judgment between the litigants on Saturday is my representative." Such an appointment, in the view of Abu Ya'la, is not permissible because a particular appointee was not specifically mentioned and it is also possible for a person who is not an expounder of Islamic law to take up the opportunity to pass judgments. If, on the other hand, the *imam* or the appointing authority says: "Whoever judges provided he is an expounder of Islamic law is my representative," then that type of appointment, in the view of Abu Ya'la, is also not permissible based on the fact that a particular nominee was not specified. If the appointing authority says: "Whoever judges, provided he is one of the jurists of the *Madhhab* of Ahmad ibn Hanbal, or provided he is a jurist of the *Madhhab* of Abu Hanifah, or provided he is a jurist of the *Madhhab* of *al-Shafi'i*, then this type of appointment, in the view of Abu Ya'la is not also permissible.

Likewise, if the *imam* mentions a number of persons without specifying a particular person among them by saying: "Whoever passes judgment between

these people is my representative," this type of appointment, in the view of al-Qadi Abu Ya'la, is not permissible as well, irrespective of whether the number of persons mentioned by the *imam* is small or large because the *imam* does not specify the actual appointee(s) among this group of people. In a situation where the *imam* or the appointing authority says: "I have referred the matter to such and such a person. Therefore, whoever looks into the matter of disputes among them is my representative." This type of appointment, as mentioned Abu Ya'la, is permissible because those mentioned by the *imam* are deemed to have been appointed according to the statement of the *imam*, irrespective of whether they are small or large in number. Thus, if one of those mentioned by the *imam* looks into that matter of dispute, it would definitely mean that the position has been duly occupied by such a person and the remaining people among those mentioned by the *imam* would not have the jurisdiction to look into that matter again because they were not collectively appointed by the *imam* to look into that matter, as the statement made by the *imam* refers only to any 'one' of them who takes up the matter in question. However, if the *imam* or the appointing authority gives them joint jurisdiction over the matter, the opinion of Abu Ya'la is that their appointment would not be permissible if they are large in number but if they are appointed jointly by the *imam* to look into the matter and their number is small, Abu Ya'la says that there are differences of opinion among the scholars as to whether such an appointment should be considered valid. This has also been mentioned during the discussion on the issue of whether it is permissible for the *imam* to appoint two judges at the same time to look into the same matter (Abu Ya'la, 2000, 69-70).

REQUEST TO BE APPOINTED AS A QADI

Abu Ya'la is of the opinion that if a person makes a request to those in authority that he should be appointed as a *qadi*, his case must be thoroughly investigated. In a situation where such a person is not an expert in Islamic law, his request to be appointed to that office shall be considered unlawful and he shall automatically be disqualified. If, however, he is an expert in Islamic law and he possesses the necessary qualifications for appointment to the office, the opinion of Abu Ya'la is that his request to be appointed to such an office may or may not be rejected depending on the circumstances of that person. If the post is occupied by someone not entitled to hold the office or if the incumbent *qadi* is not qualified enough to hold the office, either due to inadequate knowledge or partiality in the deliverance of judgments, then the application of a person who requested the appointment may be granted so as to replace the one not qualified enough for the office. Abu Ya'la further adds that there are two additional reports concerning this issue. These are:

- (i) It is forbidden for a person to request appointment as *qadi* if the person holding the office is qualified and competent. This position, as maintained

by Abu Ya'la, is based on the view of al-Imam Ahmad ibn Hanbal as reported by Abd Allah, the son of al-Imam Ahmad ibn Hanbal, that when his father was asked: "Can a person make a request to be appointed as a *qadi* in a city where a man who is holding that office is more qualified than any other person in terms knowledge and learning?" Abd Allah says that the response of al-Imam Ahmad ibn Hanbal was: "I would not be satisfied if this type of a *qadi* is replaced with another person because he is more qualified than any other person." Abu Ya'la adds that it is forbidden for a person to seek the office of a *qadi* with the motive to enjoying the benefits attached to the office. This view, as maintained by Abu Ya'la, is based on the *Hadith* of Prophet Muhammad (P.B.U.H) which was reported by Abu Hafs Umar ibn al-Khattab and transmitted by Anas ibn Malik that the Messenger of Allah says: Whoever makes a request to be appointed as a *qadi* shall be left alone to shoulder the responsibility of that office but whoever is voluntarily appointed by the authority to hold the office shall be assisted by an angel who will be guiding such a person. In a similar vein, the Messenger of Allah is reported to have said that: Whoever seeks the post of a judge and requests that he should be appointed by the authority concerned, shall be left alone to determine the cases by himself but whoever is forced to take up the appointment, an angel shall be sent down unto him to guide him in his judgments. Abu Ya'la further supports his view with another authentic *Hadith* said to have been reported by Abd al-Rahman ibn al-Samrah that the Messenger of Allah told him: O you father of Abd al-Rahman, do not ask for a position of authority (*al-imarah*) because if you are given a position of authority without you requesting for it, definitely you shall be assisted on it. Abu Ya'la, on this issue, finally cited an *Hadith* which was narrated by Muslim ibn al-Hajjaj in his authentic book of *Hadith* that Abu Burdah ibn Abi Musa transmitted from his father Abu Musa al-Ash'ari:

