



CONSTITUTIONAL ACTION AND JUDICIAL
REVIEW IN AMERICA, EGYPT AND THE
SHARĪ'AH: A COMPARATIVE STUDY

BY

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A thesis submitted in fulfilment of the requirement for
the degree of Doctor of Philosophy in Law

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MARCH 2010

ABSTRACT

This research involves an analysis of the constitutional action and judicial review in three systems which are the American, Egyptian and Islamic legal systems, in terms of its definition, methods and conditions, as well as the effect of the ruling passed in such a suit, as being the true mechanism by which judicial control over the constitutionality of laws can be applied. The research forms an attempt at discovering whether the Islamic legal system had known the constitutional suit in its contemporary form, something which requires knowledge of the nature of such a suit in the Islamic legal system, through discovering the points of similarity and difference with regards to the suit in both the positive and Islamic legal systems as well as the possibility of the utilisation by each system of the advantages of the other in improving the application of the constitutional suit. For this purpose, the researcher applied the case study methodology by choosing America as the country in which the control over the constitutionality of laws had been established, as the court in the said jurisdiction had participated in setting basic and fundamental rules and principles in this field. Egypt was also chosen as being the first Arab country that gave to its courts, especially the Supreme Constitutional Court, the right to apply judicial control which aided in the establishment of the principles of separation of powers, the rule of law and the independence of judicial authority. The researcher has applied the historical, descriptive and analytical as well as the critical research methodologies. The researcher has also specified the different methods by which the constitutional suit can be brought before the competent court, and described its general limitations and restrictions' on the exercise of Judicial review, as well as the effects of the ruling of constitutionality or unconstitutionality, in a detailed way in both the American and Egyptian legal systems as compared to the Islamic legal system. The researcher has also stated the role of judicial precedents in the stabilisation of legal status in America, which rendered the control system in the said jurisdiction to be a centralised system. Finally, the researcher concluded that the Egyptian legal system is very similar to the Islamic legal system in the application of the same methods for the filing of the suit, as well as its conditions, nature and the effect of the ruling passed under it. The researcher concluded that the Islamic legal system had known and applied the constitutional suit in practice, before the positive legal system had, but did not succeed in codifying these texts and cases in the form of a complete legal theory as in the positive legal system, an issue that made the Islamic legal system lacking in theory.

ملخص البحث

تتناول هذه الدراسة تحليل الدعوى الدستورية في النظامين القانونيين الوضعي والاسلامي، من حيث مفهومها وأساليبها وشروطها، وأثر الحكم الصادر فيها بوصفها الآلية الحقيقية التي يمكن من خلالها تطبيق الرقابة القضائية على دستورية القوانين. وتشكل الدراسة محاولة للإجابة عمّا إذا كان النظام القانوني الإسلامي قد عرّف الدعوى الدستورية بشكلها المعاصر الأمر الذي يتطلب معرفة خصوصيتها فيه، من خلال معرفة وجوه اتفاقها واختلافها في كلا النظامين وكذلك امكانية استفادة كل نظام من مزايا الآخر في أداء كفاءة الدعوى الدستورية. وقد استخدم الباحث في سبيل تحقيق غايته مدخل دراسة الحالة إذ اختار أمريكا بوصفها الدولة التي تأسست فيها الرقابة على دستورية القوانين، إذ أسهمت محاكمها في وضع مبادئ أساسية مهمة في هذا المجال. كما اختيرت مصر لأنها الدولة العربية الأولى التي أعطت لمحاكمها، وخصوصا المحكمة الدستورية العليا، الحق في ممارسة الرقابة القضائية التي ساعدت في ترسيخ مبادئ الفصل بين السلطات وسيادة القانون، واستقلال السلطة القضائية. واستعان الباحث بالمنهج التاريخي في متابعته لنشأة الرقابة القضائية وخلفيتها التاريخية والسياسية. كما استعان بالمنهج الوصفي التحليلي أثناء دراسة الدعوى الدستورية في النظامين القانونيين الوضعي والإسلامي من أجل تحليل النصوص واستنتاجها بشكل رئيس. واستخدم الباحث المنهج المقارن من أجل الوقوف على وجوه الاتفاق والاختلاف بينهما بالإضافة إلى استخدام المنهج النقدي. وقد فصل الباحث الأساليب المختلفة التي يتم بها رفع الدعوى الدستورية أمام المحاكم المختصة، وبيّن شروطها العامة والخاصة بها، وأثر الحكم الصادر بدستورية أو عدم دستورية القانون بشكل تفصيلي في النظامين القانونيين الأمريكي والمصري مقارنة مع النظام القانوني الإسلامي. ثم بيّن دور السوابق القضائية في استقرار المراكز القانونية في أمريكا مما جعل الرقابة فيها أقرب إلى النظام المركزي. أخيراً توصل الباحث إلى أنّ النظام القانوني المصري يقترب من النظام القانوني الإسلامي من حيث استخدام نفس أساليب رفع الدعوى وشروطها وطبيعتها و أثر الحكم الصادر فيها. وقد استنتج الباحث أن النظام القانوني الإسلامي قد عرف الدعوى الدستورية وطبقها في الجانب العملي قبل النظام القانوني الوضعي ولكنه لم ينجح في صياغة وتقنين هذه النصوص والقضايا على شكل نظرية قانونية متكاملة كما هو الحال في النظام القانوني الوضعي، الأمر الذي أوقعها في بعض القصور في الجانب النظري.

