

Wilāyat al Mazālim



In

Islamic and Western Laws: Theory and Practice

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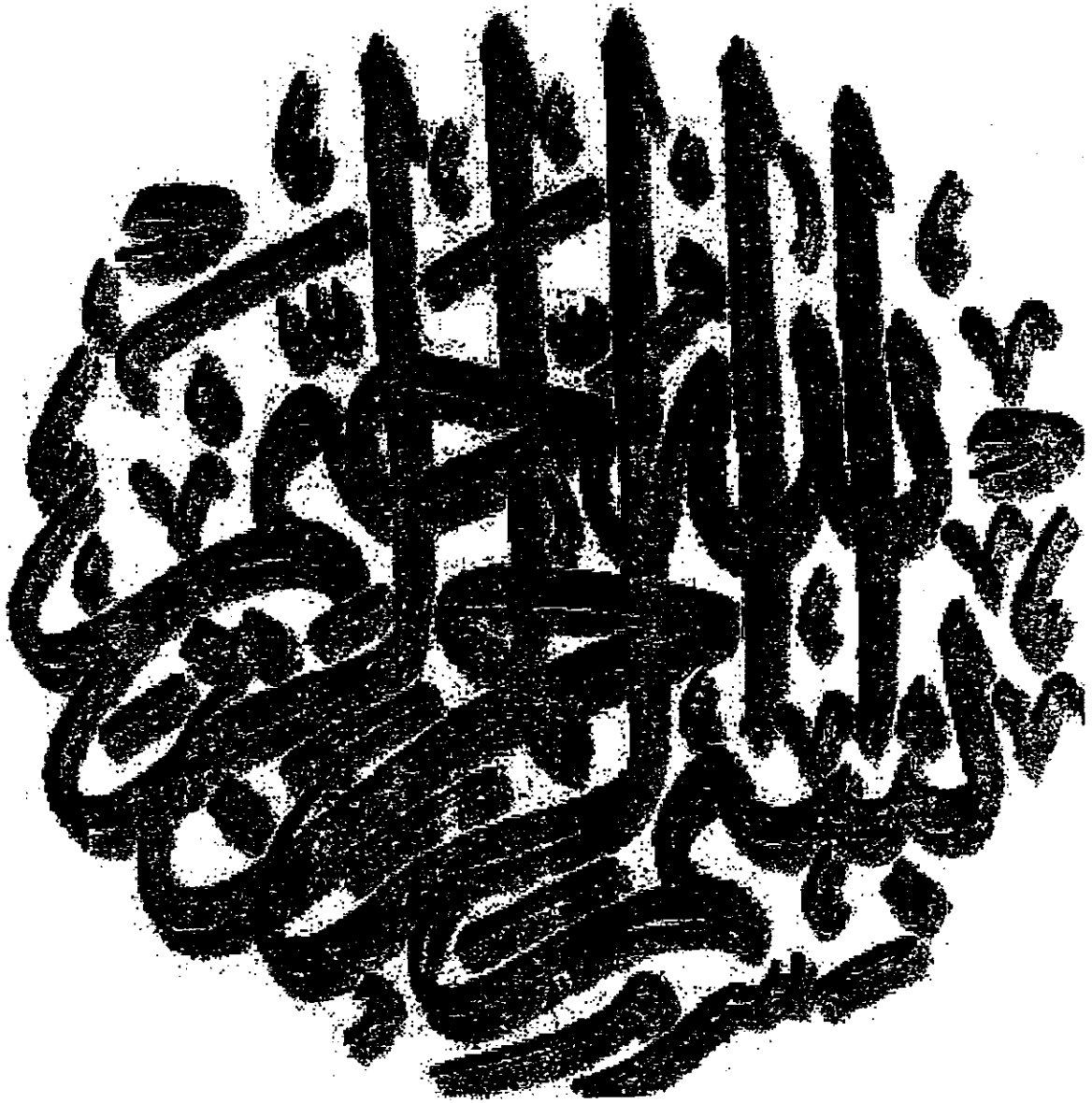
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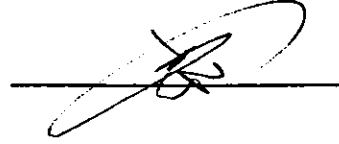
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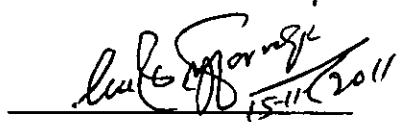
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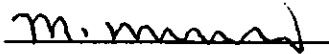


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Dedication

I dedicate

This humble effort

To all the pious souls

Who devoted and sacrificed their lives

For the implementation of Islamic Shari'ah

And to all those who strive for this noble cause

Through intellectual, academic and political efforts.

Acknowledgement

After expressing my sincere thanks to Allah *subhānahu wa t'ālā* without Whose empowerment nothing is possible to achieve, I would like to thank all those who assisted and helped me in any way to compile this dissertation. May Allah reward them the best.

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I must also thank the staff of Dr. Muhmmad Hamidullah Library of Islamic Research Institute in general and particularly the Chief Librarian Sher Nowroz Khan, Jehangir Shah, Farooq and Fayyaz who always assisted me in finding relevant materials and provided me with a comfortable atmosphere in the library.

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TRANSLITERATION TABLE

ا	a	د	<u>d</u>	خ	gh	ب	<u>bh</u>	Long Vowels	ا	ā
ب	b	ذ	dh	ت	f	پ	<u>ph</u>		آ	ā
پ	p	ر	r	ق	q	ت	<u>th</u>		ی	ī
ت	t	ز	z	ک	k	ث	<u>th</u>		و	ū
ث	ṭ	س	s	گ	g	ج	<u>jh</u>		و (URDU)	ō
ج	j	ش	z	ل	l	ح	<u>ch</u>		ع (URDU)	ē
ح	ch	ص	s	م	m	خ	<u>dh</u>		Short Vowels	
خ	kh	ض	sh	ن	n	ط	<u>dh</u>			
د	d	ط	t	و	w	ظ	<u>rh</u>		ا	a
		ظ	z	ی	y	ع	<u>kh</u>		ی	i
		ف	f			غ	<u>gh</u>	و	u	

Diphthongs			Doubled		
و	—	(ARABIC) (PERSIAN/URDU) (TURKISH)	aw	ز	—
			au		uww/uvv
			ev		
ی	—	(ARABIC) (PERSIAN/URDU) (TURKISH)	ay	ی	—
			ai		iiy
			ey		

Letter ؤ is transliterated as elevated comma (') and is not expressed when at the beginning.

Letter ع is transliterated as elevated inverted comma (').

Letter ح as Arabic letter is transliterated as *ch*, and as Persian/Turkish/Urdu letter as *z*.

Letter و as Arabic letter is transliterated as *w*, and as Persian/Turkish/Urdu letter is transliterated as *v*.

Letter ت as Arabic letter is transliterated as *ah* in pause form and as *at* in construct form.

Article ا is transliterated as *al-* (*l-* in construct form) whether followed by a moon or a sun letter.

Letter و as a Persian/Urdu conjunction is transliterated as *-o*.

Short vowel ِ in Persian/Urdu possessive or adjectival form is transliterated as *-i*.

Abstract

Justice is the foundation of Islamic legal and political system. The basic purpose of sending the Messengers and the Prophets by Allah was to establish a just system in the world. The rules of Islamic law aim at bringing justice to life in all its spheres and in the best possible form. One of the important means of ensuring the administration of justice across the board is the area of law which is left to be legislated on by the ruler in accordance with the general principles of *Shari'ah*. This is called *siyāsah shar'iyyah*. It has many manifestations one of them being the system of Redress of Grievances arising out of maladministration of the government officials. In the Islamic history the department of the government which has been working for this purpose has been named as *Wilāyat al Mazālim*. The main purpose of this dissertation is to highlight the theory and practice of *Wilāyat al Mazālim* in the past and the present. For this purpose the theoretical foundations of *Wilāyat al Mazālim* have been discussed in the first part followed by history of the institution through the centuries in the Muslim states. In the second part the application of the theory in the contemporary world has been discussed by describing and analysing the system in Saudi Arabia and Pakistan. For the purpose of comparison with the Western legal system, the institution of the Ombudsman in the United Kingdom has been discussed. In the light of all the discussion the main conclusion which has been drawn is that the essence of the institution has always been there in the Muslim history and the concept

of the Ombudsman in the contemporary world is nothing but the extension of that essence. Some important changes need to be brought in the appointment of its incharge and its other rules of working to fully bring the institution in the fold of *Shari'ah*.

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Introduction

Significance of the subject:

In the name of Allah, the Exalted, Most Beneficent and Most Merciful. All praise be to Him and His blessings and peace be upon Muhammad, the Last of the Prophets, who conveyed the Message of Allah to us and fulfilled the trust.

Islam is a *dīn* that is based on justice. All its systems and the institutions it seeks to establish are aimed at promoting justice in the world. *Al 'Adl* is one of the beautiful names of Allah that means justice. Therefore the main goal of Islam's legal and political systems is to have governance based on universal justice. This fact is manifested in all the ways and patterns which *Shari'ah* recommends for running the affairs of the state and society. From the selection of a head of state in public life to the selection of spouse in one's individual life, *Shari'ah* aims at doing everything through a just and balanced way. Even in the matter of worship where most religions tend to be on one or another extreme, Islam strikes a beautiful balance and instructs its followers to have a balance between their temporal and spiritual needs so that one side is not ignored because of over-emphasis on the other. This balance is clear in the supplication which the Muslims make at the end of every *Ṣalāh* (prayers) which reads:

"O our Lord! Give us the best in this world and the best in the Hereafter and save us from the torment of fire." {Al Qur'ān 2:201}

Among the means of ensuring justice is *siyāsah shar‘iyyah*. That is the area of legislation and governance where strict rules are not provided through texts. Here the Muslim rulers have been using their wisdom according to the broad principles of Qur’ān and Sunnah to ensure the administration of justice in the society. The focus of Muslim jurists through the centuries has been mainly upon the interpretation of texts and the area of Fiqh proper while *siyāsah shar‘iyyah* could receive little attention, though the matters involved came up for discussion in the works of jurists within the topics of Fiqh. Within the field of *siyāsah shar‘iyyah* the Grievance Redress System which was named by the Muslim jurists as *Wilāyat al Mazālim* received the same little attention. There are only a few Muslim jurists who exclusively wrote books on *siyāsah shar‘iyyah* in general and *Wilāyat al Mazālim* in particular. The foremost among these are the two well-known works, both with the same name of *Al Ahkām al Sulṭāniyyah* (The Laws of Governance) which has discussed in detail the matters related to *siyāsah shar‘iyyah* including *Wilāyat al Mazālim*. One has been written by Al Māwardī and the second by Abū Ya‘lā. Ironically both the books are identical in their contents and order to a great extent. Thus the reader is compelled to believe that one of the writers might have copied the idea from the other. Anyhow for a researcher or writer in *siyāsah shar‘iyyah* it is nearly impossible to proceed without having read these important works as they have a fundamental position in this field.

No doubt, grievance redress mechanism is one of the most important tasks of any state which wants to ensure the administration of justice because the idea of justice without it would be seriously flawed.

In the modern world too, people may tend to resort to non-judicial remedies where they have grievance to complain of or wrong to be redressed for various reasons. Neither courts nor tribunals can offer a remedy when private citizens complain that public authorities, although they have acted within the law, have failed to observe proper standards of administrative conduct. It is faults of this type which is often described as maladministration. To curb and redress such maladministration the Office of the Ombudsman has been established by the modern states. This office is, in fact, the continuation of the Grievance Redress Mechanism provided by Islamic law during its thousand year period of glory. In the modern age we not only need implementation of this mechanism but also evolution of proper rules and regulations for its conformity with the principles of *Shari'ah*.

Why this topic:

Keeping in view the significance of the subject as discussed above, I decided to choose this topic to highlight this important area of law, to explore the similarities and distinctions which existed in this institution within the two different systems of laws and to compile a comprehensive work on the topic which would be an effort to

answer all the important questions relevant to it about its theory and the application of that theory in the past and present. I selected three cases to be studied for this research namely; Saudi Arabia, Pakistan and The United Kingdom. The reason for this selection is that Saudi Arabia is a state which strives to keep its connection with the classical Islamic legal system. Pakistan is a modern Muslim state which took the grievance redress model from the West but by and large it strives to keep in the bounds of *Shari'ah* as is manifested from the process of Islamization of its constitution and its laws. The United Kingdom is a representative model country of the Western legal system.

Research Methodology:

Mainly the project was completed through library research as the scarcity of resources and time did not permit me to carry out any field research. So I have to depend upon the academic sources available in libraries and on the World Wide Web.

I did not restrict myself to one particular methodology as restriction to one methodology was not possible in such type of a study. I described the institution as it has been visualized by the Muslim jurists, as it existed in the history and in the modern world. This may be termed as descriptive methodology of research. In tracing the history of grievance redress I took the path of historical research. While discussing the rules I adopted legal research methodology and deducing them from the factual

situations I used the methodology of deductive research. So as a whole it was a mixture of many research methodologies.

I have transliterated all the foreign words and have followed transliteration scheme of the Quarterly *Islamic Studies*, Islamic Research Institute, International Islamic University Islamabad. Besides I have referred to the number and *Sūrah*s and *Āyāt* quoted and have cited the reference of all *aḥādīth* as well. For the translation of the texts of Qur'ān I have mostly relied on the works of Abdullah Yousaf Ali and Marmadook Pichthal while for the translation of *aḥādīth* I have mostly relied on my own language skills.

Research Plan:

The total work is spread over six chapters. The first chapter explains the theoretical foundations of *Wilāyat al Mazālim* (Grievance Redress in Islamic legal System). For this purpose it elaborates the significance of justice in the light of Qur'ān and Sunnah, the meaning of *siyāsah shar'īyah* and *Wilāyat al Mazālim*, Comparison between *Wilāyat al Mazālim* and other similar institutions of the government and the Legal status of grievance redress in Islam.

The second chapter traces historical evidence for this institution. It states the mechanism of grievance redress in Prophet's period, *al Khilāfah al Rāshidah*, Umayyad Period, Abbasid period, in Al Andalus, Ottoman period and in the Moghul period. By

describing and discussing the system in those well known Muslim governments, an attempt has been made to prove that the mechanism of Grievance redress existed in almost all the Muslim Governments in an age when rest of the world was hardly familiar with any such concept.

The third chapter describes the Grievance Redress system of Saudi Arabia which is called *Diwān al Mazālim*. For this purpose brief historical background of the judicial system has been traced back and the present system of judiciary with the recent amendments has also been elaborated. It follows a detailed discussion on the *Diwān al Mazālim* including its establishment process, its powers and jurisdiction, its procedures of complaint handling and its supplementary powers for running the affairs. Simultaneously evaluation of the concerned law and critical analysis of performance of the institution is also there. In between the comments on the institution, occasionally comparison between it and the same institutions in other countries particularly Pakistan and the United Kingdom has also been drawn.

The fourth chapter deals with the Grievance redress system of the the United Kingdom i.e. the Office of the Parliamentary Ombudsman. It states background of the establishment of the institution and the process through which it was established. The jurisdiction, powers, complaint handling procedures of the Parliamentary Ombudsman are next points of discussion in this chapter. Towards the end of the

chapter comes the evaluation of the role of Parliamentary Ombudsman and its performance over the years.

The fifth chapter is about the Pakistani *Wafaqi Mohtasib* (Federal Ombudsman). It states, as usual the background facts which led to the establishment of the institution, the explanation of meanings of the word “*mohtasib*” and “Ombudsman”, appointment and qualifications of the *Wafaqi Mohtasib*. It follows the discussion on the relevant rules and regulations about the jurisdiction, powers, complaint handling procedures and analysis of the performance of the institution. At the end the impact of the role of *Wafaqi Mohtasib* has been discussed.

The sixth and last chapter consists of the conclusions drawn from the study and the recommendations made in the light of the study to bring the institutions in Pakistan and Saudi Arabia in line with the principles of *Shari'ah*.

All the first five chapters begin with an introduction and ends with a conclusion except for the last chapter which contains conclusions and recommendations based on the whole dissertation.

Literature Review:

For understanding the background of *Wilayat al Mazalim* that is the nature of *siyāsah al shar'iyah*, Ibn Taymiyyah's book *Al Siyāsah al Shar'iyah fi Iṣlāḥ al Ra'i wa al Ra'iyah* is very important. It is a foundational work in this particular area of study.

Building upon the work of his teacher, Ibn Qayyim al Jawziyyah's *Al Ṭuruq al Ḥukmiyyah fi al Siyāsah al Shar'īyyah* is, nonetheless, more insightful. The book has been translated by Alauddin Kharofa with the name of "*Legal Methods in Islamic Administration*". This book with *I'lām al Muwaqqi'in* by the same author are the only classical works discussing the nature and application of *siyāsah shar'īyyah* in the early periods of Islam.

No doubt that 'Abdul Wahāb Khallāf's *Al Siyāsah al Shar'īyyah fi al Shu'ūn al dustūriyyah wa al Khārijiyyah wa al Māliyyah* and lately the research article by Dr. Muḥammad Hashim Kamali namely; "*Siyāsah Shar'īyyah*" in the *The American Journal of Islamic Social Sciences*, both are welcome additions by the two contemporary scholars on the topic of *al Siyāsah al Shar'īyyah*.

The main topic "*Wilāyat al Mazālim*" is a topic which, as was said in the beginning of this introduction, could not receive much attention of the writers in the classical period. The main source for the relevant details of the department are the two books with the same name i.e. *Al Ahkām al Sultāniyyah*, as mentioned before, by Al Māwardī and Qadī Abū Ya'alā.

For the purpose of this dissertation I have benefited from both of them. For Al Māwardī's work, I found its English translation done by Asadullah Yate while the book of Abū Y'alā was to be studied directly in Arabic as I could not find English

translation of the same. Both the works describe the system of government and its main departments in quite a good detail in the light of *al Siyāsah al Shar'īyyah*. Both have devoted a full chapter to *Wilāyat al Mazālim*. Besides the theoretical rules regarding *Wilāyat al Mazālim*, one can have a good idea of the history of this institution by studying both the books.

For the history of *Wilāyat al Mazālim* the books of history, the biographies of the *Khulafā-i-Rāshidūn* and other such books, in general have scattered information and one can find some allusions to it in those books.

I could find only one book with the name of the specific subject of the history of *Wilāyat al Mazālim* i.e. *Aṭwār Wilāyat al Mazālim 'Abr al Tārīkh* (Phases of *Wilāyat al Mazālim* Through the History) by Hāshim bin al Ḥasan al 'Abīrī al 'Alawī. Unfortunately the book is not what it seems to be, as it has very little details of the institution's history. Its main focus is particularly on the institution's history and performance in Morocco.

Muhammad Yousaf Goraya in his book *Judicial System Under the Prophet and the First Two Pious Caliph* has discussed, as is obvious from the name, the justice system of the earliest periods of the Islamic history, where he has mentioned some events of grievance redress too.

Another book which, although not very detailed, does describe briefly the history of the institution, is *The Administration of Justice in Islam* by Al Hāj Muhammed Ullah. It states the history of the institution briefly; beginning from the Prophetic period till the Mughal Empire and East India Company's rule. It also brings under discussion some legal issues like the status of *Dhimmīs* in Islamic law.

Almost at the same pattern *The concept of Administrative Accountability in Islam* by Dr. Riaz Mahmood has been written. A little difference is that the focus in this book is upon the accountability and it also discusses the evolution of the Ombudsman in the modern world.

Yet another book having the same style of briefly describing the history of the administration of justice is *Justice in Historical Islam* by Anwar Ahmad Qadri. It has been restricted to the history justice system in the Muslims states only.

For understanding the administrative and judicial system of Umayyads and Abbasids, apart from the general history books, one book is of utmost importance. It is *Arab Administration* by S.A.Q. Hussaini. It describes in detail as a whole administrative system of the Central Arab Empire, and discusses all the four main periods beginning from the first period of the Prophet (peace be upon him), the *al Khilafah al Rāshidah*, the Umayyads and the Abbasids. Ofcourse administration of justice is an important part of the discussion.

As far as the grievance redress system or generally judicial system in Al Andalus is concerned, I could not find any specific work done in this regard. There are books which discuss generally the system of government in the Muslim Spain i.e. Al Andalus and within that discussion about different government departments, justice system does come under consideration. Among such books are Syed Azizur Rahman's *The Story of Islamic Spain*, Dr. Ahmad Fikri's *Qurṭabah fi 'l 'Aṣr al Islāmī*, S.M. Imamuddin's *Muslim Spain 711-1492 A.D.* and Joseph F O'Callaghan's *A History of Medieval Spain*.

About the grievance redress system of Ottoman Empire too, no specifically written books could be availed, however, *The Ottoman Empire* by Halil Inalcik and *History of the Ottoman State, Society and Civilization* edited by Ekmeleddin Ihsan Oghlu, are of some help to give an idea of the grievance redress system of the Empire. But basically they describe the general conditions of the Empire while the legal system is only a small part of the discussion.

A very good and insightful book on Mughal's judicial system is Muhammad Basheer Ahmad's *Judicial System Under Mughal Empire* which surveys the over all judicial system of the Mughal Empire and as background gives an overview of the judicial system in Muslim India even before the Mughals. But this book provides a general view of justice system without any special focus on the grievance redress

system of the Empire, though one finds some passing references between the lines to it.

Two other detailed books on Mughal system of government with a chapter on its legal system have been written one by Ishtiaq Hussain Quraishi (*The Administration of the Mughal Empire*) and the other by Sir Jadunath Sarkar (*Mughal Administration*). Both have discussed in detail the overall Mughal administrative system including its judiciary. The discussion on judiciary, of course, includes reference to the grievance redress system too.

There are many books with the name of *Nizām al Qadā fi 'l Islām* or *Al Nizām al Qadā'i al Islāmī* (Judicial System of Islam) in Arabic. Some of them have briefly discussed the topic but they have seldom gone beyond what Mawardi and Abu Yala have outlined in their works about *Wilāyat al Mazālim*. In the classical books one may find only a brief indication towards the topic.

About *Diwān al Mazālim* of Saudi Arabia there are two books which have discussed the department in detail. Both with the name of *Al Tanzīm al Qadā'i fi 'l Mamlakah al 'Arabīyyah al Sa'ūdiyyah* (Judicial System in the Kingdom of Saudi Arabia) written by, Dr. S'aūd bin Sa'ad Āl Daryb and Ḥasan Abdullah Āl Shaykh. The one written by Dr. Āl Daryb has discussed all details of judicial system in Islam. It has begun with the definition and has gone on to state the status of judiciary, its

significance, qualifications of judges and all other relevant details to the topic. It has traced back detailed history of *Qadā* in Islam and then it has come to the history of judiciary in the Kingdom of Saudi Arabia. Among the judicial institutions it has discussed *Dīwān al Mazālim* in detail.

In this respect the research carried out by Frank. E. Vogel namely; *Islamic Law and Legal System: Studies of Sa'ūdi Arabia* is a valuable work. However it is mainly a theoretical discussion and critical analysis of how the system works and there is little focus on the topic of our concern i.e. the grievance redress system.

George N.Sfeir's *An Islamic Conseil d'Etat: Saudi Arabia's Board of Grievance* in *Arab Law Quarterly* and David E. Long's *The Board of Grievances in Saudi Arabia* in *Middle East Journal* gives a good insight into the Saudi *Dīwān al Mazālim*'s working and its nature in the start. Anyhow both are now outdated as they were written before the latest amendments took place.

The latest addition to literature on Saudi Arabian justice system is a research article by Dr. Abdullah F. Ansary, *A Brief Overview of the Saudi Arabian Legal System*, published by New York Law Global in 2008. It is a complete survey of the Saudi legal system's gradual development into a fully fledged formal and modern legal system over the years. It is the only source available so far which describes and analyze the latest amendments brought about in the Saudi legal system in 2007.

The book written by Ḥassan Abdullah Āl Shaykh describes the judicial system of the Kingdom and within that discussion describes *Diwān al Mazālim* too.

As is the case with most of the books written by Arab writers on Islamic Law, both the books mentioned above, are purely descriptive and there is almost no analysis of the information presented in them.

The British Parliamentary Ombudsman is a favourite topic for the writers on constitutional and administrative law. Almost all books on Administrative law include a detailed discussion on the topic of Parliamentary Ombudsman. It does not mean that there is no work done specifically on the institution of the Ombudsman.

F. Stacey's *Ombudsman Compared*, though relatively old and perhaps a little out dated but presents a good comparison among the Ombudsman office of many European Countries and discusses the British Parliamentary Ombudsman in good detail. *Ombudsman in the Public Sector* by M. Seneviratne is also a valuable work that discusses in detail the British Ombudsman.

Constitutional and Administrative Law by A.W.Bradley, and K.D.Ewing is having a chapter on the Parliamentary Ombudsman of the The United Kingdom but in fact it has carried out a very detailed and comprehensive analysis of the institution work and its powers. In particular it has discussed in detail the MP filter in the system of the Parliamentary Ombudsman's complaints admission. In this respect it has

presented both the points of view of the proponents and opponents of the idea of MP filter.

P.P Craig's *Administrative Law* is an effort of great value for the researchers in this particular field. It has its own style of description and analysis of administrative accountability institutions and specifically the Parliamentary Ombudsman.

Constitutional and Administrative Law by Hillarie Barnett and *The English Legal System* by Gary Slapper and David Kelly both have discussed the topic of the Parliamentary Ombudsman in a brief but comprehensive manner.

Constitutional and Administrative Law by O. Hood Phillips, Paul Jackson and, Patricia Leopold is equally important in this regard as it has also analyzed the institution from many angles.

As for the Pakistani Ombudsman i.e. the Office of Wafaqi Mohtasib, there are very few books which have discussed this institution. One booklet without any publication data which has discussed and analyzed the institution is Islamuddin's *Towards Understanding the Ombudsman Idea*.

There is a relatively old Urdu book on the subject which has surveyed in details the performance of the Mohtasib's Office and has made some recommendations in the process. It is *Wafāqī Mohtasib: Ta'āruf awr Ifādiyat kā Tanqīdī Jāyizah* (Wafaqi Mohtasib: Introductin and Critical Appraisal of its Usefulness) written by Abdul

Hafeez. His focus is especially upon the expansion of the work of Mohtasib to the provinces; however, in three of the provinces now the offices of Ombudsmen have been established.

There are three other books which, among other things have discussed and analyzed the Pakistani Ombudsman's performance. One is *Pakistan: Administrative Staff, Ombudsman and Administrative Courts* by S.M.Haider , the other is *The Institution of Muhtasib (Ombudsman)* written by Niazi , Dr. Liaqat Ali Khan (mentioned before as well) and the third one is Hamid Khan's *Principles of Administrative Law: A Comparative Study*. Among the three Hamid Khan's book has raised, among other things, some issues which has normally not been raised by anyone. An example is the issue of judicial review of Mohtasib's decision that has been discussed by him in the light of the decisions of superior judiciary of Pakistan.

Chapter one

Theoretical Foundations

of

Wilāyat al Mazālim

Chapter one

Theoretical Foundations of *Wilāyat al Mazālim*

1. Introduction:

Justice is the hall mark of Islamic politico-legal system. One of the main goals of establishing different institutions within this system is to ensure justice. To have a perfect system of justice, Islamic law has provided for the field of *siyāsah shar‘iyyah*. It is the field where the ruler has an authority to go, sometimes, even beyond apparent rules of procedures, to ensure that justice has been done. One of the important manifestations of *siyāsah shar‘iyyah* is the institution of *Wilāyat al Mazālim*. As the relation of *siyāsah shar‘iyyah* and *Wilāyat al Mazālim* has seldom been discussed by the writers of Islamic law, thus it is necessary to explore this area.

What is the meaning and concept of justice in Islam as well as in the Western legal thought? What is the meaning of *siyāsah* and *siyāsah shar‘iyyah*? What are the opinions of Muslim jurists about the implications of *siyāsah shar‘iyyah*? What is the meaning of *Wilāyat al Mazālim*, its jurisdictions and what distinguishes it from other similar institutions of the Islamic state? What is the legal status of *Wilāyat al Mazālim*?

In the current chapter an attempt has been made to answer the above mentioned questions.

2. Administration of Justice: the Ultimate Purpose of Islamic Legal System

2.1 Meaning of Justice:

In Arabic the equal of 'justice' is '*Adl*'. It means to place things in their rightful position. The term is found both as substantive and as an adjective. It means rectilinear, just and well balanced. It thus applies to both beings and things.¹ It is the opposite of cruelty and injustice.²

According to some scholars it means fairness, impartiality, equitableness, objectivity neutrality, just conduct or the exercise of authority in the maintenance of right.³

As adjective the word '*adl*' expresses more particularly a juridical conception and has numerous applications.

According to al Māwardī the quality of '*adl*' is described as a state of moral and religious perfection⁴.

¹Muḥammad 'Alā bin 'Alī Al Fārūqī al Thānvī, *Kashshāf Iṣṭilāḥāt al funūn* (Lahore: Suhail Academy, 1993) 2/1015

²Batras Bustānī, *Muḥīt al Muḥīt*, (Beirut: Maktabat Labnān, 1386 A.H), 2/1250

³*The Oxford Thesaurus*, p. 234, 'justice', 1992, *The Concise Oxford Dictionary*, p642, 1990

According to *Al Majallah*, 'the 'adl person is one whose good impulses prevail over bad'⁵ The adjective is also used substantively; that is, a person of good morals.

As we discuss the concept of justice in Islam, it would not be improper to have a look on the Western concept of justice.

2.2 Jusitice in Western Legal Thought:

A survey of the Western Legal Thought reveals that the essence of justice is almost the same in the minds of different jurists and philosophers but every one looks at the concept from his particular viewpoint and therefore the particular emphasis on the specific area might change from scholar to scholar. Thus some would consider 'justice' as a part of virtue, some virtue itself; some would consider it as divine morality and some others as security of rights.⁶

⁴ Abū al Ḥasan Alī bin Muḥammad bin Ḥabīb al Māwardī, *Al Ahkām al Sulṭaniyyah wa al Wilāyāt al Dīniyyah* (Egypt: Sharikah Muṣṭafā al Bābī al Ḥilabī wa Awlāduhu, 1973) p. 66

⁵ Muḥammad Khālīd al Atāsī, *Sharḥ al Majallah al Ahkām al 'Adaliyyah*, (Questa: Maktabah Islamiyyah, 1403 A.H) article 1705, 5/283

⁶ The concept of Justice in the Western Legal Thought, in fact, requires a separate dissertation because of the vastness of the topic. Here we can only select the opinions of a few important Western thinkers due to restraint of space. For more details reference may be made to Thomas Aquinas, *Summa Theologica*, (First Complete American Edition, Benziger Brothers, Inc. 1947), Aristotle, *The Complete Works of Aristotle* (J. Barnes ed. Princeton University Press, Princeton, 1984), two volumes, John Austin, *The Province of Jurisprudence Determined* (W.E. Rumble ed. Cambridge University Press, Cambridge, 1995), Brian Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell, London, 2003), Edgar Bodenheimer, *Jurisprudence*, (Harvard University Press, Third edition, 1978), R.W.M. Dias, *Jurisprudence* (London: Butterworth, 1985), Immanuel Kant, *The Metaphysics of Morals* (M. Gregor ed., Cambridge University Press, Cambridge, 1996)

Plato identified justice as fundamental to all virtues, seeing it as consisting in the right order of the soul-in an order keeping our passions under the control of our reason-and arguing that only such an order will guarantee that people carry out such actions, normally understood to be required by justice, as keeping promises and paying debts."⁷

The first important fact related to Plato's view of justice was that he was a student of Socrates, and being witness to his trial, it influenced his reasoning and views about justice. Plato devoted a lot of his time discussing the idea of justice, first with his friends and than later on giving his definition and views on it.

Aristotle considered justice as a whole virtue and not as a part of it, while an injustice is not a part of vice, but the whole of it. Explaining why justice is a whole virtue he asserts:

"It is complete virtue, first of all, because it is the exhibition of complete virtue: it is also complete because he that has it is able to exhibit virtue in dealing with his neighbors, and not merely in his private affairs; for there are many who can be virtuous enough at home, but fail in dealing with their neighbors."⁸

⁷ Samuel Fleischacker, *A Short History of Distributive Justice*, (London: Harvard University Press, Cambridge, Massachusetts, 2004), 10.

⁸ *The Nicomachean Ethics of Aristotle*, translated by F.H. Peters, M.A., Fifth edition, (London: Kegan Paul, Trench, Truber & Co. Ltd. 1893), 139.

Marcus Tullius Cicero presented his views regarding justice. His concept of justice is of divine origin because according to his opinion the entire universe is overruled by the power of God, that by His nature, reason, energy, mind, divinity, or some other word of clearer signification, all things are governed and directed.⁹

Universality of the laws and justice derived from God by human reason, were Cicero's starting point from which his entire theories were built. That is why Cicero saw only one source from where justice could be derived and that is God.

"The origin of justice is to be sought in the divine law of eternal and immutable morality."¹⁰

At a later stage of the evolution of Western Legal Thought, the Eighteenth Century Legal thinker Jean Jacques Rousseau was convinced that all justice comes from God. But the problem is how to receive such knowledge from God. In his opinion all justice comes from God, who is its sole source, but if we knew how to receive so high an inspiration, we should need neither government nor laws. Doubtless, there is a universal justice, emanating from reason alone; but this justice to be admitted among us, must be mutual.¹¹

⁹ *The Political Works of Marcus Tullius Cicero*, comprising his treatise on The Commonwealth and his Treatise of The Laws, translated from the original with dissertations and notes by Francis Barham, (London: Edmund Spertigue, 1842), Vol.2, 39.

¹⁰ Ibid. 37.

¹¹ Jean Jacques Rousseau, *The Social Contract & Discourses*, (London & Toronto: J.M.Dent & Sons, Reprinted 1923) p.32.

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Jeremy Bentham, another Eighteenth Century British jurist, considered to be the father of Utilitarian theory of Law, is of the opinion that justice is the security which the law provides us with, or professes to provide us with, for every thing we value, or ought to value: for property, for liberty, for honour, and for life. It is that possession which is worth all others, put together: for it includes all others. A denial of justice is the very quintessence of injury, the sum and substance of all sorts of injuries. It is not robbery only, enslavement only, and insult only, homicide only: it is robbery, enslavement, insult, homicide, all in one.¹²

The most effective exponent of utilitarianism after Jeremy Bentham was undoubtedly John Stuart Mill. His concept of justice was that justice is a name for certain moral requirements, which regarded collectively, stand higher in the scale of social utility, and are therefore of more paramount obligation, than any others; though particular cases may occur in which some other social duty is so important, as to overrule any one of the general maxims of justice. Thus, to save a life, it may not only be allowable, but a duty, to steal, or take by force, the necessary food or medicine, or to kidnap, and compel to officiate, the only qualified medical practitioner. In such cases, as we do not call anything justice which is not a virtue, we usually say, not that justice must give way to some other moral principles, but that

¹² *The Works of Jeremy Bentham*, Vol. II, *A Protest Against Law-Taxes*, (Edinburgh: William Tait, 107, Princes Street; Simpkin, Marshall, & Co., London, 1843), 574.

what is just in ordinary cases is, by reason of that principle, not just in the particular case.¹³

2.3 Qur'ān and Sunnah on Justice:

The following texts of *Qur'ān* are worth mentioning while discussing the subject of justice in Islam.

Allah declares:

- يا ايها الذين آمنوا كونوا قوامين لله شهداء بالقسط، و لا يجرمكم شأن قوم على ألا تعدلوا، إعد لوا هو أقرب للتقوى...

“O you believers, Stand out firmly for Allah, and be just witnesses and let not the enmity of people make you avoid justice...”¹⁴

- إن الله يأمر بالعدل والإحسان وإيتاء ذي القربى...

“Verily Allah enjoins justice, excellence and helping the kin...”¹⁵

- قل آمنت بما أنزل الله من كتاب وأمرت لأعدل بينكم...

¹³ John Stuart Mill, *Collected Works*, Volume X, *Utilitarianism* (University of Toronto Press, Routledge & Kegan Paul, 1969), 259.

¹⁴ *Al Qur'ān* 5: 8

¹⁵ *Al Qur'ān* 16:90

"...say I believe in whatsoever Allah has sent down of the Book and I am commanded to do justice among you..."¹⁶

• إعد لوا هو أقرب للتقوى ...

"Be just that is nearer to piety."¹⁷

• لا إله إلا هو والملائكة وأولو العلم قائماً بالقسط...

"There is no God but He: that is the witness of Allah, His angels and those endowed with knowledge standing firm on justice."¹⁸

Allah says:

• لقد أرسلنا رسلاً بالبينات وأنزلنا معهم الكتاب والميزان ليقوم الناس بالقسط...

