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A judicial review of political questions under Islamic law

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Abstract: The contemporary Arab world has witnessed uprisings and turmoil as a result of alleged power-overreaching by political elites. Consequently, people call for democracy with emphasis on constitutionalism, accountability and protection of human rights. Yet, the voice of the judiciary seems not to be heard in championing these values in many Muslim nations despite the clear roles Islam places on the judiciary regarding political matters. This paper therefore analyses the power of judicial review on political questions from the perspective of Islamic jurisprudence. It finds that the power of judicial review and its main institution existed in early Islamic periods after the demise of the Prophet (SAW). The paper concludes that failure to observe judicial review in many contemporary Muslim countries results in the absence of effective checks on the powers of the rulers by the judiciary.

Keywords: Constitutionalism; Islamic law; judicial review; Muslim countries; political questions.

Abstrak: Dunia Arab masa kini telah menyaksikan kebangkitan dan kegawatan akibat daripada kuasa yang diperintahi elit-elit politik. Justeru itu, rakyat meminta demokrasi dengan berfokuskan perlembagaan, akauntabiliti dan yang melindungi hak kebebasan manusia. Namun begitu, suara kehakiman nampaknya tidak kedengaran dalam mengutarakan nilai-nilai yang terdapat di negara-negara Islam walaupun dengan jelasnya bahawa Islam mengangkat hal-hal politik.

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Oleh itu, kertas kerja ini menganalisis bidang kuasa kehakiman mengenai persoalan-persoalan politik dari perspektif perundangan Islam. Hasil kajian menunjukkan bahawa bidang kuasa semakan kehakiman dan institusi utamanya telah wujud diawal kemunculan Islam setelah kewafatan Nabi Muhammad (SAW). Kertas kerja ini juga turut merumuskan bahawa kegagalan mematuhi semakan kehakiman di negara-negara Islam masa kini disebabkan oleh ketiadaan pemerikasaan terhadap bidang kuasa pemerintah oleh badan kehakiman.

Kata kunci: Perlembagaan; undang-undang Islam; semakan kehakiman; negara-negara Islam; persoalan politik.

With the recent Arab awakening (uprisings) across many Muslim countries, one question seems to be whether the judiciary has any role to play in the politics of these countries. There has been an allegation that the judiciary has not played a significant role in curtailing the excesses of rulers in many Muslim countries. In other words, the voices of the judiciary have not been heard in championing the rights of the people and the values of a democratic government. Consequently, many have agitated for a democratic government based on constitutionalism in which the judiciary plays an important role, through interpretations of legal provisions, in ensuring the rule of law, fairness, open-space in government, accountability, and democratic values.

Doubtless, achieving the above responsibilities is a daunting task for the judiciary. This is based on the classical conception of the doctrine of political questions which seeks to deny the court the power of judicial review in matters which are by their nature political (Shamrahayu & Sambo, 2011). The purpose is perhaps to insulate the courts from political pressures and ensure respect for co-ordinate branches of government (Sambo & Shamrahayu, 2012; Barkow, 2002; Henkin, 1976; Tushnet, 2002). The doctrine emanated from the words of Justice Marshall in the case of *Marbury v. Madison* where he recognised the existence of certain questions that are wholly outside the purview of the courts by the use of the term "questions in their nature political." Nevertheless, this does not mean that the judiciary in many Muslim countries cannot play an important role through sound interpretation of the law that would douse tension in the polity and promote the rule of law. This is premised on the fact that Islamic law, as evident in its primary and secondary sources of law, has presented the best constitutional teachings and practices on how and when the courts should exercise its power of judicial review

on questions which appear political or seem to be within the province of the executive.

Many studies on the Islamic judiciary seem to have ignored an analysis of Islamic positions on the courts' exercise of the power of judicial review on political questions. For instance, Powers (1992) and Kamali (1994) examined the Islamic perspective of judicial review. Nevertheless, the authors' focus was on review of a judge's decision by another appellate judge. The present study focuses on the power of judicial review affecting the exercise of political power by the political class. Similarly, Lau (2004) focused on judicial independence in Islamic law and Afghanistan. Moustafa (2007) and Arjomand (2013) made general discussions on the rule of law in Islam and constitutional politics in specific jurisdictions like Iran and Iraq. Hence, there is a clear gap in existing literatures regarding this issue, for which this paper seeks to fill.

