

Power Of Judicial Review And The Courts Of Muslim Rulers: An Analytical Study

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Abstract

This article critically evaluates whether or not the power of judicial review was entertained by the courts during the era of Muslim rulers. To this end, this article appraises the criteria for exercising the power of judicial review including the concept of independent and impartial judiciary and the presence of the department of Walī al-Mazālim. This article inspects the dynasties where the power of judicial review was arbitrarily utilized to pinpoint the ups and downs in the application of the power of judicial review. This article describes the significance of judicial review by employing qualitative method of surveying the Islamic Jurisprudence. With this purpose, this article finds that all the actions of rulers, government, and executive were inspected by the court to verify the conformity of these acts with the injunctions of Islamic law. This study recommends the exercise of power of judicial review, in modern era, by the courts of Muslim states because it provides a way to the accountability of the government officials.

Keywords: Judicial Review, Judiciary, Walī al-Mazālim, Islamic Law.

1. Introduction

It is commonly perceived that the only function of courts in Islam is to discuss and try matters of private nature. However, it is not true; in Islam the judge and judiciary are independent and unbiased and could try any matter. The important question is whether the judiciary can play a role by inspecting and investigating the acts of the rulers or government. The judiciary had played a vital role in verifying the conformity of the actions of the sovereign, rulers, and government in Islamic states. The Islamic courts not only interpreted Islamic law on the basis of fairness, and equity but for the dispensation of justice, they used to promote the accountability of the rulers as well. In this way, the Islamic courts had the power of judicial review. This doctrine was updated and discussed in *Marbury v. Madison* as well, where Justice Marshall held that the judiciary could discuss and try the questions of political nature under the purview of judicial review.

Where there is a case of a state emergency, during this time of necessity, the power of judicial review and the emergency condition in a state is an exception to the rule. Moreover, usually, there is a suspension of the normal legal order in order to tackle the situation of emergency. The second exception includes the acts of Holy Prophet (SAW) could never be subjected to judicial review as Prophet Muhammad (SAW) was the only interpreter of Allah's revelations and he stayed as the head of Medina State but his personality cannot be subjected to the judicial review. The only source of revelation was Prophet Muhammad so his all acts were the vantage point for reliability, legality, and validity. The Caliphs were true believers of the Holy Prophet (SAW) specifically the first four caliphs of Islam who were the example of faithfulness to the Quran and Sunnah albeit with all these characteristics they were accountable.

This article endeavors to highlight that in Islam there was a well-established concept of Judicial Review. To this end, this article pinpoints the ups and downs in the adjustment of judicial review during different regimes and dynasties. This article is divided into various segments. The first segment critically describes how the acts of the sovereign were subjected to judicial review to highlight that no one was above the law during the golden time of Islam and whoever committed an illegal act beyond the principles of Islamic law was subjected to judicial review albeit it could be government or executive. The second segment is most important as it inspects the processes of judicial review including the presence of an independent judiciary and Walī al-Mazālim. This segment is bifurcated into various portions and in each part, it highlights the ups and downs during the evolution of judicial review in Islam. The last segment investigates the cases in which judicial review was necessary against the commission of a few specific acts by the rulers. In the end, there is a conclusion and guidance for modern Islamic countries.

2. Acts of Sovereign and Judicial Review

In Islam, sovereignty belongs to Allah Almighty. Prophet Muhammad (SAW) exercised it during his life as he was the messenger of Allah Almighty. The Islamic community nowadays is an agent of the sovereignty of Allah. The ruler's authority and the governmental powers are also derived from it and rulers are representative of the Islamic community. Consequently, the community has the power to examine and inspect the actions of the rulers. Moreover, they have the power to impeach these rulers when they perform any illegal activity or whenever they breach the trust of the community (Al-Muṭī'ī, 1344H).

It is the duty of the community or Ummah to appoint the best representative for them so that he could reasonably run the state and its affairs. He should be accountable to the Ummah when he deviates from the principles of Islamic law regarding judicial, administrative, political, and executive control. The fundamental and most significant objective is that the act of the ruler or government must be in accordance with the Quran and Sunnah.