"We sent aforetime our messengers with clear signs and sent down with them the book and the balance of right and wrong that men may stand forth in justice."¹⁹

It is worth mentioning that Allah has created the whole universe with a particular measure or balance and man has been asked to observe it strictly.

¹⁶ *Al Qur'an* 42:15

¹⁷ *Al Qur'an* 5:8

¹⁸ *Al Qur'an* 3:18

¹⁹ *Al Qur'an* 57:25

• والسماء رفعها ووضع الميزان، ألا تطفوا في الميزان، وأقيموا الوزن بالقسط و لا تخسروا الميزان

“And the sky He has uplifted; and He has set the measure, that you may exceed not the measure, but observe the measure strictly, nor fall short thereof.”²⁰

The measure and balance refer to justice, the heavenly virtue which should be established among all types of men who constitute a society. Man has to act justly with him and the world around him.²¹

Allah says:

• إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ، إِنَّ اللَّهَ نِعِمَّا يَعِظُكُمْ

...٤

“Indeed Allah commands you to render back trusts to those to whom they are due and that when you judge between people, judge with justice, surely Allah admonishes you with what is excellent.”²²

There are many sayings of the Prophet Muhammad (peace be upon him) which emphasize this principle of *Qur'an*, i.e. right man for the right job.

²⁰ *Al Qur'an* 55:7,9

²¹ Dr. Muslehuddin, *Islam and Its Political System*, (Islamabad, Dr. M. Muslehuddin Islamic Trust, IIUI, 1988) p. 131

²² *Al Qur'an* 4:58

The Prophet (peace be upon him) said, "Whoever is entrusted with the affairs of the Muslims and he delegates part of it to a man while he knows a better one for it, he is a traitor in the eyes of Allah and His Messenger."²³

It is reported by Bukhāri and Muslim that a group of men visited the Prophet (peace be upon him) and asked him a governmental post. He replied, "we do not install in our offices those who ask for it."²³

Once the Prophet (peace be upon him) said to 'Abdurrahmān bin Samurah, "O Abdurrahman, never ask for a post, if it is given to you without your demand, you, left to it on your own."²⁴ The Prophet (peace be upon him) said, "Who ever asks for the position of judge and makes others intercede in his favour will be left in it to his fate and whoever is entrusted with it without his demand and without asking others to intercede in his favour, Allah will send down an angel to direct him in it aright."²⁵

²³ Muḥammad bin Ismā'īl bin Ibrāhīm bin al Mughīrah al Bukhārī, *Ṣaḥīḥ Bukhārī*, kitāb al aḥkām, bāb: mā yukrahu min al ḥirṣ 'alā al imārah, Ḥadīth No. 6730

²⁴ Imām Abū al Ḥusayn Muslim bin al Ḥajjāj al Qushayrī, *Ṣaḥīḥ Muslim*, Kitāb al Imārah, Bāb: Annahy 'an ṭalab al imārah wa al ḥirṣ alayhā, Ḥadīth No 3401, *Ṣaḥīḥ Muslim*, Kitāb al Aymān, bāb: man ḥalafa yaminan fa ra'ā ghayrahā khayran minhā an ya'tiya, Ḥadīth No 3120, *Ṣaḥīḥ Bukhārī*, Kitāb al aymān wannadhūr, Bāb Qawl Allāh r'ālā, lā yu'akhidhukumu Allāhu bi al laghwi fi aymānikum, Ḥadīth No 6132, Abū 'Isā Muḥammad bin 'Isā bin Sarwah Tirmidhī, *Jami' Tirmidhī*, Kitāb al Nudhūr wal aymān, bāb: mā jā' fi man ḥalafa 'alā yamin fa ra'ā ghayrahā khayran minhā, Ḥadīth No 1449, Abū 'Abdurrahmān Aḥmad bin Shu'ayb bin 'Alī Nasā'ī, *Sunan Nasā'ī*, Kitāb; adāb 'l Quḍāh, bāb: annahye 'an mas'alat al imārah, Ḥadīth No 5289, Imām Abū 'Abdullah Aḥmad bin Muḥammad, *Musnad Aḥmad*, kitāb: awwal musnad al Baṣriyyīn, Bāb: Ḥadīth Abdurrahman bin Samurah, Ḥadīth NO, 19704, 19707, 19709, 19711, 19712

²⁵ Sulaymān bin Ash'ath Abu Dawūd, *Sunan Abi Dawūd*, Kitāb al udḥiyyah bāb: fi ṭalab al Qaḍā wa al tassaru' ilayhi, Ḥadīth No 3107, Tirmidhī, Kitāb al aḥkām 'an rasūlullah Bāb: mā jā' 'an rasūlullāhi fi al qaḍī, Ḥadīth 1246,

'Abdullāh bin Yazīd al Rabī' al Qazwīnī Ibn-i-Mājah, *Sunan Ibn Mājah* Kitāb al aḥkām Bāb: fi ṭalab al qaḍā wa al tassaru' ilayhi, Ḥadīth No 3107

Bukhāri narrates on the authority of Abu Hurairah that the Prophet (peace be upon him) said,

“When the trust is lost, then the Last Day is at hand,” the Companions asked, “how can it be lost?” He replied, “When the offices are assigned to the people not worthy of these offices, it means that the Last day is at hand”²⁶

Muslims are unanimous about the fact that the guardian of a minor, the custodian of a endowment and a legal representative should administer the affairs entrusted to them in the best of their knowledge and effort.²⁷

Allah says:

• وَلَا تَقْرَبُوا مَالَ الْيَتِيمِ إِلَّا بِالَّتِي هِيَ أَحْسَنُ

“...and don’t approach the property of orphan except in the best possible manner...”²⁸

The Prophet (peace be upon him) also said,

²⁶ *Ṣaḥīḥ Bukhārī*, Kitāb al ‘Ilm, Bāb: man su’ila ilman wa huwa mustaghillun fi hadithihī fa atamma al hadith

²⁷ Dr. Omar A. Farrukh, *Ibn-i-Tamiyyah on Public and Private law in Islam or Public Policy in Islamic Jurisprudence* (Beirut: Khayat Book and Publishing Co. 1966) p. 19

²⁸ Al Qur’ān: 152

• كلكم راع وكلكم مسؤول عن رعيته وإمام راع ومسؤول عن رعيته والرجل راع في أهله ومسؤول عن رعيته و

المرأة راعية في بيت زوجها ومسؤلة عن رعيتها والخدام راع في مال سيده ومسؤول عن رعيته والرجل راع في

مال أبيه ومسؤول عن رعيته

“Everyone of you is a shepherd and everyone of you is responsible for his flock, the caliph who rules the people is shepherd and is responsible for those whom he governs, the woman is a shepherd in her husband’s household and is responsible for what is under her supervision, the servant is a shepherd as regards his master’s wealth and is responsible for it and a man is shepherd with respect to the wealth of his father and is responsible for what is under his supervision, Lo! Every one of you is a shepherd and is responsible for his flock.”²⁹

The Prophet (peace be upon him) said,

“Any ruler to whom Allah has entrusted His flock and who dies one day after having cheated his subjects; Allah will not allow him to smell the fragrance of paradise.”³⁰

²⁹ *Ṣaḥīḥ Bukhārī*, Kitāb al Istiqrāḍ wa adā’ adduyūn wa al ḥajr wa al taftīs, Bāb; al ‘abdu rā’in fi māli-sayyidihi wa lā y’amalu illā bi idhnihi, Ḥadīth No 2232, *Ṣaḥīḥ Muslim*, Kitāb al Imārah Bāb; faḍīlat ul Imām al ‘ādīl wa ‘uqubat al jā’ir wa al hath ‘alā al rifq, Ḥadīth No 3408, *Sunan Tirmidhī*, Kitāb al Jihād ‘an rasulullah, Bāb: mā jā’ fi al imām, Ḥadīth No 1627, Abū Dawūd, Kitāb al Kharāj wa al Imārah wa al fay, Bāb: mā yalzamu al imām min haqq al r’iyyah, Ḥadīth NO 2539, *Musnad-i-Abmad*, Kitāb: musnad al mukthirīn min al ṣaḥābah, Bāb: musnad ‘Abdullāh bin ‘Umar (May Allah be pleased with him) bin al Khattāb, Ḥadīth No 4266,

³⁰ *Ṣaḥīḥ Muslim*, Kitāb al ‘Imān, Bāb: Istiḥqāq al wālī al ghāsh li r’iyyatihi annār, Ḥadīth No 203

According to a tradition of the Prophet (peace be upon him) seven categories of believers will be given place under Allah's shade on the Day while no other shade will be available except His. The first of those mentioned is a just ruler.³¹

Abū Muslim al Khawlānī (a Companion died 62 A.H.) entered the court of Mu'āwiyah and greeted him by calling him as hireling (*ajīr*). The people there told him to call him as Commander of the Faithful but he insisted to call him 'hireling' and Mu'āwiyah allowed him to do that. Then he explained, "You are a hireling whom the Lord of these sheep has hired to take care of them. If you tar the itchy among them and cure the sick and put the surplus of the more advanced at the service of the poor, their Lord will reward you in full. If you on the contrary do not tar the itchy nor cure the sick nor put the richer at the service of the poorer, their Lord will punish you."³²

Islamic history is a witness to the fact that Muslim rulers understood the significance of administration of justice. The ideal period in this respect was, no doubt, the earliest era of the Prophet (peace be upon him) and his Companions particularly the *Khulafā-i-Rāshidūn*.

In the famous letter sent by 'Umar (May Allah be pleased with him) to Abū Mūsā Ash'arī the functions of judiciary were laid down as follows.

³¹ *Ṣaḥīḥ Bukhārī*, Kitāb al Ādhān, Bāb: man jalasa fi al masjid yantaẓiru al ṣalah wa faḍl al masājid, Ḥadīth No 620, *Ṣaḥīḥ Muslim*, Kitāb al Zakāh, Bāb: faḍl ikhfā al ṣadaqah, Ḥadīth No 1712

³² Ahmad bin 'Abdul Ḥalīm bin Abdullāh bin Muḥammad Ibn Taymiyyah, *Al Siyāsah al Sha'yyah fi Iṣlāḥ al Rā'ī wa al Ra'yyah* (Makkah: Maktabah Nizār Muṣṭafā al Bāz, 2004) p. 12

“After the praise to Allah, the administration of justice is a duty. The court must observe equality between the parties so that the weaker party may expect justice and the stronger may not expect concession. The burden of proof is on the plaintiff and the defendant may be put on oath but let this not defeat the ends of justice and law.”³³

In this letter and a few other letters, ‘Umar (May Allah be pleased with him) has explained the basic principles of the administration of justice through courts. But Islam does not only inspires its followers to adhere to the rules of formal justice, rather it creates a characteristics of watchfulness in its followers which at times persuades them to bring themselves to justice without any external force making them do that.

‘Umar (May Allah be pleased with him) once went out carrying a skin for fetching water. His son asked him disapprovingly, “why are you doing this?” ‘Umar replied, “I have been too self-satisfied and I must humble myself.” Here is a man who can recognize in the depths of his soul a pride in his office as caliph; in his conquests

³³ For complete letter see: Abū Bakr Muḥammad bin Ahmad bin Abī Sahl al Sarakhsī, *Al Mabsūṭ* (Karachi: Idārat al Qurān wa al ‘Ulūm al Islāmiyyah, 1987) 16/60 and Abū Bakr al Khaṣṣāf, *Adab al Qādi*, trans. Justice Dr. Munir Ahmad Mughal (Lahore: Qazi Publications, 1999) pp. 89-93

and greatness which he has attained and unwilling that such pride should continue. So he determines to humble himself in the right of all his subjects.³⁴

The theory behind the administration of justice in Islam is based on unique principles and the fountain head of the same is *Qur'ān* and the legislative sovereignty of the Muslim community. Under these principles the Caliph, the Emperor or the Sultan is not the fountain head of justice.³⁵

As *Qur'ān*, *Sunnah* and practice of *Ummah* throughout the history is a witness to the fact that the administration of justice is the primary purpose of Islamic legal and political systems, it is therefore imperative upon the Muslim *Ummah* that this important mission should be strived for by its representative rulers and it should be carried out in toto, i.e. all the basic departments of the administration of justice should be brought in action.

3. *Siyāsah Shar'īyyah*: A Means For Ensuring Administration of Justice

Islam is code of life which is good and practicable for all times, for every situation and for every nation provided it has a faith in Islam as a divine *Dīn*. Its legal system is one of the best in the world in the sense that it is not only a theory or philosophy rather it has been in force for over a thousand years and has proven to be a

³⁴ Syed Qutub, *Social Justice in Islam*, (trans.) John B. Hardie (New York: Islamic Publications International, 2000), p. 183

³⁵ Anwar Ahmad Qadri, *Justice in Historical Islam* (Lahore: Shaikh M. Ashraf, 1974), P.2.

system which is capable of solving the legal and political issues of the humanity once it is enforced completely and not in pieces. Main reason of this capability of Islamic legal system is that it has a permanent foundational part and another flexible part which is capable of changing with the change of circumstances. *Siyāsah Shar'iyyah* is that flexible part of Islamic legal system which may change its form according to the circumstances.

3.1 Meaning of *Siyāsah*:

Strictly literally speaking the word '*Siyāsah*' means to tend and manage, connected with *sus*, which in Hebrew means "horse". Originally it was used in Bedouin society for tending and training of beasts, hence "*Sa'is*" is manager or trainer of horses, camels, etc.³⁶

The word *Siyāsah* has been used in the sayings of the Prophet (peace be upon him). It is reported by Abu Hurairah (May Allah be pleased with him) that the Prophet (peace be upon him) said,

• كانت بنو اسرائيل تسوسهم الانبياء كلما هلك نبي خلفه نبي وانه لاني بعدي وسيكون خلفاء فيكثرون، قالوا

فما تأمرنا يا رسول الله قال فو بيعة الأول فالأول، اعطوهم حقهم فإن الله سائلهم عما استرعاهم

³⁶ For the meaning of *Siyāsah* see: word "siyasah" in Ibn-i-Manẓūr al Afriqī, *Lisān al 'Arab* (Beirut: Dār Ṣādir), Murtaḍā al Zubaydī, *Tāj al U'rūs* (Egypt: Maṭba'ah al Khyriyyah, 1356 A.H.), Majduddīn Fayrūz Ābādī, *Al Qāmūs al Muḥīṭ* (Egypt: Dār al Māmūn), *Encyclopaedia of Islam*, p. 694 vol.9

“The *Siyāsah* of *Banū Isrā’īl* was conducted by their Prophets. When one of them passed away another succeeded him, but verily there is no Prophet (peace be upon him) after me rather there will be *Khulafā* (Successors) and they will (sometimes) be many. The Companions asked, “What then should we do?” He replied, “Fulfil the oath of allegiance to the one whom you gave it firstly and then the next one. You fulfil your duty towards them and Allah will call them to account for the responsibility given to them.”³⁷

Here the word *tasūsubhum* means ‘they ran the affairs of the government. So ‘*Siyāsah*’ has been used here in its literal sense which is to run the affairs of public by their rulers in the form of enjoining what is better and forbid what is harmful. There are statements of jurists which prove this point. For example Ibn Jarīr al Ṭabarī while explaining the logic behind the selection of six Companions for *Khilāfah* by ‘Umar (May Allah be pleased with him) bin al Khattāb says: “There was no one better than those six among the Muslim community in their status of religiosity, migration (for the sake of Islam), readiness (for sacrifice), wisdom and their knowledge of *Siyāsah*.”³⁸

Ibn Manẓūr, a lexicographer of eighth century after Hijrah, says:

³⁷ *Ṣaḥīḥ Muslim*, Kitāb al Imārah, Bāb: wujūb al wafā bi bay’ah al khulafā al awwal fa al awwal, Ḥadīth No 3429, *Ibn-i-Mājah*, Kitāb al Jihād, Bāb: al wafā bi al bay’ah, Ḥadīth No 2862, *Musnad-i-Aḥmad*, Kitāb: baqī musnad al mukthirīn, Bāb: musnad Abi Hurayrah, Ḥadīth No 7619

³⁸ Imām Abū Ja’far Muḥammad bin Jarīr al Ṭabarī, *Tārīkh al Umam wal Mulūk*, (Cairo: Matba’ah al Istiqāmah, 1939) 2/205

- والسياسة القيام على الشيء بما يصلحه والسياسة فعل السائس

Siyāsah is managing a thing in a befitting manner and it is the job of a leader.³⁹

Ghazālī counts knowledge of *Siyāsah* as a communal obligation because it is something without that life cannot move on smoothly.⁴⁰

Ibn Ābidīn defines *Siyāsah* as follows:

- استصلاح الخلق وإرشادهم إلى الطريق المتنجي في الدنيا والآخرة

Seeking the betterment of people and their guidance towards the straight path delivering them in this world and in the Hereafter.⁴¹

After discussing the punishments and expiations of different crimes he says:

- وهذا تعريف للسياسة العامة الصادقة على جميع ما شرعه الله تعالى لعباده من الأحكام الشرعية

This is explanation of true public *Siyāsah* about all the legal commands of Allah the Exalted for His subjects.⁴²

³⁹ Ibn Manẓūr al Ifrīqī, *Lisān al 'Arab*, (Beirut , Dar Saadir,.) 6/108

⁴⁰ Muḥammad bin Muḥammad Abū Hāmid al Ghazālī, *Ihya' 'Ulūmuddīn* (Beirut: Dar al Ma'rifah n.d) 1/9

⁴¹ Muḥammad Amīn bin 'Umar Ibn Ābidīn, *Radd al Muḥtār 'Alā al Durr al Mukhtār* (Qetta: Maktaba Mājidīyah, 1399 A.H) 3/162

⁴² *ibid*, 3/203

This is because the purpose of punishments in Islamic law is to protect the basic objectives of *Shari'ah* envisaged in *Qur'an* and *Sunnah*. In the same manner other *Hanafi* Jurists also term the jurisdiction of the government in awarding suitable punishment for crimes where there is no provision of *Qur'an* and *Sunnah*, as *Siyāsah*.⁴³

Ibn Khaldūn says:

• فالسياسة والملك هي كفاية للخلق و خلافة الله في العباد لتنفيد احكامه فيهم

Siyāsah and government is the protection of people and being vicegerent of Allah among the subjects to implement His commands upon them.⁴⁴

'*Siyāsah*' which we usually translate as "politics" could perhaps be more appropriately rendered in English as "statecraft". As normally used in classical Arabic, it denotes skill or a craft rather than a doctrine or philosophy. This word occurs frequently in the sense of statecraft, in statements or dicta attributed to the Umayyad period.⁴⁵

Abū Naṣr al Farābī and Ibn Sīnā, in their writings discussed '*Siyāsah*' in the sense of 'art of living and dealing with people'. They look to be impressed with the

⁴³ See for example Burhānuddin Alī bin Abī Bakr bin 'Abdul Jalīl al Marghinānī, *Al Hidāyah Sharḥ Bidāyat al Muḥtadī* (Karachi: Idārat al Qur'ān wa al 'ulūm al Islāmiyyah, 1417 A.H) Kitāb al ḥudūd, 4/241-244

⁴⁴ 'Abdurrahman bin Muḥammad Ibn Khaldūn, *Al 'Ibar wa Dīwān al Muḥtadā' wa al Khabar* (known as *al Muqaddimah*) (Beirut: Mu'assasah al 'Ilmi li al maṭbū'āt, n.d) p.113

⁴⁵ For the use of word "*siyāsah*" through history see "*siyāsah*" by Bernard Lewis in "*In Quest of an Islamic Humanism*" ed. A.H. Green, pp.3-14

Greek philosophers because in their discussion of '*Siyāsah*' one do not find the any reference to the objectives of *Sharī'ah* or the popular notion of 'deputyship of Allah on earth'. They only refer to the fear of Allah in personal life of the people. Both held the same view of '*Siyāsah*' of a person with himself, his relation with his Creator, dealing in the affairs of his income and expenses i.e. his economic affairs.⁴⁶

In fourth and fifth century after Hijra, it seems, that the Muslim jurists did not discuss '*Siyāsah Shar'īyah*' as an independent branch of Islamic knowledge that is why one does not find any such reference to it in the writings of the above mentioned two scholars as is the case in the writing of later scholars who would not discuss '*Siyāsah*' except in the framework of *Sharī'ah*.

Another contemporary of Ibn Sīnā, Al Ḥusayn bin Alī al Maghribī wrote a manual on '*Siyāsah*' particularly for rulers. In the very beginning of his book he says that when one writes something on *Siyāsah*, he should be very brief because those who are involved in *Siyāsah* has very little time to read for their pre occupation in the job of running the affairs of the state.⁴⁷

According to Al Maghribī '*Siyāsah*' is of three types; *Siyāsah* for self-reformation, *Siyāsah* for the nobility and high ranking officials of the government, *Siyāsah* for general public.

⁴⁶ Sāmī Al Dahhān, , preface of the "*al Kitāb fi al Siyāsah*" by Al Ḥusayn bin Alī al Maghribī p. 38,39

⁴⁷ Al Wazīr al Kāmil Abul Qāsim al Ḥusayn bin Alī Al Maghribī, , *Kitāb fi al siyāsah*, , ed. Sāmī al Dahhān (Damascus: Al Ma'had al Fransī, 1327/1948), p.59

About the first type, he suggests, among other things, to the ruler to have sufficient time for the remembrance of Allah and reminding oneself His great bounties. In this kind of *Siyāsah*, he elaborates that the essence of *Siyāsah* is fulfilling promises and proving one's threats true, rewarding the one who does good deeds and punishing those who does anything wrong, credibility in seriousness and jest, using sufficient resources not exhausting all and awareness to the news of far and near. Who ever has this grace and got the sense of it, will have all the '*Siyāsah*' completely.⁴⁸

Al Maghribī differentiates between the *Siyāsah* for general public and *Siyāsah* for the high ranking government officials. Whatever he says about the *Siyāsah* for the high ranking government official is compatible with the statement of jurists who discussed '*Siyāsah Shar'iyyah*'. According to his thesis the ruler must pay full attention to train the government officials in good moral conduct and always keep reforming them so that they might render best services to the public. The government officials, according to his views are like organs of the body, so if they are not working properly or if they are corrupt, it will affect the whole structure of the state. The ruler himself should act like the eye of the public; checking conducts of the officials constantly; correcting their misdeeds through proper means. He should never stop the process [of accountability]. He should also take care of their rights and provide them with as much ease as he can.

⁴⁸ Ibid. p.64

Al Maghribī elaborates on the characteristics of Secretaries, Security officers, Revenue collector, army chief, judge and Muhtasib etc. About the Muhtasib he says that he should be an honest, trustworthy, having good moral conduct, aware of different ways of financial gains and cheating, and should be well versed in what is called public interest.⁴⁹

He advises to have best manner in dealing with general public i.e. *siyāsāt al āmmah*. He suggests that violence and force is not a proper way in dealing with them but always showing leniency and carelessness must also be avoided. This is because among the people there are those who are perverted when respected much and there are those who are corrupted when insulted. Al Maghribī also suggests to the ruler that he should make people serve him and come to his house for fulfilling their needs. Likewise saints and scholars should also come to the company of the ruler.⁵⁰

In the literal meaning of *siyāsah*, sense of training and managing animals passed early into the context of Islamic rulership, the conduct of state affairs and the management of the subject people, doubtless influenced by the ancient near Eastern idea of the ruler as shepherd and director of his human flock and perhaps also with the idea of the "man on horseback" as symbol of authority.⁵¹

⁴⁹ Ibid p. 67-72

⁵⁰ Ibid p. 73,74

⁵¹ *Encyclopaedia of Islam* 9/694

From the above discussion it can be concluded that the word "*Siyāsah*" literally means to train and to take care of, the meanings which are very much there in statesmanship or statecraft. Therefore *Siyāsah* is used in this latter sense now. It is the practical statecraft or the same as theory too like political science or political philosophy at the same time. Examination of the statements of Muslim jurists about *Siyāsah* shows that any measures taken by the Muslim rulers for ensuring the preservation of the objectives of *Shari'ah* whether positively or negatively are included in *Siyāsah*. So we find jurists terming the punishments which were awarded by the Companions for different crimes, keeping in view the circumstances of the crime and the criminals, without any specific evidence in *Qur'an* and *Sunnah* as *Siyāsah*.

The use of word *Siyāsah* by the Muslim jurists also show that by its use they mean only the *Siyāsah* which is recommended by *Shari'ah* i.e. which is in accordance with the general spirit of *Qur'an*, *Sunnah* and the practice of the *Ummah*. That is what is called *Al Siyāsah al Shari'yyah*. The Muslim jurists in the past never thought of *Siyāsah* as a secular concept which has nothing to do with divine revelation. As we know today *Siyāsah* (politics) aims at the interests of certain groups of individuals on the basis of language, area or ethnicity etc. In such a case morality or the concept of right and wrong becomes irrelevant and every step which promotes that particular interest is deemed legal and just. The underlying philosophy of such *Siyāsah* is "might is right".

3.2 *Al Siyāsah al Shari'yyah:*

Most of the discussion about literal meaning of word 'Siyāsah' in particular by the Muslim jurists is basically a discussion on *Siyāsah Shari'yyah* because as mentioned earlier the *Siyāsah* which does not take into consideration the basic principles of *Shari'ah* has no value within Islamic law.

Siyāsah Shari'yyah, as is evident is composed of two words; *Siyāsah* and *Shari'yyah*. The former was discussed in detail in the previous unit. *Shari'yyah* means which emanates from *Shari'ah*.⁵²

Ibn al Qayyim is of the view that division of methodology of decision (حكم) into *Shari'ah* and *Siyāsah* is like others' views of the division of *Din* into *Shari'ah* and *Haqiqah* or its division into reason and transmission; all those divisions are invalid. Rather *Siyāsah*, *Tariqah*, *haqiqah* and 'aql' all of them are divided into two kinds: valid and invalid. The valid ones are part of *Shari'ah* and it has no more divisions. Invalid ones are the opposite which negate it. This is one of the most important principles and most beneficial one. It is based upon one thing i.e. the universality of the Prophethood of Muhammad (peace be upon him) with respect to all that is needed by people in the field of knowledge and their affairs. So the *Ummah* did not need any one after the

⁵² "*Siyāsah Shari'yyah*" generally has not attracted exclusive attention of the classical Muslim Jurists, though they have indicated towards it within discussion on other topics, like punishments and other procedural matters. One exclusive book on this subject is Ibn Taymiyyah's *Al Siyāsah al Shari'yyah fi Iṣlāḥ al Rā'ī wa al Ra'īyyah* (Makkah: Maktabah Nizār Mustafā al Bāz, 2004) and the books of his pupil Ibn Qayyim al Jawziyyah which are referred to in this work many times.

Prophet except those who convey what the Prophet (peace be upon him) was told to do. Universality of the Prophethood of Muhammad has two aspects: firstly, those to whom he was sent i.e. to all, secondly, encompassing all matters of life. His Prophethood is perfect and covering everything. Belief in the Prophethood is not complete until it is firm that there is guidance in it for every matter of life. So every branch of learning is covered by it.

The Prophet (peace be upon him) taught the *Ummah* everything in life. Even manners of toilet, sexual intercourse, sleep, etiquettes of eating and drinking, standing and sitting, ascending and descending, staying at home and travelling, silence and speech, isolation and socializing, poverty and financial ease, health and sickness and all rules of life and death have been taught by him. So how is it possible that such a perfect system of life would lack *Siyāsah* and we would need some external aid to teach us *Siyāsah*. Whoever thinks that there is no *Siyāsah* in *Dīn* or is outside it, is virtually saying that they need another Prophet.⁵³

According to Ibn al Qayyim, Ibn Aqīl said, 'the practice of *Siyāsah Shar'īyyah* in the country has been shown to be firm. No Imam disregards reliance on it. If a scholar from Shafi school said, 'there is no *Siyāsah Shar'īyyah* except in a matter which agrees with Islamic law, Ibn Aqīl says, *Siyāsah Shar'īyyah* is an action in which the people are closer to righteousness and away from mischief, even if the Prophet (peace

⁵³ Ibn Qayyim al Jawziyyah, *T'lām al Murwaqī'in'an Rabb al Ālamīn* (Beirut: Dār al Fikr, 1973) 4/375-379

be upon him) did not decide precisely what was to be done in such a case nor had revelation been come about it. If you mean by your saying, 'has agreement with Islam' that it does not have any contradiction with Islam, (that is alright) but if you mean by your statement that no *Siyāsah Shar'īyyah* except in the matter which has come through Islam with precise evidence, that would be wrong. What you are saying then is that you are considering the Companions as wrong. Since the four Rightly Guided Caliphs have punished by severe means and mutilation and no body who is versed in *Sunnah* can deny it.⁵⁴

According to him there are two kinds of understanding (Fiqh) that is a must for a ruler to possess. Understanding of the rules of general events and understanding of each factual situation and circumstances of people whereby truth and lie, right and wrong can be distinguished for deciding in that particular situation according to the ground facts. This is obligatory and should not be contrary to the ground facts. Whoever has a taste of *Sharī'ah* and is aware of its perfection and its inclusion of all the temporal as well as spiritual interests and its bringing of justice which resolves disputes among people and infact there is no justice superior to it and no welfare superior to what is included in it; knows well that just *Siyāsah* is a part and branch of it. And

⁵⁴ Ibn al Qayyim, *The Legal Methods in Islamic Administration* trans. Dr. Ala'iddin Kharofa, (Kualalampur: International Law Book Services, 2000) p.13

whoever is acquainted with the objectives and understands it well does not need any other *Siyāsah* in its presence.⁵⁵

According to the opinion of a contemporary scholar *Siyāsah Shar‘iyyah* is basically the discretionary powers of the ruler; he says:

Siyāsah Shari‘yyah is basically a broad doctrine of Islamic law which authorizes the ruler to determine the manner in which *Sharī‘ah* be administered. The ruler may accordingly take discretionary measures, enact rules and initiate policies as he deems are in the interest of good governance, provided that no substantive principle of *Sharī‘ah* is violated thereby. The discretionary powers of the ruler under *Siyāsah Shar‘iyyah* are particularly extensive in the field of criminal law. The head of the state and those who is in charge of public affairs; the “*Ulū al Amr*” may thus decide on rules and procedures as they deem appropriate in order to discover truth and to determine guilt. With regard to the substantive law of crimes too, the *Ulū al Amr* have power to determine what behavior constitutes an offence and what punishment is to be applied in each case.⁵⁶

As opposed to this understanding of the concept of *Siyāsah Shar‘iyyah*, well known Orientalist Joseph Schacht has interpreted this concept in terms of

⁵⁵ Ibn al Qayyim, *Al Ṭuruq al Ḥukmiyyah fi al Siyāsah al Shar‘iyyah*, , ed. Hamid al Faqī (Beirut Dārul kutub al ‘ilmiyyah, , 1953) p. 5

⁵⁶ M. Hashim Kamali, ‘*Siyāsah Shariyah*’, *The American Journal of Social Sciences* (Virginia: Association of Muslim Social Scientists of North America) 6/1, p.59

arbitrariness in governance and policy making. According to his interpretation it is the discretionary power of the sovereign which enables him, in theory, to apply and to complete the sacred Law and, in practice, to regulate by virtually independent legislation matters of police, taxation, and criminal justice, all of which had escaped the control of *Qāḍī* in the early Abbasids' times, was latter called *Siyāsah*. In his opinion *Siyāsah* is the expression of the full judicial power which the sovereign retained from the Umayyad period onwards and which he can exercise whenever he thinks fit. To his understanding *Siyāsah* means, literally, "policy" and it comprises the whole of administrative justice which is dispensed by the sovereign and by his political agents, in contrast with the ideal system of the *Sharī'ah*; the religious law of Islam, which is administered by the *Qāḍī*. He says:

The application of *Siyāsah* in the nature of things, often touches the *nazar fi 'l-Mazālim*, and both terms are, to a certain extent, used as synonyms. The *Qāḍīs*, too are obliged to follow the instructions which the ruler may give them in exercise of his power of *Siyāsah* within the limits assigned to it by the *Sharī'ah*.⁵⁷

Here it appears that the Scholar has attempted to describe *Siyāsah Shar'iyyah* in terms of discretionary powers of the rulers and he seems to be inclined towards the idea that it is something other than *Sharī'ah*. The fact of the matter is that it is not the

⁵⁷ Joseph Schacht, *An Introduction to Islamic Law* (New Delhi: Universal Law Publishing Company, 1997) p.54

case. *Siyāsah Shar‘iyyah* is the application and implementation of the real spirit of *Sharī‘ah* therefore there is no chance of its being something else than the ideal *Sharī‘ah* which is implemented by courts. Therefore according to Muslim jurists the judiciary and broadly speaking the administration of justice itself is part of *Siyāsah Shar‘iyyah*. It would be over simplification of the matter if one says that the judiciary has to carry out whatever the ruler tells it to do. Practice may have been different from time to time and person to person in the long history of Muslim governments but theoretically speaking, though, there may be legitimate orders of the government which the judiciary is to carry out as per *Sharī‘ah* rules but many a times the judiciary would stop the ruler from doing something which goes against the law or would assert its rightful position against any wrongful steps taken by the government. That is why the opposition of the Muslim jurists to certain policies of their own governments and the persecution which they have been facing in form of various punishments from imprisonment to flogging is a commonly known thing in Islamic history.⁵⁸

Another impression which the above mentioned scholar seems to be having and creating is that there is a division of religious and secular laws in Islamic legal system. This is not a proper perspective in which Islamic Law is being seen. It must be based either on ignorance or mala fide intention to equalise Islamic law with the man

⁵⁸ There are several manuals written by the Muslim jurists particularly for keeping the rulers on the right track of *Sharī‘ah*. Among them most important is Abū Yūsuf, *Kitāb al Kharāj* and Abū al Ḥasan Ali bin Muḥammad bin Ḥabīb al Māwardī's *Naṣīḥat al Mulūk*, ed. Khidr Muḥammad Khidr (Kuwait: Maktabat al Falāḥ, 1983).

made systems. There is no doubt that Islamic law is a purely religious law but it is an all encompassing system and no matter of life is out of its purview. The political theory of Muslims is based upon the concept of Caliphate or vicegerence of Allah on earth. So every sphere of life has to be regulated by the *Shari'ah* and whatever policy the state adopts, has to be in conformity with the basic principles of *Shari'ah*. The following saying of the Messenger of Allah (peace be upon him) is a fundamental norm in this respect:

• لا طاعة لمخلوق في معصية الخالق

There is no obedience of creature if it amounts to the disobedience of the Creator.⁵⁹

Noel J. Coulson, a British professor, who was basically interested in comparing civil legal system with Islamic legal system and who sometimes opposed the ideas of Schacht seems to be in the same illusion about the nature of *Siyāsah Shar'iyyah* as according to his view there are two basic requirements for a person to hold the seat of Caliph. One; he should be extremely pious in his character, and second; he must have the ability to ascertain and understand the terms of God's Law (*ijtihad*). It is a recognised doctrine among the Muslim jurists that any one being so qualified has the power to take such steps as he sees fit to implement and supplement the principles

⁵⁹*Musnad-i-Ahmad*, Musnad al 'Asharah al Mubashsharah bi al Jannah wa min musnad 'Ali bin Abi Talib, Hadith No. 1041

established by the religious law. This system of government was known as "government in accordance with the revealed law" (*Siyāsah Shariyyah*) but it is obvious that the term "*Shar'iyyah*" here has a far wide connotation than the technical system of law which is expounded in the manuals of the jurists and which we refer to as *Shari'ah* Law. To the public lawyers the concept of sovereign being bound to rule according to the *Shari'ah* meant that he was bound to give effect to the general purposes of God for Islamic society. While legal doctrine had explained these purposes in terms of the rights and duties of individuals and had established certain inviolable standards of conduct, the wider and supreme duty of the sovereign was the protection of the public interest; and in pursuance of it he was afforded an overriding personal discretion to determine, according to the time and circumstance, how the purposes of God of the Islamic Community might best be effected.⁶⁰

To his understanding the doctrine has granted the ruler such wide discretionary powers on the assumption that he would be ideally qualified for office. But it is precisely here that the idealistic nature of the doctrine is at its most apparent; for there no constitutional machinery existed, and in particular no independent judiciary, to guarantee that the ruler would be so qualified and that those powers would not be abused. Although the doctrine expressed to perfection the concept of a state founded upon the rule of God's Law, it never seriously challenged the ruler's

⁶⁰ N.J. Coulson, *A History of Islamic Law* (New Delhi: Universal Law Publishing Company, 1997) pp.129-130

autocratic power to control the practical implementation of the law; and it finally reached the point of abject surrender and recognition of its total impotence by acknowledging the principle that obedience was due to the political power whatever its nature, and that even the most impious and tyrannical regime was preferable to civil strife. The order of allegiance expressed in the Quranic Verse: "Obey God, His Apostle and those at the head of affairs" had been reversed and the only limits upon the de facto power of the ruler were those that he found in this conscience.⁶¹

According to his understanding *Shari'ah* Law, however, strong its religious force as providing an ideal and comprehensive code of conduct for the individual, can form only a part of Islamic Legal System. The doctrine of *Siyāsah Shar'iyyah* based on a realistic assessment of the nature of *Shari'ah* Law and the historical process by which it had been absorbed into the structure of the state, admitted the necessity for, and the validity of , extra-*Shari'ah* jurisdictions which cannot therefore be regarded in themselves, as deviations from any ideal standard. Islamic government has never meant in theory or in practice, the exclusive jurisdiction of *Shari'ah* tribunals⁶².