One day I entered the house of the Prophet (P.B.U.H) in company of two men from the family of my uncle. One of them says to the Prophet (P.B.U.H): "Kindly appoint us into one of those positions of authorities that have been entrusted to you." The second man, as reported by Abu Musa al-Ash'ari, also requested for the same thing from the Prophet. The prophet then answered that: "I swear by the name of Almighty Allah, we on our own part shall not entrust that position to anyone who makes a request for it." Therefore, the Prophet did not appoint any of them (Abu Ya 'la, 2000, p. 71).

- (ii) It is not forbidden for a person to request that he should be appointed as a *qadi* in a situation where the motive is to remove evil or abomination (*munkar*). This view, as expressed by Abu Ya'la, is also based on the opinion of al-Imam Ahmad ibn Hanbal as reported by al-Marwudhi: "It is

compulsory for the Muslims at all times to have their judge (*hakim*) because the rights of the people could not be left to go astray." Abu Ya'la further adds that in a situation where this type of request is made and upon investigation it is discovered that the intention of the person who made the request is to remove the person who is not qualified for the post, then this is acceptable, as it expressly implies that the person seeking the appointment is doing so in order to remove a *munkar* and replace him with something better because the person actually knows he is more qualified to hold the appointment to that office than the person already appointed. Therefore, the action of that person, as maintained by Abu Ya'la, shall be rewarded by Almighty Allah.

Abu Ya'la is also of the opinion that in a situation where the office is occupied by a qualified and competent person and the person making a request to that same office is doing that so that the incumbent would be removed from the office either because of personal hatred or purposely to use the office to seek benefits for himself, then the application of such a person shall be rejected and the integrity of such a person shall be considered damaged. However, in a situation where there is no one to serve as a *qadi* and the office becomes vacant, the opinion of Abu Ya'la is that the circumstances surrounding the application of the person who requests appointment as a *qadi* shall be thoroughly examined. If his desire is to establish the truth and he fears that the post may be occupied by a person who is not qualified, Abu Ya'la holds the view that the request of such a person shall be considered in line with either of the two views given above depending on circumstances surrounding the request of such a person. If it is discovered that he is looking for a position (*manzilah*) and pride (*mubahah*) for himself, Abu Ya'la says that the opinion expressed by a group of scholars is that the request of such a person shall not be granted because it is detestable for a person to seek an office in this world in order to gain access to a high position or to be praised by the people.

Almighty Allah the Most Exalted says: "That home of the hereafter (i.e. paradise), We shall assign it to those who do not desire for high position on earth or do mischief, and the good shall belong to the pious" (*Qur'an* 28:83). Abu Ya'la also adds that another group among the scholars are of the opinion that the application of a person who requests appointment to the post of a *qadi* shall not be rejected due to the fact that a Prophet of Allah, Yusuf (may peace be upon him) requested a position of authority from Fir'awn to act as his representative by saying: "Set me over the store-houses of the land; I will indeed guard them with full knowledge" (*Qur'an* 12:55). Abu Ya'la, finally on this matter, concludes that the application of a person who makes a request to be appointed to a position shall not be granted automatically because Yusuf (may Allah grant him peace) was a Prophet of Allah and a guided person who is protected from committing injustice (*al-zulm*) and oppression (*al-jawr*) over the power and the authority conferred on him, and as a result of that, the preference given to Prophet Yusuf in this matter does not cover any other person, except Yusuf alone.

OFFERING OF BRIBE TO BE APPOINTED AS A QADI

Abu Ya'la in his exposition is of the opinion that it is forbidden (*mahzur*) for a person to offer a bribe in order to be appointed as a *qadi* and it is also forbidden for a person to accept any money paid for that purpose. This view, as maintained by Abu Ya'la is based on the *Hadith* narrated by Anas ibn Malik that the Messenger of Allah (P.B.U.H) says: "Allah curses the one who offers the bribe and the one who receives it" (*la'ana Allah al-rashi wa al-murtashi*). It is also the opinion of Abu Ya'la that it is not permissible for a *qadi* to accept a gift from any people in authority, or from the litigants, or from anyone working under him or in his area of jurisdiction because this might cause the person giving the gift to request his assistance as *qadi* whenever he wishes. Also, the acceptance of the gift itself, in the view of Abu Ya'la, may, at times, affect the decisions of a *qadi* in cases that may be brought to him. The evidence given by Abu Ya'la for his stand on this matter is based on the *Hadith* of the Prophet (P.B.U.H) in which he says: "The gifts (*hadaya*) of the rulers (*al-umara'*) are shackles (*ghulul*)."¹ In a situation where a *qadi* accepts a gift and makes a swift reward (*mukafa'ah*) to the person who gave it, then the gift shall automatically become his own. If, however, the *qadi* who accepts the gift could not make an instant reward to the person giving him a gift and it is not possible for him to return it to the person who gave it to him, then such a gift, in the view of Abu Ya'la, shall be transferred to the treasury (*bayt al-mal*) (Muhammad Hamid al-Faqi, 1974).