Wasfi (1975) describes that all the acts of the sovereign are undoubtedly subjected to judicial review and the court has power to inspect such matters. He says: "An instance of this was when

Shurayḥ, a judge of Kūfah, during the period of Caliph Alī ibn Abī Ṭālib, ordered the Muslim Army to withdraw their troops from an area they had occupied because he had contracted with its people not to enter the area. When it was necessary for the Muslim Army to occupy the city, the people complained to Shurayḥ who ordered the Muslim Army to vacate having regard to the verse where Allah (SWT) says: O ye who believe! Fulfil all obligations... (Qur'ān, 5:1) and the saying of the Prophet (SAW) that: Believers are (bound) by their conditions (Al-Bayhaqī, 7:14210) and this seems to be an act of sovereignty relating to war (Wasfi, 1977).”

Shaker (2010) says that the actions of the sovereign or government can never enjoy the immunity from judicial review. However, the jurisdiction of acts of the sovereign had never been confined to an extent that whether any of the acts might invoke the process of judicial review. The court had the power to evaluate these acts where any illegality had been committed and the judiciary was independent in doing so. It had the power to impeach the tyrannical leader's rule (Shaker, 2010).

The Ḥudaybiyyah treaty was signed between the Prophet Muhammad (SAW) and the Masters of Meccans and due to this treaty; peace was maintained for ten years in the states. Romans and Al-Amīr Mu'āwiyah also entered into the no-war treaty. But the army of Al-Amīr Mu'āwiyah moved to the Roman boundary and were going to attack them (Abū Dāwūd, 14:2753). Al-Amīr Mu'āwiyah was the commander of that army. He heard that “to Allah alone belongs all greatness. To Allah alone belongs all greatness. Muslims should fulfill rather than violate their covenants” from one of the Holy Prophet's companions Umar ibn Absah. Who further narrated the saying of Holy Prophet (SAW) that “whoever has entered into a pact with a people should neither relax the pact nor tighten it till its terms expire or it is thrown back to them on terms of equality (i.e. revoking it without causing injury to the party.” In this way, Al-Amīr Mu'āwiyah withdrew his army as moving forward because crossing the border could breach the contract (Hamidullah, 1988).

The decision of Al-Amīr Mu'āwiyah to move forward would be an executive act but he turned his decision. Al-Amīr Mu'āwiyah withdrew his army due to Umar ibn 'Absah. Umar ibn 'Absah was not a judge but he was the companion of the Prophet Muhammad (SAW). Hence, the intellect of Umar ibn 'Absah had great significance. An inference can be drawn, by stretch of no imagination, that a judge by exercising the power of a judicial review can make the ruler attentive against the commission of an illegal act.

3. The Judicial Review Process in Islam

There are two fundamental processes that can actually review the acts of the rulers of the time. These processes include the presence of the independent Judicial System and the reasonable existence of the department of Walī al-Mazālim or Muslim Ombudsman.

3.1 Judicial Review in Independent Judicial System

It is a viable query whether any of these processes existed in the period of Muslim rulers more specifically in the regime of reputed Muslim Caliphs. Maḥmaṣānī (1979) describes that these

processes of the review were part of the Caliphs regime. Specifically, in the well-established regime of Hazrat Umar who was the second Caliph of Islam. However, in this period, albeit the dispensation of justice was expeditious, the scope of the judiciary was very general as it was not particular. Due to such generality, it was easily applicable to the rulers of the time. Moreover, Walī al-Maẓālīm had the power to entertain any action against the executive or the rulers (Maḥmaṣānī, 1979). Possibly it could be stated as it was his power and independence to perform any legal action.

It come more and more interesting when it comes to the roles of the institutions in reviewing the executive and rulers' actions. Undoubtedly and undeniable, all the Caliphs of Islam promoted the independent judiciary. In the regime of Hazrat Umar, it was on its highest practice. Additionally, all the other Caliphs considered the independent judiciary as a building block of the state as well as they also respected and took several reasonable measures for the independence of the judiciary and advancement of the judicial system (Maḥmaṣānī, 1979).

Kamali (1994) emphasized that Hazrat Umar and Hazrat Ali never encourage the judiciary for giving them preferential treatment. They used to be part of the litigation. It evinces that the judge in Islamic state was independent and can easily assume jurisdiction independently over anyone including the rulers as well (Hasan, 1981).