There are points in Coulson's view which are worth commenting. One is that he mixes the practice with theory by mentioning the autocratic powers of the ruler in Islamic law. In previous lines a saying of the Prophet (peace be upon him) has been

⁶¹ N.J. Coulson, *A History of Islamic Law* op.cit. p.133

⁶² Ibid. P.134

stated which is a criterion for the obedience of any leader among the Muslim at least theoretically. Nevertheless if a comparison is to be made, the Muslim rulers are the ones who have always been restricted on the pretext of rules of *Shari'ah*. In the systems of the government where Islamic law finds no place the ruler cannot be restricted in most cases even if he rules through so called "democratic" way. There are a thousand ways of manipulation of rules and laws for self interest by the rulers even in the apparently most advanced and civilised societies of today's world. It is the distinction of Islam, however, that when the world was not familiar with any type of rights for those ruled, in the Islamic societies there has been an opposition to the government's unIslamic policies, though its intensity varied from time to time.⁶³

Second thing which has been mentioned by Mr. Coulson is extra-*Shari'ah* jurisdiction, which again creates an impression as if there is some domain of state affairs which is out of the purview of *Shari'ah*. This contention is a total fallacy. There is nothing like extra-*Shari'ah* jurisdiction. The permission to the ruler to pursue special policies in fitness to the circumstances of his time, where no textual rule is available, is not unconditional. He must never deviate from the basic principles of *Shari'ah*. He must never legislate in the matters where clear text is available for guidance.⁶⁴

⁶³ An elaborative work on the powers and jurisdiction of Islamic government is Sayyid Abū al Ala Maudoodi, *Islamic Law and Constitution*, trans: Khurshid Ahmad (Lahore: Islamic publications, 1997)

⁶⁴ For the limitations on legislation by the Islamic government and other related issue a very good work is that of Muhammad Asad, *The Principles of State and Government in Islam* (Kuala Lumpur, Islamic Book Trust, reprint 2007)

One angle of looking at '*siyāsah shar'iyyah*' is that man is a trustee of Allah on earth. The trust which he has to take care of is '*Khilāfah fi 'l Ardḥ*' (deputyship of Allah on earth). Islam has provided man with instruments and tools to fulfill the responsibilities given by Allah to him. One of those instruments is "*Siyāsah Shari'yyah*" which helps the Muslim ruler to govern the affairs of the state which may sometime be quite unpredictable. If this facility is removed the ruler will be left with an inflexible and fixed legal system which will not be capable of coping with ever changing circumstances.⁶⁵

Some contemporary jurists consider *Siyāsah Shari'yyah* as to act on '*maṣlahah*' (public interest) which the Law Giver has neither upheld nor overruled or it denotes administration of public affairs in an Islamic polity with the aim of realizing the interests of and preventing harm to the Community, in harmony with general principles of *Shari'ah* even if it disagrees with the particular rulings of Mujtahidīn.⁶⁶

If one has to search for legal evidence or authority of '*Siyāsah Shari'yyah*' in Islamic law, one may deduce this from the injunctions of *Qur'ān* and *Sunnah* which make it a compulsion upon the *Ummah* to enjoin good and forbid evil. This compulsion is an obligation to be discharged by the *Ummah* through its representatives i.e. the rulers. To fulfill this obligation there has to be some means and

⁶⁵ M. Hashim Kamali, '*Siyāsah Shariyah*', *The American Journal of Social Sciences*, op.cit. 6/1, p. 63

⁶⁶ Abdul Wahab Khallaf, *Al Siyāsah al Shar'iyyah fi al Shu'ūn al dustūriyyah wa al Khārijīyyah wa al Mālīyyah* (Kuwait: Dār al Qalam, 1988) p.6

that is *Siyāsah Sharī'yyah*. As it is a duty of Muslims to follow the commands of their rulers, in turn they have to obey all the commands given by him in course of *Siyāsah sharī'yyah*. Thus those in authority within an Islamic state must have a way to strive for the ultimate goal of the *Ummah* i.e. to enjoin virtue and forbid evil. For this purpose the ruler can take any measures which he thinks suitable for this purpose. Any such measures will not be called *Siyāsah Sharī'yyah* unless it observes the limits of moderation which tends neither towards undue strictness nor towards laxity, for both lead to injustice and the loss of rights.

A just *Siyāsah* would require that a judge should not set well known and dangerous criminals free merely because of insufficient evidence, but should detain them until the truth emerges. It would be patently tyrannical on the other hand to exercise the same degree of severity with every accused person, especially the first time offenders who have no criminal record.⁶⁷

According to the opinion of Muslim jurists *Siyāsah* is of two kinds; *Siyāsah 'ādilah* (just), and *Siyāsah zālimah* (unjust or cruel). The former is recommended and encouraged by *Sharī'ah* because it helps the oppressed to gain his lost right from the

⁶⁷ 'Abdurrahmān Tāj, *Al siyāsah al Sharī'yyah wa al fiqh al Islāmī* (Beirut: Dār al Fikr al Ārabī, 1976) p.67

dissolute oppressor and it is a vital part of Islamic legal system. The latter is forbidden by Islam.⁶⁸

Some scholars explain types of *Siyāsah* as follows:

- (a) *Siyāsah multawiyah. taqsudu ilā naf. qaum. wa. darri ākharīn* [*Siyāsah* of selfishness] which basically aims at benefitting a particular group of individuals on the basis of colour, area or ethnicity etc. This kind of *Siyāsah* permits use of any and every means for achieving its goals notwithstanding their legitimacy. It follows the saying; Goals justifies the means. To elaborate on this kind of *Siyāsah* Machiavelli compiled his infamous book 'the Prince' and therefore this kind of *Siyāsah* is attributed to him as Machiavellian *Siyāsah*. It is neither approved by Islam nor by any good moral standard and it can never be adopted by Islam because it divides the humanity into the ruling and the ruled nations which leads to every kind of evil in the course of establishing hegemony upon each other.
- (b) *Siyāsah Sharīḥah ādilah* [Just and Straight forward *Siyāsah*]: It aims at reaching at the truth and obtaining of welfare for humanity in general. Only legal means are sought to achieve its goals. This is the *Siyāsah*

⁶⁸ Ibn al Qayyim, *The Legal Methods in Islamic Administration*, op.cit. p.3
Zayn al 'Ābidīn bin Ibrāhīm bin Nujaym, *Al Baḥr al Rā'iq Sharḥ Kanz al Daqā'iq* (Quetta: Maktaba Majidiyyah n.d) 5/76,

which Islam promoted during Prophet (peace be upon him)ic era and in the era of the Rightly Guided Caliphs⁶⁹

According to Ṭarablusi, *Siyāsah* is extensive law (شرع منظر) and it is of two kinds, unjust *Siyāsah* which is prohibited by *Sharī'ah* and just *Siyāsah* which takes the usurped right from the cruel, redress many grievances, deters the mischievous and obtains objectives of *Sharī'ah* for people. Thus it is obligatory to adopt it and rely upon it. It is vast areas of understanding where many are mistaken and their steps slip. To overlook it is to waste rights, leave *Hudūd* (fixed punishments of public crimes) and encourage evil doers. On the other hand to commit an excess in it opens the door of cruelties and injustice which causes blood shed and usurpation of wealth illegally.⁷⁰

The concept of *Siyāsah Shar'iyyah* though in practice since the earliest period of Islamic history, was crystallized by Muslim scholars like Ghazālī and others but very particularly by the two Ḥanbalī scholars, Ibn Taymiyyah and his pupil Ibn Qayyim al Jawziyyah. The former thinks that if the divine law or *Sharī'ah* is duly observed, *Siyāsah* of the rulers will not conflict with *Fiqh* as elaborated by the scholars. Earlier authorities had conceded that rulers had the need and the right to deviate from *Fiqh* in order to attain collective *Siyāsah* but Ibn Taymiyyah claimed that such "deviation" is imaginary. If the conflict between them appears, it is either because the *Fiqh* is

⁶⁹ 'Abdul Muta'al al Ṣa'idi, *AL Siyāsah fi 'Abd al Nuburwah* (Beirut, Dār al Fikr al 'Arabī) p.3,4

⁷⁰ Al'ā'uddīn Abī al Ḥasan 'Alī bin Khalīl al Ṭarāblusi, *Mu'īnūl Ḥukkām fi mā yataraddadu bayna al khaṣmayn min al Ahkām* (Egypt, Mustafā al Bābī al Ḥilabī wa Awlādūhu) p. 169

understood too narrowly, neglecting the rich resources of the *Shari'ah* for attaining the public good or because rulers disregard the divine will and act unjustly.⁷¹

A contemporary scholar comments on *Siyāsah Shari'yyah* as follows:

“Administration of justice is called *Siyāsah Shari'yyah* in Islamic law. In the wider meaning it includes the courts of the *Qādīs* as well, and would thus cover the work of the jurists. In its narrow sense, it means the area of the law that the jurists left to the ruler to develop and adapt according to the changing times and circumstances. The distinctive feature of this part of law is its flexible rules of procedure and evidence as compared to the laws derived by the jurists. Under this heading we discuss the *Mazālim* courts and the offences falling under their jurisdiction. There were many other functions like regulation of the markets and maintenance of public morality that also came under this jurisdiction. Today the laws of taxation, traffic, hijacking, terrorism, corruption, accountability and the like would all fall under the *Siyāsah Shari'yyah* of the ruler.⁷²

An in depth examination of the statements of the scholars about ‘*Siyāsah shari'yyah*’ reveals that from practical viewpoint it denotes extensive

⁷¹ See Qamaruddin Khan, *The Political Thought of Ibn Tamiyah* (Islamabad: 1973) and the same author “Ibn Tamiyah’s Views on the Prophetic State”, *Islamic Studies* (Islamabad: Islamic Research Institute, International Islamic University 1964) 3/521-30 and *Encyclopedia of Islam*, 9/695

⁷² Imran A. Khan Nyazee, *Outlines of Islamic Jurisprudence*, (Islamabad: Centre for Islamic law and Legal Heritage, 2002) pp.32,33,

powers of the ruler to carry out anything which is in the larger collective interest of the community and which is not conflicting with any injunction or principle laid down in *Qur'an* and *Sunnah* although there is no specific evidence for each of such cases. In fact it is the manifestation of the universality of *Qur'an* and permanence of great part of *Shari'ah*. It is through this means that the Muslim rulers, on behalf of the Muslim community at large can play the role of the deputy of Allah on earth".

4. *Wilāyat al Mazālim: Application of Siyāsah Shari'yyah*

4.1 Meaning of *Wilāyat al Mazālim*

It is a combination of two words; *wilāyah* which means department and *Mazālim*. The latter is plural of *mazlamah* (مظلمة), coming from the root word *zulm* (ظلم) i.e. to do injustice. Noun from this verb is *Zulm* (ظلم) i.e. cruelty. Literal meaning of this word is:

• وضع الشيء في غير محله

Placing something in a wrong position

• الميل عن القصد

The word *ẓulm* (ظلم) also means to deviate from the middle path⁷³

It is reported that Huzaifah (May Allah be pleased with him), Abdullah bin Masood and Salman said that ظلم means deviation from the middle path. In a Ḥadīth after explaining the method of ablution the Prophet (peace be upon him) is reported to have said:

• فمن زاد أو نقص فقد أساء وظلم

“...and whoever adds or leaves something, he mistakes and transgresses.”

It also means cruelty and transgression that is an antonym to ‘*adl*’.⁷⁴

Al Māwardī defines (ظلم) as follows:

• وفي الشريعة عبارة عن التعدي عن الحق إلى الباطل وهو الجور وقيل هو التصرف في ملك الغير ومجاورة الحد

“Legal meaning of ظلم is transgression from right path to illegal way i.e. cruelty, it is also said that it is appropriation of others’ property and not abiding by the limits.”⁷⁵

The word *mazlamah* (مظلومة) means the right which has been usurped by the wrong doer.⁷⁶

⁷³ Ibn Durayd, *Jamharat al Lughah*, (Dār Iḥyā al Turāth al ‘Arabī, Beirut, 1989) 3/166.

⁷⁴ Baṭras Bustānī, *Muḥīṭ al Muḥīṭ*, op.cit., vol.3

⁷⁵ Muḥammad Alī Thānvi, *Kashshāf Istīlāḥāt al funūn* (Lahore: Sohail Academy, 1993) word:ظلم

The word *mazlamah* (مَظْلَمَة) means the right which has been usurped by the wrong doer.⁷⁶

According to Al Asfahānī⁷⁷, *Qur'ān* mentions three types of *Zulm*:

Firstly, the cruelty which is committed by man against Allah like associating others with Allah and disobedience to Him. It is said in *Qur'ān*:

إن الشرك لظلمٌ عظيم

Associating others with Allah is a great injustice.⁷⁸

Disobedience to Allah has also been termed as (ظلم). Allah says:

• ولا تقربا هذه الشجرة فتكونا من الظالمين

“...And come not near this tree else you both will be of the cruel.”⁷⁹

• وَالْكَافِرُونَ هُمُ الظَّالِمُونَ

“and the non-believers are surely the cruel”⁸⁰

Second is the cruelty which is committed by man against others.⁸¹

⁷⁶ Ibn Manzūr al Ifrīqī, *Lisān al 'Arab*, Vol. 15

⁷⁷ Al Asfahānī, *Al Mufradāt fī Gharīb al Qur'ān*, (Karachi: Noor Muhammad, (n.d)) p.316

⁷⁸ Al Qur'ān 31:13

⁷⁹ Al Qur'ān 2:35

⁸⁰ Al Qur'ān 2:254

⁸¹ Al Asfahānī, *Al Mufradāt fī Gharīb al Qur'ān*, (Karachi: Noor Muhammad, n.d) p.316

Allah says:

• ومن قتل مظلوما فقد جعلنا لوليه سلطانا ...

“..And whoever is killed unjustly, so we have given his heir the authority which strengthens him.”⁸²

Thirdly; it is the cruelty which is committed by man against himself.⁸³

• فمنهم ظالم لنفسه

‘And among them are those who do injustice to themselves’⁸⁴

• ربّ إني ظلمت نفسي فاغفر لي

“... My Lord, I have committed injustice to myself, so forgive me...”⁸⁵

• وَمَا ظَلَمْنَاهُمُ اللَّهَ وَلَكِنْ كَانُوا أَنْفُسَهُمْ يَظْلِمُونَ

“And we never inflicted any cruelty upon them; rather they did it to themselves”⁸⁶

So it can be derived from the literal explanation of the term ‘*Wilāyat al Mazālim*’ that it denotes the department of the government responsible for redressing

⁸² Al-Qur’ān 17:33

⁸³ Al Asfahānī, *Al Mufradāt fi Gharīb al Qur’ān*, op.cit., p.316

⁸⁴ Al Qur’ān 35:32

⁸⁵ Al Qur’ān 28:16

⁸⁶ Al Qur’ān 16:33

the grievances of the public. It is also called *Diwān al Mazālim*. The in charge of this department is called *Nāzir al Mazālim* or *Wālī al Mazālim*.

Technically it is the department of the government which aims at redressing public grievances against public servants which may arise because of maladministration, mismanagement or abuse of public authority.

According to Al Māwardī, it is judicial investigation of wrongs or abuses and is concerned with leading those who have committed wrongs to just behaviour by instilling fear in them and with dissuading litigants from undue obstinacy in their disputes by instilling a feeling of respect in them.⁸⁷

According to Ibn Khaldūn it is a mixed job of executive dominance and justice of judiciary and it needs a strict approach and a great capability of putting the cruel in fear.⁸⁸

The above explanation of the term *Wilāyat al Mazālim* by the Muslim jurists show that the essence of this department of the government is dominance, hegemony and a capability to put the oppressor under the fear of law. It goes without saying the without such a characteristic the basic job of this department cannot be carried out

⁸⁷Al Māwardī, *Al Ahkām al Sultāniyyah*, , trans. Dr. Asadullah Yate, (London: Ta Ha Publications, 1996) p.58

⁸⁸ George Sordon, *Ikhtiyār al fusūl fī al Ahkām al Sultāniyyah wa 'ilm al Mujtama' min Muqaddimah ibn Khaldūn*, (Algeria: Al Maṭba'ah al Rasmiyyah, 1951)

because it is the powerful among the public servants who oppress others or usurp the rights of others.

It also appears from the statements of the jurists that this is not purely a judicial job nor is it purely an executive post. It is a combination of both types of authorities. This is the quality which makes it a part a manifestation of *Siyāsah Shar'īyah*. The ultimate goal of *Siyāsah Shar'īyah* is to promote the basic objectives of *Sharī'ah* and it is through normal judiciary, *Wilāyat al Hisbah* and *Wilāyat al Mazālim* that these objectives can be taken care of by the government.

The evidence of the dual nature of this job is that the in charge of *Wilāyat al Mazālim* has got extensive powers including power of judges and those of executive branch of the government.⁸⁹

Although it is a job which includes the authority of judges but it is more powerful than them and has got a wider jurisdiction than judiciary.⁹⁰

Most of the writers who mentioned this department of the government are of the opinion that it is more powerful than simple judicial courts but there is an opinion

⁸⁹ 'Abdul Karīm Zaydān, *Nizām al Qadā fi al Sharī'ah al Islāmiyyah* (Baghdad: Matba'ah al 'āni, 1984) pp. 300-299

⁹⁰ Burhanuddīn Abī al Wafā Ibrāhīm bin al Imām Shamsuddīn Abī 'Abdullah Muḥammad Ibn Farḥūn al Ya'marī al Mālikī, *Tabṣirat al Hukām fi Uṣūl al Aqdiyyah wa al Manābij al Ahkām* (Beirut: Dār al Kutub al 'Ilmiyyah 1301 A.H.) 1/20-21

that it comes under judiciary and it resembles contemporary court of appeal where people can complain against the injustices of judges and other public officials.⁹¹

At an early stage in the development of Islamic institutions of the government *Mazālim* came to denote the structure through which the temporal authorities took direct responsibility for dispensing justice.⁹²

A western Scholar looks at the institution of *Wilāyat al Mazālim* as one which the early Abbasids, and perhaps before them the later Umayyads, borrowed from the administrative tradition of the Sassanid kings. According to his understanding it was a prerogative of the absolute monarch by which the caliphs themselves or, by delegation, ministers or special officials and later the sultans, heard complaints concerning miscarriage or denial of justice or other allegedly unlawful acts of the *Qādīs*, difficulties in securing the execution of judgments, wrongs committed by government officials or by powerful individuals and similar matters. Very soon formal court Courts of Complaints were set up. More important lawsuits concerning property; which in theory would have come within the jurisdiction of the *Qādi*, tended to be brought before the Court of Complaints too, so that their jurisdiction became, to a great extent, concurrent with that of the *Qādīs*' tribunals. The very existence of these tribunals, which were established ostensibly in order to supplement

⁹¹ Jorjī Zaidān, *Tārikh al Tamaddun al Islāmī*, (Egypt: Matba'ah al Hilāl, 1902) 1/187

⁹² *Encyclopedia of Islam*, 6/933

the deficiencies of the jurisdiction of the *Qādīs*, shows that much of the administration of justice by the *Qādī* had broken down at an early period.⁹³

Shachet considers the establishment of institution of *Wilāyat al Mazālim* as a way for the political authority to escape the implementation of judgements taken by the judiciary against themselves.

According to his contention although they may have been formally appointed by the Chief Judge, the judiciary held office only during the pleasure of the political authority, as indeed did the chief *Qādī* himself, and their character of political subordinates was responsible for a serious limitation on their powers of jurisdiction which existed from the outset. This was the inability of the *Qādīs* to deal effectively with the claims against high and powerful officials of the state. Such inability was simply the result of failure of the political authority to recognise the decisions of the judiciary in these cases and to enforce them by the machinery at his command. Although executive authorities may have been understandably reluctant to submit to the jurisdiction of an official whom they considered certainly no higher in the political hierarchy than themselves, they could have been forced to do so. But when the sovereign chose not to do this but to sit himself as a court, known as the Court of *Mazālim*; to hear cases of this type, he demonstrated the subordinate position that had been assigned to the *Qādīs* in the direction of the affairs of the state. *Mazālim*

⁹³ Joseph Schacht, *An Introduction to Islamic Law*, op.cit. p.51

jurisdiction, particularly as it involved dealing with complaints against the behaviour or the judgements of the *Qādis* themselves, underlined the fact that supreme judicial power was vested in the political sovereign, and that the jurisdiction and authority of *Shari'ah* courts were subject to such limits as he saw fit to define⁹⁴.

The views of the Western Scholars presented in the above lines are a stereo type of the style of the Western scholarship when they talk about Islam and particularly Islamic political and legal systems. The first thing he mentions is that the institution of *Wilāyat al Mazālim* has been borrowed by the Sassanid Kings. May be he is right to the extent that there was a similarity of the work in this institution and the Court of some Sassanid Kings who used to hear to the complaints of the public. However, as the historical evidence of the application of this concept has been discussed in the next chapter of this work, there is no denial that the Muslim rulers were more aware of the grievances of the public than anyone else in the history before. As a matter of fact the essence of accountability is a built in feature of Islamic political and legal system.

Another point to which an indication is made is that, due to the Courts of *Mazālim* the system of *Shari'ah* Courts were broken down. This is totally based on ill information or may be ill intention. The Courts of *Mazālim* were in fact established to supplement the normal judiciary which it did well. So in cases where judiciary would

* N.J.Coulson, *A History of Islamic Law*, op.cit. p.122

fail to take action against a powerful official or an influential personality, the *Mazālim* court will take action. Actually the jurisdiction of normal judiciary and *Mazālim* courts were different. One was for prosecution of criminals who committed 'crimes' and to resolves civil disputes between the parties, while the *Mazālim* courts were basically meant for addressing the issue of abuse of power by the state authorities.

Another misconception is that the judiciary was ineffective because it was subordinate to the rulers. Again it is not true because we are aware of many examples where judiciary, sometimes the rulers themselves decided the cases against those who are powerful and in authority. As stated before, the next chapter of this work is full of such evidence.

A contemporary scholar describes *Wilāyat al Mazālim* as a judicial authority superior to that of a judge and *Muhtasib* which looks into disputes which are out of the jurisdiction of judges. Thus it is a job the is a combination of the strength of the state and fairness of the judiciary although in reality it comes under judiciary. Its incharge is called *Ṣaḥib al Mazālim* who is presented with complaints of injustice done by officials or member of royal family or judges.⁹⁵

Another contemporary scholar describes it as the highest category of courts. According to his view it deals with appellate matters as well as with those that are beyond the jurisdiction of the qāḍī. All "rights of State" are adjudicated by these

⁹⁵ M. Salām Madkūr as quoted by Fārūq Nabhān, *Nizām al Ḥukm fi al Islām*, p.667

courts. The procedure followed by these courts is not restricted by the strict requirements for the court of the *qāḍī* as regards the number and qualifications of witness and the type of admissible evidence. The matters of evidence and procedure are left to the *ijtihād* of the *imām*.⁹⁶

This institution came into existence gradually through early phases of Islamic history. Its essence i.e. preventing cruelty and injustice and to call the oppressor to account was very much there from the very first day when Islamic state was founded in Madinah by the Prophet (peace be upon him) but it was developed as an institution with the passage of time and with the development of other political and administrative institutions with the Islamic state. Primarily it was to perform the duties which the judges failed to perform with respect to the implementation of the decisions. It also looked into the matters of evidence, punishments, circumstances of the offence, delay in deciding the case by judges, making the litigants reach to a mutual resolution of disputes and many other things pertinent of judicial system.⁹⁷

4.2 Qualifications for *Wālī al Mazālim*:

According to al-Māwardī the job of *Wālī al Mazālim* is concerned with leading those who have committed wrongs to just behaviour by instilling fear in them and with dissuading litigants from undue obstinacy in their disputes by instilling a feeling

⁹⁶ Imran A. Khan Nyazee, *Outlines of Islamic Jurisprudence*, op.cit. p.335

⁹⁷ See: Ibn Khaldūn, *Iktibār al fusūl fi al Ahkām al Sultāniyyah wa 'ilm al Mujtama' min Muqaddimah ibn Khaldūn*, ed. George Sordon, op.cit. p. 58, and Sulaiman Al Ṭahāwī, , *Al Sultāt al thalāth*, p. 447

of respect. Therefore the qualities demanded of the *Wālī al Mazālim* is that he should be of imposing stature, that he ensures actions follows his words, that he commands great respect, is manifestly correct in his keeping within moral bounds, restrained in his appetites, and possessed of great scrupulousness⁹⁸, he needs to have the strength of the law-enforcement officers and the firmness of *Qādīs* in their judicial tasks and to combine the qualifications of the two types of person, so that by the majesty of his bearing he is able to execute any command with respect to both parties.⁹⁹

It is not difficult to derive from the qualities stated for the *Wālī al Mazālim* by al-Māwardī, that the qualifications required are a level above than what is required for a *Qādī* in Islamic law. It goes without saying that initially he must have the qualifications of a *Qādī*. Those qualifications are as follow¹⁰⁰:

- (a) Islam: To be a Muslim is pre-requisite for the post of *Qādī* as to be a judge is a public authority and non-Muslim can not have any authority over Muslims. Allah says in *Qur'ān*.

⁹⁸It means conformity to high standards of ethics or excellence and strict attention to minute details.

⁹⁹ Abū al Ḥasan 'Alī bin Muḥammad bin Ḥabīb al Māwardī, *al Ahkām al Sultāniyyah*, trns. Asadullah Yate, op.cit. p. 116

¹⁰⁰ Generally all the classical books of Islamic law contains "*Kitāb al Qadā*" i.e. the Chapter on Judiciary wherein among other things, the qualifications of *Qādīs* are discussed. See for these conditions: Abū Bakr Muḥammad bin Aḥmad bin Abī Sahl al Sarakhsī, *Al Mabsūṭ* (Karachi: Idarat al Qur'ān wa al 'Ulūm al Islāmiyyah, 1987) vol. 16, Abū Bakr Aḥmad ibn 'Umar al Shaybānī al Khaṣṣāf, *Kitāb Adab al Qādī*, (Cairo: Al Awqāf, 1904), 'Alāuddīn Abī Bakr bin Mas'ūd al Kāsānī al Ḥanafī, *Badā'i' al Ṣanā'i' fi Tartīb al Sharā'i'* (Beirut: Dār al Fikr, 1996) Vol.7, Ibn Farḥūn: *Tabṣirat al Ḥukkām*, op.cit. 1/17, Ibn al Qayyim al Jawziyyah, *I'lām al Muwaqqi'in*, op.cit. 1/105, Al Māwardī, *al Ahkām al Sultāniyyah*, op.cit. p. 62, Qādī Muḥammad al-Ḥusayn Abū Ya'lā al-Ḥanbalī, *al-Ahkām al-Sultāniyyah* (Cairo, 1937) p. 55-56

• و لن يجعل الله للكا فرين على الموء منين سبلا

...and Allah will never let the non-believers to have authority over the faithful.¹⁰¹

Judicial job is basically the application of *Shari'ah* rules and a non-believer has no knowledge of *Shari'ah*, so how can he implement it. However, according to the opinion of *Hanafis* a non-believer may be appointed *Qādi* for the non-believers because he can give evidence in their matter.

- (b) Maturity and Sanity: *Qādi* must be *sui juris* because a minor and insane cannot comprehend the rules of *Shari'ah*. Only being *sui juris* is not enough, rather he should be a man of distinction having enough wisdom to distinguish between truth and fabrication. According to al Māwardī he should be, "Distinguishing rightly, having excellent insight in affairs, faraway from negligence and mistake, who reaches through his wisdom to the solution of any confusion"
- (c) Freedom: He should not be a slave. The Muslim jurists mentioned this condition in the old days but after the abolition of slavery according to

¹⁰¹ Al Qur'an: 4: 141

the Vienna Convention 1815 and Geneva Agreement of 1956, endorsed by all the countries of the world now there is no need to mention this condition.

- (d) Physical and Mental Health: He should be physically fit; that is his faculties of hearing, sight and speech should properly work so that rights can be proven before him and so that he can distinguish between the plaintiff and defendant and the one who confesses and the one who denies.¹⁰²
- (e) 'Adalah (Religious Probity): It is a terminology used by the Muslim jurists for a characteristic in the character of a person who refrains from major sins and does not continue to commit minor sins. This is because he has to do justice so if he can not be just in his relation with the Creator, how can he be expected to do justice in people's matters¹⁰³.
- (f) Knowledge of the Rules of *Shari'ah*: He should have requisite knowledge of the rules of *Shari'ah* and should be learned enough for

¹⁰² Qādi Muḥammad al-Ḥusayn Abū Ya'ālā al-Ḥanbalī, *al-Aḥkām al-Sultāniyyah* (Cairo, 1937) p. 57 and Abū Bakr Muḥammad bin Aḥmad bin Abī Sahl al-Sarakhsī, *Al-Mabsūṭ* (Karachi: Idārat al-Qur'ān wa al-'Ulūm al-Islāmiyyah, 1987) 16/61,

¹⁰³ According to the Ḥanafī opinion a person lacking probity (i.e. sinful person) may be appointed as Qādi, as probity is a condition for perfection i.e. not a pre-requisite. So the ruler should not appoint such a person but if he does appoint one, his appointment is legal and his decisions shall be enforceable at law if they do not exceed the limits of *Shari'ah*. Al Kāsānī, *Al-Badā'ī' wa al-ṣanā'ī'*, as quoted by Muḥammad Mustafā al-Zuḥylī, *Al-Tanzīm al-Qadā'ī fi al-Fiqh al-Islāmī* (Damascus: Dār al-Fikr, 1980) p.56

deciding disputes otherwise he will be among the cruel because he will be deciding without knowledge.

The above mentioned conditions are agreed upon among almost all the schools of thought in Islamic Fiqh. There are some other conditions which are disputed by some while some of the jurists consider them to be the basic conditions. Among those is the condition for *Qādī* to be a male and to be a *Mujtahid*. In short according to the opinion of Mālikī, Shafī'ī and Ḥanbalī Schools of thought these two conditions are necessary for a *Qādī* while Imām Abū Ḥanīfah does not consider *Ijtibād* to be a condition while he considers being male only in the matters where the evidence of women is not accepted like the cases of *Hudūd* and *Qiṣās*, otherwise in the matters where the evidence of women is valid, the women can be appointed *Qādī* for such matters.¹⁰⁴

So it may be concluded that the qualifications of *Wālī al Mazālim* are same as a *Qādī* but in addition he should have an imposing stature, the strength of law-enforcing officer and firmness of *Qādī*, as described by al Māwardī.¹⁰⁵

4.3 Jurisdiction and Powers of *Wālī al Mazālim*: Muslim jurists have identified ten areas of the jurisdiction of *Wālī al Mazālim*. They are the following¹⁰⁶:

¹⁰⁴ Ibid. pp.57,58

¹⁰⁵ Abū al Ḥasan 'Alī bin Muḥammad bin Ḥabīb al Māwardī, *al Aḥkām al Sulṭāniyyah*, trns. Asadullah Yate, op.cit. p.116

- (a) He investigates any abuse of power by rulers towards their subjects and brings them to account for the injustice of their actions; this is necessary part of investigation and is not dependent upon a petition from a plaintiff; thus he examines the behavior of officials and enquires after their state in order to strengthen their case if they are equitable, to restrain them if they go beyond the limits, and to replace them if they are unjust.
- (b) Extortions made by agent-collectors when exacting the taxes on wealth and property- in this case he should have recourse to the laws of justice contains in the *Diwāns* of the government. He should ensure that people are treated accordingly, and that the agents apply the directives accordingly, and that they investigate any overestimations, if these amounts have been paid to the treasury, they should be returned, and if the agents themselves have taken them , he makes them return the money to their owners.
- (c) Keeping records of the treasury officials: As they occupy positions of trust; in this way the wealth of the Muslims may be correctly administered, both in its collection and its distribution. Thus he has to investigate the nature of what has been entrusted to them, and if

¹⁰⁶ Ibid. pp.121-125

there is any excess or deficiency with respect to any incoming or outgoing funds, then he applies the corresponding laws and takes the necessary measures regarding all irregularities.¹⁰⁷

(d) Claims of deficiency, delay or negligence towards those receiving provision: In these cases, he should refer back to his *Diwān* in order to establish the obligation and justice of any payment, and to see whether it continues to be paid to them; he should examine if officials have made short payments in the past or have prevented payment; if the official incharge have taken the funds, he should recover the sum from them, if not, he meets the loss from the treasury.

(e) Restitution of seized property.¹⁰⁸ It may be divided into two types:

(i) The first are things seized by the authorities that are those taken from its owner either out of greed or out of hostility towards its owner. As soon as the person responsible for putting a stop to abuses comes to learn of this during his investigation, he should order its restitution without waiting for anyone to lodge a

¹⁰⁷ Qādi Muḥammad al-Ḥusayn Abū Ya'lā al-Ḥanbalī, *al-Aḥkām al-Sultāniyyah* (Cairo, 1937) p. 60, Abū al-Ḥasan 'Alī bin Muḥammad bin Ḥabīb al-Māwardī, *al-Aḥkām al-Sultāniyyah*, trns. Asadullah Yate, op.cit. p.116

¹⁰⁸ For a comparative study of the issues in seizure of property see: kitāb al-Ghaṣb in Abū Muḥammad Abdullah bin Ahmad bin Muḥammad bin Qudāmah al-Miqdasī, *Al-Mughnī*, ed. Abdullah bin Abdul Muḥsin al-Turkī and Abdul Fattāḥ Muḥammad al-Ḥilw (Cairo: Hījri li al-Ṭib'ah wa al-Nashr, 1992) 7/362-434

complaint with him. If, however, he does not learn of anything in his investigation, his action is dependent on the owner lodging a complaint.¹⁰⁹

- (ii) The second kind of property seized by force is that taken by powerful individuals and who dispose of it with violence and coercion, as if they were the owners. Its restitution is dependent on a complaint on behalf of their true owners, but they may only be recovered from those who have seized them in one of four circumstances: i. either by way of an admission and confirmation by the one who took it; ii. On the basis of information possessed by the person responsible for setting right the abuse, in which case he may give judgment in accordance with what he knows iii. By means of witnesses who testify to the improper seizure or to the victim's right to ownership; iv. The corroboration of accounts, which exclude all possibility of collusion by the witnesses: as witnesses may testify to the ownership of goods, the person responsible for setting right the

¹⁰⁹ Qādi Muḥammad al-Ḥusayn Abū Ya'ālā al-Ḥanbalī, *al-Aḥkām al-Sultāniyyah* (Cairo, 1937) p. 61, Abu al-Hasan 'Alī bin Muḥammad bin Ḥabīb al-Māwardī, *al-Aḥkām al-Sultāniyyah*, trns. Asadullah Yate, op.cit. p.118

abuse has all the more cause to base his judgment on a concordance of statements.¹¹⁰

- (f) The surveillance of Waqf institutions.¹¹¹ They are either of a general or of a particular kind:
- (i) As for the general, he should begin by examining these waqfs even if there has been no complaint against them in order that he might have them run in the manner appropriate to them, and so that they are administered in accordance with the conditions stipulated by the waqf-donors.
 - (ii) As for *waqfs* of a particular kind, his inspection of them is dependent upon receipt of a complaint from interested parties who have differences of opinion-given that these waqfs have been set up for the benefit of specific parties. In the case of dispute, he should proceed according to the law before a judge in case of any establishment of rights;
- (g) The execution of those judgments which the *Qādīs* have suspended because of their own weakness and incapacity in applying them to the

¹¹⁰ Ibid. p.127

¹¹¹ For a comprehensive discussion on Waqf property in *Shari'ah* see: Abū Muḥammad Abdullah bin Aḥmad bin Muḥammad bin Qudāmāh al Miqdāsī, *Al Muḡbni* (Beirut: Ālam al Kurub, n.d) 5/600-648

party against whom judgment has been passed-because of the later's strength and power, or because of the superiority of his position and standing . As the person responsible for redressing the abuse is stronger and more capable of executing the order, he should carry out the judgment against the person in question either by taking away what he possesses or by coercing him into giving up what he owes.