APPROVAL PAGE

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DECLARATION PAGE

I here declare that this dissertation is the results of own investigation, except where otherwise stated. I also declare that is has not been previously or concurrently submitted as a whole for my other degree at IIUM or other institutions.

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Signature.....

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**ECONOMIC AND FINANCIAL CRIMES AND ICT: AN APPRAISAL OF
THE RESPONSE OF THE NIGERIAN CRIMINAL LAW**

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DEDICATION

To My Partners in the Path of Knowledge and Faith

My Dear Mother and Father

With Love, Appreciation

And Acknowledgment of Favour

ACKNOWLEDGEMENTS

After praising Almighty Allah, He Who granted me aid, with His utmost grace, in the writing of this humble thesis, I find myself obliged, in academic honesty, to thank whoever had extended a helping hand while conducting this research, with the full admission of my sole responsibility for any deficiency or error that it may have. I thus truly thank my two respected educators, Dr. Zaid Mohamad and Prof. Dr. Mohammad Hashim Kamali, who endured, with all patience and sincerity, the responsibility of academic supervision of this research. The benefit I gained from their knowledge, and the continuous discussion with them, in addition to their encouragement, had the utmost impact on the conclusion of the study as such. My utmost appreciation also goes to the respected chairman of the viva committee, Assoc. Prof. Dr Nasr Eldin Ibrahim Ahmad Hussein., and members of the committee, Prof. Dr. Mahdi Zahraa, Asst. Prof. Dr. Khairil Azmin Mokhtar, and I also thank Assoc. Prof. Dr Naemah Ami, Deputy Dean for Postgraduate Studies-AIKOL, for facilitating the administrative procedures, and I shall not forget to thank the International Islamic University-Malaysia, which granted me the opportunity to further my studies. My continuous gratitude is to my beloved parents and siblings, and my dear friends and colleagues, especially Dr. ‘Abd al-Raḥmān Ḥusein, Dr. Ḥāzīm Muḥī al-Dīn, and Brother Suhaib Sharaiyra. May Allah (S.W.T.) reward all of them with His blessings.

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LIST OF STATUTES

Al-Dustūr al-Miṣrī (Constitution of Egypt) 1971 (Egypt)
Al-Dustūr al-Sūdānī (Constitution of Sudan) 1998 (Sudan)
Qānūn al-Maḥkamah al-Dustūriyyah al-‘Ulyā (Law of the Supreme Constitutional Court) No. 48 of 1979 (Egypt)
Qānūn al-Maḥkamah al-Dustūriyyah (Law of the Constitutional Court) 1998 (Sudan)
Constitution of the United States of America 1787 (USA)
Federal Civil Defense and Internal Security Law 1950 (USA)
Judiciary Act of 1789 (USA)
Federal Railroad Safety Act of 1970