Based on the above backdrop, this paper aims at analysing the judicial review of political questions from the point of view of Islamic jurisprudence. To achieve this objective, the paper analyses the historical perspective of constitutional government in the *Sharī'ah*. It further examines the concept of *Shūrā* as popular participation in government. From there, it analyses how the judicial review of the acts of a sovereign or executive operates in Islam to show whether judicial review applies to the acts of a sovereign in a state of emergency or period of necessity. Lastly, the paper discusses the mechanisms put in place for the judicial review. This paper, however, does not endeavour a comparative study of the practices of modern Muslim states with the Islamic position concerning judicial review of political questions. Although comparison may be drawn once in a while, it is simply for purposes of clarification, while in other instances it is an assertion. It is anticipated that this paper will serve as a guideline for any Muslim majority state which seeks to conduct its affairs according to Islamic constitutional principles and at the same time comply with calls for democratic values.

Historical perspective of constitutional government in the *Sharī'ah*

The *Sharī'ah* dictates the totality of the constitutional government in Islamic law as the government and the people must act according to the dictates of the *Sharī'ah* (Ahmad, 2009; Khan, 2003; Zahraa, 2000). The principles of the *Sharī'ah* were enunciated in Mecca but found application in Medina (Gleave & Kermali, 1997; Kamali, 1988;

Sambo, 2013). One of the most authoritative sources of constitutional doctrine in the *Sharī'ah* is the Model or Charter of the Medina State which the Prophet (SAW) established in 622 A.D. (Elwa, 1980; Faruqi, 1994). This is because the Charter was implemented by the Prophet (SAW) and the rightly guided caliphs (*Al-khulafā' al-rāshidūn*) who were the successors of the Prophet (SAW) (Arnold, 1966). The caliphs succeeded the Prophet (SAW) as political leaders and not as prophets receiving revelations. As the Qur'ān declares that the Prophet (SAW) is the last Prophet of Allah (SWT) (33:40), revelation stopped after his death (Qur'ān 5:4).

Since the term modern constitutionalism entails legal limitation of powers of the head of state and his political accountability to an institution other than himself, the paper may not speak of this in terms of the Prophet's (SAW) rule. This is because the Messenger of Allah was equipped with revelation. His actions are therefore yardsticks of validity and legality. Allah (SWT) also described him as being of the highest morality "And indeed, you are of a great moral character" (Qur'ān, 68:4). The caliphs, especially the four rightly guided caliphs, who succeeded the Prophet (SAW) ruled based on the belief in the caliphs' moral integrity and utmost faith in the teachings and practices of the Prophet (SAW).

It should be noted that during the Prophet's (SAW) years in Medina, he was the sole recipient and interpreter of divine revelations. He was also the executive and judicial head of the community. Muslims, therefore, submitted to the rule of the Prophet (SAW) voluntarily mainly because of his exemplary character. In an attempt to follow the example of the Prophet (SAW), the caliphs became the agents of divine sovereignty in political matters. The caliph determined which interpretation of the *Sharī'ah* was authoritative, with the assistance of sound intellectuals. He could delegate some executive, legislative and judicial functions; however, he retained the authority to overrule the policies of his companions so long as it was not against Qur'ān and *Sunnah* (Abdur Rahim, 1981; Coulson, 1957; Mehdi, 1960).

As regards man being legislator, it is beyond argument that Allah (SWT) is the Legislator. However, some scholars opined that there can be no basis for law making or legislative powers in the *Sharī'ah* (Gibb, 2008). A contrary view has been offered that human judgment has long been exercised to determine the applicable rules of the *Sharī'ah* and that

Qur'ān and *Sunnah* have to be interpreted to develop legal principles and rules (Faruqi, 1994).