- (h) The inspection of whatever the *muhtasibs* have been unable to undertake in matters of public good; thus concerning the open practice of something illicit which they are too weak to prevent, transgressions committed on public highways which they cannot stop or the violation of the rights which they do not have the means to put an end to, he applies Allah's judgment, may He be Exalted, to them, and orders that they be forced to respect this judgment.¹¹²
- (i) He sees that the public acts of worship are respected, like the Friday prayer, the *Eids*, the *Hajj*, and the *jihād*, and that there is no deficiency or omission regarding any aspect of them, for the rights and obligation of Allah, the Exalted, have priority concerning their fulfillment and execution.

¹¹² Qādi Muḥammad al-Ḥusayn Abū Ya'āl al-Ḥanbalī, *al-Aḥkām al-Sultāniyyah* (Cairo, 1937) p. 61, Abu al Hasan 'Alī bin Muḥammad bin Ḥabīb al Māwardī, *al-Aḥkām al Sultāniyyah*, trns. Asadullah Yate, op.cit. p.118

- (j) Arbitration between two disputing parties and judgment between two litigants, although he is not to depart from the demands of the law and its consequences in his investigation, and he may not pronounce judgment between them by other than that by which judges and *Qādīs* judge. Many a time judgment in cases of abuse causes ambiguity for those responsible for their investigation, and so they in turn transgress in their judgments and go beyond the appropriate limits.¹¹³

The officer in charge of *Mazālims* had vast power and wide jurisdiction which made him superior to *Qādi*. He had power to intimidate a defendant if circumstances warranted. He could eliminate unnecessary evidence and short circuit the procedures for speedy justice. He could appoint arbitrators and administer oaths to witnesses if their veracity was doubtful and more than that, he could summon any person to provide him with relevant information, a power which was denied to the officers presiding over the regular courts.¹¹⁴

5. *Wilāyat al Mazālim* and other Similar Institutions of the government

There is no doubt in the fact that all the institutions of Islamic state aim at one primary goal i.e. promoting virtue and elimination evil. The three departments;

Wilāyat al Mazālim, judiciary and *al Hisbah*, all are particularly established for

¹¹³ Ibid. p.119

¹¹⁴ Dr. Liaqat Ali Khan Niazi, *The Institution of Muhtasib (Ombudsman)* (Lahor: Diyal Singh Trust Library, 1994) p.163

achieving this primary goal. Their goal is the same but every department has its own jurisdiction and therefore the experts draw lines of demarcation among them so that no institution should interfere in the domain of the other and so that the business of the government is run in a smooth way. In this respect we will try to have a comparison of *Wilāyat al Mazālim* both with Judiciary and *Al Hisbah*.¹¹⁵

5.1 *Wilāyat al Mazālim* and Judiciary¹¹⁶

Wilāyat al Mazālim and Judiciary are similar in the sense that both aim at the protection of rights and both take corrective measures if there is a loss of rights or where lack of responsibility or abuse of power occurs. Both the departments may take *suo moto* action as well as an action on the complaint of aggrieved party. However there are some distinctions between the two. Those distinctions are as follow:¹¹⁷

- (a) *Wilāyat al Mazālim* is based upon instilling fear into the cruel but in case of normal judiciary it is not done.

¹¹⁵ For the working of various administrative organs of the government according to Islamic principles see: 'Abdul Ḥay bin 'Abdul Kabīr al Kattānī, *Niẓām al Ḥukūmah al Nabawiyyah al Musammā al Tarātib al Idāriyyah* (Cairo: Dār Ihyā' al Turāth al Arabī n.d.) 2 volumes.

¹¹⁶ A good discussion on the jurisdiction and other issues related to judiciary can be found in Alauddin al Samarqandī, *Tuhfat al Fuqahā'* (Beirut: Dār al Kutub al 'Ilmiyyah, 1984) 3/ 369-374

¹¹⁷ Al Māwardī, *Al Ahkām al Sultāniyyah*, p. 126,127, trans. Dr. Asadullah Yate, Abi Ya'lā, *Al Ahkām al Sultāniyyah* p. 63,64

- (b) The jurisdiction of *Wilāyat al Mazālim* is much wider than that of judiciary.
- (c) Incharge of *Wilāyat al Mazālim* may use fear factor in his investigation to reach to the truth. He can also decide a case on the basis of circumstantial evidence and determine right or wrong in a dispute. That is not allowed for a judge.
- (d) The in charge *Wilāyat al Mazālim* punishes those who openly commit injustice and reprimands with disciplinary action and censure those whose hostility is manifest while that is not allowed for judges.
- (e) He can delay judgement when the matter involving the litigants is unresolved because of the ambiguity of their case and the uncertainty regarding their rights; this in order to make an examination of their details and circumstances. In short, a judge may not do this if one of the litigants asks for a definitive judgement, while incharge *Wilāyat al Mazālim* can do this.
- (f) He can refer litigants to arbitration of trusted persons if they become troublesome in order that their differences may be resolved to their satisfaction. The judge, on the other hand, cannot do so unless agreed by both the parties.

- (g) He may place litigants under surveillance if there are clear indications that their mutual denials are inconsistent, and can authorize the obligation of surety or bail with respect to matters where such guarantees are allowed in order to compel the litigants to a mutual sense of justice and to make them avoid all mutual denials and mutual denigration. This is not allowed for judges.¹¹⁸
- (h) He may hear testimonies from good and honest persons in circumstances where judges would not be able to hear them without breaching established practices in the case of upright citizens.
- (i) He may have the witnesses swear on oath when he is in doubt as to whether they are making their testimonies of their own accord; he may also demand that there be a number of them, so as to avoid any possibility of doubt and to remove any uncertainty he may feel. This is not, however, permitted for judges (who form their decision on the basis of two witnesses except in case of fornication.)
- (j) Incharge *Wilāyat al Mazālim* is allowed to initiate the summoning of the witnesses and to ask them what they know of the dispute between the litigants, whereas the custom amongst the judges is to charge the

¹¹⁸ Qādi Muḥammad al-Ḥusayn Abū Ya'āl al-Ḥanbalī, *Al-Aḥkām al-Sultāniyyah* (Cairo, 1937) p. 63

plaintiff with producing witnesses who he does not hear until after questioning the plaintiff.

5.2 *Wilāyat al Mazālim* and *Al Ḥisbah*.¹¹⁹

As for comparison between the institution of *al Ḥisbah* and *Wilāyat al Mazālim*, there is a side of resemblance which joins them and a side of difference which separates them.¹²⁰ As for the resemblance which joins those, both have two aspects.

- (a) Activity of both the institutions is based on intimidation applied with force of authority and with energetic severity;
- (b) Activity of both the institutions may be concerned with matters of public interest and with seeing that manifest acts of wrong doing are denounced.

As for the distinction between the two, it also has two aspects.

In case of *Wilāyat al Mazālim* the investigation in cases of complaints is carried out where the judges fail to do so (because of the accused being very powerful and

¹¹⁹ *Al Ḥisbah* is the department of government which is charged with the task of enjoining virtue and forbidding evil in the society, particularly its work include supervision of market places to check any cheating or other illegal practices there. For a detailed discussion on the department of *al Ḥisbah* see: Taqiyyuddin Abū al 'Abbās Aḥmad Ibn Taymiyah, *Al Ḥisbah fi al Islām*, (Madinah: Al Jami'ah al Islāmiyyah, n.d), Muḥammad bin Aḥmad bin Bassām al Muḥtasib, *Nibāyat al Rutbah fi Ṭalab al Ḥisbah* ed. Ḥusamuddin Samrā'i (Baghdād: Matba' al Ma'ārif, 1968) and *Al Ahkām al Sulṭāniyyah* both by al Māwardī and Abū Ya'lā

¹²⁰ Al Māwardī, *Al Ahkām al Sulṭāniyyah*, p. 340, trans. Dr. Asadullah Yate, Abū Ya'lā, *Al Ahkām al Sulṭāniyyah* p. 65

influential person) whereas investigation in the realm of *al Hisbah* is carried out because the judges disdain to do so; for this reason the rank of incharge *Wilāyat al Mazālim* is higher and that of the Muhtasib is lower. Incharge *Wilāyat al Mazālim* may make a signed order both to the judge and to the Muhtasib, while the judge can not make such an order to the incharge *Wilāyat al Mazālim* but he may issue such order to the Muhtasib. Anyway the Muhtasib can neither make such an order to the judge nor can he do so in case of incharge *Wilāyat al Mazālim*.

- (a) The person incharge of *Wilāyat al Mazālim* may pronounce a judgement but that is not the domain of Muhtasib.¹²¹

6. Legal Status of *Wilāyat al Mazālim* in *Sharī'ah*

Wilāyat al Mazālim means the institution of the government which works for the elimination of injustice/ cruelty (ظلم). This word has frequently been used by Quaran and *Sunnah* in many different forms to highlight a particular behaviour which is condemned.

Allah says:

• لعنة الله على الظالمين

Curse of Allah be upon the Cruel.¹²²

¹²¹ Al Māwardī, *Al Abkām al Sultāniyyah*, p. 340, trans. Dr. Asadullah Yate, Abū Y'lā, *Al Abkām al Sultāniyyah* p. 65

Likewise having loyalty relations with the enemies of Islam, misappropriation of others' wealth through wrongful means, acts of disobedience, not implementing the Divine law, associating others with Allah, forbidding people from remembrance of Allah in the mosques, making joke of others and giving bad names to them, all such acts and many other acts and behaviour which are disliked by Allah have been termed as *ظلم* in *Qur'ān*.¹²³

There are many sayings of the Prophet (peace be upon him) (peace be upon him) too which lay emphasis on the same theme.

In a *Ḥadīth-i-Qudsī*, it is narrated that Allah said

• يا عبادي إني حرمت الظلم على نفسي وجعلته بينكم محرماً، فلا تظالموا

O my servants, indeed I have prohibited injustice for My self and have banned it among you too, so do not oppress each other.¹²⁴

The basic rule about injustice or *zulm* has been declared by the Prophet (peace be upon him) (peace be upon him) in the following saying:

• انصر أخاك ظالماً أو مظلوماً، قال يا رسول الله، ننصره مظلوماً فكيف ننصره ظالماً؟ قال تأخذ فوق يديه

¹²² Al Qur'ān 7:44

¹²³ It is difficult to state all the texts of the Qur'ān that say something about *zulm*, however, only for example see Al Qur'ān: 3: 57, 18: 59, 42:45, 3:192, 42:42 and 11:1.

¹²⁴ *Ṣaḥīḥ Muslim*, Kitāb al birr wa al ṣīlah wa adāb, Bāb: taḥrīm al *zulm*, Ḥadīth No 4674

“Help your brother whether he is oppressor or the oppressed. Some one asked, O Messenger of Allah, we help him if he is oppressed but how can we help him when he is an oppressor? He replied: Hold his hands (stopping him from cruelty)”¹²⁵

It is narrated that the Prophet (peace be upon him) said:

• لعن الله من رأى مظلوماً فلم ينصره

May Allah curse the one who sees an oppressed person and does not help him.¹²⁶

Jābir bin Abdullah narrates that the Prophet (peace be upon him) (peace be upon him) said,

• اتقوا الظلم فإن الظلم ظلمات يوم القيامة

“Fear from cruelty for it will be sheer darkness on the Judgment day..”¹²⁷

According to a report of Ahmad he said:

• إياكم و الظلم فإن الظلم ظلمات يوم القيامة

¹²⁵ *Ṣaḥīḥ Bukhārī*, Kitāb al Ikrāh, Bāb: Yamin al rajul li ṣāḥibihī innahu akhūhu idhā khāfa alayhi al qatl, Ḥadīth No 6438, *Tirmidhī*, Kitāb al fitan ‘an rasulullah, Bāb: mā jā’ fi annahy ‘an sabb al ra’iyyah, Ḥadīth No 2181, , Alauddin al Muttaqī bin Ḥassam Al Hindī, *Kanz al Ummāl*, vol.3 Ḥadīth No. 7204, 7205, 7206, 7213

¹²⁶ Al Hindī, op.cit. Ḥadīth No 7207

¹²⁷ *Ṣaḥīḥ Muslim*, Kitāb al birr wa al ṣilāh wa al ādāb, Bāb: tahrīm al zulm, Ḥadīth No 4675

“Abstain strictly from cruelty for it will be sheer darkness on the Judgement Day”¹²⁸

It is narrated that there Abū Salamah bin ‘Abdur Raḥmān had some problem over a piece of land with some people, so Ā’ishah (May Allah be pleased with him) told her that he should abstain from such things because the Prophet (peace be upon him) had said:

• من ظلم قيد شبر من الأرض طوفه من سبع أرضين

“Whoever usurps a piece of land measuring one span will be punished (on Judgment day) with winding of that piece around his neck across the seven earths.”¹²⁹

The Prophet (peace be upon him) (peace be upon him) is reported to have said,

• الظلّة و أعوا لهم في النار

“The oppressor and their supporters will be in the Hellfire”¹³⁰

There is more than one saying of the Prophet (peace be upon him) (peace be upon him) warning against the supplication of the oppressed.

¹²⁸ *Musnad-i-Aḥmad*, Kitāb al Mukthirīn min al ṣaḥābah, Bāb: bāqī al Musnad al Sābiq, Ḥadīth No 5568

¹²⁹ *Ṣaḥīḥ Bukhārī*, Kitāb al Maḥālim wa al Ghaṣb, Bāb: ithm man ḥalama shay’an min al arḍ, Ḥadīth No 2273 *Ṣaḥīḥ Muslim*, Kitāb al Musāqāh, Bāb: taḥrīm al ḥulm wa ghaṣb al arḍ wa ghayraha, Ḥadīth No 3025, *Musnad-i-Aḥmad*, Kitāb:bāqī musnad al anṣār, Bāb: Ḥadīth sayyidah ‘Ā’isha, Ḥadīth No 23217, 23364, 24947,

• إتقوا دعوة المظلوم فإنما يسأل الله تعالى حقه وإن الله تعالى لم يمنع ذا حق حقه

“Fear from the supplication of the oppressed against you, for indeed he asks Allah the Exalted, his right and indeed Allah the Exalted does not prevent the right of anyone to whom it is due.”¹³¹

According to another report the Prophet (peace be upon him) said:

• إتقوا دعوة المظلوم وإن كان كافراً فإن ليس دونه حجاب

“Fear the supplication of the oppressed against you even if he is a non believer for there is no hurdle in his way.”¹³²

Yet according to another report the Prophet (peace be upon him) said:

• دعوة المظلوم مستجابة وإن كان فاجراً ففجوره على نفسه¹³³

“The supplication of the oppressed is heard. If he is disobedient to Allah, the burden of his disobedience is upon him”

The above ayaat and sayings of the Prophet (peace be upon him) prove that cruelty/injustice has been severely condemned by Islam and something

¹³⁰ Ala 'iddin al Muttaqī Al Hindī, *Kanz al 'ummāl fi sunan al aqwāl wa al af'āl* (Hyderabad, India, n.d) vol.3, Ḥadīth No 7589

¹³¹ Ibid. Ḥadīth No 7597

¹³² *Musnad-i-Aḥmad*, Kitāb: bāqī Musnad al Mukthirīn, Bāb: musnad Anas bin Mālik, Ḥadīth No 12091, Al Hindi, vol.3 Ḥadīth No 7602

¹³³ *Musnad-i-Aḥmad*, Kitāb bāqī musnad al Mukthirīn, op.cit. Bāb: al musnad al sābiq Ḥadīth No 8440, 'Alāuddin al Muttaqī Al Hindī, *Kanz al 'Ummāl*, op.cit. vol.3. Ḥadīth No 7627

which has been condemned in such strong terms has to be eliminated from the human society. This is one side of the matter.

On the other hand the very first section of this chapter is about the significance of justice from Islamic viewpoint. As has been discussed there that the ultimate purpose of Islamic legal system is administration of justice. This purpose can never be served if there is no grievance redress for the common man. It is a principle of Islamic law that something which is essential in fulfilling an obligation is also. Thus accountability of public servants becomes obligatory upon the Muslims collectively because without it there is no justice. And establishing institutions to provide justice in the society including particular accountability of public servants to eliminate *zulm* is an obligation of the Islamic state.

Moreover all the injunctions of *Qur'an* and *Sunnah* which make enjoining virtue and forbidding evil (*al amr bil ma'rūf wannahy 'an 'l munkar*) an obligation upon the *Ummah*, are indirectly emphasising the obligation of establishing the institution of *Wilāyat al Mazālim* because that is the best form of *Nahy 'an 'l Munkar* (forbidding evil) at the government level.

Same is the case with the injunctions which focus upon values like standing for Truth, 'Adl, Qist, Birr etc. All those indirectly prove the obligation of grievance redress too.

Some of the Āyāt of *Qur'ān* in this respect are following:

- كُتِمَ خَيْرَ أُمَّةٍ أُخْرِجَتْ لِلنَّاسِ تَأْمُرُونَ بِالْمَعْرُوفِ وَيَنْهَوْنَ عَنِ الْمُنْكَرِ

“You are the best people raised for the humanity to enjoin virtue and forbid evil¹³⁴

- وَلَتَكُنْ مِنْكُمْ أُمَّةٌ يَدْعُونَ إِلَى الْخَيْرِ وَيَأْمُرُونَ بِالْمَعْرُوفِ وَيَنْهَوْنَ عَنِ الْمُنْكَرِ وَأُولَئِكَ هُمُ الْمُفْلِحُونَ

“Let there be a group among you who invite people to all that is good, enjoin virtue and forbid evil, and it is them who are successful.”¹³⁵

- يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ بِالْقِسْطِ شُهَدَاءَ لِلَّهِ وَلَوْ عَلَىٰ أَنفُسِكُمْ أَوِ الْوَالِدِينَ وَالْأَقْرَبِينَ

“O those who believe stand out firmly for justice being witnesses for Allah even if it be against you or parents or relatives...”¹³⁶

- يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ لِلَّهِ شُهَدَاءَ بِالْقِسْطِ، وَلَا يَجْرِمَنَّكُمْ شَنَاٰنُ قَوْمٍ عَلَىٰ أَلَّا تَعْدِلُوا، إِيَّادُوا هُوَ أَقْرَبُ

لِلتَّقْوَى

¹³⁴ Al Qur'ān 3:110

¹³⁵ Al Qur'ān 3: 104

¹³⁶ Al Qur'ān 4: 135

“O those who believe stand out firmly for Allah and be just witnesses and let not the enmity of some people make you avoid justice, Be just! That is closer to piety..¹³⁷

● قل أمر ربي بالقسط

“Say! That my Lord has commanded me to do justice”¹³⁸

● ولا تعبدوا، إن الله لا يحب المعتدين

“...and transgress not for Allah does not like transgressors.”¹³⁹

Following are some of the sayings of the Prophet (peace be upon him) about enjoining virtue and forbidding evil.

● عن حذيفة بن اليمان عن النبي صلى الله عليه وسلم قال، والذي نفسي بيده لتأمرن بالمعروف و لتنهون عن

المنكر أو ليوشكن الله ان يبعث عليكم عقاباً منه ثم تدعونه فلا يستجاب لكم

Huzayfah bin al Yamān reported that the Prophet (peace be upon him) said:

By the Being in Whose possession my soul is, you will have to enjoin virtue and you will have to forbid evil or it is possible that Allah sends over you a

¹³⁷ Al Qur’ān 5: 8

¹³⁸ Al Qur’ān 7:29

¹³⁹ Al Qur’ān 5:87

punishment, then you will ask Him (to remove it) but He will not accept your supplication.¹⁴⁰

• كلاً والله لتأمرن بالمعروف و لتنهون عن المنكر و لتأخذن على يدي الظالم و لتأطرنه على الحق أطراً

ولتقصرنه على الحق قصراً

Lo! By Allah, You will have to enjoin virtue and forbid evil, you will have to stop the cruel by force, you will have to compel him to the truth and confine him to the same¹⁴¹

• عن عائشة قالت قال رسول الله صلى الله عليه وسلم مروا بالمعروف وانهوا عن المنكر قبل أن تدعوا فلا

يستجاب لكم

“According to the report of Ā'ishah (May Allah be pleased with him) the Messenger of Allah (peace be upon him) said:

Enjoin virtue and forbid evil before the time comes that you will pray but your prayer will not be accepted.¹⁴²

• إِنَّ النَّاسَ إِذَا رَأَوْا الْمُنْكَرَ لَا يَغْتَرُونَهُ أَوْشَكَ أَنْ يَعْتَمَهُمُ اللَّهُ بِعِقَابِهِ

¹⁴⁰ *Tirmidhī*, Kitāb al Fitan 'an rasulullāh, Bāb: mā jā' fi al amr bil ma'rūf wannahy 'an 'l munkar Ḥadīth NO: 2095

¹⁴¹ *Abū Dawūd*, Kitāb al Malāḥim, Bāb: al amr wannahy, Ḥadīth No 3774

¹⁴² *Ibn Mājah*, Kitāb al fitan, Bāb: al amr bil ma'rūf wannahy 'an 'l munkar, Ḥadīth No 3994

“When the people see evil and do not change it, it is possible that Allah will punish them all in general.”¹⁴³

عن حذيفة بن اليمان عن النبي صلى الله عليه و سلم قال، والذي نفسي بيده لتأمرن بالمعروف و لتنهون
عن المنكر أو ليعثن عليكم قوماً ثم تدعون له فلا يستجاب لكم

According to the report of Ḥudhyfah bin al Yamān, the Messenger of Allah said: By He in Whose possession my soul is you will have to enjoin virtue and forbid evil or a [bad] people will be imposed upon you then you will pray against them but your prayers will not be accepted.¹⁴⁴

• يا أيها الناس إن الله عزوجل يقول مروا بالمعروف وانهوا عن المنكر من قبل أن تدعوني فلا أجيبكم وتسالوني

فلا أعطيك وتستصروني فلا أنصرکم

The Messenger of Allah said: O people, verily Allah says: enjoin virtue and forbid evil before you call me and I don't respond to your call, and you ask me [for something] and I don't give you and you pray for my help and I don't help you.”¹⁴⁵

• إن الناس إذا رأوا الظالم فلم يأخذوا على يديه أوشك أن يعمهم الله بعقاب منه

¹⁴³ *Ibn Mājah*, Kitāb al fitan Bāb: al amr bil maroof wannahye a'nil munkar, Ḥadīth No 3995 and *Musnad-i-Aḥmad*, Kitāb Musnad al a'sharah al mubashsharah bil jannah, Bāb: Musnad Abī Bakr al Siddīq

¹⁴⁴ *Musnad-i-Aḥmad*, Kitāb Bāqī Musnad al Anṣār, Bāb: Ḥadīth Ḥudhyfah bin al Yamān a'n annabiyye, Ḥadīth No 22238

¹⁴⁵ *Musnad-i-Aḥmad*, Kitāb bāqī Musnad al Anṣār, Bāb: bāqī al Musnad al Sābiq

“Indeed when the people see the cruel and don’t stop him, it is possible that Allah may punish them all in general.”¹⁴⁶

In one of the sayings the Prophet (peace be upon him) explains that Allah has commanded the believers with what He has commanded the messengers.¹⁴⁷

Allah has commanded His Prophet (peace be upon him) to decide among people with justice so the same command is true for the believers too. The above mentioned many *āyāt* and *ahādith* prove that it is the primary duty of Islamic government to have a stable system of the administration of justice where *Amr bil ma’rūf wannahy ‘an’l munkar* (enjoining virtue and forbidding evil) is ensured. This is not possible until it is done on government level and for that purpose there has to be a mechanism. That mechanism has been proven to be the department of grievance redress or *Wilāyat al Mazālim* and the department of *Hisbah*. Something that is the duty of the government or the *Ummah* is called in the language of Fiqh as communal obligation (*Fard kifāyah*). Thus the conclusion is that grievance redress is a communal obligation of the *Ummah*.

¹⁴⁶ *Tirmidhī*, Kitāb al Fitān a’n rasulullāh, Bāb: mā jā’ fi nuzūl al adhāb idhā lam yughayyar al munkar, Ḥadīth No 2094

¹⁴⁷ The said report is about the consumption of pure wealth in the cause of Allah but it says, among other things, that Allah has commanded the believers to do things which He has required the Messengers to do. See: *Ṣaḥīḥ Muslim*, Kitāb al Zakāh, Bāb: Qabool al ṣadaqah min al kasb al ṭayyib wa tarbiyyatihā Ḥadīth No 1686 and *Tirmidhī*, Kitāb: Tafsīr al Qur’ān a’n Rasulu Allāh, Bāb: wa min Surat al Baqarah Ḥadīth No 2915

7. Conclusion:

To conclude this chapter, the main points are summed up in the following.

- Justice is the fundamental norm in Islamic politico-legal system and there is no question of an Islamic state without an adequate system for the administration of justice.
- *Qur'an* and *Sunnah* have laid down great emphasis on justice and there are innumerable texts which elaborates the significance justice and its administration in an Islamic society.
- Islamic history is a witness to the fact that justice has held centre stage in the Islamic politico-legal system.
- *Siyāsah Shar'īyah* is *Siyāsah* according to the principles of *Sharī'ah*. It is necessary for humans to fulfil the duty assigned to them by their Creator i.e. to be His deputy on the earth and this duty is impossible to be fulfilled without the exercise of *Siyāsah Shar'īyah*.
- *Wilāyat al Mazālim* i.e. redress of the grievances is a manifestation of *Siyāsah Shar'īyah* in Islamic legal system.
- *Wilāyat al Mazālim* is the department of the government which aims at redressing public grievances against public servants which may arise because

of maladministration, mismanagement or abuse of public authority. It is a mixed job of executive dominance and justice of judiciary and it needs a strict approach and a great capability of putting the cruel in fear.

- The essence of the institution i.e. grievance redress has been there from the earliest period of the Messenger of Allah (peace be upon him) but it took its formal shape through different phases of Islamic history.
- All three institutions of the Islamic state namely; *Wilāyat al Mazālim*, Judiciary and *Ḥisbah* has a common goal of enjoining virtue and forbidding evil though the three have separate and distinguished jurisdiction.
- Injustice is *haram* or prohibited in the strictest terms according to the injunctions of *Qurʾān* and *Sunnah* and it is the obligation of the *Ummah* to remove *ḥarām* from the society. On the other hand the establishment of a society based on justice and fairness is an obligation of the *Ummah* collectively. So the conclusion is that the establishment of *Wilāyat al Mazālim* is a communal obligation of the *Ummah*.

Chapter two

Historical Evidence

of

Wilāyat al Mazālim

Chapter Two

Historical Evidence of *Wilāyat al Mazālim*

1. Introduction:

Islamic legal and political system has a long history of fourteen hundred years of implementation in different areas and eras by different Muslim governments. In the beginning of this history there was an ideal Muslim government which was a model for an Islamic state i.e. *al Khilāfah al Rāshidah*. Afterwards there was some deterioration in the political system but the legal system mainly remained the same. Some times the enforcement of Shariah was a priority of the government and sometimes it enforced Islamic system only as a compulsion. For one thousand years this system was the only option for the Muslim governments and states as there was no other viable system which could take its place. *Wilāyat al Mazālim* has always been a cherished idea of the Muslim rulers. Having said that we do not mean that there has been a uniformed organisation of the department of *Mazālim* but in one form or another department has been working side by side with the formal judicial system.

The goal of the current chapter is not to discuss minute details of the department in many different Muslim states and governments, as it is very difficult to find out its minute details, rather the goal of this chapter is broadly to prove that the

department has been working in all the Muslim governments, though the form and strength may have been varied from time to time.

2. *Wilāyat al Mazālim* in Prophet (peace be upon him)'s Era¹⁴⁸

The period of the Prophet (peace be upon him) was that of the foundation of the Islamic state and its various institutions. *Wilāyat al Mazālim*, as an independent institution was, therefore, not yet there but the work and spirit of this institution was very much there. The Prophet (peace be upon him) is a role model for the believers in all walks of life and redress of grievances is one of the most important features of Islamic state so he must be and, surely, he was a role model in this respect too. So we find the Prophet's era was ideal in this respect. He used to call to account any official of the government if there was any corruption or misuse of authority. In this regard he did not forgive even himself. That is why in the famous book of Hadith; al Musannaf, a *bāb* (section) has been compiled in the name of 'Retaliation of the Prophet (peace be upon him) from himself' and a few *Aḥādīth* of the Prophet (peace be upon him) have been mentioned there. We will state here three of those *aḥādīth*.

- (a) Abū Sa'īd al Khudārī reported that once the Prophet Muhammad (peace be upon him) came out from his house intending to go for prayers. A

¹⁴⁸ Here the Prophet's era means the ten year period of Prophet Muhammad (peace be upon him) at Madinah when he established formal state institutions there. The period at Makkah is not under consideration because there the Muslim community as a whole was under oppression itself and due to the absence of any political institution of the Muslims there was no question of a system of grievance redress.

man caught hold of the rein of his she-camel and said, 'I have to say something to you O Messenger of Allah!' The Prophet (peace be upon him) said, leave me now, you will have your need fulfilled. But the man insisted and said that thrice. So the Prophet (peace be upon him) hit him with a lash and said, 'Leave me and you will have your need fulfilled'. Then the Prophet (peace be upon him) led the prayers. After finishing he asked: where is the man whom I flogged? The people looked at each other and asked the same. The man came from the back rows and said, 'I seek refuge of Allah from His and His Messenger's wrath.' The Prophet (peace be upon him) asked him to come near and take his revenge. He threw the lash over to him. The man said, 'I forgive you', the Prophet (peace be upon him) said, 'Are you forgiving me?' He said, 'yes, I forgive you.' So the Prophet (peace be upon him) said, 'by Him, in Whose possession my soul is, any believer who oppresses another and then does not give him an opportunity to retaliate in this world, Allah will take revenge from him on the Judgement Day. Abū Dhar said, 'O Messenger of Allah! Do you remember the night when I was driving your camel and you were taking a slumber? I touched your head with the stick and told you to be seated straight. So you retaliate from me now for that. The Prophet

(peace be upon him) said, 'I forgive you' but Abu Dharr insisted and at last the Prophet (peace be upon him) hit him with the lash.¹⁴⁹

(b) It is reported that the Prophet Muhammad (peace be upon him) met a man who had his hair dyed yellow. There was a branch of date palm in the hand of the Prophet (peace be upon him). He said "remove this", pushing the man with the branch and added: "Did not I forbid you from doing this". As a result of pushing the man was hurt, though did not bleed. The man said, "Retaliation O Messenger of Allah!" when the people objected to this, the man said, "Allah has not preferred any body over my body." So the Prophet (peace be upon him) uncovered his abdomen and said, "take your revenge". But the man said, "I leave it so that you intercede for me on the Judgement day"¹⁵⁰

(c) It is reported that once the Prophet Muhammad (peace be upon him) said to his Companions: "Anyone whom I have insulted should take his retaliation from me. Any one whom i have hit should take his retaliation from me and anyone from whom I have taken any property illegally should take back his property from me, no one should say that he fears rancour from the Messenger of Allah. Lo! That is not my

¹⁴⁹ Abū Bakr bin Hummām 'Abdurrazzāq al Ṣan'ānī, *Al Muṣannaf*, vol.9, Ḥadīth No 18037, bāb: *Qawad al Nabiy min nafsihi*

¹⁵⁰ Ibid Ḥadīth No 18039

nature nor is it my morals. Among you favourite to me is the one who took his due from me or forgive me, so that when I meet my Lord, I am with pure soul.¹⁵¹

It is reported that a man owned a date palm in the garden of an Ansari. The former used to tease the owner of the garden (perhaps by going there at odd times or in a bad manner). The owner of the garden offered to him to either sell his tree to him or exchange it with another tree, but the man refused. The Prophet (peace be upon him), therefore said,

• أنت مضار

“You are causing harm” and ordered the Ansari to cut off the tree.¹⁵²

The Prophet (peace be upon him) investigated a dispute of irrigation between Al Zubayr bin al ‘Awwām and one Anṣārī. He came personally and said to Zubayr, “you water O Zubayr and then the Anṣārī”. To this the later objected and said, “Surely he is the son of your maternal aunt, O Messenger of Allah!” The Prophet (peace be upon him) got angry at his words and said, “O Zubayr! Make it to flow over his stomach until the water reaches the ankles” He told him to have it flow over his stomach as a reprimand for his audacity. There is a difference of opinion regarding his

¹⁵¹ Ibid Hadīth 18043

¹⁵² Sunan Abū Dāwūd, Kitāb al Aqdiyyah, bāb: min al Qaḍā, Hadīth No 3152

order to have the water flow up to the ankles that is whether it was to affirm a right in the form of a judgement between them or it was merely to affirm that it was permitted but delivered as a reprimand to the two parties.¹⁵³

The administration of the Islamic state during Prophet's period had among other things, a distinctive feature of accountability.

In the seventh year of Hijrah, the holy Prophet (peace be upon him) sent a detachment of over one thousand Companions under the leadership of Ghālib bin Abdullah Laythī to confront the tribe of Maniah which was successfully done. During the course of action Usman bin Zayd killed Nāhik bin Mardās despite his recitation of لا إله إلا الله، محمد درسه ولى الله The Holy Propohet took him to task after returning. He replied that he had recited the *shahadah* just to save his skin. But the Prophet (peace be upon him) asked him whether he had incised his heart to know about the fact.¹⁵⁴

In eighth year of Hijrah the Holy Prophet (peace be upon him) sent another detachment of eight persons under the command of Abū Qalābah to a place Izm, eight miles from Madinah on an espionage mission; on their way they met a person Amar bin Adbat Ashja'i who greeted them in an Islamic manner but Muhlam bin Jath'amah put him to death on account of his personal feud going on in the past. The matter was

¹⁵³ Al Māwardī, *Al Ahkām al Suttāniyyah*, trans. Asadullah Yate p.116, 117, Abū Ya'la, *Al Ahkām al Suttāniyyah*, p.58

¹⁵⁴ Dr Riaz Mahmood, *The Concept of Administrative Accountability in Islam* (Lahore: Maqbool Academy .2001) p.82

reported to the Prophet (peace be upon him). Allah, the exalted, disliked it and revealed the following Ayah:

• يا أيها الذين آمنوا إذا ضربتم في سبيل الله فبيّنوا ولا تقولوا لمن ألقى إليكم السلام لست مؤمنا

‘O those who believe, When you go out in the way of Allah, ascertain properly and don’t say to a person who greets you (like Muslims) that he is not a believer..¹⁵⁵

The detachment met the Holy Prophet (peace be upon him) on its way to Makkah and the matter was reported to him. Muhlam asked the Holy Prophet (peace be upon him) to seek for him forgiveness from Allah. The Prophet (peace be upon him) by way of rap rover said that Allah might not for give him. Muhlam went away weeping and died of shock after a few days.¹⁵⁶

The Prophet (peace be upon him) sent a company of Muslims under the command of Khalid bin Walid to a tribe Banū Jadhima in 8 A.H. The detachment consisted of *Muhājirs*, *Anṣārs* and Banū Sulaym who were three hundred strong. When they reached there they had embraced Islam, had constructed mosques and offered prayers. Khalid bin Walid asked, ‘then how do you explain the arms you are carrying?’ They replied that actually they apprehended that a tribe having time old strife with them had attacked them but when he asked them to lay down arms they

¹⁵⁵ Al Qur’ān 4:94

¹⁵⁶Dr. Riaz Mahmood, *The Concept of Administrative Accountability in Islam*, op.cit. p.83

readily did. Despite that Khalid bin Walid took them as prisoners. Banū Sulaym killed their captives. The *Muhājirs* and the *Anṣār*, however, released the captives in their custody. When the Holy Prophet (peace be upon him) came to know, he immediately said, O Allah I am not responsible for the act of Khalid.' Banū Jadhima, in pre Islamic era had murdered 'Auf bin Abdurrahman bin 'Auf, the uncle of Abdurrahman and Faka bin Mughirah the uncle of Khalid bin Walid. Khalid replied that he had avenged the murder of his uncle. The Holy Prophet (peace be upon him) listening to this altercation reprimanded Khalid that he should not quarrel with his companion and said that even gold equal to the weight of Mountain Uhud spent in the way of Allah could not weigh his Companion's one morning and one evening. The holy Prophet (peace be upon him) did not hesitate to condemn the wrong doer howsoever strong or important he might be.¹⁵⁷

The Prophet (peace be upon him) used to make his officials accountable for whatever they have before the job and after the job. He checked their income and expenditure as has been reported in *Ṣabīḥayn* (Bukhari & Muslim) by Abū Hamīd al Sā'idi that the Prophet (peace be upon him) appointed a man from Azd; whose name was Ibn-e-al Lutaibah in *Zakāh* collection department. When he returned from his job, the Prophet (peace be upon him) called him to account for whatever he was possessing. He said that some of the wealth is that of the state and some of it has been

¹⁵⁷ Ibid. p.84

gifted to him. The Prophet (peace be upon him) said, 'what is the matter with a person whom we appoint for some job, then he says this is yours and this has been gifted to him. Should not he stay at his parents' home and see whether he is given gifts or not? By Him in Whose possession my soul is, any one whom we appoint for some job in the affairs which Allah has assigned to us, then he misappropriates something from it, will come on Judgement Day bearing upon his back whatever he misappropriated, if it be a camel it will be grumbling, if it is a cow it will be mooing and if it is a goat, it will be shouting, then the Prophet (peace be upon him) lifted his hands towards the sky and said, "O, Allah, Did I convey?" He did that twice or thrice.¹⁵⁸

The above mentioned examples show that the Prophet (peace be upon him) kept the Companions under strict surveillance even in the matter of war. As a usual approach towards war is that everything is fair in it. But the Prophet (peace be upon him) taught the *Ummah* through his conduct that it should not be the case. Even during war the Muslims are to follow the rules; the essence of which is that only those people are to be killed or captured who are really up to fight Muslims. The last example explains the state of accountability and Prophetic approach towards this. There is a very great lesson for all those involved in any type of job. Anything which one gets by virtue of the post to which he is appointed should be deposited to the public treasury.