The review of the actions of the rulers could also affect their policy but they used to be tried at any cost. This means it was not a concern whether the policy made by the rulers would be disturbed or affected but the action could be facing the open court proceedings. There are many instances and circumstances that had been reported as well. The Umayyads regime had considered the independence of the judiciary a priority. Al-Nabhān says that they allowed the Qazi to entertain the power of the independent *ijtihād* as well (Al-Nabhān, 1974).

At one time, the office of the Caliphs was accompanied by judicial functions, however, in the Umayyad dynasty, in the regime of Mū‘āwiyah, all the judicial power was entirely transferred to the judiciary means all the judicial procedures and processes were in the control of the judiciary (Al-‘Ajlānī, 1985). Asad (1961) describes that this dynasty modernized and modified the judicial system. Moreover, this regime actualized the practice of an independent judiciary. The judiciary in the regime tried all the cases of personal, private, and matters of civil nature (Asad, 1961).

3.1.1 Viewpoints of Four Schools of Thought towards Judicial Review

In the Abbasid dynasty, the four main and fundamental schools of thought evolved and flourished. However, these schools of thought have restricted judicial independence specifically they were also against the independence of the judge. Moreover, they tried that the judge mainly had to follow the established doctrines of these schools with all their eternity (Kamali, 1994). Khallāf (1988) highlights due to this attitude of these schools the executive started interfering in the realm of the judiciary and the judicial functions with time were intervened by the executive. Furthermore,

Khallāf states that this was the reason that in the Abbasid period very reputed scholars like Abū Ḥanīfah and Ahmad ibn Ḥanbal declined the opportunity of being a judge (Khallāf 1988).

The restriction of *ijtihād* was a limitation on judicial independence (Kamali, 1994). The judges were restricted to following one school and they could not go beyond the realm of that school and they were not allowed to give any decision based on the doctrine of any other school. Al-Māwardī pinpointed that the judge should exercise the individual *ijtihād* rather than following the doctrine of any single school as the judge could not be bound to the ruling of the single school (Al-Māwardī, 1996).

Ibn Qudāmah, a prominent Ḥanbalī jurist, stated that it is not permissible to appoint a *qāḍī* on the condition that he should adjudicate on the basis of a particular school because of being righteousness, the criterion of justice as set by Allah (SWT), cannot be confined to a school and that where this is done, such a condition is null. However, such limitation imposed on the school does not affect a fearless and incorruptible judge's power to review the actions of sovereigns. This is because no school of thought precludes a judge from deciding a case against a ruler where his actions violate the Qur'ān and Sunnah (Kamali, 1994).

However, Hārūn al-Rashid, an Abbasid caliph established the first centralized judiciary. He appointed Abū Yūsuf as Chief Justice or *Qāḍī al-Quḍāt* of the court (Al-'Ajlānī, 1985). Abū Yūsuf was a great judge and the supervisor of the whole judicial system. King gave all powers to the Abū Yūsuf. Hence, the appointment of judges in the courts was recommended by Abū Yūsuf at that time (Kamali, 1994). Abū Yūsuf, the chief justice of the Abbasid regime was a state officer in charge of the courts. Moreover, Madhūr (1964) highlights that he was not a task officer but he was a *hākim*.

Al-Nabhān (1974) discusses that the chief justice and other judges derived their authority through the head of state by way of *wilāyah* (delegation). He applied his discretion in the exercise of authority; this is the reason why a judge must be learned in Islamic law without any need to make reference to an Imām for instruction (Al-Nabhān, 1974). This is basically the evolution of the doctrine of separation of power as there is the separation of power between the courts and the state organs (Kumo, 1978).

3.1.2. The Necessity of Independent Judiciary

An Independent Judiciary is a basic need for the implementation and exercising of judicial review. The reason is straight and simple where the court is not independent or it is intervened by the executive or any other department then it becomes impossible for the judge to take an action against the ruler of the time. It is undeniable fact; the clarity and effectiveness of the judicial system make it impartial and impartiality is the backbone of independence. The circumstance where the judge is unnecessarily bound by anyone else other than law, and then he is not going to take an action against any ruler, king, or executive. Moreover, the court will not even try these authorities

when they are arbitrarily practicing law. When the cases or allegations are clear than a crystal, the dependent judge fails to try them.