The above view, therefore, represents the perspective dimension of legislative duties in the *Sharī'ah*. This was the function of the caliph relying sometimes on the opinions of eminent Muslim jurists through the *Majlis al-Shūrā* (Consultative Council) and judges. Thus, where opinions differ among the jurists, he would take the one most suited as far as the case at hand was concerned (Coulson, 1956). The nature of the ruler's powers under the *Shūrā* system is pertinent to show whether autocracy with no room for judicial review has a place in Islam.

Shūrā as popular participation in government

The discussion of *Shūrā* as giving room for popular participation in Islam is important because it illustrates whether the nature of the powers awarded to the ruler in Islam is autocratic and devoid of judicial review. A ruler in Islam is not autocratic as he needs to consult the principal members of the community. People have a say in their affairs. Otherwise, they can ventilate their grievances in the court. This is unlike the modern political questions, which do not give room for judicial review of the actions of the sovereign.

In view of this, many Muslim authors have advocated for *Shūrā,* i.e., the practice whereby the ruler consults the principal members of the community in reaching a decision in matters relating to state affairs (Auda, 1980; Rida, 1947). Allah (SWT) enjoins the Prophet (SAW) to deal gently and kindly with the believers and consult them in state affairs but once he is resolute, he should execute his decision and rely on Allah (SWT) (Qur'ān, 3:159). This does not mean that the Prophet (SAW) was under obligation to consult the companions in all occasions. Indeed, he consulted them in some affairs and at the other times, he did not. The consultations were mainly on matters not subject to revelation. Here, he consulted but was not bound by the advice. For instance, during the treaty of *Ḥudaybiyyah*, the Prophet (SAW) rejected 'Umar's advice with respect to certain terms of the treaty as he thought that the Prophet (SAW) was too tolerant. The Prophet (SAW) was awarded the right to decide independent of the views of his companions because he was the recipient of revelation, and as such was privy to divine wisdom.

In addition, Allah (SWT) describes the believers as a community who decides their affairs through mutual consultation (Qur'ān, 42:38).

This does not mean, however, that the view of the majority should prevail. Abū Bakr, the first caliph, while ruling, decided whether to consult his community or act on a given advice. There was an instance where the caliph acted against what was supposed to be the view of the majority of the companions. He decided to fight Arab tribesmen who rebelled after the death of the Prophet (SAW) (An-Na'im, 1990). Similarly, 'Umar, the second caliph, acted against the majority of companions with respect to the distribution of lands taken in Southern Iraq as spoils of war. This shows that the majority may not necessarily be correct.

Today *Shūrā* requires the ruler to consult and be bound by the advice given by the principal members of the community. Reliance has been placed on verses of the Qur'ān which describe the believers as commanding what is good and prohibiting what is evil (Qur'ān, 3:110, 3:112 and 22:41). This supports the power to command what is good and prohibiting what is evil in government.

The caliph was not a despotic and dictatorial leader as he was bound by the *Sharī'ah* like any other Muslims. Although he was an ultimate authority on the *Sharī'ah* because he exercised what is now categorised today as executive, legislative and judicial functions, this does not mean that his limitations set by the *Sharī'ah* was not of high practical value. This also did not mean that there were no checks and balances. In fact, his checks and balances were stricter than those of today. This is because first, the caliphs asked the people to follow them as long as they follow the injunctions of Allah (SWT) and the Prophet (SAW). Second, they knew what religion imposed on them as rulers and that they would be accountable to God on the day of judgement. Third, the caliphs were pious Muslims with outstanding characters. Fourth, they ruled as servant leaders since they had the belief that Allah (SWT) gave them the positions not because they were the best of the *Ummah* but because Allah (SWT) had so destined and to Allah (SWT) belongs all powers. All these were potent checks on the ultimate authorities of the caliphs to avoid oppression and abuse of power. Thus, the dangers of abuse of office commonly associated with the chief executive of today are much greater than in the past due to the higher levels of faith and commitment exercised by earlier Muslim rulers. Despite all these, the question is whether the acts of a sovereign are subject to judicial review and which situations are subject to such review. This is addressed in the next segment.