¹⁵⁸ Ibn Qayyim al Jawziyyah, *Al Turuq al Hukmiyyah fi al Siyāsah al Shari'yyah*, , ed. Hāmid Al Faqī (Beirut: Dārul kutub al 'Ilmiyyah, 1953) P.248

At the time of the Prophet (peace be upon him) the population of the Muslim state was small in number and the people of Arabia were illiterate and straight forward. Therefore a very complex legal system was not in place neither one was needed. Hence the complaints against government officials were also not that much in number as compared to the later periods. That is why, though there was not an independent department which would take care of grievance redress but the essence of accountability was very much there.

3. *Wilāyat al Mazālim* during *al Khilāfah al Rāshidah*

The period of the four caliphs who are called as *Khulafā' Rāshidūn*, was the best era with respect to the administration of justice. They were called *Rāshidūn* (Rightly Guided) because they followed the footsteps of the Prophet (peace be upon him) in every matter of life confronted by them.

The first of those four was Abū Bakr (May Allah be pleased with him) who only ruled the Muslim state for two years. Those two years were mostly spent in eliminating the tumults which broke out after the passing away of the Prophet (peace be upon him). Among those tumults one was the imposters who claimed Prophet-hood and another important problem was apostasy among many tribes. Some of the tribes refused to pay *Zakāh* money to the government. Abū Bakr (May Allah be pleased with him) had not only to confront those challenges but he also had the

biggest challenge to keep the *Ummah* united which was leaderless after the passing away of the Prophet (peace be upon him). He did that successfully. Keeping in view the peculiar situation which prevailed during this period, it can easily be understood that there was no 'business as usual' situation. Perhaps this is the reason that one does not find much about the manner of governance of Abū Bakr (May Allah be pleased with him) as is the case of 'Umar (May Allah be pleased with him), 'Uthman and 'Alī (May Allah be pleased with them). However there is no doubt in the fact that in the matter of accountability Abū Bakr was a role model as he is described "the best man after the prophets".

When he was elected as caliph and people took oath of allegiance to him, he stood up and said among other things:

'O people, I have been made responsible over you and am not the best of you. If I do something good, support me and if I do something wrong, correct me. Truth is trust and lie is dishonesty. The weak among you is the strongest in my view till I reinstate his right to him and the strongest among you is the weakest in my view until I take from him the right (of others), Allah willing...'¹⁵⁹

Because of pre occupation with the affairs of government he left his business and took a small amount as salary from the public treasury. When his death came

¹⁵⁹ Hassan Ibrāhīm Hassan, *Tārīkh al Islām al siyāsī wa al Dīnī wa al iḥqāf wa al Ijtimā'ī*, (Beirut: Dār Iḥyā al turāth al 'Arabī, , 1964) 1/205 and Muḥammad Ḥusayn Haykal, *Al Siddīq Abū Bak* (Egypt: Matba'ah Miṣr, Sharikah Musāhamah Miṣriyyah, 1958) pp.123-124

close, he asked his family to return if anything has been spared from the belongings of public treasury.¹⁶⁰

This shows his sense of accountability in the matter concerning public property.

The inaugural address of Abū Bakr (May Allah be pleased with him) reflects the administrative policy particularly regarding the redress of people's grievances against the government officials. There is not much which has been reported regarding accountability of the public servants because most of the officials during his rule were those who had been appointed by the Prophet (peace be upon him) and most of them were retained by Abū Bakr (May Allah be pleased with him).

The second caliph 'Umar (May Allah be pleased with him) was the best ruler, the world has ever seen, in all respects but particularly with regard to the accountability of public servants and grievance redress. He ruled the Islamic state for over ten years. That is the golden era in Islamic history particularly with respect to the administration of justice.

He told his people, "I did not appoint the officials for torturing you, insulting you and taking away your properties. Rather I appointed them to teach you the Book of your Lord and the Sunnah of your Prophet (peace be upon him). So whoever is

¹⁶⁰ Ibid. p. 124.

oppressed by any government officials should come to me unhesitatingly and complain to me so that I call the oppressor to account.¹⁶¹

He wrote to his military commanders: "Render due rights of Muslims to them. Don't thrash them, it will defile them. Don't praise them which will land them in trouble and don't close your doors to them lest the stronger should usurp the rights of the weaker among them and don't prefer yourselves over them as it would be tantamount to oppressing them."¹⁶²

There are many instances of accountability of the public servants by 'Umar (May Allah be pleased with him) which clearly show that he did not hesitate to call to account any official of the government even if, apparently, there would be a risk of disorder. Prime example in this respect is that of Khālid bin Walid, who was removed from his post by 'Umar (May Allah be pleased with him) although his importance was known to him very well. The charge sheet contained the following allegations against Khālid, during his tenure as commander of the Muslim Army at Qinnasreen sector of Syria

- (a) A Roman commander launched an attack on the forces of Khālid but failed and defeated by Muslim army. The contingent of the enemy army included local Arab Christians. After the defeat, they sent an excuse to

¹⁶¹Muhammad Hussain Haykal, *Al Fārūq 'Umar* (Cairo: Sharikah Musāhamah Miṣriyyah, 1364 A.H.) 2/216

¹⁶²Ibn Jarīr al Ṭabarī, *Tārīkh al Umam wa al Mulūk* op.cit. 2/274

Khālid and begged for his forgiveness. He forgave them against Islamic military code. Those Christian Arabs fought a severe battle against the Muslims and were defeated. In such a case they must be made prisoners of war and treated in accordance with the terms prescribed in the code. Their release out of favour or for ransom was the prerogative of the head of the state. When the news of Khālid's act reached 'Umar (May Allah be pleased with him), he charged him with accusation by saying, "Khālid has invested himself with authority."¹⁶³

- (b) After his successful campaign of Qinnasreen he in his leisurely mood entered a bath wherein he embrocated himself with liquid containing liquor. On the receipt of this news 'Umar (May Allah be pleased with him) wrote to him: I have come to know that you had a massage with liquor whereas Allah has prohibited both its patent and latent qualities and its massage. Therefore don't have its massage on your body. Khālid's explanation of the allegation did not satisfy 'Umar (May Allah be pleased with him) who expressed his disapproval by remarking: The progeny of Mughirah are tempted to antipathy. Allah may not kill you on the same.

¹⁶³ Ibid. 2/491

- (c) On the completion of his conquest of Qinnasreen Khālid received a very large share of booty. Many people benefitted from his bestowal. Al Ash'ath bin Qays was one of the beneficiaries to whom he gave ten thousand. It was reported to 'Umar (May Allah be pleased with him), who sent him the following instructions: You shall not bestow upon a goat or a camel without my prior approval.

On the receipt of these instructions from the capital, Khālid instead of complying with replied: Either I may be left alone and allowed to act or you proceed with your action.¹⁶⁴

With all this background 'Umar ordered trial of Khālid bin Walid in an open court. He called for a messenger and handed over to him the following order addressed to Abū 'Ubaydah bin al Jarrāh, commander in chief of the Muslim army in Syria.

"Ask Khālid to stand up. Tie him with his turban. Remove cap from his head until he discloses to you the source wherefrom he bestowed the gift upon Al Ash'ath. Did he do it from his personal wealth or from the state property which he acquired as booty? If he maintains that he has given it to him from

¹⁶⁴ Ibid. 2/491

state property, it means he has confessed to his dishonesty. If he maintains that he has given it from personal property he has committed extravagance.”

Abū ‘Ubaidah summoned Khālid for appearance. The messenger of ‘Umar (Bilal) stood up and asked Khālid the question but he did not reply. So his turban and cap were removed and he was dismissed from his post of army general.¹⁶⁵

‘Umar (May Allah be pleased with him) was very careful in selecting the right man for the right job. He did not stop at selection; rather he would keep his officials under constant observation throughout their tenure of service. He stipulated the following for his officials: That he will not ride on Turkish horse, will not eat bread of starch, would not use superior cloth and would not close his doors for needy people.¹⁶⁶

The things mentioned in the above stipulation of ‘Umar (May Allah be pleased with him) were considered a luxury during that era. It is reported that that when Umar (May Allah be pleased with him) appointed an official, he used to tell him: “I am not imposing you on the blood of the people nor upon their bodies. I am appointing you so that you establish prayers among them distribute their due among them and resolve their disputes among them with justice.”¹⁶⁷

He wrote to Abū Musā Ash’arī:

¹⁶⁵ Muhammad Yousaf Guraya, *Judicial System Under the Prophet and the First Two Pious Caliphs*. (Lahore: Anjuman-e-Himayat-e-Islam, 1982) pp. 284, 285

¹⁶⁶ Dr Riaz Mahmood, *The Concept of Administrative Accountability in Islam*, op.cit. p. 95,

¹⁶⁷ Tabarī, *Tarikh al Umam wa al Mulūk*, op.cit. 3/273, , Dr. Sulaymān Muḥammad Al Tamāwī, *‘Umar bin al Khattāb wa Usūl al Siyāsah wa al Idārah al Hadithah* (Beirut: Dār al Fikr al Arabī, 1976)p.277

"Give equal treatment to all the people in your court and in your presence so that the highborn shall not expect you to do injustice and the weak shall not be afraid of your tyranny."¹⁶⁸

A man complained to 'Umar (May Allah be pleased with him) bin al Khattāb that Abū Musā Ash'arī punished him with shaving his head after getting angry with him without any such punishable crime. Umar wrote to Abū Musā:

"Peace be upon you, Mr. So and so informed me that you ordered his head to be shaven without any offence punishable with such punishment. If you have done it before people, so give him a chance to retaliate from you in public and if you have done it in privacy, give him opportunity to do that with you in privacy. The man brought the message and gave it to Abū Musā. The people took the matter seriously and asked the man to forgive Abū Musā but he said, "No, by God, I will never give up my right on the demand of people."¹⁶⁹

When Abū Musā got ready for his retaliation, the man lifted his head towards the sky and said, "O, Allah, we praise you for the true *dīn* and justice and I make you a witness that I am forgiving him at my own will."¹⁷⁰

He would not only stop advising the officials to fulfil their duty of providing

¹⁶⁸Yousaf Guraya, *Judicial System under the Prophet and First Two Pious Caliphs*, op.cit. p 327

¹⁶⁹ Dr. Aḥmad Shalabī, *Mawsū'at al Nuzum wa al ḥadārah al Islāmiyyah* (Cairo: Maktabah al Nahdah al Miṣriyyah, 1981) 8/239

¹⁷⁰Ibid. 8/239

justice to public, but would demand them to have direct contact with the masses. Therefore if he knew that any official does not visit the sick or does not allow the weak to visit him he would remove him from his post. In this respect he wrote to S'aad bin Abī Waqqās, the governor of Iraq:

“Visit the Muslim patients, go and participate in their funerals. Keep your door open, solve their problems yourself, indeed you are one of them except that Allah has charged you with more responsibility”.¹⁷¹

He did not only use to give instructions but he also applied the same rules first of all on his own self, his family members, his government officials and then on general public. This was the reason that the common man was encouraged to speak out if he observed anything wrong.

It is said that 'Umar (May Allah be pleased with him) received from Yemen, sheets of cloth. He distributed it among people each of whom received one length as his share. 'Umar's share was that of one Muslim. He tailored it, wore it. The next day he ascended the pulpit to give orders to the people for preparation of Jihad. A Muslim stood up and said, “We neither listen to you nor obey you.” “Why so?” asked 'Umar (May Allah be pleased with him). He answered, “Because you have preferred yourself to us.” 'Umar again asked, “In what way I have done so?” He replied, “When you

¹⁷¹ Dr. Sulaymān Muḥammad Al Tamāwī, *'Umar bin al Khattāb wa Uṣūl al Siyāsah wa al Idārah al Hadīthah*. Op.cit. p.277

distributed the Yemen lengths of cloth, each one received one and so you too. But one length would not make you a garment; we see you have tailored it into a whole shirt and you are a tall man too. If you had not taken more, you could not have made a shirt of it." 'Umar (May Allah be pleased with him) turned to his son 'Abdallah and said, "'Abdallah! Reply him". He stood up and said, "When the commander of the faithful 'Umar wished to tailor this length of cloth, it was not sufficient, so I gave him enough of my length to complete it for him." The man said, "Now we listen and obey you".¹⁷²

'Umar used to hold an open court for the accountability of public servants every year during Ḥajj season. He used to inquire about the property of a person before appointing him to the post. He kept a check on him during his service tenure whether his assets increased. If they did increase, he would confiscate the additional property and used to say to them: "We appointed you as a public servant, not a businessman"¹⁷³

'Umar bin al Khattāb wrote to one of his governors a letter in which he required him to explain his position regarding the assets which came under his ownership after he became the governor of Bahrain. He replied justifying the ownership of those assets but 'Umar was not satisfied. He sent Muḥammad bin

¹⁷² Muḥammad Alī Ṭabā Ṭabā, *Al Fakhrī*, , trans. C.E.J. Whitting, (London: Luizac & Co. 1947) p.25

¹⁷³ Muḥammad Ḥusayn Haykal, *Al Fārooq 'Umar*, op.cit. p.223

Maslamah to divide his assets in two and to confiscate one of the parts for depositing it in the public treasury.¹⁷⁴

According to another report he appointed 'Utbah bin Abū Sufyān over Ṭa'if and then dismissed him for some reason after some time. Once, after his dismissal he met him and found with him thirty thousand *dirhams*. He inquired about the money. 'Utbah said that he was going to buy an estate with it. But Umar (May Allah be pleased with him) confiscated the money and deposited it in public treasury.¹⁷⁵

Some of the examples of checking maladministration of government officials by Umar are as follow:

- (a) There was a report that Sa'ad bin Abī Waqqāṣ had closed the door of his residence opening towards market place due to noise. 'Umar (May Allah be pleased with him) sent Muḥammad bin Maslamah to burn the door who went and did the same.
- (b) He dismissed Qudamah from governorship of Bahrain and inflicted *Hadd* punishment on him for drinking.
- (c) He changed the governors of Kūfa successively on complaints. Ammār bin Yāsir was removed because he had no necessary qualifications to be

¹⁷⁴ Ibn 'Abd Rabbihī, *Al Aqd al farīd*, ed. M. Sa'īd al 'Irbān, (Beirut: Dār al Fikr, n.d) 1/35

¹⁷⁵ Ibid. p.37

governor. Abū Musā Ash'arī was removed because his slave dealt in business and that he was a weak governor.

- (d) When a person from Egypt complained to 'Umar (May Allah be pleased with him) that his governor was doing wrong things and was saying that he could not do anything. 'Umar sent for 'Ayād bin Ghanam and gave him a flock of cattle to graze as his father used to graze cattle.
- (e) When 'Umar (May Allah be pleased with him) asked Abū Hurayrah (May Allah be pleased with him), governor of Bahrain to explain about affluence of wealth with him while at the time of appointment he had no shoes even. He replied that the horses have procreated and gifts accumulated. Being not satisfied with the explanation 'Umar got the excess deposited in public treasury.
- (f) An Egyptian came to Madinah and complained to 'Umar about the oppression done by son of 'Amr bin al Āṣ, governor of the area. 'Umar (May Allah be pleased with him) summoned both 'Amr and his son. He gave a lash to the Egyptian and asked him to beat the son. When he did, 'Umar asked him to beat the father too for it is because of father that he did the wrong. The Egyptian, however, did not beat him as he was satisfied with the punishment of his son. At this occasion 'Umar said to

‘Amr: “When did you enslave the people while their mothers have born them free.”¹⁷⁶

All the above stated examples and many others too, are a clear proof that ‘Umar was a role model when it comes to the implementation of law in its real sense. That is why according to a report, the Prophet (peace be upon him) has termed him as the strictest in the matter of Allah (...وأشدّهم في أمر الله عمر...)¹⁷⁷

When ‘Uthmān bin Affān (May Allah be pleased with him) took over after ‘Umar’s martyrdom, he continued the policies of his predecessors. There is a common notion about ‘Uthmān that he was very lenient but that may not be a whole truth. History says that he called to account the public servants whenever there was a need for that.

It is reported that Sa‘ad bin Abī Waqqās who was governor of Kūfa, borrowed some money from public treasury, of which ‘Abdullāh bin Mas‘ūd was incharge. After some time when Ibn Mas‘ūd demanded of him to pay the due, he could not do that and wanted more time for payment. This issue grew into a dispute between the two companions. When ‘Uthmān came to know about the issue, he, after investigation, removed Sa‘ad from his post and appointed Walīd bin ‘Uqbah in his place.¹⁷⁸

¹⁷⁶M. Hussayn Haykal, *Al Fārūq Umar*, op.cit. p.283

¹⁷⁷ *Tirmidhī*, Kitāb: al Manāqib, bāb: manāqib Mu‘ādh bin Jabal wa Zayd bin Thābit wa Ka‘b, Hadith No 3723

¹⁷⁸ Ṭabarī, *Tārīkh al Umam wal Mulūk*, op.cit. 3/311, Ibn Athīr, *Al Kāmil fi al Tārīkh*, op.cit. 2/456

It is reported by Ṭabarī that in the first letter of ‘Uthmān to his officials he wrote:

Allah has commanded the leaders to be protectors and not tax-collectors. In the beginning of this *Ummah* protectors and not tax-collectors were prepared. It is possible that your leaders will become tax collectors and they will not be protectors. When that happens to be the case; modesty, honesty and loyalty will come to an end.¹⁷⁹

He also sent a letter to all provinces wherein he wrote:

I will call to account the governors every year in Ḥajj season. If there is any complaint against any official, I will hold an inquiry about it and will address the problem. I have come to know that some of the officials are teasing people without any reason. Let me tell you that since this responsibility has been assigned to me, I have made enjoining virtue and forbidding evil as my pre-occupation. People should know that if they have any complaint against me or my governors, they should mention it on the occasion of Ḥajj or should forgive it.¹⁸⁰

It is reported that Walīd bin ‘Uqbah who has been appointed by ‘Uthmān as

¹⁷⁹ Ṭabarī, *Tārīkh al Umam wal Mulūk*, op.cit. 3/306

¹⁸⁰ Ibid 3/380

governor of Kūfa, was dismissed by him because he had drunk. He was not deposed only but also punished with *Hadd* after investigation of the matter.¹⁸¹

From the above discussion the fact become manifest that 'Uthmān like his predecessors did not hesitate from calling to account any officer of his government. He followed the pattern of Abū Bakr and 'Umar (May Allah be pleased with them) in this respect. We can therefore say that the essence of *Wilāyat al Mazālim* i.e. accountability of the public servants did exist in the period of 'Uthmān in a more developed form because he based his conduct of affairs on the experiences of those before him.

The last of the four caliphs was 'Alī bin Abī Ṭālib (May Allah be pleased with him), about whom the Prophet (peace be upon him) has declared that he is the best in understanding legal matters (...واقضاهم علي...) ¹⁸²

He is called *Khalīfah-i-Rāshid* because he followed the footsteps of the Messenger of Allah like his predecessors. In his first address after election as *Khalīfah*, he said:

Allāh has revealed the guiding book and explained in it all what is good and what is bad, so take what is good and leave what is evil. Fulfil your obligation towards

¹⁸¹ Ibid p. 318

¹⁸² *Tirmidhī*, Kitāb al Manāqib bāb: manāqib Mu'ādh bin Jabal wa Zayd bin Thābit wa Ka'ab, Hadith No 3723

Allah; He will lead you to Paradise. Indeed Allah has granted sanctity to *al Haram* (Holy House of Ka'abah) but preferred the sanctity of a Muslim over it and encouraged sincerity and unity among Muslims. A Muslim is one from whose tongue and hands others are safe except if there is a legal justification. You are accountable even for the land and animals. Obey Allah and don't disobey him.¹⁸³

According to another report he addressed the people in the following words:

Allah has given me right over you that I should govern your affairs and you have a similar right against me as I have one. The affairs of public can not go smooth until there is a competent government and the government can not run efficiently unless the public is good. So when the public render back to its ruler his rights; and the ruler respects their rights, right will prevail among them, the ways of religion become established, signs of justice become fixed and the Sunnah gains currency, thus the times become good.¹⁸⁴

The period of Alī bin Abī Ṭālib (May Allah be pleased with him), which was not more than five years, mostly passed in coping with the turmoil caused by the martyrdom of 'Uthmān and later clash between M'āwiyah bin Abī Sufyān, the governor of Syria and the central government. There was no normalcy in the Islamic state. Most of the history reports are also about the problems which were created by

¹⁸³ Ṭabarī, *Tārīkh al Umam wa al Mulūk*, op.cit. 3/456, Ibn Athīr, *Al Kāmil fi al Tārīkh*, op.cit. 2/557

¹⁸⁴ Al Sharīf Al Radī, *Nahj al Balāghah*, , trans. Sy. Ali Raza, (Tehran: World Organisation for Islamic Services, 1980) p.467

that turmoil. Thus little can be found about the manner of accountability which was carried out by him in the matters of abuse of power or maladministration by the government officials. However, one can easily have an idea from the above mentioned address of Alī, the type of accountability which was carried out by him. He used to have a check and balance over the conduct of his officials. In this regard the comment of Māwardī is worth noting.

“Among the four caliphs none of them particularly held a court for hearing cases of *Mazālim* as they were at the very beginning of the matter when *Dīn* has just appeared among them; among men who willingly allowed themselves to be guided to the truth and who desisted from evil deeds by mere admonition. Any disputes arising among them were confined to dubious matters, which judicial judgment explained to them. If a brutish Bedouin committed an act of injustice; admonition alone was sufficient to make him renounce it and rough treatment made him act correctly. The caliphs of the first four generation restricted themselves to settle disputes among people by way of judicial decisions that is by applying the yardstick of truth to these disputes. Aware as they were, of the people’s complete acceptance of the necessity of this truth.¹⁸⁵

¹⁸⁵ Māwardī, *Al Abkām al Sultāniyyah*, , trans. Asadullah Yate op.cit. p. 117

Ali, however, at a time when consolidation of his imamate was delayed because of people's interference and their headstrong and excessively individualistic political action found him obliged to make great effort to arrive at solution to obscure points of law. He was the first to pursue this path and achieved mastery in it, although he did not fix a session for looking into *Mazālim* cases as he did not need that.¹⁸⁶

Mandhar bin Jārūd was the governor of Astakhar. There were reports that he is in habit of hunting having leisure time and playing with dogs. Ali warned him and ultimately deposed him.¹⁸⁷

According to another report that Ali appointed Ka'ab bin Mālik Anṣārī as investigator for probing against the officials of Iraq.¹⁸⁸

Once Yazīd bin Qays, an official, delayed sending tax money to the capital so Ali wrote to him:

You delayed sending tax money. I am not sure about the reason but I advise you to fear Allah. Don't do a thing which would spoil your reward and will nullify your Jihad. Fear Allah and keep your soul pure of prohibited wealth. Don't give me a chance to call you to account. Honour Muslims but don't oppress non-Muslim citizens either. Whatever Allah has bestowed upon you

¹⁸⁶ Jurjī Zaidān, *Tārīkh al Tamaddun al Islāmī*, (Egypt: Matba'ah al Hilāl, 1902) 1/ 187

¹⁸⁷ Yaqūbī, 2/240 as quoted by, Shah Mueenuddīn Aḥmad Nadawī, *Tārīkh-i-Islām*, (India: Ma'ārif Press, Azam Garh, 1939) 1/354

¹⁸⁸ *Kitāb al Kharāj*, p. 9, as stated by Nadwī, *Tārīkh-i-Islām* op.cit. p.355

make it a source of achieving success in the Hereafter and don't forget this worldly life as well.¹⁸⁹

Once Abdullāh bin Abbās drew ten thousand dirhams from public treasury in Baṣra. When Alī demanded of him to return the same he refused. Alī after advising him returned the sum himself.¹⁹⁰

To another official Naumān bin Ajlān, who went away with the tax money of Bahrain, Alī wrote:

Whoever does not fulfil his trust and does not save his soul and his *Dīn*, he, in fact, harms himself in this world and what is going to face him in the Hereafter is more bitter, more unfortunate and more sustained. Fear Allah as you come from a noble family. So give me a chance of thinking about you in positive terms. If the news which I have heard is correct, repent and don't compel me to change my opinion about you. Pay the money back.¹⁹¹

The above discussion proves that all the *Khulafā-i-Rāshidīn* were more or less equal in the matter of accountability of the public servants. Infact they were called *Rāshidīn* (Rightly Guided) because they followed the pattern which was taught to them by the Prophet (peace be upon him). They considered the public property and

¹⁸⁹ Yaqūbī, 2/237 as stated by Nadawī *Tārīkh-i-Islām* op.cit. p.356

¹⁹⁰ Ibid p. 356

¹⁹¹ Ibid. p.356

wealth as a sacred trust which they were supposed to protect. They did not allow their families and friends to misappropriate that wealth. They selected public servants on the basis of their capabilities and sincerity for the collective welfare. After selection and appointment they did not allow them to enjoy life as they liked, rather they kept them under strict surveillance and corrected and punished them whenever it was needed. They did not forgive a person for his abuse of authority or corruption only because he was very influential or important. They observed equality in the matter of accountability. They always did justice which was in time and visible to all. They would not declare the investigative process against the public officials as a secret. Everything was open to all and transparent. Consequently we can say the *Wilāyat al Mazālim* did exist in this period in its best form although it was not given this name but its real spirit prevailed during the period perhaps in a manner which the history never saw after that.

4. *Wilāyat al Mazālim* during Umayyads' Period

According to the statement of Māwardī in the period of *al Khibāfah al Rāshidah* there was no need to have independent courts for grievance redress purposes. However after that period during the reign of Umayyad such cases became more frequent-so much so that people would openly act unjustly towards each other and try to get the better of each other. Admonition and exhortation were not then enough to prevent them from mutual hostilities and recriminations. There was, thus a need of

judiciary which combined the power of authority with the fairness of legal system; to investigate cases of *Mazālim* in order to prevent people from taking undue advantage of each other and to see that justice was done for those taken advantage of.¹⁹²

Although the government of Umayyad cannot be compared with the *al Khilāfah al Rāshidah* as the former was a dynastic rule while the later was a government which was more democratic in today's sense where people were having much more freedom of expression. Nevertheless this period was much better if it is to be compared with any other kingdom particularly those which are ruled by non-Muslim kings. The only big flaw in the system of government was that it did not have the confidence of the masses as the previous government of *Khulafā-i-Rāshidīn*. otherwise there were many good qualities.

The first caliph of this dynasty was Mu'āwiyah bin Abī Sufyān. He was a Companion of the Prophet (peace be upon him) and was one of his scribes too. He has been governor of *Bilād al Shām*¹⁹³ for quite a long time before taking over as caliph after abdication of Ḥasan bin Alī.

There are reports in the books of history which suggest that Mu'āwiyah did take care of public grievances himself. For this purpose he had fixed a time in the morning when he used to sit in the mosque in an open session to listen to the

¹⁹² See: Māwardī, *Al Ahkām al Sulṭāniyyah*, trans. Asadullah Yate. pp.116,117,

¹⁹³ *Al Shām* mentioned in Islamic history consisted of today's Syria, Lebanon, Palestinian territories, Jordan and so called Israel.

complaints of the down trodden who found it difficult to reach to the royal court. So the poor, the needy, the weak, the Bedouins and the sick used to come to him, present their complaints and he used to pass orders for the solution of those problems on the spot. Only after completion of this open session he would go to royal court and would sit on the throne.¹⁹⁴

After Mu'āwiyah, it is 'Abdul Malik bin Marwān who was the fifth caliph of Umayyad dynasty. He is mentioned by historians as one who took great care of redress of public grievances against public servants.

According to the claim of Māwardī and Abū Ya'alā, he was the first to assign a specific day for the investigation of claims by those who suffered wrong actions without doing it directly himself. When he had to deal with some problem or needed executing a judgement, he would hand it over to his judge; Abū Idrīs al Īwadī. The litigants had to accept his verdict out of the fear of Abdul Malik who was aware of the circumstances and reason for the decision. Thus Abū Idrees was actually conducting the cases and orders were given by Abdul Malik.¹⁹⁵

When Ḥajjāj once insulted Anas bin Mālik, the Companion of the Prophet (peace be upon him) , he went and complained to Abdul Malik, who was shocked after

¹⁹⁴ Mas'ūdī, *Murūj al dhahab wa Ma'ādin al Jawābir*, , trans. (urdu): Akhtar fatehpuri, (Karachi: Nafees Academy. 1985) 4/54-55

¹⁹⁵ Al Māwardī, *Al Aḥkām al Sulṭāniyyah*. op.cit.p.118, Abi Ya'ala, *Al Aḥkām al Sulṭāniyyah* op.cit. p. 59

hearing his complaint. He sent written orders to Ḥajjāj to go to Anas with all his staff and ask for his forgiveness. Ḥajjāj ultimately did that.¹⁹⁶

Once Abdul Malik learnt about one of his officials that he accepted gifts from the public. He called him and asked, "Have you been accepting gifts from the people since you have assumed the office?" He replied, "O commander of the faithful, the land of your cities is fertile, plenty of tax is collected and people are enjoying their lives." Abdul Malik asked him to reply the question which he had asked i.e. whether he had been accepting gifts since the assumption of office." He said, "Yes". Abdul Malik said, "If you accept gifts and do not reward the giver, you are a mean person and if you reward him from the wealth which does not belong to you, you are a dishonest and cruel person. So whatever you have done is either dishonesty or injustice or artificial ignorance." Having told him that, he dismissed him from his position.¹⁹⁷

Afterwards the injustice of officials and the oppressive conduct of the haughty increased to such an extent that only most powerful authority and the strictest of commands could restrain them. So 'Umar bin Abdul Azīz undertook judicial investigation of wrong action and abuse. He would reject all such wrong doing and would maintain respect for just and fair practices if necessary. He re-instated property

¹⁹⁶ Shah Mueenuddin Ahmad Nadawī, *Tārīkh-i-Islām*, op.cit. 2/140,141

¹⁹⁷ Mas'ūdī, *Murūj al dhabab wa Ma'ādin al Jawāhir*, trans. (urdu) Akhtar Fateh Puri, op.cit. 3/152,

seized unlawfully by the Umayyad to their owners with such force and roughness that it was said, "we fear the consequences of such repression for you", he replied, "I am at pains to guard my actions before Allah and fear Him every day on account of my deeds but my fear for the Day of Judgment of which there is no escape is still greater."¹⁹⁸

This is the reason that made great jurists like Sufyān al Thawrī and Sa'īd bin al Musayyab term him as the fifth Rightly Guided Caliph (ال خليفة الراشد الخامس) and counted his era as part of the Rightly Guided Caliphate.¹⁹⁹

Imām Aḥmad bin Ḥanbal said,

"It is narrated in a Hadith that Allah will raise at the beginning of every century a man who will revive the *Dīn* for this *Ummah*. So when we look into first century it is 'Umar bin 'Abdul 'Azīz and when we look at the second century, it is Imām Shaf'ī."²⁰⁰

'Umar bin 'Abdul 'Azīz was nominated as the next caliph by his predecessor Sulayman. He came to the mosque and addressed the people:

"O people, I have been put to trial with this matter (caliphate) and I was never consulted about it, nor did I demand it. The Muslims were also not consulted.

¹⁹⁸ Al Māwardī, *Al Aḥkām al Sultāniyyah*, op.cit, , trans. Asadullah Yate, p118

¹⁹⁹ Ibn al Jawzī, *Sirat-i-Umar bin Abdul Azīz*, ed. Naeem Zarzor, (Beirut: Dār al Kutub al 'Ilmiyyah, 1984) pp. 72-73.

²⁰⁰ Ibid. p. 74,

Therefore I resign from this responsibility and you are free to elect for you whoever you like.”

All the people shouted in one voice, “We elect you O commander of the faithful, we agree upon your leadership.”

When he heard this, he praised Allah, recited greetings over the Prophet (peace be upon him), delivered a speech and said at the end:

“O people, whoever obey Allah, his obedience is compulsory and whoever is disobedient to Him, there is no compulsion of his obedience. So if I disobey Allah, there should be no obedience for you to me.”²⁰¹

Once he addressed the people and said,

“I have appointed men over you whom I don’t say are the best among you but are better than whom, who are worse, so whoever is oppressed by his ruler, he should come to me without permission (to complain).”²⁰²

According to Māwardī, ‘Umar bin ‘Abdul ‘Azīz addressed his people at the beginning of his rule and said, “I advise you to fear Allah as He approves nothing but piety and welcomes none except people having piety. There are governors who do not give what is true and right till it was bought from them and they spread falsehood

²⁰¹ Ibid. p. 66

²⁰² Abū Muḥammad Abdallah Ibn ‘Abdul Ḥakam (d.214 A.H.), *Sīrat-i-‘Umar bin ‘Abdul ‘Azīz*, , ed. Aḥmad ‘Ubayd, (Beirut: Dār al ‘Ilm lil Malayīn, 1967) p.43

until it was taken from them in lieu of ransom. By Allah, if I am not able to revive an abandoned Sunnah and to eliminate an evil deed I would not care to live for a single moment. Put the matter of your Hereafter in order, your worldly life will become orderly. A man is separated from Adam only because of death is already submerged in death.”²⁰³

Something unique which was done by ‘Umar bin ‘Abdul ‘Azīz, was that he reinstated the properties of people which were grabbed by the members of royal family. It is reported that a group of people went to him complaining that their land, which they have revived, has been occupied by Walīd bin Abdul Malik who in turn granted it to some other person. ‘Umar said, “The Messenger of Allah said, that this country belongs to Allah and people are the subjects of Allah, whoever revives a barren land will become his property.”²⁰⁴ Thus he reinstated the owners of the land.²⁰⁵

This is only one example but actually he returned all property and wealth of his family members which was owned by them illegally, either to the public treasury or if the original owner is known, to the owners.²⁰⁶

He was over cautious in this matter. So it is reported that he would deposit anything belonging to him or his family members even if he had in his mind the

²⁰³ Māwardī, *Al Akhām al Sultāniyyah*, op.cit. trans. Asadullah Yate. p.121,

²⁰⁴ The Ḥadīth has been narrated by many books; among them Abū Dāwūd, *Kitāb al Kharāj wa al Imārah wa al fay*, bāb: fi ihya al mawāt, Ḥadīth No 2671

²⁰⁵ Ibn Jawzī, *Sīrat-i ‘Umar bin ‘Abdul Azīz*, op.cit. p.125,

²⁰⁶ *Ibid*, pp.125-132, Ibn ‘Abdul Ḥakam, *Sīrat-i ‘Umar bin ‘Abdul Azīz*, op.cit. p. 58

slightest doubt that it might have come to his possession illegally. It is said that he sold his agricultural lands, slaves, animals, machinery, dresses, perfumes and whatever items of luxury were in his possession and deposited the money in public treasury.²⁰⁷

Even he objected to the big quantity of ornaments of gold and diamonds owned by his wife. He asked her either to deposit that in public treasury or leave his home. She agreed to deposit that in public treasury.²⁰⁸

It is reported that a man came to him and complained about misuse of authority by one of his officials and that he had grabbed his property illegally. Umar asked for ink and pen and then wrote to that official:

Mr. So and so has told this. If he is true, needless to come to me, just return whatever belongs to him.²⁰⁹

A man brought apples for him but he regretted to accept them. The man said, "The Prophet (peace be upon him) used to accept gifts." He replied, "It was gift for the Messenger of Allah and bribery for us and I don't need them."²¹⁰

The above discussion shows the strictness and care of Umar bin Abdul Aziz about the property and belongings of the public. One can guess that if a ruler is so

²⁰⁷ Ibn 'Abdul Ḥakam, *Sīrat-i-Umar bin 'Abdul Azīz* op.cit. p. 124

²⁰⁸ Ibn Jawzī, *Sīrat-i-Umar bin 'Abdul Azīz*, op.cit. p.128

²⁰⁹ Ibn 'Abdul Ḥakam, *Sīrat-i-Umar bin 'Abdul Azīz*, op.cit. p. 63

²¹⁰ Ibid p. 156

strict about his own self and his family members, how much he will be taking care of the abuse of power by his officials.