LIST OF CASES

Adderley v Florida (1966) 385 U.S. 39 (U.S.A.)
Adkins v Children's Hosp. (1923) 261 U.S. 525 (U.S.A.)
Aetna Life Insurance Co. v Haworth 300 U. S. 227 (1937) 300 U.S. 227 (U.S.A.)
Allen v Louisianan (1880) 103 U.S. 80 (U.S.A.)
American presidential election that Bush v Al Gore (2000) 531 U.S. 98, 148 L. Ed. 2d 388,121 S.Ct.525 (U.S.A.)
Arsenault v Massachusetts (1968) 393 U.S. 5 (U.S.A.)
Association of Data Processing Service Organisations v Camp (1970) (U.S.A.)
Bailey v Drexel Furniture Co. (1922) 259 U.S. 20 (U.S.A.)
Buchanan v Warley (1917) 245 U.S. 60 (U.S.A.)
Burnet v Corodando of oil & Cas Co. (1931) 285 U.S. 393, 401, 52 Sup. Ct. 443, 76 L. Ed 815 (U.S.A.)
Burnet v Corodando of oil, & Gas Co. (1932) 285 U.S. 393 (U.S.A.)
Calder v Bullv (1798) 3 U.S. 386 (U.S.A.)
Carter v Carter Coal Co. (1936) 298, U.S. 238, 56 S. Ct. 855. 80 Led. 1160 (U.S.A.)
Chicago &Grand Trunk Ry. v Wellman (1892) 143 U.S. 339 (U.S.A.)
Chicago, I. & L. Ry. Co v Hackett 228 U.S. 559, SGG (U.S.A.)
Chicot County Drainage District v Baxter State Bank (1940) 308 U.S. 371, 374 (U.S.A.)
Cooper v Aaron (1958) 358 U.S.1, 18 (U.S.A.)
CSX Transportation v Easer wood (1993) (U.S.A.)
De Stefano v Woods (1968) 392 U.S. 631 (U.S.A.)
Doremus v Board of Education (1952) 342 U.S. 429 (U.S.A.)
Dorsch v the state of Kansas (U.S.A.)
Duncan v Kahanamoku (1946) 327 U.S. 304 (U.S.A.)
Everson v Board of Education (1947) 330 U.S.1; 67 S. Ct. 504; 91 L. Ed (U.S.A.)
Flast v Cohen (1968) 392 U.S. 83 (U.S.A.)
Florida ex rel. Hawkins v Beard of Control (1959) 397 U.S. – 971 (U.S.A.)
Forthingham v Mellon (1923) 292 U.S. 447 (U.S.A.)
Gelpck v Dubuque (1864) 68 U.S. 175 (U.S.A.)
Gideon v Wainwright (1963) 327 U.S. 335 (U.S.A.)
Griswold v Connecticut (1965) 381 U.S. 479 (U.S.A.)
Immigration and Naturalization Service v Chadha (1983) (U.S.A.)
Ivan v City of New York (1972) 407 U.S. 203 (U.S.A.)
Lee v Wiseman (1992) 120 L. Ed. 2d 467 (U.S.A.)
Linkletter v Walker (1965) 381 U.S. 618 (U.S.A.)
Lochner v New York (1905) 198 U.S. 45 164, 205, 213,223, 228 (U.S.A.)
Lujan v Defenders of Wildlife (1992) 504 U.S. 555 (U.S.A.)
Mapp v Ohio 367 U.S. 643 (1961) (U.S.A.)
Marbury v Madison (1803) 5 U.S. 137 (U.S.A.)
Marks v United States (1977), 430 U.S. 188 (U.S.A.)
Martin v Mott (1827) 25 U.S.19. (U.S.A.)
Massachuestts v Mellon (1923) 292 U.S. 447 (U.S.A.)
McConnell v Rhay (1968) 393 U.S. 2 (U.S.A.)