Judicial review of the acts of sovereign

Sovereignty in Islam resides in Allah (SWT) (Qur'ān, 26-27). During the period of the Prophet (SAW), it was exercised by the Prophet (SAW) as the Messenger of Allah (SWT). The *Ummah* (Community) today, i.e. the entire Muslim community represents the agent of divine sovereignty rather than individuals or a group of persons. Therefore, the power of government is and will be derived from his position as the representative of the *Ummah* (Community) that installed him there. The community therefore has the right to check his excesses and remove him where he becomes recalcitrant. It is seen as a trust given by the community to him to represent them as the ruler (Al-Muṭī'ī, 1344H; al-Nabhani, 1952; Auda, 1980). Thus, the *Ummah* can appoint their representatives to run state affairs and hold them accountable where they deviate from the teachings of the *Sharī'ah*.

It should be noted that Islamic law advocates, most importantly, for the submission to law by the ruler and the ruled and all acts must be subject to control whether executive, administrative, judicial and political. The basic principle is that acts of the sovereign are required to be in accordance with the Qur'ān and *Sunnah.*

Thus, acts of the sovereign are subject to judicial review before the court. 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).

The Islamic system of governance has subjected the act of the sovereign to judicial review, although it did not confine the acts of the sovereign to certain acts nor did it give details of such acts (Shaker al-Omran, 2010). Rather, the judge has the power to evaluate the facts to ascertain if they are acts of the sovereign or administrative actions (Shaker al-Omran, 2010). This shows a measure of judicial independence in the Islamic system thereby preventing the public from being subjected to

arbitrary rule by a tyrannical leader. Thus, during the treaty of *Ḥudaybiyyah* between the Prophet (SAW) and the Meccans which brought about peace for about ten years in Mecca, al-Amīr Muʻāwiyah (an army leader) and the Romans had entered into a no-war pact for a period of time. Al-Amīr Muʻāwiyah moved his armies to the boundary of the Roman territory (Abū Dāwūd, 14:2753; Hamidullah, 1988). However, as al-Amīr Muʻāwiyah commanded his armies towards the Romans, a voice was heard behind the ʿAmir and said: "To Allah alone belongs all greatness. To Allah alone belongs all greatness. Muslim should fulfil rather than violate their covenants." Turning round al-Amīr Muʻāwiyah discovered that the words were spoken by a companion of the Holy Prophet, 'Umar ibn Absah, who on enquiry related that he had heard the Prophet (SAW) saying 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). Al-Amīr Muʻāwiyah therefore withdrew the armies as going forward would be a breach of contract (Abū Dāwūd, 14:2753; Hamidullah, 1988).

It is submitted here that the decision of al-Amīr Muʻāwiyah commanding his armies to advance against the Romans can be regarded as an executive act which is a political question. His decision was nevertheless reviewed by ʿUmar ibn ʿAbsah, a companion of the Prophet (SAW). Although ʿUmar ibn ʿAbsah was not a judge or a *Maẓālim*, his statement, being a companion of the Prophet (SAW), carried enormous weight as a man of knowledge who could be equated with a judge or *Maẓālim*. The reason is that one of the functions of a judge is to call the executive's attention to that organic document, i.e., Qur'ān and *Sunnah* which needs to be respected.

Thus, the acts of the sovereign must be in compliance with the law and can be reviewed by the judiciary in Islam, though it appears there is disagreement among scholars on the extent to which the acts of the sovereign enjoy protection of judicial review in Islam. The authors' view, however, is that the judicial authority to review the acts of the sovereign is not alien in Islam, as everybody is subject to the dictates of the rule of law.

The acts of sovereignty in a state of emergency/necessity

The acts of a sovereign usually feature during periods of war, civil unrest, economic crisis, civil disaster and so on. Normal legal order

is suspended during such periods. The *Sharī'ah* has as its objectives (*maqāṣid*) fostering public benefit and prohibition of evil. In other words, the *Sharī'ah* seeks to govern public interest (Ibn al-Qayyim, 1969, vol. 1).