Among the fourteen caliphs of the Umayyad besides Mu'āwiyah it is not only 'Abdul Malik bin Marwān and 'Umar bin 'Abdul Azīz, who are known for taking care of redress of public grievances. Hishām bin 'Abdul Malik was also known for his strictness and stinginess when it came to the expenses from public treasury. From historical reports one can easily conclude that he took care of avoiding any injustice with the public. Thus when there was a sum of money given to him by his governors or other officials to be deposited in public treasury, he would demand confirmation through proof that the sum had been legally collected and only after that he would allow it to be deposited in public treasury.²¹¹

Hisham was known for his good character. It is reported that once he misbehaved with a respectable man. He said to him that being a caliph he should be ashamed of using such vulgar language. On hearing that Hisham apologised to him.²¹²

In the historical sources there is no mention of the justice system of other Umayyad caliphs, who came after Hishām. It is presumed that as a whole the justice system did work like in the past but it seems that among the later caliphs there was no

²¹¹ Shalabī, Dr. Ahmad, *Maṣū'at al Tārīkh al Islāmī wa al Ḥadārah*, (Cairo: Maktabah al Nahdhah al Misriyyah, , 1984) 2/97

²¹² Ibn al Athīr, *Al Kāmil fī al Tārīkh*, op.cit. 5/196

one who was prominent particularly in the matter of accountability of public servants and redress of public grievances like their predecessors.

5. *Wilāyat al Mazālim* during Abbasid Caliphate

A study of the early history of Islamic state reveals that the Abbasids were the first dynasty who paid full attention to the establishment and development of state institutions as never before. There was a policy difference between Umayyads and Abbasids. The Umayyad period was mainly of conquests whereas one great objective of the early Abbasids was the consolidation of the empire and in order to attain this end, aggression enterprises and foreign conquests were abandoned. The political machinery which existed under the Abbasid Caliphate and was afterwards adopted either wholly or with some modifications by the states that came into existence on the breakup of the Arab Empire was founded by Mansūr and derived its character from his genius.²¹³

The government of the caliph was called *al-Diwan al 'aziz* (August Board). The grand *Wazir* presided over the board and received the designation of *Wazir al Diwan al 'Aziz*. The administrative machinery under Abbasids, in its effective distribution of work and its control of details, ranks with the best modern systems. The following were the principal departments of the state.

²¹³ Ameer Ali, *A Short History of the Saracens* (London: Mac Millan & Co.,1955) p. 405

- The *Diwān al Kharāj* (Control office of taxes) or department of finance
- The *Diwān al dhimam* (Audit or Accounts office)
- The *Diwān ul Jund* (War office)
- The *Diwān al Mawālī wa al ghilmān* (office for the protection of clients and slaves), in which a register was kept of the freed men and slaves of the Caliph and whence their support was assigned to them
- The *Diwān al Barīd* (the Post office)
- The *Diwān al dhimam al Nafaqāt* (Household Expenses Office),
- The *Diwān al Rasā'il* (Chancery office)
- The *Diwān al Tawqia* (Board of Requests)
- The *Diwān al Nazar fi 'l Mazālim* (Board for the inspection of grievance)
- The *Diwān al Abdāth wa al Shurṭah* (Militia & Police office)²¹⁴

After the assassination of 'Alī and attempt on the life of Mu'āwiyah, the Caliphs became less and less accessible to the public. However, most of the Umayyad caliphs set apart some time for hearing appeals and the inspection of grievances.

According to Ibn al Athīr, Abdul Malik was the first caliph to devote a special day for hearing cases of *Mazālim*. 'Umar bin 'Abdul Azīz followed the precedent

²¹⁴ Ibid p. 414

established his uncle with great zeal. The Abbasids continued this practice and established a regular department which was the highest court of criminal appeal.²¹⁵

The administration of justice, besides judges, in this period was in the hands of *Ṣāhib al Mazālim*. The moral qualities required in person exercising the jurisdiction were set out. Practically he was to combine vigilance with firmness. *Wazīrs* and governors with full powers had the jurisdiction inherent in them; if they had restricted powers, it was necessary that special mandate should be obtained and in as much as the jurisdiction was general in scope, the nominee should be apt for the office of successor-designate to the caliphate, *Wazīr* or governorship of the large province. If, however, the jurisdiction was limited to supplementing the deficient authority of the judges, persons of lesser rank were eligible so long as they were not suspended of injustice or bribery. The highest tribunal of the *Mazālim* was *Diwān al Naẓar fī 'l Mazālim*. It was presided over by the sovereign himself or in his absence, by a special officer known as the President. Other members of the board included the chief justice, the *Ḥājib*, the principal secretaries of the state with some nominated *Mufīīs* or jurists.²¹⁶

According to the report of Māwardī among the Abbasid caliphs many paid personal attention to the redress of public grievances particularly against public servants. So among them those who heard such cases personally were Mahdi, Hadi,

²¹⁵ DR. S.A.Q Hussaini, *Arab Administration* (Lahore: Shaikh M. Ashraf, 1970), p. 190

²¹⁶ Anwar Ahmad Qadri, *Justice in Historical Islam*, (Lahore: Shaikh M. Ashraf, 1974), pp. 50-51

Al Rashīd, Māmūn and the last one who did that personally was al Muhtadī who reinstated owners in their properties.²¹⁷

Once al Manşūr asked his son Mahdī about the number of his livestock and the later showed ignorance. Manşūr told him that he did not know about his cattle while the responsibility of the empire was much greater. Likewise Manşūr at the time of his death wrote a letter to this son Mahdī reminding him of the obligations towards Allah and the public.²¹⁸

Once al Manşūr was sitting in his palace when an arrow fell near him. He took it and noticed that something was written on it. He read it; it was quite a long statement in which he has been warned of his destiny if he did not care for the wrong deeds done by him. Among other things it read:

“It is destiny which goes on by itself. So wait and see, the destiny keeps changing. It elevates a mean person to high ranks and humiliates a dignified person sometimes.” At the end it was written, “From one of your prisoners belonging to Hamzan”

Al Manşūr sent his men to find out in the prison about the person. There they found an old man in fetters reciting the ayah:

²¹⁷ Al Māwardī *Al Ahkām al Sultāniyyah*, op.cit. p.78

²¹⁸ DR Riaz Mahmood, *The Concept of Administrative Accountability in Islam*, (Lahore: Maqbool Academy, 2001) p. 113

• وسيعلم الذين ظلموا أي منقلب ينقلبون...

(And the wrong doers will see what a come-back they shall have)²¹⁹

They asked him if he belonged to Hamzan. He replied in positive. They brought him to al Manşūr. He told the caliph that he was a feudal of Hamzan where the Abbasid governor wanted to occupy his estate and on refusing he was imprisoned by him for four years then. Manşūr ordered him to be released, returned his estate to him, offered him governorship of his area and told him to decide the fate of that Abbasid governor. The man thanked him, regretted to accept the governorship and forgave the governor. However Manşūr dismissed the accused governor of his post.²²⁰

It is reported that whenever Manşūr dismissed an official, he used to confiscate his property too.²²¹

It is narrated that Manşūr, on learning that a group of his scribes had made some fabrications and alteration in the record, ordered them to be brought before him and be punished. One of them recited some poetic verses in which he said, "O commander of the faithful, May Allah prolong your life in prosperity and power. We seek protection in your forgiveness, for if you grant us protection, it is by virtue of your being able to afford safety to the whole world. As for us, we are merely scribes

²¹⁹ *Al Qur'ān* 26:227

²²⁰ Mas'ūdī, *Murūj al Dhahab wa Jawāhir al M'ādin* 3/348, tran. (urdu) Akhtar Fatehpuri

²²¹ Jurjī Zaydān, *Tārīkh al Tamaddun al Islāmī*, op.cit. 2/34

who have committed mistakes so forgive us for the sake of noble recording angels". Thereupon he ordered them to be released and bestowed gifts on the young man as he had shown his sense of trust.²²²

Al Manşūr though was very harsh for rebels and criminals but was very merciful for masses. He had told the people to complain to him without hesitation if any official of the government did any injustice to anyone. Once a farmer complained against a government official. Manşūr told him that if he was true, he was allowed to bring the official with his hands tied. Likewise 'Isā bin Mūsā, governor of Kūfa killed a man. When Manşūr came to know he intended to kill him in retaliation. However, he found out that he was killed by mistake therefore he reprimanded him severely.²²³

It is narrated that Mūsā al Hādī was sitting in a court hearing for claims and grievances and Umārah bin Hamzah who had influence in the court was sitting next to him. A complainant claimed that Umārah had taken his property illegally. Al Hādī ordered Umārah to sit with the complainant for the hearing. Umārah, however said, "O, commander of the faithful, if the property belongs to him, then I don't oppose his claim and if it is mine I gift it to him. I do not want to sell my position in the royal court. It may happen that the magistrate act graciously when according to him the victim is right but at the same time maintain a respect for the defendant, which safeguards his honour from suspicion of using force or preventing a rightful claim.

²²² Al Māwardī, *Al Ahkām al Sulṭāniyyah*, op.cit. trans. Asadullah Yate, pp.122-123

²²³ Shah Mueenuddin Nadwī, *Tārikh-i-Islām*, op.cit. 3/56

Thus 'Awn bin Muḥammad relates that the people of Nahr al Mirghab at Basra claimed against Maḥdī about the area through his judge Ubaidullah bin al Hasan al Anbari, but neither he nor al Hadi, his successor handed it over to them. When al Rasheed came to power and they sought redress from him before Ja'far bin Yahya who was the incharge of *Wilāyat al Mazālim* but al Rasheed did not cede it to them either. Then Ja'far bin Yahya purchased it from al Rasheed for 20,000 dirhams and gave it to them saying, " I am doing this so that you may be aware that the commander of the faithful holding to his right did not want to cede it to you and that his servant has purchased it from him and has granted it to you."

It is possible that Ja'far undertook what he did at his own in order to remove suspicion of wrongdoing from al Rashīd; it is also possible that he did it on the advise of al Rashīd so that neither his father nor his brother be accused of injustice and the later is more likely. However which ever of the two cases it was , justice was done, honour safeguarded and meanness prevented.²²⁴

Many Abbasid rulers presided over *Wilāyat al Mazālim* personally. Among them were Al Maḥdī, Al Hadi, Al Rashīd , Al Māmūn, Al Mu'taṣim and Al Muhtadī. Mu'taṣim is said to be very strict in this matter. Once a woman complained to him that a military officer has abducted her son. Mu'taṣim called him and on his refusal to

²²⁴ Al Māwardī, *Al Ahkām al Sulṭāniyyah*, op.cit. trans. Asadullah Yate. pp.136-137

confess he pressed him with his hand till the sound of his bones was heard and he fell down on ground. Then he ordered him to produce the child and he did.²²⁵

It is narrated that Al Māmūn used to personally sit in the court for hearing grievances of people on Sundays. Once he rose to leave the court when a woman in rags met him saying (in poetic verses):

“O flower of the justice to who even uprightness itself is guided. O, Imam, by whom the whole land has been illuminated. A widow takes her complaint to you, O support of realm, against whom, without means of defence, a lion has made an attack: has seized land from her after she was rendered incapable and had become separated from her family and children.”

Al-Māmūn lowered his eyes for a moment and then raised his head saying: “Before less than what you have spoken of, patience and fortitude they would have weakened; my heart is sickened by your sadness and affliction. Now is the time for the midday prayer, so depart and bring your adversary on the day I shall promise you; the court sits on Saturdays; and if I sit on the day I will see that you receive justice; if not, then at the Sunday sitting.” She then went and attended on Sunday in the first row. Al Māmūn then asked her, “Against whom have you a complaint?” She replied, “The one standing by your side, Al ‘Abbās, your son.” Al-Māmūn told his judge, Yahyā bin Aktham to hold a sitting with both the parties for investigation of the case. He did

²²⁵ Hāshim bin al Ḥasan al ‘Abīrī Al ‘Alawī, *Aṭwār Wilāyat al Mazālim ‘Abr al Tarīkh*, p.41, (n.d)

that in the presence of Al Māmūn. When the woman raised her voice, one of the people reprimanded her ; but al Māmūn said, "leave her, for surely it is the truth which is making her speaking and falsehood is making him silent." Then he ordered that her land be restored to her. His action of holding investigation in his presence without doing it personally was indicative of good administration in two ways. Firstly; it concerned a judgment which might have been in favour of or against his son. One may not give judgment in favour of his son although it may be done against him. Secondly, the litigant was a woman with respect to whom he was too highly placed to respond; moreover his son by virtue of his rank, found himself in a position in which no one other than caliph could enforce the law. Thus al Māmūn referred the investigation in his son's presence to someone who was able to converse with the woman, resolve the claim and elucidate the relevant facts but it was the caliph himself who issued the decree and enforced the law.²²⁶

It is recounted that once, while al Muhtadī was holding a court for redress of grievances, various petitions regarding the coins known as *Khusroes* were presented to him. When he inquired about them, Sulayman bin Wahab replied, "Umar bin al Khattab, had imposed on the inhabitants of *al-Sawād* and the areas around it to the east and west which he conquered. Payment by instalments of the *kharāj* in silver and gold; the *dirhams* and dinars were minted with the weight of *Khusroes* and of the

²²⁶ Mawardi, *Al Ahkam al Sultaniyyah*, op.cit., trans. Asadullah Yate, p.128

Ceaser, and the people of these regions would pay the money they had, according to the number required without considering the disparity in weight between various coins. Then the people became corrupt and those who had to pay *kharāj* would give *Ṭabarī* coins, which were four *doniq* and would keep the *wafī* money of full weight, which had the weight of a *mithqāl*. When *Ziayad* became the governor of Iraq, he exacted payment in *Wafis* and imposed payment in *Khusroes*. The agents of the Banu Umayyad continued the practice until *Abdul Malik* began his rule. He examined the difference between the two weights and assessed the weight of *dirham* at five and a half *mithqāl*, leaving the *mithqāl* as it was. Later *al Ḥajjāj* began to demand payment in *khusroes*, something which was annulled by *ʿUmar bin Abdul Azīz* but was reinstated by those who came after him until the time of *al Manṣūr*. When, however, as *Sawād* was destroyed, *al Manṣūr* put an end to payment in silver of the *Kharāj* due on wheat and barley and transformed it into a proportional tax in kind. These two grains are the most common in *al Sawād* and he left a few other grain crops, dates and fruit trees to be assessed in accordance with the *kharāj*, which was till then exacted in *khusroes* and provisions." *Al Muhtadī* said, "May Allah guard me from imposing an unjust measure on the people, be it from long ago or recent past- relieve the people of it." *Hassan bin Makhlad* said that this abolishment of the commander of the faithful represented an annual loss of 12 million *dirhams* to the treasury-*Al Muhtadī* replied, " I would

establish what is right and will remove what is unjust even if it cause loss to the treasury.²²⁷

From the above mentioned examples it becomes manifest that during Abbasid period there was a particular emphasis upon the institution of *Mazālim*. Although all caliphs were not equal in this respect but no doubt that redress of public grievances and accountability of public servants and that of the influential did receive due care and attention during this period.

6. *Wilāyat al Mazālim* during Muslim Rule in *Al Andalus*

During search for information about *Wilāyat al Mazālim* during Muslim rule in *al Andalus* one finds that the main focus of writers about the subject has been on the establishment of Muslim rule, its consolidation and its later dismemberment. Social and political aspects of that society have been the centre of attention and very little information is found about the legal system and particularly about the accountability system in *Al Andalus*. Nevertheless between the lines it is not difficult to understand that there existed the essence of the institution of *Wilāyat al Mazālim*.

The administration of justice in *al Andalus* was carried out by the *Qadis* with limited and unlimited powers. For the trial of criminal suits, there was a separate department known as "*Shurtah*" which was headed by an officer who carried the

²²⁷ Al Māwardī, *Al Ahkām al Sultāniyyah*, op.cit., trans. Asadullah Yate, pp.121, 122

designation of "*Ṣāhib al Shurṭab*". He was the most dreaded officer of the state because of his vast powers. He was competent to impose any punishment on the offenders-fine, imprisonment, confiscation of property, amputation and execution. The capital punishment was carried out after the approval of the Sultan. The peace and harmony in the city depended upon him and his other associates-the *Ṣāhib al Madinah* and *Ṣāhib al Mazālim*. The specific duties of the last two officers are not clear. They kept a watch on day to day law and order while *Ṣāhib al Mazālim* dealt with complaints of high-handedness and corruption of civil servants.²²⁸

The traditional custom of the *Khalīfahs* to hear cases in person was in existence in Al Andalus, but it was not as common as at Damascus.²²⁹

According to a contemporary scholar the department of *Mazālim* was different than judiciary. Most probably its concern was implementation of decrees of judiciary. It was also indicated by the report from Al Maṣṣūr bin Abī 'Āmir who ordered his special police officer to bring a young man and the complaint against him and present him to the *Ṣāhib al Mazālim* so that law may be implemented against him in the strictest possible terms. In some reports of the historians in-charge of documentation and *al Mazālim* has been mentioned.²³⁰

²²⁸ Syed Azizur Rahman, *The Story of Islamic Spain*, (India: Good word Books, 2001)

²²⁹ Al Haj Mohammed Ullah, *The Administrative Justice in Islam* (New Delhi: Kitāb Bhavan, 1990) p.34

²³⁰ Dr. Ahmad Fikri, *Qurtābāb fī al 'Asr al Islāmī*, , (Al Iskandariyyah: Muassasat Shabaab al Jamaiah, (n.d)) p.307

It is said that Cordova had a special judge other than that of the normal judiciary, called *Şāhib al Mazālim* who was appointed by the *Amir* to hear cases of breach of privilege or offences committed by public officials. *Şāhib al Radd* was to hear cases of complaints against judges. He and *Şāhib al Mazālim* was often one and the same officer.²³¹

According to a western historian the *Qāḍī*'s jurisdiction was limited to those types of litigation of which the revealed laws took cognizance while the other judges administered justice of more secular character. Among them was the *Şāhib al Mazālim* or lord of injustices, who was authorized to correct abuses of power and exploitation of people by public officials.²³²

Here are some precedents from the justice system of *al Andalus*.

- (a) It is said that a man presented himself in the court of Prime Minister, Ibn 'Ali Amir, styled as al Manşūr and accused the shield bearer of the wazier of breach of contract and refusal to appear in the court of *Qāḍī* to answer the charges. He reported that the judge also had not compelled the shield bearer to present himself in the court. Therefore, al Manşūr became indignant and ordered the prefect of police to conduct these two men in the court of *Qāḍī* Abdur Rahman bin Futais.

²³¹ S.M. Imamuddin, *Muslim Spain 711-1492 A.D.*, (Leiden: E.J. Brill, 1981) p. 54

²³² Joseph F O'Callaghan, *A History of Medieval Spain*, (London: Cornell University Press, 1975) p.145

The judge decided the case in favour of the plaintiff. He appeared to thank the wazier. The *wazir* said, " Spare me your thanks, you have gained your case."²³³

- (b) At another occasion an African merchant approached the *Wazir* and accused his major domo, who thinking that he was immune from legal proceedings by virtue of his high office, had declined to appear before the court of *Qāḍī*. The *wazir* at once placed the major domo under arrest and sent him to the court. When the case was decided in favour of the African, he deprived the major domo of his office.²³⁴

(c) In this case the accused was the President of the court of appeals and the poet Ramādī. They were charged of high treason. The eunuch Jaudhar was selected by the conspirators for the assassination of the young Caliph in order to give preference to Abdur Rahman bin Ubaidullah . The conspiracy was detected and a trial ensued before the Council. The pretender and the president of the court of appeals were sentenced to death. The eunuch was crucified and the poet was banished but was allowed to remain in Cordova under strict supervision. ²³⁵

In all the above three cases there is no specific mention of

²³³ Anwar Ahmad Qadri, *Justice in Historical Islam*, op.cit. p.42

²³⁴ Ibid. p.42-43

²³⁵ Ibid p.43

Wilāyat al Mazālim but they are, in fact, the cases of public grievances against the high handedness of public servants or cases of abuse of authority by such officials and therefore relevant to our discussion.

It may be concluded here that during Muslim rule in *al Andalus* the institution of *Wilāyat al Mazālim* was very much in action. At the same time it should be kept in mind that when we talk of Muslim Spain or *al Andalus*, it is not a discussion about one monolithic state. There were many ups and downs in the history of *al Andalus* when it comes to Muslim rule there. Any how it seems that learning from the central Caliphate of Muslims in Baghdad, successive governments through hundreds of years of Muslim history in *al Andalus*, did establish the department. Study of different sources, however, reveals that the jurisdiction and authority of the department varied from time to time.

7. *Wilāyat al Mazālim* during Ottomon Caliphate

The need to increase the state's revenue and power required the reign of justice which the Sassanid kings and Muslim Caliphs dispensed in a number of ways. The sovereign could at fixed times convene an imperial council where surrounded by his high officials he would listen to the complaints of people against the authorities and pass immediate judgment. If he was hunting or on campaign he could receive written complaints of the people or he could send secret agents to the provinces to investigate

cases of oppression, every oriental government maintaining as one of its basic institutions an elaborate secret service. More dramatically to display this form of justice the Sassanid rulers used for two days in every year to stand as ordinary persons before the Great Magi-the religious leader- and hear any grievances against their rule. A thousand year later we find the same institution maintained by the Seljuk sultans of Anatolia, who for one day a year would go to *Qāḍī*'s court of justice in the capital so that if there was any plaintiff against them, he would stay before the *Qāḍī*.²³⁶

An early Ottoman folk epic in the Gazi tradition reflects the same concept of the state. The dervish Sari Saltuk advises Uthman Ghazi, "Be just and equitable; don't provoke the curse of the poor, don't mistreat your subjects.....keep a watch over your *Qāḍīs* and governors. Act justly so that you may stay in power and retain the obedience of your subjects." The Ottomans received this concept of state in a form modified since eleventh century by Turco-Mongol traditions of Seljuks.²³⁷

The Ottomans organised the judicial set up and placed the *Shaikh al Islam* and the two *Qāḍī Aḥkār* of Rumelia and Anatolia at the top. Below them were the Great Mullahs who filled the offices of Chief *Qāḍī* in the capital, the two holy cities and others of Busra, Adrianpole, Damascus, Cairo and other centres. Below them came the lesser Mullahs having different grades. The *Qāḍīs* not only exercised judicial functions but also had a general supervisory function over the conduct of administration. Those

²³⁶ Halil Inalcik, *The Ottoman Empire* (London: Phoenix Press, , 1973) p.66

²³⁷ Ibid. p. 66

belonging to control the actions of customs department and certified the accounts before their finalisation.²³⁸

The highest court was that of *Qazi Askar*, the Grand *Wazir* and *Diwan*. *Diwan* acted as the court of trial involving great officials. As the most influential institution of the Ottoman central Administration during periods of foundation and later progress, the *Diwan* (called *Diwan-i-Humayun*) became fundamental in the success of Ottoman administrative system. Though no definite knowledge about the date of founding the *Diwan* is available, it is clear that in the period of Orhan Ghazi it became well defined like other state institutions. During the reign of Murad the First (1360-1402) it progressed enormously as its membership increased with the inclusion of more *wazirs* and *Qazi Askar*. It is reported that Ottoman Caliphs heard the people complaints every morning while seated at an elevated place.²³⁹

Like wise the functions of Grand *Wazir*, whose position was somewhat near to that of prime minister, included a check and balance on all governmental departments.²⁴⁰

There are examples which show that the essence of accountability of the public servants did exist during this period. In 1595 two of the clerks to the treasury were

²³⁸ Anwar Ahmad Qadri, *Justice in Historical Islam*, op.cit. p. 80

²³⁹ Ekmeleddin Ihsan Oghlu, ed. *History of the Ottoman State, Society and Civilisation* (Istanbul: IRCICA, 2001) 1/153

²⁴⁰ Halil Inalcik, *The Ottoman Empire*, op.cit. p.97

hanged and six dismissed for accepting bribes and in 1598 the Grand *Wazir* castigated the secretaries saying, "With your many treacheries, you aim to undermine the good order of the state."²⁴¹

The *Dīwān-i-Humāyūn*, mentioned above essentially fulfilled the functions of the *Mazālim* courts common in other Islamic states. It was instrumental in establishing the rule of law in the Ottoman caliphate.²⁴²

8. *Wilāyat al Mazālim* during Mughal Empire

Mughal dynasty ruled India between 1526 and 1857 with a break during 1539-1555 when Suris ousted them and took over.²⁴³

Mughal emperors considered themselves as caliphs of Muslims and were lovers of justice. Akbar is stated to have declared: "If I were guilty of any unjust act, I would rise in judgment against myself." He was most zealous and watchful in the matter of administering justice.²⁴⁴

²⁴¹ Lord Eversley, *The Turkish Empire*, (Lahore: Shaikh Muhammad Ashraf, 1958) p. 307

²⁴² Ekmeleddin Ihsan Oghlu, ed. *History of the Ottoman State, Society and Civilisation*, op.cit. 1/456

²⁴³ Humayun fled India in 1542 after he was defeated by Sher Shah Suri and sought asylum in Persian Kingdom under Shah Tahmasap. Afterwards he defeated his brothers and gained control of Qandahar and Kabul in 1545. Meanwhile Sher Shah Suri was killed by the Rajputs during a battle and when the Afghans were defeated by Humayun in Lahore in 1555, he was restored to the throne again and from that date the Mughals ruled India effectively until 1750 and legally upto 1857. For details see C.Paul Mitchell, *Sir Thomas Roe and the Mughal Empire*, (Karachi: Mehran Printers, 2000) pp.3-4 and Muhammad Basheer Ahmad, *Judicial System Under Mughal Empire* (Karachi: Pakistan Historical Society, 1978), p.208

²⁴⁴ Vidya Dhar Mahajan, *Muslim Rule in India* (New Delhi: S. Chand & Co., 1978) 2/250

The policy of Mughals with regard to the administration of justice and their interest in this matter is evident from the following order of Akbar, which he issued to his judges in 1595:

“Let connive at men’s faults as men become more hardened sometimes by punishments or take to flight through fear of it when they cannot be without fault. In short there may be one man who must be punished for the first fault and another who must be forgiven for a thousand. Knowing then that awarding punishments is one of the most difficult matters in the art of government, they should award it with mildness and discernment.”

No consideration of official rank, or even royal kinship deterred them from meting out the severest punishment to the culprit. Nor were notions of a false prestige allowed to thwart the course of justice and tarnish the good name of the ruler. To the Mughals prestige consisted in inspiring confidence not in awe. As a matter of fact wherever a responsible official was found to be guilty of oppression or injustice in his dealings with the people, the emperors invariably gave exemplary and deterrent punishment²⁴⁵.

The Mughals administered impartial and stern justice and Abul Fazal is quite right when he claims: “His majesty in his court makes no difference between relative and stranger and no distinction between a chief and a tangle-haired beggar.”

²⁴⁵ S.A.Q. Hussaini, *Administration Under the Mughals* (Dacca: A. Ahmad, , 1952), pp.209-210

Khan-i-Azam Mirza Aziz Koka, one of the greatest nobles and boyhood playmate of Akbar had to pay blood money to the father of a servant of his whom he had executed without sufficient cause. Similarly Akbar punished with death a powerful military chief of Gujrat for the murder of one Chingiz Khan on the representation made by the mother of the deceased. A striking example of impartial justice is found in the case of Hushang, the brother's son of Khan-e-Alam, the favourite *Amir* who was charged with the murder of some insignificant person whose name does not even appear in the records of the period, and sentenced to death. Jehangir writes:

"Having summoned him to presence, I investigated the charge and after it was established, gave an order for his execution. God forbid that in such affair i should consider princes and far less that I should consider *Amirs*. I hope that the Grace of God may support me in this."²⁴⁶

Jahangir regarded the administration of justice as his most essential duty. Shah Jahan considered justice to be the very foundation of government, while Aurangzeb said that, "the garden of administration is watered by the rain of justice."²⁴⁷

As regards the organisation of judiciary the highest court was the Royal Court presided over by the emperor himself. Below was the court of *Qāḍī ul Qudāh* (Chief

²⁴⁶ *Ibid.* p.209

²⁴⁷ Pakistan Historical Board, Pakistan Historical Society, *A Short History of Hind-Pakistan* (Karachi: the Time Press, 1955) p. 261

Justice) at the capital. The duties of the Chief Justice included, among other things, the supervision over all provincial *Qādīs*. The Chief Justices were men of exceptional character and they were also entrusted with the duty of leading the Friday prayers in the capital.

The Mughul Empire was divided into several provinces. At the head of the provincial administration was the governor (*Subahdār*). The *Subahdār*, like the Emperor at the Centre, possessed powers to decide cases under *Mazālim*. He did not have the right of inflicting capital punishment. Whenever he heard cases of *Mazālim* he had the assistance of muftis and also the judges of provincial high court.²⁴⁸

In each province there was a provincial court in each district too. All of them were presided over by *Qādīs*. In later period subordinate courts were established in sub-districts which were presided over by *Nāyib Qādīs*.²⁴⁹

So far as redress of public grievances and accountability of public servants is concerned, the Mughal Emperors like their predecessors took pains to keep in touch with their subjects. Akbar showed himself every morning to his subjects in what was called the *Jharoka-e-darshan*²⁵⁰ where anyone could draw the attention of the monarch by simply raising his hand holding a petition. He was then escorted by mace-bearer to

²⁴⁸ Ibid. p. 261

²⁴⁹ S.A.Q Husaini, *Administration Under the Mughals*, op.cit. p. 200

²⁵⁰ According to Mitchell, adapting a previously Hindu facility such as this was one of the many examples of Muslim Indianization common to the sixteenth and seventeenth centuries. See. C.Paul Mitchell, *Sir Thomas Roe and the Mughal Empire* (Karachi: Mehran Printers, 2000) P.195

the imperial audience in the *dawlat-khāna-i-khās* where the hearing took place. If the case required an inquiry, it was ordered. Decisions were made according to *Shari'ah*.²⁵¹

A unique effort was made by Jehangir (who ascended the throne in 1605 and retained his father's definition of a just ruler) to provide a link between the emperor and the aggrieved persons without any middleman. He hanged a golden chain, afterwards known as Chain of Justice, having seven bells in it. It was hung in a manner that any person who would like to complain to the emperor against any oppression of a state functionary, a member of royal family or any influential person of the state could just by jerking it cause the bells ringing. There upon the emperor took notice and personally held an inquiry in the matter.²⁵²

Maqarrab Khan was an influential person, a noble of high standing, who was punished by Jehangir on the complaint of an old woman.²⁵³

Alamgir was equally keen to ensure access of complainants to the monarch. During his reign the courts were extremely independent.

Successive Mughal emperors maintained the custom of earmarking a day of the week for the purpose of holding a court of *Mazālim*. It was attended by the officers of the court, the *Qādi 'askar*, jurists and other learned persons.²⁵⁴

²⁵¹ Ishtiaq Hussain Qureshi, *The Administration of Mughal Empire* (Karachi: University of, 1966) p.195

²⁵² Molvi M. Zakaullah Dehlavi, *Tārikh-i-Hindustān*, (Lahore: Sang-i-mil publications, 1998)6/13, Vidya Dhar Mahajan, *Muslim Rule in India* op.cit. 2/250, Jahangir, *Tuzuk-i-Jahangiri*, trans. & ed. (London: A. Rogers and H. Beveridge,) Vol. 1, p. 7

²⁵³ Dr. Riaz Mahmood, *The Concept of Administrative Accountability in Islam*, op.cit. p. 139

Both Shah Jehan and Aurangzeb held no public *darbār* on Wednesdays but reserved the day for holding a court of law. Aurangzeb particularly called the Wednesday session of justice as *Diwān-i-Mazālim*.²⁵³

From a closer examination of the historical sources it becomes clear that the Royal court presided by the Mughal emperors was the highest court of appeal and the court of *Mazālim* i.e. to redress the grievances which could not be redressed by the lower courts.

Those emperors had a high sense of justice. They did not like their sons or the high officials of the state to act as tyrants. In this regard the statement of Akbar is worth quoting. He said, "If I were guilty of an unjust act, I would rise in judgment against myself. What shall I say then of my sons, my kindred and others." Alamgir took care that the highest in the land obeyed the orders of the court even though they were summoned to answer the complaint of a beggar.

Jehangir was so keen in providing justice to the people that even illness did not prevent him from attending to his public duties, he appeared regularly in the *Jharokah-i-darshan* and *Diwān-e-Khās* and 'ām. Shah Jehan's historians considered it the chief purpose of the monarchy that the weak should be protected against oppression of the mighty and in ordering the affairs of his fellow beings, the monarch should be a friend

²⁵⁴, Ishtiaq Hussain Qureshi, *The Administration of Mughal Empire* (Karachi: University of Karachi, 1966)p.195

²⁵³ Sir Jadunath Sarkar, *Mughal Administration* (New Delhi: Orient Longman, 1935) , P.71

and helper through justice and equality. The sin for which Alamgir had the greatest horror was injustice.²⁵⁶

9. Conclusion:

To conclude this chapter the important points are summed up in the following:

- *Wilāyat al Mazālim* is grievance redresses particularly the one caused by maladministration of public officials and it existed throughout Islamic history.
- The Messenger of Allah, Muhammad (peace be upon him) was very particular about the administration of justice in every matter of life. Therefore he never allowed maladministration or abuse of power. Examples in this respect have been discussed above.
- The period of *Khulafā-i-Rāshidīn* was a model in the sphere of grievance redress. All the four caliphs followed the footsteps of the Prophet (peace be upon him) in all matters of life and particularly in the matter of grievance redress caused by the maladministration of public officials.
- The system also existed during almost all Muslim governments though they were based on hereditary monarchical system like that of the

²⁵⁶ Ishtiaq Hussain Qureshi, *The Administration of Mughal Empire*, op.cit. p.198

Umayyads, the Abbasids, the Umayyads of *Al Andalus*, the Ottomans and the Mughals.

- There have been many other Muslim governments and states in the Islamic history belonging to many different areas which could have possibly been covered but due to the scarcity of time and relevant material only a few of them which are something like household names among the Muslims have been covered in this chapter with respect to the application of *Wilāyat al Mazālim*.

Chapter Three

Dīwān al Mazālim

In

Kingdom

of

Saudi Arabia

Chapter Three

Dīwān al Mazālim in the Kingdom of Saudi Arabia

1. Introduction:

In the previous chapter the discussion was about the historical evidence of *Wilāyat al Mazālim* while in this chapter the focus is on the contemporary Muslim world. Specifically it is about the application of the concept of *Wilāyat al Mazālim* in one of the important country of the modern Muslim world namely Saudi Arabia. It is a country where though political system is that of monarchy but the legal and judicial system is based on *Shari'ah*. One of the distinctions of Saudi Arabia is also that it strives to be more traditional in its system and be nearer to original Islamic institutions. That is why the institution of addressing the issues of public grievances against the government officials is named as *Dīwān al Mazālim*. The department is a mix of *Mazālim* jurisdiction where the members of the public can file any complaint against the maladministration of the government officials and administrative judiciary where all government employees can take their departmental disputes for solution.

The current chapter shows that the system gradually advanced from a very simple way of addressing public grievances against the government officials through a traditional "complaint box" to a very sophisticated organisation which has branches

throughout the kingdom and which is now a vibrant system encouraging the citizens to come forward with any complaint against the abuse of authority and maladministration in the apparently authoritarian society of the kingdom.