Abu Ya'la is further of the view that a *qadi* does not have the right to delay a judgment on a case brought to him by disputing parties unless there is a valid excuse for doing so. It is also not permissible for a *qadi* to hide himself from the people unless during periods of rest (*awqat al-istirahah*). At the same time, Abu Ya'la says that a *qadi* shall not be allowed to adjudicate in a matter which involves his parents or children because of the suspicions (*al-tuham*) that may arise. However, it is the view of Abu Ya'la that a *qadi* may adjudicate in a matter which involves any of his parents or children if he is to pass judgment against them because the suspicion that he may favor them would no longer exist.

Abu Ya'la also holds the view that a *qadi* shall not render any testimony in favor of any of his children or parents but he may grant his testimony if it is against them just as he may bear his testimony in favor of his enemy and not against them. A *qadi* may pass judgment in favor of his enemy but he shall not be allowed to pass judgment against his enemy. However, in a contrary view, Abu Ya'la says that Abu Bakr ibn Muhammad popularly known as Ghulam al-Khallal in his book titled: "*al-Khilaf*,"² is of the view that a *qadi* may pass judgment in favor or against his parents, children and enemy because the reasons for him to pass judgment either in their favor or against them are based on established facts that are conspicuous (*asbab al-hukm zahirah*) while reasons for testimony he renders either in their favor or against them is based on hidden facts (*asbab al-shahadah khafiyyah*). Therefore, he will be free of suspicion in any judgment he may pass on

them, be it in their favor or against them because his judgment will be based on established facts while on the other hand, he will be subjected to suspicion in any testimony (*shahadah*) which he may give, be it in their favor or against them because of the fact that testimony is only requested to be given in a situation where there is lack of factual evidences either in favor or against the person or persons concerned (Abu Ya'la, 2000, p. 73).

Abu Ya'la further goes on to say that if a *qadi* dies, the opinion of some scholars is that all his representatives (*khulafa'uhu*) shall be removed from the office but in a situation where it is the *imam* who dies, his judges (*qudatihi*) shall not be removed from the office. On the other hand, some scholars, according to Abu Ya'la, are of the opinion that the representatives of a *qadi* who dies shall not be removed from the office because they are considered to be serving the general interest of Muslims and not the interests of the person who had appointed them. Therefore, if it is the *qadi* who, by himself, wishes to remove his representatives from office, he shall not have the authority to do so because his representatives are not considered as serving him but as serving the general interests of the Muslims. Abu Ya'la also stressed that if people of a territory where there is no *qadi* agree to appoint a *qadi* of their own, their case shall be thoroughly investigated and accordingly:

- i. If there is an *imam* during the time they are appointing their *qadi*, then their decision to appoint a *qadi* of their own shall be regarded as invalid, but if there is no *imam* at the time they are appointing their *qadi*, then their decision to appoint a *qadi* of their own shall be valid and any judgment passed by that *qadi* either in favor or against them shall be thoroughly executed; and,
- ii. If a new *imam* comes to power after the people of that territory have appointed a *qadi* of their own, that *qadi* shall not continue to adjudicate any matter again without the permission (*izn*) of the *imam*, and furthermore, his judgments given before the new *imam* comes to power shall not be invalidated (Abu Ya'la, 2000, p. 73).

CONCLUSION

From the foregoing analyses on the theories of Abu Ya'la on the nature of appointments that may be conferred by the *imam* on a *qadi*, it is evident from his opinion that a person shall not be appointed as a *qadi* unless he is able to fulfill the requirements for appointment to the office. A *qadi* to be appointed by the *imam* may be examined so as to ascertain whether the person actually possesses the experience that would qualify him to serve as a *qadi*. In a situation where a *qadi* passes a judgment on a case and a similar case comes up at a later time, such a *qadi* should strive to make another *ijtihad* on the matter before he passes judgment, even if his new judgment negates his previous one. The contract of appointment of