Abū Isḥāq al-Shāṭibī noted that Allah (SWT) made *Sharī'ah* accommodative and convenient and thus won the hearts of human beings and invoked in them love and respect for the law. He noted that if it was left to people's convenience, it would be difficult to fulfil their obligations. He further stated that the *Sharī'ah* was revealed in order to protect the interest of the people (worshippers) both worldly and in the hereafter (Al-Shāṭibī, 1999, vol. 1; see also al-Ḥakīm, 1977; Mursī, 1972).

Thus, the benefit brought by the *Sharī'ah* is not limited to only normal circumstances but also abnormal, exceptional or emergency circumstances. In such a case, Allah (SWT) allows departure from the rules originally stated though with clear limits set by Allah (SWT). The Holy Qur'ān says:

> He hath only forbidden you dead meat, and blood, and the flesh of swine and that on which any other name hath been invoked besides that of Allah. But if one is forced by necessity, without wilful disobedience, nor transgressing due limits, then he is guiltless. For Allah is oft forgiven most merciful (Qur'ān, 2:173. See also Qur'ān, 5:3; 16:106).

It was also revealed that: "Allah doth not wish to place on you a burden" (Qur'ān, 5:6) and "…hath imposed no difficulties on you in religion" (Qur'ān, 22:78).

The Prophet (SAW) has applied the principles of emergency or exceptional situation or necessity where the Prophet (SAW) precluded the cutting of hands during war-like expeditions, conquest and travels, even though its *ḥadd* punishment was prescribed by Allah (SWT) (Abū Dāwūd, 38:4394). He also forbade this penalty if the theft had been committed in the course of a raid (Abū Dāwūd, 38:4394). This was because in such a situation effects of the punishment could be more dangerous than the theft itself thereby leading a person whose hand is cut off to join the enemy at that time (Al-Qaradawi, 1985). By analogy, interpreters of laws ordered the suspension of penalties and punishments in enemy territories lest the convict joins the enemy. The

scholars considered all these circumstances and established the maxim that 'hardship begets facility' (Al-Qaradawi, 1985).

The Prophet (SAW) made the above order notwithstanding the fact of the Qur'ānic verse that says: "As to the thief, male or female, cut off his or her hands: a punishment by way of example from Allah for their crime: and Allah is Exalted in power" (Qur'ān, 5:38). One would ordinarily think that this position is incorrect as the text was clear and definitive providing for no exception. However, this was applied under an exceptional or emergency situation, and as the Prophet (SAW) was the utmost interpreter of the law, he took this decision as an executive authority. It is therefore clear that Allah sanctions the position taken by the Prophet (SAW) as no further revelation came to contradict his decision.

Apart from the Prophet (SAW), the caliphs applied this issue of exceptional or emergency situation. For instance, ʿUmar ibn al-Khaṭṭāb forbade the cutting of the hand of a thief and suspended the punishment for theft during droughts. This is notwithstanding the fact that as earlier mentioned, the verse made no express exceptions to the application of the rule. However, 'Umar, in his capacity as the head of state noted that drought validly constituted an exception to the application of the rule. Thus, Article 21 of the *Mejelle* reads: "Necessity renders prohibited things permissible" (The *Mejelle,* 2007).

From the above, it can be said that the executive head of a state has the power to make a decree or law based on a different interpretation of the *Sharī'ah* in order to deal with exceptional circumstance or emergency situation. This could be in the period of extreme dangers such as war, turmoil, economic depression and so on. All these exceptions aim at meeting the objectives of the *Sharī'ah* and promoting peace and orderliness in an Islamic state. Judicial review cannot be made in this circumstance. Constitutional rights cannot succeed to challenge the legality of laws or decrees made in this state of emergency on the ground that it contradicts the Qur'ān or *Sunnah* (Tabātabā'i, 1983). Al-Ghazālī (2004) opined that the head of state should be given a measure of powers to face emergency or exceptional situation.