2. A Sketch of Saudi Arabian Judicial System

2.1. A Brief Historical Background:

When King Abdul Aziz, the founding father of the Kingdom and its king (1932-1953), after a long struggle, took over Hijaz in 1924, and consolidated his power over the Peninsula, he was faced with three separate judicial systems. The first one was that of Hijaz, with an Ottoman orientation. The second was that of Najd. Under this system an *Amīr* (similar to regional governor) with the assistance of a judge, represented the law. The Amir would try to solve the disputes submitted to him or refer them to the judge for a final ruling. The implementation of the judge's decision was the duty of the *Amīr*. The third more primitive and indigenous system was the tribal one. Here the conflicting parties would refer their disputes to the individual's tribal law and its own lawyers would give a final decision according to the precedents.²⁵⁷

King Abdul Aziz began to develop a system of government compatible with the requirements of his time. Keeping the public needs in mind he took decisions for initiating a governance system which embodied the principles of *Shoorā* (mutual

²⁵⁷ Fouad Al Farsy, *Moderity and Tradition*, (London: The Saudi Equation, Kegan Paul International, 1990), p.34.

consultation) as stated by Qur'ān and Sunnah of the Prophet (peace be upon him). In 1924, *Al Majlis al Ahli* (National Council) was established which had the powers over many affairs of the state except foreign affairs and military; both were supervised by the king directly. In August 1925, '*Makkah Shoorā*' with more powers was introduced. It dealt with trade, education, communication, internal security and municipal affairs. In 1926 King Abdul Aziz promulgated a constitution termed as Basic Law (*Al Talimāt al asāsiyyah*) for Hijaz. It was similar to modern day constitutions of other countries. In 1927 a committee was set up to review the over all administrative system. It was named as "Inspection and Reform Commission". It proposed a new law of the Consultative Council that was approved by the King in the same year. The new Council was charged with the pointing out to the government any loopholes in the implementation of laws. It was also given the responsibilities to oversee other affairs like appropriation of public property, concessions given in projects of construction, budget etc. As a result of the recommendations rendered by the Commission, a *Majlis al Wukalā* (The Deputies Council) was created in 1932. It was a kind of small council of ministers only for Hijaz until a grand Council of Ministers was formed in 1953, which brought all provinces under its domain.²⁵⁸

In 1953, the Council of Ministers was established by the King. Under the rule of King Saud bin Abdul Aziz (1953-1964) its first session was held in 1954. In the

²⁵⁸ Ibid. p. 92 and Abudllah F. Ansary, *A Brief Overview of the Saudi Arabian Legal System*, <www.nyulawglobal.org/globalex/Saudi_arabia.html> Accessed: 19-10-2009

beginning it was an advisory body but gradually it grew into an executive and legislative body having powers of decision making. After King Faisal Bin Abdul Aziz took the reins of power in 1964, the institutions of the government were developed according to his vision. It was during King Fahad's era that a constitution was promulgated for the whole of the Kingdom which was termed as the Basic Law. This document reaffirmed *Qur'ān* and Sunnah as the fundamental law of the land. It determined that the system of the government shall be that of Monarchy, however, 'Shoorā' (mutual consultation) and 'Adl (justice) will be the guiding principles²⁵⁹ for the system as a whole. The law asserts the protection of the fundamental rights of Saudi Citizens as an obligation of the state. It explains the nature of different authorities of the government too.²⁶⁰

A Royal Decree implemented a relatively modern and sophisticated judicial system in 1927, providing for, multiple-judge courts and regular appeals-which operated in the cities of Makkah, Madinah, and Jeddah. Since that time, several Royal Ordinances have been issued which aimed at regulating various aspects of the Courts of *Shari'ah* in the Kingdom. In 1931 a Royal Ordinance issued that consisted of provisions that regulated procedure of the courts. The *Shari'ah* Judicial Responsibility Law was passed in 1938. The law in its 282 sections explained the regulation of Courts

²⁵⁹ *The Basic Law: the System of Government*, Article: 7 & 8, available at <http://www.mideastinfo.com/documents/Saudi_Arabia_Basic_Law.htm> Accessed: 4-11-2009,

²⁶⁰ *Ibid*, article 26, 27, Accessed: 4-11-2009

of *Shari'ah*, their grades, their jurisdiction and their powers. Unification of judicial system and its extension to the whole kingdom took place after 1956. To be specific King Sa'ūd implemented a judicial system throughout the Kingdom similar to that of Hijaz in 1957. In 1960, he unified the two systems under the Presidency of the Judiciary in Riyadh, which extended those regulations developed for a few cities to the whole of the kingdom. The judicial unification was part of the greater administrative unification that King Abdul-Aziz had initiated when he passed the law for the creation of the Council of Ministers just before his death on November 11, 1953.²⁶¹

2.2. Present System of Judiciary:

Presently, there is a dual judicial system in Saudi Arabia having the *Shari'ah* Courts System (*al-Mahākim al-Shar'iyyah*) and an independent administrative judiciary known as the Board of Grievances (*Dīwān Al-Mazālim*).²⁶²

²⁶¹ Dr. Sa'ūd bin Sa'ad Āl Darayb, *Al Tanzīm al Qada' fi al mamlakah al 'arabiyyah al sa'ūdiyyah*, (Riyadh: Imam Muhammad bin Saud University, 1973), pp.344-348 and Abdullah F. Ansary, A Brief Overview of Saudi Arabian Legal System, op.cit.

²⁶² Frank E. Vogel, a Western Scholar having his PhD on Saudi Legal System says about the establishment of *Dīwān al Mazālim*: " The 1955 *nizām* drew from his (King Abdul Aziz) practice, from nine-centuries old works of Islamic Public Law, and also no doubt from the models of the French and Egyptian *conseils d'etat*, to lay the foundation of the new court. The board's evolution was carried further in an extensive new *nizām* in 1982. The board is charged not only with suits against the government and appeals from administrative decisions but also with certain judicial tasks, such as the enforcement of foreign judgments, which the *Shari'ah* Courts do not deign to handle or handle in a way acceptable to authorities and which were originally dealt with by ad hoc tribunals constituted by the King. Because the Board has an impeccable *Shari'ah* pedigree and is an expression of the King's personal authority, it has considerable prestige. But both the King and the board's president have been careful not to infringe on *Shari'ah*'s jurisdiction. Although classical Islamic public law allows it to hear cases also heard by *Shari'ah* Courts and also to review complaints against the decisions of the *Qādis*, the board has always been careful to decline jurisdiction of any fiqh matter. The latest regulation of the

In addition to those judicial structures, there are various Committees having jurisdiction to look into specified cases. Moreover, the Judiciary law allows the formation of special courts by, Royal Ordinance on the recommendation of the Supreme Judicial Council.²⁶³

In 1975 the law of Judiciary was enacted which was upheld in 1992 by the Basic Law of Governance. The Shari'ah Courts, thus, were given jurisdiction over all types of cases save those exempted by law. Any other forum that is given a specific jurisdiction over certain matter would be considered exceptional case.²⁶⁴

A contemporary scholar claims that the Law of Judiciary has guaranteed the independence of judicial institution in the Kingdom. He argues that the Law of Judiciary in its first section states that no one has any authority over the judges and that no one is allowed to interfere with the work of judiciary in any manner. He says that independence of judiciary is reflected in the high moral character of judges, their courage to stand firm for the truth and for their steadfastness in face of worldly temptations and threats. He narrates an event as example of the independence of judiciary. According to him once a man claimed a debt against the late father of the King. He asked for proof. The man said that he had no proof but his only witness is

board makes this more explicit.", Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia*, (Leiden Brill, 2000), pp.288-289

²⁶³ Hasan 'Abdullah Al Shaykh, *al Tanzim al Qada'i fi'l mamlakah al 'arabiyyah al sa'udiyyah*, (Jeddah: Tihāmah, 1983), p.43

²⁶⁴ Ibid, p.43

Allah. Both the parties went to the Chief Judge Sa'ad bin Ateeq. The King knocked the door of his house. The judge came out and after seeing both of them asked the King whether he had come to him as a guest or a litigant. He said, "Ok, if you have come as litigants so both of you sit on the ground". They did that and after hearing the arguments of both the judge decided the case. After the trial was over, the judge invited the King to his home and honoured him by offering him Arabian tea.²⁶⁵

Same is the opinion some other writers as well. There are certain rules regarding judiciary in the Kingdom which are said to be a manifestation of the independence of judiciary.

According to the second section of the Law of Judiciary the judges once appointed shall not be removed from their position except in the manner stated in that law itself. That is in case of dissatisfactory performance of a judge during probation period, his continuous sickness which hampers him from performing his duties or his bad performance report three times consecutively by the concerned authorities. Otherwise the only way to remove them is when they reach the age of seventy, whereby they are sent on retirement.²⁶⁶

To guarantee the independence the transfer or deputation of a judge, without

²⁶⁵ Sa'ūd bin S'ad Āl-i-Daryb, *Al Tanzīm al Qada'i fi 'l Mamlakah al 'Arabiyyah al S'ūdiyyah*, op.cit. , pp. 366-367

²⁶⁶ Hasan 'Abdallah Āl-i- Shaykh, *Al Tanzīm al Qada'i fi 'l Mamlakah al 'Arabiyyah al S'ūdiyyah*, op.cit. p.67

his consent, to any other department than judiciary is banned. This has been stated in the third section of the Law of Judiciary with an exception in section 55, whereby it is possible if it is done with the royal orders after the recommendation of Supreme Judicial Council. Likewise the procedure for promotion has also been laid down by the Law. According to this procedure a judge shall be promoted only through Royal order after the recommendation of Supreme Judicial Council on the basis of seniority. The judges have also been given judicial immunity so that they are able to decide the cases free of any such fear or worry.²⁶⁷

The independence of Judiciary has been affirmed by the Basis Law, wherein Article 46 says, "The judiciary is an independent power, there is no authority over judges in their adjudication other than the authority of Islamic Sharī'ah".²⁶⁸

There are four types of Sharaiḥ Courts established under the Law of Judiciary enacted in 1975.

1. *Majlis al Qada al a'lā* (Supreme Judicial Council)
2. *Mahkamah al Tamyiz* (Court of Appeal)
3. *Al-Mahākim al 'Āmmāh* (General Courts)
4. *Al-Mahākim al Juz'iyyah* (Summary Courts)

²⁶⁷ See. Ibid. p. 68-73,

²⁶⁸ Basis Law, op.cit. Article 46.

2.3. *Majlis al Qadā al a'lā* (Supreme Judicial Council):

It is the highest judicial forum in the Kingdom having eleven members. Five among them are permanent. They are full-time members who are appointed through a Royal Order. Their rank is equal to that of President of the Court of Appeal. The other five are part-time members. They are, the President of the Court of Appeal or his deputy, the Secretary of the Ministry of Justice and three of the senior most judges of general courts. While the president of the Council is appointed by a Royal order and acts as the chairman of the General Assembly.²⁶⁹

Under the Law of the Judiciary, the *Majlis al Qadā al a'lā* is involved in many different matters.

These functions range from legislation and consultation to administration.

It has been given a kind of supervision over other Courts all within the boundaries prescribed by the law. This particular power of the council has been enumerated in Article 7 of the Judiciary Law.²⁷⁰ It primarily, "supervises the courts, administers the employment-related affairs of all members of the judiciary within the

²⁶⁹ Sa'ūd bin S'ad Āl-i-Daryb, *al Tanzīm al Qadā'ī fi 'l mamlakah al 'Arabīyyah al Saūdiyyah* op.cit. p. 441, for a detailed account of the Judicial Set up see: Al Ghadyan, Ahmad A. The Judiciary in Saudi Arabia, *Arab Law Quarterly*, 13/3, 1998, pp. 235-251, available at www.jstor.org/stable/3382009 and Abdullah F. Ansary, A Brief Overview of Saudi Arabian Legal System, <www.nyulawglobal.org/globalex/Saudi_arabia.html> visited: 19-10-2009

²⁷⁰ *The Law of Judiciary*, Translation of Saudi Laws, series-1, Official Translation Division, Bureau of Experts at the Council of Ministers, KSA. 2002, p.13

limits laid down in the [law], such as appointment, promotion, transfer, assignment of duties, monitors the proper discharge of their duties and assigns members of the Inspection Division to inspect, regulate and if so required, end the services of judges."²⁷¹

On the other hand it also look into the decisions of the courts about capital punishments and many other cases pertaining to heinous crimes.

In its legislative role the verdicts of the *Majlis al Qadā al a'la* are binding precedents for the lower judiciary whereby it sets general principles of law to be followed by the lower courts.

Sometimes the Ministry of Justice may refer to it questions related to *Shari'ah* rules which requires interpretation and elaboration. So it plays consultative role in such cases as it renders its legal opinions in the matters referred to it by the Ministry of Justice or sometimes by the King.

2.4. *Mahkamah al Tamyiz*: (Court of Appeal):

There are two courts of appeal in the Kingdom; one sitting in Riyadh and the other sitting in Makkah. The court of Appeal consists of a Chief Justice and a number of senior judges from among the judiciary.²⁷²

²⁷¹ Abdullah F. Ansary, *A Brief Overview of Saudi Arabian Legal System*, p. 10

²⁷² S.H. Amin, *Middle East Legal Systems* (Glasgow: Royhston Limited, 1985) p.320

According to its needs the court may establish as many panels as it deems proper provided each panel is headed by the Chief or one of his deputies. As mentioned above the permanent seats of the court are presently two: one in Riyadh and another in Makkah but it may hold its session in any city of the Kingdom where it is required.

Normally a panel would consist of three judges but if a major issue like capital punishment is under consideration then the number of judges may reach to five. Difference of opinion in the verdicts is a natural phenomenon and it happens here as is the case in any multi member court. Ultimately the general council of the court composed of active judges only gives a final verdict in such cases. The main concern of the *Maḥkamah al Tamyīz* is the matters relating to the interpretation of rules of *Shari'ah*. It has vast powers in this regard.

Article 14 of the Judiciary Law of the Kingdom states the following:

"If one of the court's panels, while reviewing a case deems it necessary to depart from an interpretation adopted by the same or another panel in previous judgments the case shall be referred to full court. Permission for such departure is given by a decision of the panel adopted by majority vote of no less than two thirds of its total membership. If the panel does not so render its

decision, it shall refer the case to Supreme Judicial Council for a final decision."²⁷³

So the *Mahkamah al Tamyiz* on the one hand reviews questions of law in the form of interpretation of rules of Shari'ah by the lower courts, and on the other hand it looks into appeals against the decisions of the lower courts either by the convicted party or by the prosecution.

The period of filing an appeal against any decision of the lower court is a maximum of thirty days.

There is also a provision of *suo moto* appeal by the Court in some cases. Kidnapping, burglary and crimes punished with capital punishments are included in the list. Particularly those circumstances include:

"The convicted person was the administrator of a '*waqf*' (religious endowment), a testamentary or legal guardian, a public treasury official or equivalent thereof or if he was tried in absentia. In cases involving kidnapping or house breaking and cases involving crimes punishable by death or amputation; in cases where the

²⁷³ Article 14 of *The Law of Judiciary 1975*, Translation of Saudi Laws, series-1, Official Translation Division, Bureau of Experts at the Council of Ministers, KSA. 2002, p.15

discretionary penalty exceeds 40 lashes or 10 days imprisonment; in cases in which the discretionary penalty involves both flogging and imprisonment.”²⁷⁴

In case of such appeals the Court of Appeal does not reverse the decision of the lower court. What it does is either to affirm the decision or to send it back with its recommendations for reconsideration by the concerned court itself. If the judge of the lower court does change the decision, he will make it known to the litigants and will hear them again on record. This judgment shall be again appealable then. However if the judge of the lower court sticks to his previous decision, he shall respond to the views of the Court of Appeal which in turn has the authority to send the case with its recommendation, to another judge for reconsideration.²⁷⁵

2.5. Lower Courts:

In this category there are two types of courts; *Al-Mahākim al Juz’iyyah* (Summery Courts) and *Al-Mahākim al Āmmah* (General Courts).

2.5.1. *Al-Mahākim al Juz’iyyah* (Summery Courts):

These Courts were founded with the establishment of the Shari‘ah Courts and its establishment was confirmed by the present law of Judiciary. In these courts only

²⁷⁴ Abdullah F. Ansary, *A Brief Overview of Saudi Arabian Legal System*. P. 9

²⁷⁵ Article 185-188 of the *Law of Procedure before Shari‘ah Courts*, Translation of Saudi Laws, series-1, Official Translation Division, Bureau of Experts at the Council of Ministers, KSA. 2002, p.99

one or two judges are normally appointed. These courts are regulated by the Minister of Justice in the light of instructions of Supreme Judicial Council.

Supreme Judicial Council determined the jurisdiction of the Summary Courts as following:

A. The criminal jurisdiction is mostly pertained to relatively insignificant crimes.

Example of those crimes may be minor assault, theft of petty things, intoxication or any small offence punishable with a week imprisonment.

B. The civil jurisdiction is concerned with small claims of not more than 20,000 Riyal. Nonetheless they do not include family matters and cases of immovable property notwithstanding the value of the claim. Up till now fourteen such courts have been established by the Kingdom in different cities. One judge is specified in those courts to hear cases of juvenile delinquency.

2.5.2. *Al-Mahākim al Āmmah* (The General Courts):

Al-Mahākim al Āmmah were established through the same Law of Judiciary which resulted in the formation of other courts. They were named as *Al-Mahākim al Āmmah* by the current Judicature Law.

Like the Summary Courts they are regulated by the verdicts given by the Ministry of Justice on the instructions of Supreme Judicial Council. There has to be one or more judges in accordance with the needs of the station where the court sits.

Among these courts Class A Courts are established in the cities and Class B are established in the villages.

The rules of recruitment of judges and their up gradation are to be found in the Law of Judiciary. Initial post in these courts is trainee or Assistant Judge.

Certain requirements are to be fulfilled by the person who applies to this post. He should be either be holding a degree in Shari'ah from a recognized government educational institution or should be known for his good knowledge of Shari'ah even if he does not hold a degree. In such case he will have to pass a special examination prepared by the Justice Ministry for this purpose. Minimum age limit is twenty two. To be a Saudi national is pre-requisite. He should have good moral character and should not have been convicted by any court.

The trainees have to work as court assistants for a minimum of three years that is considered as a basic training period for them.

After completing the training period they are appointed to the rank of judge Grade C. Then on the basis of seniority promotion to Grade B and A is made. Sometimes fresh appointments are also made to the rank of Grade B Judge from

among the faculty members of the Shari'ah Colleges. The senior most rank in these courts is that of President of Court A, preceded by President of Court B and Deputy Presidents of both courts A and B.²⁷⁶

General Courts are authorized to hear cases wherein the punishment sought is either capital punishment, or retaliation in cases other than death. They too have capable to hear cases of civil nature involving claims for an amount exceeding SR20, 000.²⁷⁷

Normally a single judge decides the cases in these Courts. However if the death sentence or retaliation is involved then there has to be three judges on the panel according to the Law.

These courts are not authorized to award capital punishment by way of *T'azir* except through a unanimous decision of all the members of the court.

The appointment and promotion in these courts are made by a Royal Order after the Supreme Judicial Council recommends a person in accordance with the rules of procedure. The General Court has the power to hear cases in cities where no Summary Court exists.²⁷⁸

²⁷⁶ Article 37-40, *Law of Judiciary*, Translation of Saudi Laws, series-1, Official Translation Division, Bureau of Experts at the Council of Ministers, KSA. 2002, P. 22-23

²⁷⁷ *Al Qada' fi 'l Mamlakah al 'Arabiyyah al S'udiyyah*, Ministry of Justice, 1419, p.131

²⁷⁸ Article 53, *The Law of Judiciary*, Translation of Saudi Laws, series-1, Official Translation Division, Bureau of Experts at the Council of Ministers, KSA. 2002, p. 27

3. Amendments in the Law of Judiciary:

Through a Royal order in April 2005, major amendments were brought about in the Law of Judiciary introducing for the first time the specialized courts system in the Kingdom. These specialized courts included criminal, family, labour and commercial courts. The jurisdiction of general courts and specialized court system is to be elaborated on to avoid any confusion in this regard. In October 2007 a fresh Royal decree was issued bringing about more amendments to the Law of Judiciary and Law of *Diwān al Mazālim*. This new set of laws enforced through the Royal decree took the place of those laws which have been implemented for more than 20 years. A huge amount of money was approved for rejuvenating and up gradation of Judicial system to keep pace with the growing needs of modernization and increasing population of the country. The money was to be used for providing infrastructure to new courts and to impart training to the new judges for those courts. A plan was made to implement those amendments within a span of two to three years. The hierarchy of the court system now is as follows:

- A. Supreme Judicial Council (Not a regular Court as in the past)
- B. High Court (the highest court according to the new system)
- C. Courts of Appeal
- D. Courts of first instance which include:
 1. General Courts

2. Criminal Courts
3. Personal Status Courts
4. Commercial Courts
5. Labour Courts.

3.1. Change in the role of Supreme Judicial Council:

In its new role, the Supreme Judicial Council shall not be the highest court in the judicial hierarchy but it will have the role of administrative supervision of the system.

The membership of the Council shall be as follows:

- The President of the Council
- Chief Judge of the High Court
- Four full time members, appointed by the King, equal in rank to the Chief of Appellate Court
- The Deputy Minister of Justice
- The Chief of the Bureau of Investigation and Prosecution
- Three members appointed on Royal Order, equal in qualification to the judge of Appellate Court
- The tenure for the membership of the Council shall be four years that may be extended to another term of four years.

- The council in accordance with the new law shall supervise the Shari'ah Judicial system. It shall manage and regulate all matters related to the employment of the members of Judiciary.
- To protect the independence of judiciary it shall monitor the performance of judges according to the rules and regulations.
- It shall have powers to frame regulations about the duty of judges after the Royal approval.
- It can frame rules to determine the jurisdiction of the courts and to form their divisions.
- It shall appoint the chief judges of the Appellate Courts and that of the courts of the first instance and the deputies thereof.
- The council shall frame rules to determine the authority of the chiefs, their deputies, rules for the recruitment of judges and to regulate the affairs of assistant judges and any other regulations it understands are necessary for the betterment of judiciary.²⁷⁹

3.2. High Court:

This is the highest court in the hierarchy of the judicial system now and it shall take the position which was held by the Supreme Judicial Council in the past with

²⁷⁹ Abdullah F. Ansary, A Brief Overview of Saudi Arabian Legal System, p. 17

respect to pure judicial decisions. In fact it is the same as Supreme Court in other Countries.

There shall be a President of the High Court, appointed on the Order of His Majesty having the qualifications as that of the Chief of Appellate Court. He shall be accompanied by a number of judges appointed through Royal Orders after recommended by the Supreme Judicial Council.

The High Court will function in the form of special divisions; each one having three judges with the exception of criminal one which shall have five members and which will have jurisdiction over major issues like capital punishment. On the recommendation of the Chief Justice High Court, the Supreme Judicial Council shall appoint the chiefs thereof.

The role of the High Court will vacillate between judicial work and legislation. With its routine role as the highest Court, it has been given the jurisdiction of overseeing the enforcement of Shari'ah and the regulations enacted by the Government.

In its routine functions it has the jurisdiction of reviewing the decisions of the Appellate Courts where Capital punishment has been awarded. Decisions about certain other major crimes also come under its purview.

All decisions of the appellate courts regarding issues without any precedent involving questions of procedure or questions of law may also be challenged in the High Court.

The High Court shall have a general body for deciding cases and issues where general principles are precedents binding on lower courts are involved. The decisions of the general body will be final and will be taken through majority vote, with the President having a deciding vote in case of any tie.²⁸⁰

3.2. Appellate Courts:

According to the new law of Judiciary, in each province of the Kingdom one or more Appellate courts are to be established. To fulfill the needs of administration of justice the court of appeal can reverse any decision of a lower court if it goes against the principles of justice. The Court will function in the form of different divisions comprising each of three judges with the exception of criminal division which will have five members and which will have jurisdiction to review decisions in cases of major crimes like those involving capital punishment.

Other divisions include labour, commercial, Civil and division related to Personal Status. Special Division may be set up in any districts of the province where the court of appeal is established Every division of the appellate court will have a president

²⁸⁰ Ibid, p. 18

appointed by the Appellate court Chief and other judges having the status of judge of Appellate court. ²⁸¹

3.4. Courts of First Instance:

Among these courts there will be Criminal, Commercial, Labour, General courts and courts of Personal Status.

The Criminal Courts will have the following divisions: Division for the cases of *Qisās*, Division of *Hudūd* cases, Division for *Ta'zīr* Cases and Division of Juvenile cases. The summery Courts working at present will be transformed into criminal courts.

General Courts will have special divisions like Implementation and approval division and Traffic Cases Division. These courts will have three judges as determined by the Supreme Judicial Council.

Other courts like Commercial, Labour, and that of Personal Status will have one or more than one judges as detrmind by the Supreme Judicial Council. They will handle the matters which were tackled in the past by the special committees in various ministries like that of Commerce and Labour. Family cases will be heard by the Courts

²⁸¹ Ibid p. 18

of Personal Status. In case of need the Supreme Judicial Council is authorized to give jurisdiction to a special court to hear the cases of the Pilgrims too.²⁸²

From the above discussion about the amendment in the system of judiciary it becomes clear, that main things introduced in the new system are; the High Court that is basically equal to Supreme Court in other countries, and the specialized courts i.e. having specific jurisdiction in a particular area like commercial and labour etc. With the introduction of High Court in the system, the role of Supreme Judicial Council has also somewhat changed as most of its powers as the highest court were given to the High Court. As a whole, it is a good omen for the administration of justice to have as many courts as possible and particularly specialized courts are very helpful in dispensation of quick justice. The amendments in the judicial system of the Kingdom were not only needed for the reason of increase in population, rather it is a sign of the advancement the judicial system in the country.

²⁸² Ibid p. 18

4. *Diwān al Mazālim* in Saudi Arabia²⁸³

4.1. Brief Historical Background:

The history of *Diwān al Mazālim* cannot be detached from the history of grievance redress through different period of Islamic History. In this respect chapter two of this work elaborates the point.

²⁸³ The Saudi Judicial system which includes its grievance redress system has been an area of interest for few writers. Among the books written in Arabic language, on the topic are those ones which discuss the judicial structure of the Kingdom. There are a number of them with the name of *Al Tanzīm al Qadā'i fi 'l mamlakah al Saūdiyyah al 'Arabiyyah* (Judicial System of the Kingdom of Saudi Arabia) but the problem is that all are the same as all of them just describe the system in the light of the statutes and no one analyse the system critically. For such an analysis one has to go for the research papers written in different journals. Reference here may be made to, David E. Long, The Board of Grievances in Saudi Arabia, *Middle East Journal*, Vol. 27, No. 1 (Winter, 1973), pp. 71-75 Published by: Middle East Institute available at: <http://www.jstor.org/stable/4325022> Accessed: 06/06/2009, George N. Sfeir, An Islamic Conseil d'Etat: Saudi Arabia's Board of Grievance, *Arab Law Quarterly*, Vol. 4, No. 2 (May, 1989), pp. 128-137, available at: <http://www.jstor.org/stable/3381804>, accessed: 3-3-2010, George N. Sfeir, The Saudi Approach to Law Reform, *The American Journal of Comparative Law*, Vol. 36, No. 4 (Autumn, 1988), pp. 729-759 Published by: American Society of Comparative Law, available at : <http://www.jstor.org/stable/840279> Soliman A. Solaim, Saudi Arabia's Judicial System, *Middle East Journal*, Vol. 25, No. 3 (Summer, 1971), pp. 403-407, available at: <http://www.jstor.org/stable/4324782>, accessed: 4-3-2010, Ayoub M. Al Jarbou: *Judicial Independence: Case Study of Saudi Arabia*, Arab Law Quarterly (Leiden: Koninklijke, Brill NV, 2004)19/1,2, Rashed Aba-Namay, The Recent Constitutional Reforms in Saudi Arabia, *The International and Comparative Law Quarterly*, (Cambridge: Cambridge University Press, 1993)Vol. 42, No. 2, pp. 295- 331, Dr. Abdullah F. Ansary, A Brief Overview of the Saudi Arabian Legal System, available at: <www.nyulawglobal.org/globalex/Saudi_arabia.html> Accessed: 19-10-2009 Nancy B. Turck, Resolution of Disputes in Saudi Arabia, *Arab Law Quarterly*, Vol. 6, No. 1 (1991), pp. 3-32 Published by: BRILL, available at:<http://www.jstor.org/stable/3381890>, accessed: 4-3-2010, Herbert J. Liebesny, Judicial Systems in the Near and Middle East: Evolutionary Development and Islamic Revival, *Middle East Journal*, Vol. 37, No. 2 (Spring, 1983), pp. 202-217, Middle East Institute available at: <http://www.jstor.org/stable/4326562>, accessed: 4-3-2010, Soliman A. Solaim, Saudi Arabia's Judicial System, *Middle East Journal*, Vol. 25, No. 3 (Summer, 1971), pp. 403-407, Middle East Institute, Available at: <http://www.jstor.org/stable/4324782>, accessed: 4-3-2010 Ahmed A. Al-Ghadyan, The Judiciary in Saudi Arabia, *Arab Law Quarterly*, Vol. 13, No. 3 (1998), pp. 235-251 Published by: BRILL, available at: <http://www.jstor.org/stable/3382009>, accessed: 4-3-2010

So far as Saudi Arabia is concerned, the history of *Diwān al Mazālim* begins when in current period of Saudi history King Abdul Aziz bin Saud regained power and ultimately established the Kingdom of Saudi Arabia in the beginning of the twentieth century. Before the current system of *Diwān al Mazālim* was established in 1954, keeping in line with the Islamic traditions, the King used to redress public grievances against the influential and high officials of the state himself by making himself available everyday to any member of the public who would like to interact with him directly in his court.

He had hanged a "complaints box" at the gates of the royal palace for the general public and has announced that any one having any complaint or grievance against any official of the state might drop a written plaint in that regard and the king would make sure to open the box himself and entertain all *such* complaints provided they bore full details of the plaintiff. It was made known to the people that any fabrication or cheating would be dealt with strictly.

The announcement which was made with respect to the Box in the *Ummul Qurā*, newspaper on *Dhil Hajj* 26, 1344 A.H. (May 7, 1936) stated the following:

"His Majesty the King is pleased to make it known to all the people that if anyone having any grievance against anybody whosoever, employee or non-employee, influential or non-influential and he/she conceals that grievance, so

he himself will bear the sin, because a Complaint Box has been hanged on the gates of the government headquarters which is opened only by His Majesty the King, so the one having any grievance should drop his complaint therein. All should rest assured that the complainant will be harmed in no way due to his complaint."²⁸⁴

With the passage of time and particularly after the discovery of oil in the Peninsula the circumstances changed rapidly and the government had to keep pace with the demands of an increased population and developing society where the number of complaints increased manifold as compared to the past. Now it was not possible for the King to handle all the complaints himself. That is why the government sought a solution to the problem. In 1373 A.H. (1953) a separate department at the Cabinet i.e. Ministers' Council was established with the name of Grievances Division.²⁸⁵ It was authorized to probe the complaints and prepare a report expressing its opinion or

²⁸⁴ Hasan 'Abdallah Āl Shaykh, *Al Tanzīm al Qada'i fi 'l Mamlakah al 'Arabiyyah al Sūdiyyah*, op.cit., p. 121.

²⁸⁵ A contemporary writer comments: "The Grievance Board can be considered the final refinement of the original idea of the "box of complaints" referred to above. Historically, it goes back to the concept of *ma.zalim* in Islamic law. It is the most important of the supplementary organs not only because of the wide area of its jurisdiction, which includes, inter alia, administrative justice, but equally because it is progressively asserting itself as a permanent institution. This central position in the system of justice in Saudi Arabia has been the product of the extreme difficulty involved in digesting and incorporating the ever-growing administrative and other regulations into the shari'ah and, consequently, into the Shari'ah court system." Soliman A. Solaim, *Saudi Arabia's Judicial System*, Middle East Journal, Vol. 25, No. 3 (Summer, 1971), p. 406 available at < <http://www.jstor.org/stable/4324782> >

proposing the way of redressing the complaint and that report was to be submitted to the King.²⁸⁶

4.2. Establishment of *Diwān al Mazālim*:

Hardly after a year of the establishment of the Grievances Division was a need felt for the establishment of a full-fledged independent institution for this purpose. There came the Royal decree in 1955 establishing a separate government department with the name of *Diwān al Mazālim*. It was authorized to probe complaints of any misuse of authority by any official of the government and to send its recommendations about the redress of that issue to the concerned government Ministry. According to the Law the concerned minister was supposed to render a report within fourteen days about the action he took in the subject matter. In the situation of disagreement with the recommendation of the *Diwān* or non-compliance on part of the concerned ministry, the matter was to be referred to the King for final decision.

In spite of separation and independence the *Diwān al Mazālim* still played an advisory role and did not have any original judicial jurisdiction.

In 1982 a new Law came regarding the status of *Diwān al Mazālim*. It was given the status of "an independent administrative judicial board directly affiliated with His

²⁸⁶ *Al Qadā fi 'l Mamlakah al 'Arabiyyah al Sa'ūdiyyah*, Ministry of Justice, 1419A.H. (1998).P. 94

Majesty the King .²⁸⁷ This was the beginning when the *Diwān al Mazālim* was transformed into an independent judicial structure having its own original jurisdiction over certain matters. Though *Diwān al Mazālim* is an independent judicial organization distinguished from the common Shraiah courts in the Kingdom, but fundamentally it applies the rules of Shari'ah simultaneously with the law statutes, terms and conditions of any signed agreement and custom of the society.²⁸⁸

²⁸⁷ Dr. Sa'ūd bin Sa'ad Āl Darayb, *Al Tanzīm al Qada'i fi 'l Mamlakah al 'Arabīyyah al S'ūdiyyah* op.cit. p. 495

²⁸⁸ Here the comments of George N.Sfeir about the status of *Diwān al Mazālim* are noteworthy. He says: "Article 1 of the new law describes the Board of Grievances as an "independent, administrative, judicial organ answering directly to H.M. the King'. There are several elements in this description which are only comprehensible in the context of Saudi Arabia's particular judicial system and the Board is historic origins. With its temporal source of power and purview, the use of the term "administrative" in describing the Board is clearly intended to distinguish it from the mainstream Islamic judicial institution, the Shari'ah court, and to identify it with the non-Shari'ah tribunals answering to the executive. The decades of the 1960s and 1970s saw the proliferation of these administrative tribunals. The failed attempt in the early thirties to constitute the commercial court envisaged in the Commercial Court Regulations of 1931 and the subsequent pressure more recently of commercial causes of action generated by the economic boom, made it inevitable for these tribunals to be established in order to deal with a growing number and variety of disputes which the Shari'ah courts were either ill-disposed or ill-prepared to deal with. Indeed, the evolving duality in the judicial system was not unforeseen by the Saudi legislator. The Judicature Act which reorganized the Sharia courts, awarded these courts general jurisdiction in all matters" except those excluded by regulation". However, while they alone are designated courts (*mahkama*) and supervised by the Ministry of Justice, the administrative tribunals are designated committees or commissions and are attached to the respective ministry in the government. It is with this group of administrative tribunals that the Board of Grievance is identified, albeit in a higher category. The Board's designation as also judicial is a recognition of its changed role in the administration of justice, something which the Saudi legislator could not have done lightly in view of the singular place of Shari'ah courts in this regard. That is why the Explanatory Memorandum of the new law saw fit to point out perhaps more to justify, that the functions of the Board had become unquestionably judicial in character. The direct linkage between the Board of Grievance and the King, on the other hand, serves both a doctrinal and a pragmatic purpose. In stating that it is only "natural" to associate the Board with the person of the King, whom it described as *waliy al-amr* (guardian of the affairs of state") the Explanatory Memorandum invokes thereby the particular position traditionally enjoyed by the ruler in Islamic society. Without going into the complex subject of the constituent powers of the ruler in an Islamic state, one can safely say that he is the person entrusted with carrying out the mandate of the Shari'ah, even though his authority to do so is often derived from the fact that he simply happens to wield the power to do so. It follows that he alone could validate the acts of state officials or undertakes the corrective functions of the grievance procedure undeterred by the ordinary judicial process. At the

4.3. Organizational Structure of *Diwān al Mazālim* :

Article 1 of the Law of *Diwān al Mazālim* says: " *Diwān al Mazālim* is an independent administrative judicial organization directly responsible to His Majesty the King. Its headquarters shall be in the city of Riyadh and its President is authorized to establish its branches according to the needs." This means that after this law the decisions of *Diwān al Mazālim* are now final and there is no need for any further action to confirm it.