Molitor v Kane land Community Unit Dist .IVo. 302, 18 III. 2d at 25,162 N.E 2d at 96 (U.S.A.)
Munn v Illinois (1877) 94 U.S. 113 165,166,180 (U.S.A.)
Muskrat v United States (1911) U.S. 219, 346 (U.S.A.)
Nebbia v New York (1943) 291. U.S. 502 (U.S.A.)
Northeastern Florida Chapter of the Associated General Contractors of America v City of Jacksonville, Florida (1993) 508 U.S. 656 (U.S.A.)
Notion v Shelby County (1856) 118 U.S. 425, 442 (U.S.A.)
Poe v Ullman (1961) 367 U.S. 497 (U.S.A.)
Roe v Wade (1973) 410 U.S. 113 (U.S.A.)
Siler v Louisville & Nashville R. R. Co. 213, U.S. 175, 191, 29, S. Ct. 451. (U.S.A.)
Smith v Oil all Wright (1944) 321 U.S. 649 (U.S.A.)
Stark v Wicked (1944) 321, U.S. 288. (U.S.A.)
Stovall v Den no (1967) U.S. 293 (U.S.A.)
United States v Raines (1960) 362 U.S. 17; 80 S. Ct. 519; 4 L. Ed. 2d 524 (U.S.A.)
United States v Lovectt (1946) 328 U.S. 303 (U.S.A.)
United States v Reality (1895) (U.S.A.)
Vanhorn's Lessee v Durance (1795) 2, Dall 304 (U.S.A.)
Watson v Bush (1941) 313 U.S. 387 (U.S.A.)
West Coast Hotel Co. v Parrish 300 U.S. 379 (U.S.A.)
Witherspoon v Illinois (1968) 397 U.S. 510 (U.S.A.)
 Case No 4, session of (3) July 1971 (Egypt)
 Case No 22 session of (5) February 1977 (Egypt)
 Case No 33 session of (2) July 1977 (Egypt)
 Case No 131 session of (6) May 1978 (Egypt)
 Case No 97, June 1988 (Egypt)
 Case No 131, session of (7) May 1988 (Egypt)
 Case No 12 session of (4) June 1988 (Egypt)
 Case No 14, session of (15) April 1989 (Egypt)
 Case No 10, session of (5) October 1991 (Egypt)
 Case No 28, session of (5) October 1991 (Egypt)
 Case No 4 session of (7) December 1991 (Egypt)
 Case No 26 session of (7) January 1992 (Egypt)
 Case No 19 session of (18) April 1992 (Egypt)
 Case No 25, session of (1) February 1992 (Egypt)
 Case No 73 session of (18) April 1992 (Egypt)
 Case No. 3, session of (2) January 1993 (Egypt)
 Case No. 10, session of (7) May 1994 (Egypt)
 Case No.11 of (8) July 2000 (Egypt)
 Civil Court Cassation, session of 1st of April 1976 (Egypt)
 Constitutional Court, session (5) March 1994 (Egypt)
 Court of Cassation, in Case session of (28) January 1998 (Egypt)
 Supreme Cassation Court, session of 1st of March 1975 (Egypt)
 Supreme Cassation Court, session of 7th of February 1976 (Egypt)
 Supreme Cassation Court session of 6th of March 1976 (Egypt)
 Supreme Cassation Court, session of 3rd of April 1976 (Egypt)
 Supreme Cassation Court, session of 7th of May 1977 (Egypt)
 Supreme Constitutional Court, session of 7th of July 1977 (Egypt)
 Supreme Cassation Court, session of 16th of May 1978 (Egypt)

Supreme Cassation Court, session of 6th of May 1987 (Egypt)
Supreme Constitutional Court, session of 4th of May 1991 (Egypt)
Supreme Cassation Court, session of 7th of December 1991 (Egypt)
Supreme Cassation Court, session of 1st of February 1992 (Egypt)
Supreme Cassation Court, session of 7th of March 1992 (Egypt)
Supreme Constitutional Court (18) May 1996 (Egypt)
Al-Mu'iz Ḥamdūn v The Government of Sudan, M.D, Q.D3-99, 23-3-2000 (Sudan)
Sudan Government v Shiabu Saeed Moḥammd, *Sup-ct/crim-Riv /301/1406A/M*
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LIST OF ABBREVIATIONS

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|-----------|--------------------------------------------------------------------------------|
| S.W.T. | Subhanahu wa ta'ala an Arabic phrase (Praise be to Allah and the Most High) |
| P.B.U.H | peace be upon him |
| SCC | Supreme Constitutional Court of Egypt |
| U.S.A | United States of America |
| S.C.U.S.A | Supreme Court of United States of America |
| C. E. | Common Era, Christian Era, or Current Era |

TRANSLITERATION TABLE

| Arabic Term | Transliteration | Arabic Term | Transliteration | Arabic term | Transliteration |
|-------------|-----------------|-------------|-----------------|-------------|-----------------|
| ء | ‘ | ر | r | ف | f |
| ب | B | ز | z | ق | q |
| ت | T | س | s | ك | k |
| ث | Th | ص | ṣ | ل | l |
| ج | J | ض | ḍ | م | m |
| ح | ḥ | ط | ṭ | ن | n |
| خ | Kh | ظ | ẓ | ه | h |
| د | D | ع | ‘ | و | w |
| ذ | dh | غ | gh | ي | y |
| ا | a | ي | i | أ | u |
| آ | ā | ي | ī | أ | ū |

CHAPTER ONE

INTRODUCTION

In most democratic countries with written constitutions, one of the basic elements of the state to be submitted to law is the principle of the Supremacy of the constitution over all other norms in the legal system and over all state acts. This Supremacy implies not only submission to the procedural and organic rules established in the constitution, but also the respect of fundamental rights of individuals contained therein.