It is therefore crystal clear that the head of state may make a law or decree in order to levy tax on the rich during emergencies for the purpose of having internal and external security of the Muslim state.

This is notwithstanding the fact that it may be contradictory to the law and this should not be subject to the courts power of judicial review.

Mechanisms for judicial review

There are two basic mechanisms to review certain actions of the rulers, namely, the independent judiciary and *Walī al-Maẓālim* (Muslim Ombudsman). These two mechanisms dated back to the periods of the Caliphs, particularly, the second Caliph ‘Umar. While the scope of judicial function was general as it could apply to rulers and the ruled, *Walī al-Maẓālim* entertained actions specifically against the ruler or executive. The discussion becomes apt in view of the roles the institutions played in the review of actions of rulers or executive.

An independent judiciary

The practices of the Caliph ‘Umar and other caliphs show that the judiciary had enormous respect and a measure of independence (Maḥmaṣānī, 1979). In fact, Caliphs ‘Umar and ‘Alī were parties to litigation and opted not to be given preferential treatment (Kamali, 1994). This shows that a judge in Islamic law can assume jurisdiction against the head of state or where the sovereign is a party to a dispute (Hasan, 1981). Thus, the court’s decisions may affect the policy of the head of state or he may even be tried in the open court. It has also been reported that the Umayyads (c.665-750 CE) gave judges considerable independence and were not restricted in the exercise of independent *ijtihād* (Al-Nabhān, 1974). The office of the caliphs combined the functions of the judiciary. Mū‘āwiyyah, the founder of the Umayyad dynasty, made the first attempt to confer all judicial functions to the judiciary (Al-ʿAjlānī, 1985). This shows the judiciary was fully independent, though an observer said it was mainly for private wrongs and civil matters (Asad, 1961).

The emergence of the four schools of Islamic jurisprudence during the early period of the Abbasid dynasty in the eleventh century restricted the independence of judges, as judges were expected to follow the doctrines of established schools (Kamali, 1994). Thus, there were examples of executive intervention in judicial functions. This explains the reason why many pious scholars such as Abū Ḥanīfah, his follower Zufar, and Ahmad ibn Ḥanbal declined to be judges during the Abbasid period (Khallāf, 1988). This restriction of *ijtihād* to a particular school has been described as a departure from the precedent of the caliph and

a limitation on the freedom of judges (Kamali, 1994). The reason is that judges are required to follow the school and cannot decide a case based on any other schools. Al-Māwardī noted this when he said a judge must exercise his own *ijtihād* and should not be bound by the rulings of the school he subscribes to (Al-Māwardī, 1996). The Ḥanbalī jurist, Ibn Qudāmah, said it is not permissible to appoint a *qāḍī* on the condition that he should adjudicate on the basis of a particular school because 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 (Ibn Qudāmah, 1964).

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.* This is more so that, as stated earlier, Caliphs 'Umar and 'Alī had been parties before to litigation (Kamali, 1994).

As far as centralised judiciary is concerned, it was first established by the Abbasid caliph, Hārūn al-Rashid, appointing Abū Yūsuf (d 798 CE), as the *Qāḍī al-Quḍāt* (chief justice) (Al-'Ajlānī, 1985). He also relinquished supervision of the judiciary to Abū Yūsuf and made appointments of judges on his recommendation (Kamali, 1994). *Qāḍī al-Quḍāt* was a state officer in charge of judiciary exercising his powers in his capacity as the *hākim* (ruler) and not a task officer (Madhūr, 1964). 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 the authority; this being 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 shows gradual separation of powers between the judiciary and the other state organs (Kumo, 1978).