a *qadi* may be made by verbal expression if a person to be appointed is present and also by correspondence or by writing if a person to be appointed is absent. The verbal expression may be done in two ways; the first is by a clear declaration while the second is done in equivocal form but the better option is for it to be declared either in form of verbal expression or by writing. Abu Ya'la also sets the duties of a *qadi* to be ten and emphasizes that the *imam* may restrict the area of jurisdiction of a *qadi* to a special matter or to a certain territory. Therefore, the duty of a *qadi* who is appointed with general authority in a special area of jurisdiction is to pass judgments in all cases covered by that authority or to pass judgments in all cases arising in a particular territory to which his jurisdiction is restricted. He is also of the opinion that it is permissible for the *imam* to appoint two judges for the same territory provided that the authorities granted to either relate to any of the following: (i) one may be put in charge of a location and the other may be put in charge of another location within the same territory; (ii) one may be assigned to look into specific cases different from those assigned to the other; (iii) both may be empowered to look into the whole cases which may arise in that same territory. On the request that may be put forward by a person for appointment as *qadi*, the opinion of Abu Ya'la is that a proper investigation should be carried out to determine whether the person is an expert in Islamic law and if he is not, his request shall be considered unlawful. Hence, his disqualification, but if he is an expert in Islamic law and possesses the qualifications that make him eligible for appointment to the office, his request may be granted or it may be rejected depending on whether the incumbent *qadi* is qualified and competent. He also maintains that it is forbidden for a person to offer a bribe in order to be appointed as a *qadi*, and it is also forbidden for a person to accept any money that may be paid for this purpose. It is, thus, submitted that the exposition of Abu Ya'la on the nature of appointments that may be conferred by the *imam* on a *qadi* is not only germane in policies relevant to the contemporary judicial professional ethics, adequate in terms of equitable dissemination of justice but also found to be useful for the transformation of the contemporary judicial institutions.

REFERENCES

Books

- Al-Zahabi, Shams al-Din Muhammad ibn Ahmad ibn Uthman. 1422 A.H / 2001 C.E. *Siyar A'lam al-Nubala'*. Vol. 13, 11th edition. Beirut: Mu'assasat al-Risalah.
- Hay'at al-Mawsu'ah al-Arabiyyah. 2005. *al-Mawsu'ah al-Arabiyyah*. Ed. Muhammad Azizi Shukri, Vol. 11, 1st edition. Dimashq: Mu'assasat al-Salihani.

- Husaini, S.A.Q. 1970. *Arab Administration*, Vol. 11, 6th edition. Lahore, Pakistan: SH. Muhammad Ashraf Publishers.
- Ibn al-Farra', Abu Ya'la. 1403 A.H / 1983 C.E. *Al-Ahkam al-Sultaniyyah*. In Muhammad, Hamid al-Faqi (ed.). Beirut: Muasasat al-Risalah.
- Ibn al-Farra', Abu Ya'la. 2000. *Al-Ahkam al-Sultaniyyah*. In Muhammad, Hamid al-Faqi (ed.). Beirut: Dar al-Kutub al-'Ilmiyyah.
- Mahmud Saedon Awang Othman & Nik Ahmad bin Kamal Nik Mahmood. 1989. *The Appointment of Qadi: Responsibilities, Conditions and Methodologies*. IIUM Law Journal, Vol. 1, No. 2. Malaysia: IIUM.
- Muhammad Abd a-Qadir, Abu Faris. 1403 A.H / 1983 C.E. *Al-Qadi Abu Ya'la wa Kitabuhu al-Ahkam al-Sultaniyyah*. Beirut: Mu'assasat al-Risalah.
- Muhammad ibn al-Qadi Abu Ya'la, Abu al-Husayn. 1350. *Tabaqat al-Hanabilah*. Shams al-Din Abu Abd Allah Muhammad ibn Abd al-Qadir ibn Uthman al-Nablusi (ed.). Dimashq: Matba'at al-I'tidal.
- Muhammad ibn al-Qadi Abu Ya'la, Abu al-Husayn. n.d. *Tabaqat al-Hanabilah*. Beirut: Dar al-Ma'rifah.
- Syafiq, al-Mughni. 1990. *Hanbali Movements in Baghdad from Abu Muhammad al-Barbahari (d.329 A.H / 941 C.E) to Abu Ja'far al-Hashimi (d.470 A.H /1077 C.E)*. Unpublished Ph.D Thesis, University of California: Los Angeles.
- Yusuf, Abdul Azeez. 2011. *Abu Ya'la's Doctrine of the Imamate*. Unpublished Ph.D Thesis, Ahmad Ibrahim Kulliyah of Laws, International

Disclaimer

Opinions expressed in this article are the opinions of the author(s). Journal of Fatwa Management and Research shall not be responsible or answerable for any loss, damage or liability etc. caused in relation to/arising out of the use of the content.