It is submitted that in the Abbasid dynasty, the courts were not independent, the judges were dependent. There was the downfall of the judicial review doctrine. The judicial review and judiciary suffered a lot in the regime of Abbasid. There was no concept to try the ruler or executive. It will be difficult to imagine what would be the condition of justice and whether such courts and court systems would be dispensing justice or not.

Mutawallī (1974) pinpoints that there were many circumstances where the executive had overridden the orders of the courts in the Abbasid dynasty. The executive was independent in utilizing their discretion by overriding the decisions, directions, and orders of the court (Mutawallī, 1974).

Coulson (1956) states that in the Umayyad and Abbasid dynasties, there were prominent cases in which the executive had interfered in the matters of the judiciary and judges were impossible to perform their function without the interference of the executive. Coulson highlighted that albeit Qur'ān says that the judges should perform their functions without the interference of anyone and should judge the matter impartially (Coulson, 1956). Al-Qāsimī stated that well-established Islamic justice principles were not followed during Umayyad and Abbasid periods. Hence, it was an abuse of power during these periods. He emphasized that judges should exercise the power of judicial review independently (Al-Qāsimī, 1977).

The Holy Qur'ān says: “Obey God and Obey the Messenger and those who are in charge of affairs among you. Should you differ over something, then refer it to God and the Messenger (Qur'ān, 4:58).” In the circumstances, where the disputes arise, the preference should be given to Sharī‘ah which is the interpretation of the words of Allah Almighty and the Prophet Muhammad (SAW).

The matter should be referred to the Sharī‘ah. Consequently, the judiciary must be independent while deciding the cases of people or the state (Asad, 1961). Al-Khālidī (1980) says that the ruler or the head of the state must not be having absolute power to dismiss the judges (Al-Khālidī, 1980). The constitutional theory of Islam authorizes the people to depose the ruler or state’s head in cases of the infirmity of body or clear aberration (Kamali, 1994). Hence, the judiciary can exercise judicial review at any cost and in any circumstances. Additionally, it should be independent in trying and disqualifying the ruler or head of the state.

3.2 The Judicial Review and Role of Walī al-Mazālim

In Islamic history, Walī al-Mazālim had been an established department wherein the people used to register their grievances against the kings or rulers. It is the duty of parliament to appoint the Walī al-Mazālim or Ombudsman. The function of the ombudsman is to investigate and inspect the complaints of the people against the injustice or incompetence of the executive or bureaucracy (Walker, 1980). However, the term ombudsman does not properly reflect the actual meaning and

functions of Walī al-Mazālim as Walī al-Mazālim had the power of deciding the legality of an act of an executive as well.

The roles and functions of Walī al-Mazālim were similar to the today's constitutional courts. Walī al-Mazālim was a constitutional court of its time. Now, in modern world, the constitutional courts have the power to try the cases of the executive or government while in past this function was to be performed by the Walī al-Mazālim. Walī al-Mazālim had very vast jurisdiction as it had the power of judicial review on matters of public interest and the public good. Moreover, it could also try the matters of rulers of state as well as it had the power to judge the legality and illegality of the actions of the executive.

Khalid (1976) says that Walī al-Mazālim inspected the ruler's authority and investigated whether such authority had conformity with the regulations of the Quran and Sunnah. It brings into play the authoritative powers of the ruler and adjudicatory power of the court in order to ensure that justice prevails no matter the caliber of the person involved (Khalid, 1976). Ibn Khaldūn describes that this department was made to maintain the balance between the autocratic power of the rulers and the justice of the issue before the court (Ibn Khaldūn, 1974). Mazālim is a person who acts as the head that examines the complaints of the aggrieved person against the oppressive actions of the executive or public officers and hence performs a kind of judicial review in this regard (Faruqui, 1994).

In the long-lasting Islamic history, the department of Walī al-Mazālim consistently played a significant role in society. This institution was inaugurated in the regime of Caliph Umar (Thaib, 1990). Caliph Ali strengthened this department by increasing its jurisdiction and modifying it. He used to preside over this department (Ali, 1975).

Al-Māwardī says that many acts of leaders or public officers in many Islamic jurisdictions were presented before the Caliph for a review as a judge. Actions were brought by people irrespective of their status or rank against public officers in this court. In addition, during the Umayyad period, the practice was further institutionalized. The acts of public officers were submitted before the court (Mazālim headed by the Caliph) for review. The institution gained more prominence during the Abbasid period. The jurisdiction was extended to cover ethical and religious functions. This was also personally headed by the Caliph and practiced in Baghdad. There are some precedents in the Islamic tradition where judicial review could occur. It could take place in certain classes of actions of the executive or public officers. First, where the executive maltreats or oppresses the public, it is the duty of the judges to exercise judicial review no matter the status of the person involved. Thus, judges have the right to stop a tyrannical government (Al-Māwardī, 1996).