An independent judiciary is indeed necessary for the court to exercise judicial review. The reason is that in a situation where the judge is not independent, he might be unwilling to decide a case against the ruler or executive even where the case is obviously against them. This is in line with the saying that he who plays the piper dictates the tone. However, independence of judiciary and judicial review mostly suffered during the Abbasid period. There were instances of executive non-enforcement

of court orders and exercise of their own discretion in some matters (Mutawallī, 1974). In the Umayyad and Abbasid period, judges were not insulated from politics and there were cases of interference with judicial matters (Coulson also noted in view of this that even though the Qur'ān laid down the judge's duty and obligation to be impartial, the practice was impossible because of the intervention of the executive in the acts of the judiciary during this period (Coulson, 1956). A similar conclusion was reached by Al-Qāsimī who opined that the principle of Islamic justice was not followed in certain periods of the Islamic history (Al-Qāsimī, 1977). A judge should be able to check abuse of power by way of judicial review no matter who is involved and this can only be done where he enjoys some measure of independence (Al-Qāsimī, 1977).

The Qur'ānic verse envisages the possibility of disputes between the ruler and the ruled. Allah (SWT) 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). Thus, in the event of dispute, the *Sharī'ah,* i.e., the law of God and the *Sunnah* of the Prophet (SAW) should be referred to. The arbiter, therefore, must be an independent judiciary with powers to adjudicate disputes between the people and the state (Asad, 1961). For this to be effective, it has been noted that the head of state should have no absolute power to replace or dismiss the judges of the land (Al-Khālidī, 1980). Islamic constitutional theory, as has been noted, permits the community to depose the head of state in case of clear aberration or infirmity of body or mind (Kamali, I994). Thus, judiciary, where independent, can be called upon, though a very sensitive task, to disqualify him. This form of adjudication involving state officials takes the form of, as noted by al-Khalidī (1980), the historical *Maẓālim* in Islam.

Institution of *walī al-maẓālim* (Muslim Ombudsman)

Walī al-Maẓālim is an institution in the history of Islam where people ventilate their grievances against a ruler. The word ombudsman implies a person appointed by the Parliament to investigate people's complaints against the executive or bureaucratic incompetence or injustice but not illegality (Walker, 1980). It is used here for convenience, as the ombudsman does not perfectly describe *Walī al-Maẓālim.* This is more so that *Walī al-Maẓālim* can decide on the legality of an executive act.

Walī al-Maẓālim is similar to what is today referred to as constitutional courts. Some countries have created constitutional courts with powers to decide matters relating to the executive or governmental institutions (section 166 (a) of the constitution of the republic of South Africa, No. 108 of 1996; section 119 of the Interim National Constitution of the Republic of Sudan (2005).

Walī al-Maẓālim exercises jurisdictions in matters relating to the acts of rulers or public officers in an Islamic State. However, unlike many constitutional courts in many countries today which interpreted the constitution as it affects the political class (for instance, section 122 (1) and (2) of the Sudanese Constitution and section 167 (4) of the South African Constitution), *Walī al-Maẓālim* subjects the authority of the ruler to the Qur'ān, *Sunnah* and regulations made under it. It brings into play the authoritative powers of the ruler and adjudicatory powers of the court in order to ensure that justice prevails no matter the calibre of the person involved (Khalid, 1976). It strikes a balance between the ruler's autocratic power and justice of the matter before the judge (Ibn Khaldūn, 1974). A *Maẓālim* is the head who investigates the complaints of oppressive acts of public officers or executive (Faruqui, 1994).

The institution of *Walī al-Maẓālim* has long been established in Islamic history. Caliph 'Umar Ibn Khaṭṭāb first established the institution (Thaib, 1990). It was strengthened by Caliph Ali who personally presided over the institution (court) (Ali, 1975). 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 institutionalised (Al-Māwardī, 1996). The acts of public officers were submitted before the court (*Maẓālim* headed by the Caliph) for a 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 practised 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 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 whatever the calibre of the person involved is. Thus,

judges have the right to stop a tyrannical government (Al-Mārwadī, 1996).

Similarly, the executive or public officers must ensure that they pay tax due to them, take the ones they are entitled to and return others to the treasury. If this is not done, the judge may exercise a judicial review. Besides, the secretariat of the government department having a responsibility in records keeping with regards to tax must have their work monitored and must comply with the regulations. In addition, matters of bad treatment of pensioners, inadequacy of pensions and delay in issuing them are subject to court actions against the public officers concerned (Al-Mārwadī, 1996).