As we know the constitution is an organic and procedural as well as substantive rule. Therefore, statute could be unconstitutional not only because of the procedural non-regulation, but also when its contents are contrary to the principles established in the constitutional regarding the rights of individuals. Thus, constitutional supremacy would mean nothing if there is no particular way of the protection of the constitution.

Consequently, it is necessary to find mechanisms that lead to a more practical way. Among the mechanisms is the judicial control over the constitutionality of law which guarantees the protection of public freedoms and rights from the arbitrariness the legislature or a person's departure from it when he breaches a rule that is established by the constitution. This mechanism requires a method in order for the judiciary to look into breaches of the constitution. This operation can be executed through the constitutional action which is considered the basic way through which the courts can practice their function in controlling over the constitutionality of the legislations as well as the degree of their conformation with the constitution and its

spirit. The constitutional action plays a fundamental role in sustaining democracy in any legal system. The constitutional action has the main role in maintaining political stability within the existing constitutional framework of democratic principles and human rights. The constitutional action achieves a balance between powers given to government and the protection of human rights, all within the bound arises of the rule of law. Any observer of the rulings of the constitutional courts in the democratic countries will easily recognise the high priority it has given to human right issues. Judicial review has defined and applied important principles of human rights, including the presumption of innocence, right of access to the courts, the right to a fair trial, equal protection under the law, the right to privacy and freedom of expression. So, the judicial review aims to protect public freedom and rights through exercising laws, which are passed by legislative authority.

Therefore, if the objective of the constitutional action is to prevent the legislative authority from putting forward unconstitutional laws in contemporary countries. Then, the wisdom of the constitutional action in the Islamic law is to deny the rules from wording legislation that contradicts the legitimacy and higher divine rule demanded by Allah (S.W.T.).

Among the significant principles which have the link with the system of judicial review of laws is the principle of separation of powers. The separation of powers is one of the main principles which have helped to establish a system of judicial review in the democratic countries. This principle is that separation of powers creates a system of check and balance and thereby prevents one of the authorities from becoming too powerful. Also, the separation of powers allows the bodies exercising the different powers to become specialised with their area of activity and thus ensures that decisions are made correctly and adequately by organs especially designed for

specific tasks. The executive authority exerts influence on the judiciary through the appointment of judges, while the courts control the executive by the means of judicial review.

In the American constitution of 1787, the principle of separation of powers is a judicial fact. According to Article 3, the constitution of Virginia of 1776 stated:¹ *“the legislative, executive and judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time...”* The American constitution of 1787 has considered the principle of the separation of powers a very important and has clearly expressed it.

The American Constitution has stipulated the principle of separation of powers, yet this separation allowed various interferences among the powers, as a system of checks and balances. Therefore, Article 1 of the constitution entrusted the legislative powers of the United States to Congress, so that democratically-elected representatives will determine national policy. Article 2 vests the executive power of President, in the interest of a unified administration by an elected officer. Article 3 places the judicial power in judges appointed for life and removable only for high crimes and misdemeanors, so that cases may be decided without fear of reprisal.²

In this regard, Egyptian constitution authorizes executive power more than to limit it. The constitution does not state only by explicit authorization but also by its silence, gaps, and vagueness.³ In this respect, the executive power is exercised by the

¹ M. J. C Vile, *Constitutionalism and the Separation of Powers*, (Clarendon Press, Oxford, 1967), 119 and 147. Also see Hilaire Barnett, *Constitutional and Administrative Law*, (Cavendish Publishing Limited), 178-185.

² E. C. S. Wade and A. W. Bradley, *Constitutional and Administrative Law*, (London and New York Longman, 11th Edition, 1986), 51-59.

³ *Article 74 of Egyptian constitution of 1971.* "If any danger threatens the national unity or the safety of the motherland or obstructs the constitutional role of the State institutions, the President of the Republic shall take urgent measures to face this danger, direct a statement to the people and conduct a