When the public officers or executive failed to pay the tax or if they have to return the money to the treasury or they failed in doing so or they did not do so due to malafide intention then the judge or the ombudsman exercises the power of judicial review. It is fact that all the record regarding the

tax is controlled by its department but the judge can possibly check such record when he is dealing with such case (Al-Mārwadī, 1996).

4. Cases for Judicial Review

Al-Mārwadī describes that the oppressive rulers and governors usurping of the properties by the state are subjected to judicial review. The unlawful seizure of anyone's property or any ruler of state had illegally seized the property of anyone for his personal use or for any malicious purpose, in this situation the power of judicial review can be invoked and the property can be returned to its original and legal owner.

Al-Mārwadī highlights that Umar ibn 'Abd al-'Azīz, was on his way to prayer, ran into a man, who had just arrived from Yemen to make a complaint. The man said: You call people who are perplexed and wronged at your door, so a victim of oppression from a far-away land has come to you! When asked what his complaint was, the man said: 'Al-Walīd ibn 'Abd al-Malik has dispossessed me of my farm.' Umar said, 'Muzāḥim, bring me the book of confiscations.' The book contained records of confiscations of farms. Then he said: cross it out of the books, and let him not only restore the farm to the man but also double his regular payments (Al-Mārwadī, 1996).

Moreover, it is necessary that protection must be provided for the endowments. These should not only be protected but also be strictly monitored as well. The endowments could be either private or public. The private endowments must be protected and monitored even though no one has a complaint against them while the public endowments should also be protected but it requires the filing of the complaint by the beneficiary so it becomes easy and possible for the judge to look into it.

It is also necessary that matters related to public welfare like reprehensible behavior or any issues concerning the moralities of the public can also invoke the power of judicial review. It is stated that the judge acts by extracting God's right on such public officers concerned, forcing them to change their ways. The court can also review any such decisions which offend public acts of worship such as Friday prayers, feasts, pilgrimage, military duties, and so on. This is because God's dues and observance of religious duties should supersede. The institution of Walī al-Mazālim was effective in reviewing the actions of the public officers in the earlier period of Islamic history (Al-Mārwadī, 1996)."

The reviewing of the public officers or rulers of states' actions is an administrative assessment. Moreover, it promotes and protects the interest of justice in light of the Quran and Sunnah and all the regulations that are made under it. In Muslim countries, this practice has been modified in the form of constitutional courts. However, it is necessary to check the actions of rulers because due to it the turmoil and chaos in the states can be prevented.

5. Conclusion and Recommendations

In Islam, the actions of rulers and the executive were usually checked. In the regime of Caliphs of Islam, the judiciary was independent and hence, it could have the power of judicial review. The Caliphs not only promoted the independence of the judiciary but also encourage the power of judicial reviews. In their period, the judges were unbiased and impartial and they by utilizing their powers could easily entertain their power of judicial review. The purpose of promoting the power of judicial review was to inspect the activities of the sovereign and investigate the conformity of such acts in accordance with Islamic law. To this end, the modern system in Islamic Countries can be modified in a way that the actions of their leaders should be inspected to verify their conformity according to the Quran and Sunnah. Where the acts of the leaders are oppressive then a judicial review of such acts should be the last resort. Moreover, the issues concerning tax evasion, illegal seizure of properties, insufficiency of the pension fund, mistreatment and abuse of prisoners, non-compliance with principles, protocols, and obligations, and illegitimate aggressive acts against bordering states should be inspected and subjected to judicial review. This study recommends the exercise of power of judicial review, in modern era, by the courts of Muslim states because it provides a way to the accountability of the government officials.

There were two processes for inspecting the actions of the executive or rulers that were independent judiciary and the department of *Walī al-Mazālim*. Undoubtedly, these were very important and effective processes for checks and balances on the ruler's autocratic powers. The practice of these processes has come to end in Muslim worlds and has been modified in the form of constitutional courts.

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