In the same vein, usurped properties by the state or oppressive governors are subject to judicial review. Thus, where the state illegally seizes the property of another, or the property is committed by an oppressive head of state by force for the owner's personal use or for other selfish or malicious reasons, the court can restore it to the rightful owner. It was reported that 'Umar ibn 'Abd al-'Azīz, 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 ʿAbd al-Malik has dispossessed me of my farm.' ʿUmar 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).

In addition, endowments must be protected and strictly monitored. This can be either public or private endowment. The former must be monitored even if no complaint is received regarding them to show that they are properly managed. The former needs complaints to be laid, usually by the beneficiary so that the judge can look into it (Al-Mārwadī, 1996).

Furthermore, issues of public welfare such as reprehensible behaviour or matters affecting public morals can be subject to judicial review (Al-Mārwadī, 1996). 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, and military duties and so on (Al-Mārwadī, 1996). This is because God's dues and observance of religious duties should supersede.

The institution of *Walī al-Maẓālim* was effective in reviewing the actions of the public officers in the earlier period of Islamic history (Al-Mārwadī, 1996). It ensured sound administrative assessment by reviewing the actions of the public officers in the interest of justice in accordance with the Qur'ān and *Sunnah* and regulations made under it. The practice appears to have ceased in many Muslim countries today. The practice of reviewing the actions of the rulers by the judiciary could have saved many modern Muslim countries from the recent uprising and turmoil, as there would be effective checks on the powers of the rulers. Nevertheless, the fact that the institution serves as a mechanism for judicial review of acts of public officers merits mention in this work.

Conclusion

Reviewing the acts of the executive or a ruler is not alien in Islam. This is because the judiciary enjoys some measure of independence and could exercise the power of judicial review especially during the periods of the rightly guided caliphs. This is more so that acts of the sovereign are required to be in accordance with the law, i.e., Qur'ān and *Sunnah*. Thus, in many occasions, such as where the acts of the sovereign become oppressive, it is subject to judicial review. Therefore, issues like tax evasion, maltreatment of prisoners, inadequacy of pension fund, unlawful seizure of properties, non-compliance with regulations, and unlawful acts of aggression against neighbouring state are subject to judicial review. However, the only exception to this seems to be acts of sovereign in a state of emergency or during the period of necessity. In such a situation, normal legal order is suspended in order to deal with the emergency situation.

In the same vein, the acts of the Prophet (SAW) were not and could not have been subject to judicial review. This is because the Prophet (SAW) was the sole recipient and interpreter of divine revelations, and the executive and judicial head during his lifetime in Medina. In addition, a modern concept of constitutionalism which entails legal limitation of powers of the head of state and his political accountability to an institution other than himself was not applicable to the Prophet (SAW). This is because the Messenger of Allah (SWT) was equipped with revelation. His actions and deeds are therefore yardsticks of validity

and legality. In an attempt to follow the example of the Prophet (SAW), the caliphs became the agents of divine sovereignty in political matters.

The caliphs, especially the four rightly guided caliphs, who succeeded the Prophet (SAW) followed his practices and ruled based on the belief in the caliphs' moral integrity and utmost faithfulness to the teachings and practices of the Prophet (SAW). They were accountable as they instructed their followers to obey them as long as they followed the teachings of Islam; hence a form of constitutionalism. They were always ready to subject their acts to judicial review before an impartial and independent judiciary. Thus, Islam has two major mechanisms for judicial review. The first is an independent judiciary and the second represents the institution of *Walī al-Maẓālim*. This is an effective system of checks and balances on the autocratic powers of the sovereign, in addition to accountability to Allah (SWT). This practice seems to have gone into extinction in many contemporary Muslim countries. Consequently, there seems to be no potent checks on the powers of the rulers by the judiciary, which could have avoided many demonstrations, uprising, riots, and turmoil recently witnessed across many Muslim states.

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