Article 2 states that the *Diwān al Mazālim* will have a President equal in status to a Minister and a Vice President or more than one vice president and a number of Deputies and members for assistance having specialized qualification in Shari'ah . There shall be sufficient number of employees and administrators attached to this office.²⁸⁹

The organizational structure of *Diwān al Mazālim* is as follows:

same time the direct association of the Board with the King is intended to underscore the autonomy of the Board vis-à-vis other governmental institutions. Though technically an organ of the executive, the Board, unlike the other administrative tribunals is not privy to any ministry of the government. Its president is appointed by, and serves at the pleasure of, the King to whom alone he is answerable. Furthermore the Board as reconstituted by the new law occupies a position in the civil, non-Shari'ah , judiciary comparable to the Higher Judicial Council, the highest organ in the Shari'ah court system. (George N. Sfeir, An Islamic Council d'Etat: Saudi Arabia's Board of Grievances, *Arab Law Quarterly*, Vol. 4, No. 2 (May, 1989), pp. 130-131)

²⁸⁹ Dr. Sa'ūd bin Sa'ad Āl Darayb, *Al Tanzīm al Qada'i fi 'l mamlakah al 'Arabiyyah al Sa'ūdiyyah*, op.cit. p. 495

4.3.1. The President:

- He is appointed by His Majesty the King and his services can be terminated by the same authority. He is responsible directly to the King.
- The President shall have full authority and privileges of a Minister as has been stated in concerned rules and regulations.
- He is the source of all recommendations sent by the *Diwān* to other ministries and departments of the government.
- He is supposed to supervise all the committees and different departments of the *Diwān*, its branches and its work as a whole.
- He is required to furnish an annual report about the performance of the institution to His Majesty the King.
- He is also required to attach to the annual report, cases and decisions of the *Diwān* which it took about those cases.²⁹⁰

It may be noted here that no qualifications are determined by the law for the President, except that he shall be appointed by His Majesty and shall be equal in rank to a Minister. Ideally there must be specific qualifications for the President, as are specified for his deputies. In practice there may be no problem, because the one appointed for the job by the King may have the requisite abilities for the purpose but a good legal system must have everything transparent.

²⁹⁰Hasan 'Abdallah Āl Shaykh, *Al Tanzīm al Qada'i* fi 'l Mamlakah al 'Arabiyyah al Sūdiyyah, op.cit. p. 127

The basic concept for the qualifications of the head of this institution may be derived from the Islamic legal texts. Fundamental among such texts is that written by Māwardī and Abū Ya'la. Māwardī states about the one who should head *Wilāyat al Mazālim*:

“Therefore, whoever is supposed to do this job should be a man of importance who is firm, highly respected, of high moral standards, with few desires and very principled in the matter of right and wrong.. In this office a man must have the fierceness and the firmness of judges..”²⁹¹

Qaḍī Abū Ya'la (a Ḥanbalī jurist) stipulates almost the same qualifications for the incharge of *Wilāyat al Mazālim*, he says:

“The qaḍī who decides the issues in complaints must be a highly respected, influential man, a man of prestige, of proven impartiality, not greedy and very pious. He must be strong as an eagle but accurate as a judge should be...”²⁹²

4.3.2. Vice Presidents:

- The vice presidents are appointed and terminated on the Royal Order after the recommendation of the President of *Dirwān al Mazālim*.

²⁹¹ Māwardī, *Al Ahkām al Sultāniyyah*, trans. Dr. Asadullah Yate, (London: Ta Ha Publications, 1996), p.58

²⁹² Qaḍī Abū Ya'la Muḥammad al-Ḥusayn al-Ḥanbalī, *al-Ahkām al-Sultāniyyah*, (Cairo: 1937), p. 60

- The vice president acts as the President in his absence and assists him in the affairs which are entrusted to him by the President.
- The deputies and members in *Diwān al Mazālim* are basically given the status of judges of the Sharī'ah courts. Their salaries, perks and immunities are the same as that of other judges.²⁹³

4.3.3. The Director General:

He is responsible for over all management of the department.

5. Judicial Set up:

- The judicial set up is the administrative courts which exercise the judicial jurisdiction of the *Diwān*.
- A number of advisors and judicial members having specialized qualifications in the field of Sharī'ah and Statute law are inducted in this set up and in many circles related to it be it commercial, administrative or summary.
- The number of these committees and the type and area of their jurisdiction is determined by the President.²⁹⁴

5.1. Administrative Judicial Council

According to the Royal Order of 1428 (2007) in this regard there shall be an Administrative Judicial Council in the *Diwān*.

²⁹³ Ḥasan 'Abdallah Āl Shaykh, *Al Tanzīm al Qada'i fi 'l Mamlakah al 'Arabiyyah al S'ūdiyyah*, op.cit. p.128

²⁹⁴ Ibid. p. 129, Dr. Sa'ūd bin Sa'ad Āl Darayb, *Al Tanzīm al Qada'i fi 'l mamlakah al 'Arabiyyah al Sa'ūdiyyah*, op.cit., p. 496

- This council" shall be formed within the Board of Grievances and it shall consist of the following:
 - President of the Board of Grievances, chairman, -
 - Chief of the Supreme Administrative Court, member,
 - The most senior vice president, member,
 - Four judges equal in rank to a judge of court of appeal nominated by a royal order, members.
- The Administrative Judicial Council, with respect to the Board of Grievances, shall have the same jurisdiction as that of the Supreme Judicial Council set forth in the Law of the Judiciary.
- The chairman of the Administrative Judicial Council, with respect to the Board of Grievances, shall have the authorities entrusted to the chairman of the Supreme Judicial Council.
- The Administrative Judicial Council shall hold its meetings presided by the chairman of the council at least once every two months or whenever necessary. The quorum for the validity of the session of the council shall be at least five members.
- The council's decisions shall be taken by majority vote of its members.
- In case the chairman is absent, he shall be replaced by the chief of the Supreme Administrative Court.

- The council shall have a general secretariat and it shall select a general secretary from among judges.²⁹⁵

6. Courts Under the *Diwān al Mazālim*:

The courts of the *Diwān al Mazālim* shall consist of the following:

1. Supreme Administrative Court,
2. Administrative Courts of Appeal,
3. Administrative Courts.

- Each court shall be composed of a chief and a number of judges not lower than the rank of judge of the court of appeal.
- Administrative courts shall be composed of a chief and a sufficient number of judges.
- The Administrative Judicial Council may establish other specialized courts upon the approval of the king
- The courts shall carry out their duties through specialized divisions formed by the Administrative Judicial Council on the recommendation of the respective chiefs of the courts.
- Divisions of each of the three courts shall have at least three members except for the administrative courts which may have single member division as well.

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²⁹⁵ *Law of Diwān al Mazālim* (Royal Decree No. M/78 dated 19.9.1428 AH (September 2007) Article 4-7.

6.1. Supreme Administrative Court:

- It shall consist of a chief and a sufficient number of judges not less than the rank of chief of the court of appeal.
- The chief of the Supreme Administrative Court shall be nominated by a royal order and shall hold the rank of a minister.
- His services shall only be terminated by a royal order
- He shall also meet the conditions required to occupy the rank of a chief of the court of appeal, and in his absence, the most senior judge of the court shall take his place.
- The members of the Supreme Administrative Court shall be nominated by a royal order upon the recommendations from the Administrative Judicial Council.
- The Supreme Administrative Court shall have a general panel under the chairmanship of the chief of the court and the membership of all its judges.
- The most senior judge shall act on behalf of the chairman in case of his absence.
- The panel shall hold its meetings under the chairmanship of the chairman or his deputy.

²⁹⁶ *Law of Dīwān al Mazālim* (Royal Decree No. M/78 dated 19.9.1428 AH (September 2007) Article 8-9

- The quorum for the panel shall be at least two thirds of its members including the chairman or his deputy.
- Its decisions shall be taken by the majority vote of its members.
- If any division of the Supreme Administrative Court, on any case under consideration, decides to supersede any precedent it or any other division has adopted on any previous cases, the issue shall be presented to the Chief of the Supreme Administrative Court to refer it to the general panel of the Supreme Administrative Court to decide on.²⁹⁷

6.1.1. Jurisdiction:

- The Supreme Administrative Court shall have the authority to look into the objections to judgments passed by the Administrative Courts of Appeal if the subject of objection to the judgment relates to any of the following:
 - (a) Violation of the provisions of the Islamic *Shari'ah* and the regulations that do not contradict the provisions of the Islamic *Shari'ah* or errors in the application or interpretation of these provisions and regulations including the violation of judicial precedents adopted by the Supreme Judicial Court,
 - (b) Judgments issued by a court having no jurisdiction to consider the case in question,

²⁹⁷ Ibid. Article 10

- (c) Judgments issued by courts that have not been properly formed in accordance with the provisions of this law,
- d. Erroneous details or descriptions of the event,
- e. Conflict of jurisdiction between the courts of the *Diwān*.²⁹⁸

6.2. Administrative Courts of Appeal:

These Courts shall review judgments subject to appeal issued by administrative courts.

- They shall issue their judgments after hearing litigants in accordance with the procedures set forth in the Law.

6.3. Administrative Courts:

These courts shall have the jurisdiction to look into the following:

- (a.) Cases related to the rights related to civil and military service laws and rules of retirement for government employees and those hired through contracts by the government, and independent public entities and their heirs and claimants.
- (b.) Cases of objection filed by the effected parties against final administrative decisions where the bases of such objection is lack of jurisdiction, a deficiency in the form, a violation or erroneous application or

²⁹⁸ Ibid. Article 11.

interpretation of laws and regulations, or abuse of authority including disciplinary decisions and other decisions taken by semi-judicial tribunals and disciplinary boards and decisions taken by public welfare organizations and other similar entities related to their activities, that is considered to be an administrative decision and the rejection or refusal of an administrative authority to take a decision that it should have taken in accordance with the laws and regulations.

- (c.) Cases of compensation filed by parties concerned against the government and independent public corporate entities resulting from their actions.
 - (d.) Cases filed by parties concerned regarding contract-related disputes where the government or an independent public corporate entity is a party thereto.
 - (e.) Disciplinary cases filed by the concerned agency.
 - (f.) Other administrative disputes.
 - (g.) Requests for the enforcement of foreign judgments and foreign arbitrators' judgments.
- The courts of the *Diwān* may not hear requests related to sovereign actions or objections filed by individuals against judgments or decisions issued by courts or legal panels which are not governed by this law and whose judgments fall

within their jurisdiction or related to decisions issued by the Supreme Judicial Council and the Administrative Judicial Council.

6. 4. Jurisdiction Conflict Committee:

If a suit is brought before a court of the *Diwān* and the same suit is also brought before another body having jurisdiction to decide on certain disputes, and if both courts do not relinquish jurisdiction over the suit, or both decide to abstain from hearing it, a petition shall be submitted to the Jurisdictional Conflict Committee which shall be formed of three members:

- A. One member from the Supreme Administrative Court to be selected by the chief of the court,
- B. One member from another body to be selected by the chief of another body
- C. One member from the Administrative Judicial Council selected by the chairman of the council who shall act as the chairman of the said committee.

This Committee shall also have jurisdiction to decide the dispute which arises in respect of the enforcement of two conflicting final judgments, one of which is rendered by a court of the *Diwān* and the other by the other body. These suits shall be decided on in accordance with the provisions and procedures set forth in the Law of the Judiciary.²⁹⁹

²⁹⁹ Ibid. Article 12-15

The rules of service of the judicial members of the *Diwān* shall be the same as enunciated for the members of Shari'ah Judiciary in the Law of Judiciary. So in this regard the Law of *Diwān al Mazālim* states the following:

“The ranks of the Board judges are the same ranks of judges set forth in the Law of the Judiciary and shall be treated with respect to remuneration, benefits, bonuses and allowances in line with their equals under the Law of the Judiciary. Appointment, promotion, transfer, assignment, deputation, training, vacations, inspection, disciplining, dismissal and termination of the Board judges shall be in accordance with the procedures set forth in the Law of the Judiciary.”³⁰⁰

6. Advisory Committee:

It is a consultative forum for the *Diwān* whenever there is a need for consultation in legal and procedural matters.³⁰¹

7. Investigative Committee:

This committee is assigned investigation in issues which come forth before the *Diwān* and sometimes in the relevant rules in the under consideration issues.

8. Research Committee:

As is clear from its name, it is tasked with research.

³⁰⁰ Ibid. Article 16-17

³⁰¹ *Al Qadā fi 'l Mamlakah al 'Arabiyyah al Sa'ūdiyyah*, Ministry of Justice, p.152.

9. Office for general claims:

A number of skilled employees and administrative specialists are attached to this office. They handle the secretarial, financial and administrative affairs.³⁰²

10. Branches of the *Dīwān*:

- The headquarters of *Dīwān al Mazālim* is in Riyadh.
- The President can decide the establishment of its branches according to the need.
- The President shall select heads of the branches from among the members of the *Dīwān* keeping in view grades of officials in the concerned branch.
- The President shall determine the authority and jurisdiction of the heads of the branches.³⁰³

On the basis of this authority and keeping in view the public interest to make the procedure of claims easier, several branches of the *Dīwān* have been established in other cities of like that in Jeddah, Damaam and Abha.

These branches have been provided with full administrative set up and they are actively connected with the headquarters.³⁰⁴

After having understood the Saudi *Dīwān al Mazālim* it appears very clearly that fundamentally this is a system administrative judiciary, although

³⁰² Ibid. p. 153

³⁰³ Ibid. p.129

³⁰⁴ *Al Qadā fi 'l Mamlakah al 'Arabiyyah al S'ūdiyyah*, Ministry of Justice, p. 153.

the focus is on maladministration. The difference between this system and other systems of the Ombudsman like that in Pakistan and the Britain is that in case of both Britain and Pakistan service matters are out of the jurisdiction of the Ombudsman's Office. The reason is very clear namely; those cases are either heard by the normal judiciary or by the services tribunals established for this purpose particularly. So this is a major difference between the *Diwān al Mazālim* and the institution of the Ombudsman.

One thing that is different is that corruption cases are also heard by the *Diwān al Mazālim* which is not the case in Pakistan, where it is the domain of normal judiciary or at times the domain of specialized courts like those working under National Accountability Bureau.

Another main difference is that the Ombudsman's Office does not have a hierarchy of courts beginning from lower and going to the supreme court as is the case of *Diwān al Mazālim*. The Ombudsman Office may have regional offices or branches or, for that matter, the provincial Ombudsman's offices but it does not have a court system. Reason being that it is distinguished from the normal judiciary. But in case of *Diwān al Mazālim* it is very much part of judiciary but its specialization is matters related to administrative decisions of the governmental departments. So the big distinction is that in the case of Ombudsman institution the prime goal is to facilitate and help out the

aggrieved common citizen against any maladministration which take place because of negligence, delay, inaction, miscommunication or abuse of power by an administrator in a governmental department while in case of *Diwān al Mazālim* the main purpose is to target maladministration but its canvas of jurisdiction is vast which include the employees and their service matters. This has, probably, taken the general public's grievances a bit in the back waters.

As long as a complaint comes to one of the courts of *Diwān al Mazālim*, it is now sub judice and has to be decided according to the rules. There are little chances of informal resolution of the case. Whereas in the case of Ombudsman, in Pakistan for example, many cases and disputes are resolved on informal basis at an early stage before entering into the intricacies of legal complexities.

From Islamic point of view the spirit of *Wilāyat al Mazālim* does exist there as the people at the helm of affairs in the government departments are in fact influential ones and they need to be called to account for their deeds when, particularly, an individual or group is aggrieved by those deeds.

11. Performance of *Diwān al Mazālim*:

To discuss the performance of *Diwān al Mazālim* it is necessary to have its annual reports before the eyes which give you an opportunity to evaluate the performance in the light of facts and figures about the complaints registered and those

solved on yearly basis. Unfortunately no such reports were found during research on the topic, neither in libraries nor on the internet. Even the Saudi *Diwān al Mazālim* is yet to launch its official website. Other relevant efforts also failed in this regard.³⁰⁵ So resort has to be made to some news items found on the internet about the decisions of *Diwān al Mazālim*. Those reports show that there is an active role played by *Diwān al Mazālim* to curb maladministration and corruption in the government departments.

In one such case *Diwān al Mazālim* issued its verdict requiring the officials in the Health Ministry at Jawf region to pay dues to a nurse who claimed the payment against the Ministry a year ago. According to his claim he was transferred to a hospital in the region but was not paid the 'transfer allowance' in spite of him demanding it from the Ministry for more than two months. The irresponsible attitude of the Ministry officials made him go to a court of *Diwān al Mazālim* that admitted his case for hearing. During the hearing the President of *Diwān al Mazālim* in the Kingdom transferred his case to another three member court where the hearing continued for a whole year. The representative of the Ministry defended the decision of his department but could not produce any proof to substantiate his claim. The hearing was prolonged due to his requests that he should be given more time for furnishing a

³⁰⁵ The compiler of this dissertation visited Saudi Cultural Office in Islamabad for collection of relevant material but was not encouraged by the staff. Even he was not permitted to have a look on the library there, though an insider told him that the library is not an orderly one and there is no ambition on the part of the officials there to update it or bring new books there. The compiler also tried to procure some relevant material, particularly the performance reports, if any, from the Kingdom by writing to King Faisal Centre for Research, a Saudi and a non-Saudi friend there but, unfortunately all in vain.

proof. Finally the Court decided the case in favour of the nurse, asking the ministry to pay his dues. This decision paved way for two hundred more nurses of the department to claim the same amount as they also qualified for the same.³⁰⁶

This case is an indicator of the multiplying effect of the grievance redress system in a state. In this case one person complained and made a little effort and the decision in his favour benefitted a large group of people who were suffering because of the maladministration of the department. This decision did not only benefit the group of nurses having the same grounds for claiming the amount, rather it must have been persuading for the health department in the Kingdom to review its administrative rules, the attitude of its officials and to improve them to save its face in the future.

According to another news item published in daily 'The Riyadh' on July 07, 2009, *Dīwān al Mazālim* gave its final verdict in the case, which continued for more than four years between a government department and a trading company. According to the decision the department has to pay SR37 million to the company as rent of a residential complex having 280 residential units. The government department has vacated the said residential complex without giving due notice to the owner i.e. the trading company. So the company claimed the amount of rent for the year in which the complex was vacated. This case was decided after four years of hearings.³⁰⁷

³⁰⁶ <http://www.alsaudeh.com/news.php?action=show&id=9207>, accessed: 6-3-2010

³⁰⁷ <http://www.qatarshares.com/vb/showthread.php?t=283090> accessed: 6-3-2010

In another decision the *Diwān al Mazālim* rejected the claim of a Saudi citizen against a communications company in the Kingdom on the ground that it was not a governmental department nor was it having an independent legal personaliy. The citizen had demanded compensation for having suffered psychologically after he was called by the security agencies for a complaint against a cell phone registered in his name. The citizen wanted the company to be called to account because there were more than 10,000 connections registered in his name without his knowledge, obviously because of the loose policy of registration on the part of the company.³⁰⁸

In 2007, *Diwān al Mazālim* for the first time heard the case filed by a Saudi lady against the President of *Al Amr bi 'l Ma'rūf wa al Nahy 'an al Munkar* demanding for the restoration of her right as a person after she suffered harassment at the hands of a member of the department and after a court in Riyadh rejected her previous plaint on the ground that those responsible for the accountability could not be held accountable. The lawyer of the lady Abdurrahman al Lāhim Advocate explained that a committee was formed consisting the administration of Riyadh Region and a number of other governmental departments including the Office of the President of *Al Amr bi 'l Ma'rūf wa al Nahy 'an 'l Munkar* to investigate the problem and as a result the said official of the department was convicted and necessary steps were taken against him. Mr. Lāhim added that the lady filed the case in the High Court of Riyadh and the case

³⁰⁸ <http://www.kabar.ws/news-action-show-id-1246.html>. accessed: 6-3-2010

continued for quite a long time, amid the efforts on the parts of certain circles of the society to persuade the lady to give up her claim. But the lady was shocked when the said court gave its verdict to the effect that the men of accountability could not be held accountable. He added that the basis for the verdict was a legal opinion given before forty years that those responsible for the accountability were not held accountable. Anyway the lady did not accept this verdict and insisted on her demand for the restoration of her personal dignity. The lawyer added that the department of *Al Amr bi 'l Ma'rūf wa al Nahy 'an 'l Munkar* is like any other government department and the officials working in it take salaries and like any other officials of the government may be right or wrong in their deeds.³⁰⁹

This case shows the invisible impact of the work of *Diwān al Mazālim*. The lady whose claim was rejected in the normal judiciary did not stop and was encouraged by the *Diwān al Mazālim* and its work to resort to its court. This is the impact of grievance redress system which can not be measured through any means but from such claims of individuals it becomes clear that there is an awareness on social level about the personal dignity and that the general public have a trust in the institution of the grievance redress.

In September 2007 *Diwān al Mazālim* issued its final decision against the Ministry of Trade due to its negligence and lack of attention towards the price hike of

³⁰⁹ <http://www.amanjordan.org/a-news/wmview.php?ArtID=10982> accessed: 6-3-2010

food items and other commodities and a hike in the rents of properties accompanied by fraud in business matters. The case had been filed by advocate Amin Tahir Al Badīwī. The plaintiff had accused the Ministry of Trade for the following:

- a. Negligence of the ministry officials regarding the supervision of markets and trade centres and that of the prices which caused an inflation of more than 50 %.
- b. Lack of warnings to the trade centres with respect to the undue price hike and lack of punishment of those who violated the rules
- c. Lack of surveillance of markets for keeping a check on commercial cheating and lack of punishment for those who committed such fraud a situation which encouraged cheating and commercial fraud.

The complainant demanded the following:

- a. Removal of the Minister from his post and holding him accountable.
- b. Accountability of the concerned officials of the ministry who neglected their duty
- c. Punishment of all the trade centres indulged in illegal price hike and imposing fines upon them and to use that money for the welfare of the public who suffered because of the inflation.
- d. Controlling the prices of consumer products down to the level before the price hike i.e. at 50%.

- e. Activating Consumer protection organization and its patronage by the Minsitry of Trade.

The court of *Diwān al Mazālim* held the following:

- a. Referring the Minister and his assistants to the Consultative Assembly for his accountability and for investigation of the accusations leveled against them,
- b. Punishment of the concerned officials of the Ministry for negligence, something which caused the undue inflation
- c. Asking the trade ministry to punish all the trade centres who violated rules with respect to price hike,
- d. Asking the ministry to bring down the prices of the consumer products to the previous level
- e. Punishing the property offices that increased the rents of the properties and applying law to them.³¹⁰

The plaintiff was satisfied with the verdict while the representative of the ministry said that the ministry would file an appeal against the decision.

This was in fact a revolutionary decision of *Diwān al Mazālim* in a country about which there is an image that the high officials might not be called to account. It could not be found out what was the result of appeal filed by the ministry and

³¹⁰<http://www.saudiinfocus.com/ar/forum/showthread.php?t=42012> accessed: 9-3-2010

whether the court of appeal upheld the decision of the lower court or accepted the appeal but most probably it should have not accepted the appeal at least completely. Such decisions gives real courage to the citizens to raise their voice against the maladministration of the government departments because they know that there is a forum which would pay attention to their grievances and would bring forward some solution.

There may be so many other examples of the decisions of *Dīwān al Mazālim* in the Kingdom but the above mentioned summaries of few cases are enough to gauge the performance of the institution. It is quite clear from the decisions of *Dīwān al Mazālim* that there is no hurdle in the way of a citizen to complaint against any government department or official, whosoever he may be, and his grievance is redressed. The latest in this list is the admission of case against the Saudi Interior Ministry for illegally keeping in prison a human rights activist Dr. Abdurrahman bin Abdullah al Shamīrī, something which never happened before in Saudi history.³¹¹ On the other hand people have been disappearing at the hands of Saudi security agencies but no one could dare question any such move of the government. With the admission of the case against Interior ministry now that taboo has been broken too and it is because of *Dīwān al Mazālim*. Such an atmosphere has surely a positive impact on the advancement of the society as a whole because every individual in such a society

³¹¹ <http://www.daawa.net/display/arabic/news/NewsDetails.aspx?ID=4658&tid=10> accessed: 9-3-2010

works for the betterment of his personal conditions as well as for the collective welfare of the society with a sense of satisfaction that if someone dares to violate his right, it will be restored by the institution like that of *Diwān al Mazālim*. A society where there is no rule of law and justice, there can be no real progress.

12. Conclusion:

To conclude this chapter the main points are summed up in the following:

- The founder of the modern Saudi Arabia, King Abdul Aziz was mindful of the fact that the judicial system should be one which can keep pace with the requirements of the present society.
- In 1927 first formal Judicial System was established by him in the region of Hijaz only, replacing there the traditional informal judicial forums.
- In 1957 a judicial system based on Shari'ah was established for the whole of the Kingdom. This was a dual system having two types of courts; one that was called Shari'ah Judiciary and the other *Diwān al Mazālim*.
- In 2005 and in 2007 major amendments were introduced in the Law of Judiciary.
- In the new system a High Court was established which replaced the Supreme Judicial Council as the Highest Court, though the administrative authority remained within the purview of Supreme Judicial Council.

- The essence of grievance redress existed in the Kingdom from the very start when King Abdul Aziz hanged a “complaint box” on the gates of Royal palace inviting the public to drop any complaint against the maladministration or abuse of power by any government official. The king personally supervised the redress of those grievances.
- In 1953 *Diwān al Mazālim* was established as an attached department in the Council of Ministers but hardly after a year was it made an independent institution.
- In 2007, with the amendment in the Law of Judiciary, the Law of *Diwān al Mazālim* was also amended. With this amendment *Diwān al Mazālim* became a full fledged system of administrative judiciary, having jurisdiction to hear cases of public complaints against government officials as well.
- In the new system *Diwān al Mazālim* now consists of Supreme Administrative Court, Administrative Court of Appeal, and Administrative Courts.
- From Sharī'ah perspective *Diwān al Mazālim* is doing the same job as that of *Wilāyat al Mazālim* in the Islamic history i.e. the accountability of public servants for maladministration or abuse of power.
- The performance of *Diwān al Mazālim* is no doubt satisfactory and it appears from the decisions of different cases that it is improving with the passage of

time and with the increase in awareness of public about their rights and the work of *Diwān al Mazālim*.

Chapter Four

Parliamentary

Ombudsman

of

The United Kingdom

Chapter Four:

Parliamentary Ombudsman of the United Kingdom

1. Introduction:

Among the European countries Sweden pioneered the institution of the ombudsman but soon the United Kingdom followed suit and established the institution. As the parliament is very much powerful in Britain, so the institution was made subordinate to the Parliament. Its performance is supervised by a Select Committee of the parliament on regular basis and improvements are made in its working procedures. Since its inception its work has been expanded a great deal which is the proof of its usefulness. The current chapter describes the circumstances which led to its establishment, elaborates its working procedures and evaluates its performance over the years.

2. Background of British Ombudsman

Redress of the grievances is one of the basic forms of administration of justice. No civilized society can survive without it. There is a saying frequently quoted which says: A state may survive with infidelity but it cannot survive with injustice. That is why the United Kingdom which is a leader of civilization in Europe cannot exist without such a system, thus there does exist a system which fulfills the purpose of

grievance redress; that is the institution of Parliamentary Ombudsman³¹² However, before the creation of the Parliamentary Ombudsman the main safeguards for the citizen against oppressive or faulty government were the following:

- a. Judicial review of administrative action
- b. Right of appeal to a tribunal against an administrative decision
- c. The opportunity of taking part in a public inquiry held before a ministry's decision was made;
- d. Redress by parliamentary means with the aid of a Member of Parliament
- e. A request for administrative review of a decision already taken.

³¹² The volume of this work does not allow quoting all the detailed accounts which have been written about the background reasons for the establishment of Parliamentary Ombudsman in the Britain. Reference for example may be made only to : F. Stacey, *Ombudsman Compared* (London ,Oxford University Press, 1978.), M. Seneviratne, *Ombudsman in the Public Sector*, (Open Univesity Press, 1994) Senevirantne, *Public Service and Administrative Justice*, (Oxford: Oxford University Press, 2002) Gregory and Giddings, *The Ombudsman and Parliament*, (London: Politics Publishing, , 2002) Hillarie Barnett, *Constitutional and Administrative Law*, (London: Routledge-Cavendish, 2009) Marshall Geoffrey, The British Parliamentary Commissioner for Administration, *Annals of the American Academy of Political and Social Science*, Vol. 377, The Ombudsman or Citizen's Defender: A Modern Institution (May, 1968), pp. 87-96 Published by: Sage Publications, Inc. in association with the American Academy of Political and Social Science, available at <<http://www.jstor.org/stable/1038144>> accessed: 19/10/2009 , Gavin Drewry and Carol Harlow, A 'Cutting Edge'? The Parliamentary Commissioner and MPs ,*The Modern Law Review*, Vol. 53, No. 6 (Nov., 1990), pp. 745-769 , Blackwell Publishing for Modern Law Review available at: <<http://www.jstor.org/stable/1096389>> , J. F. Garner, The British Ombudsman , *The University of Toronto Law Journal*, Vol. 18, No. 2 (Spring, 1968), pp. 158-164 Published by: University of Toronto Press, Available at:<http://www.jstor.org/stable/825260> and David Williams, Parliamentary Commissioner Act 1967, *The Modern Law Review*, Vol. 30, No. 5 (Sep., 1967), pp. 547-551 cited at 1 above.

Each of the above procedures might be effective in some situations but each has its limitations. For example many discretionary decisions affecting the individual are made without the possibility of recourse to a tribunal or inquiry. Judicial review is expensive and often uncertain and is not ideal procedure for investigating the process of official decision making. Parliamentary procedures are not well suited to impartial finding of facts or to the resolution of disputes according to sound principles of administration.³¹³

Another angle of looking at the institution of the Ombudsman is that it reflects the increased activity of the contemporary State. As the state became more engaged in everyday social activity, it increasingly impinged on, and on occasions conflicted with the individual citizen. Courts and tribunals were available to deal with substantive breaches of particular rules, but there remained some disquiet as the possibility of the adverse effect of the implementation of general state policy on individuals. If tribunals may be categorized as an alternative dispute resolution (ADR) procedure to the ordinary court system in relation to decisions taken in breach of rules, the institution of Ombudsman represents a procedure for the redress of complaints about the way in which those decisions have been taken. It has to be admitted, however that the two categories overlap to a considerable degree. The

³¹³ A.W.Bradley, and K.D.Ewing, , *Constitutional and Administrative Law* (Edinburgh: Addison Wesley Longman Ltd England. 1998) p. 756.

Ombudsman procedure, however, is not just an alternative to the court and tribunal system; it is based upon a distinctly different approach to dealing with disputes. Indeed in the Parliamentary Commissioner Act 1967, which established the position of the first Ombudsman, provides that complainants with rights to pursue their complaints in either of those forums will be precluded from making use of the Ombudsman procedure.³¹⁴

The office of Parliamentary Commissioner for Administration has been created as part of a deliberate effort "to humanize the administration and to improve relations between Westminster and Whitehall, on the one hand, and the individual citizen." These words were used by Mr. Harold Wilson in a speech at Stow market in July 1964. Sir Edmund Compton, the first holder of the office, formally took up his duties on April 1 of this year, though he had, in fact, acted as Parliamentary Commissioner designate since the previous year. The statute under which he works—the Parliamentary Commissioner Act 1967 is the United Kingdom's contribution to the Ombudsman Experiment, an experiment which has aroused and continues to arouse world-wide interest.³¹⁵

The Britain took the idea of the Ombudsman from Sweden and the main

³¹⁴ Gary Slapper and David Kelly, *The English Legal System*, (London: Cavendish Publishing Ltd. 2004) P.367-368

³¹⁵ David Williams, Parliamentary Commissioner Act 1967, *The Modern Law Review*, Vol. 30, No. 5 (Sep., 1967), pp. 547-55, Blackwell Publishing for Modern Law Review, available at: <<http://www.jstor.org/stable/1093434>> accessed: 19/10/2009

purpose was to check the maladministration of the government departments. The question remains to be answered that what is in fact "maladministration"?

Even in the Parliamentary Commissioner Act 1967 this term was not defined. Richard Crossman illustrated it as involving rudeness, ineptitude, delay, wrong advice and loss of documents. In 1994 William Reid, a serving Parliamentary Commissioner attempted his own definition which encompassed; ignoring valid advice or disregarding relevant considerations; failing to offer redress; failure by management to monitor compliance with adequate procedures; cavalier disregard of guidance which was intended to be followed in the interests of equitable treatment of those who use a service; and failure to mitigate the effects of rigid adherence to the letter of law where that produces manifestly inequitable treatment.³¹⁶

Maladministration may also be explained to be a situation where the performance of a government department has fallen below acceptable standards of administration.³¹⁷

³¹⁶ Michael T Molan, *Constitutional Law: The Machinery of the government*, (London: Old Baily Press, 2003), p.230

³¹⁷ Many examples of maladministration may be found in the Ombudsman's reports. They include failure to give effect to assurances given to a citizen; incorrect advice about social security or tax matters; failure to give proper effect to a department's policy guidance; dilatory enforcement of regulations against asbestosis; failure to make departmental policy known to the press and making of misleading statements by a minister in Parliament. In 1984, Home Office officials were criticized severely for having failed to deal promptly with complaints from a prisoner that his conviction for murder had been based on evidence from forensic scientist whose evidence in other trials was known to be incompetent and unreliable. See: A.W.Bradley, and K.D.Ewing, , *Constitutional and Administrative Law* , op.cit. p. 761 and David Kelly, Gary Slapper and David Kelly, *The English Legal System*, op.cit. p.368

It is inefficiency or any other form of bad practice such as excessive delays in dealing with individuals' affairs, discourtesy, incompetence and bad advice etc.³¹⁸

According to others it covers bias, neglect, inattention, delay, incompetence, ineptitude, arbitrariness etc. In other words it is faulty administration or ineffective or improper management of affairs.³¹⁹

The Parliamentary Commission for Administration itself defined maladministration as poor administration or the wrong application of rules. Examples include: avoidable delay; faulty procedures or failure to follow correct procedures, not telling the individual about appeal rights; unfairness, bias or prejudice; giving misleading or inadequate advice; refusing to answer reasonable questions; discourtesy; mistakes in handling claims; and not offering an adequate remedy where one is due. In reality the defects most commonly found in the context of executive administrative action are failing to provide information, misapplication of departmental rules, misleading advice, unjustifiable delay and inconsiderate behavior.³²⁰

An example is the Crichel Down case, where a landowner complained that the Ministry of Agriculture had refused to hand back to him after the war part of his land which had been requisitioned during the war and was no longer required by the

³¹⁸ Irving Stevens, *Constitutional and Administrative Law* (Glasgow: Pitman Publishing, UK, 1996).p.218

³¹⁹P.A Read, *A-Level Constitutional Law Textbook* (London: HLT Publications, UK, 1998) pp.240-241

³²⁰ P.P Craig, *Administrative Law* (London: Sweet and Maxwell, UK, 2003) p.236

Ministry for the purposes for which it had been requisitioned. In this particular case the Minister was induced by the outcry to hold a departmental inquiry, which criticized the conduct of certain officials in the Ministry, with the result that the officials were moved to different work and the Minister (although not personally involved) resigned from his office. The citizen's only remedies at that time were for his Member of Parliament to ask a question in the House, to raise the matter in the debate on the adjournment or in debates on supply, to correspond with the Minister or to persuade the Minister to hold an ad hoc inquiry.³²¹

In the late 1950s there was increasing concern over the operation of the administration. The Crichton Down affair which was a catalyst for the establishment of the Franks Committee, proved to be outside the terms of reference of that Committee. In 1961, The Wyatt Report³²² was published which made two suggestions. There were recommendations for the establishment of a "General Tribunal" to deal with miscellaneous group of appeals. This suggestion was not adopted. The report also considered the possibility of machinery to deal with maladministration that is decisions taken with bias, negligently, unfairly, etc.

³²¹O. Hood Phillips, Paul Jackson and, Patricia Leopold, *Constitutional and Administrative Law* (London: Sweet and Maxwell, UK, 2001), pp.757-758

³²²In 1959 the British Section of the International Commission of Jurists, JUSTICE, established an inquiry into grievances against administration. The resultant report, "The Citizen and the Administration" was afterwards called as Wyatt Report. See: Hillarie Barnett, *Constitutional and Administrative Law*, (London: Routledge-Cavendish, 2009.)

While the courts could tackle some of these, others might not be reviewable or such might be inappropriate.³²³

As the report stated, there appeared to be: "...a continuous flow of relatively minor complaints, not sufficient themselves to attract public interest, but nevertheless of great importance to the individuals concerned, which give rise to feelings of frustration and resentment because of the inadequacy of the existing means of seeking redress". The existing machinery was found unfulfilling the needs, parliamentary Question Time was inadequate to deal with the volume of problems arising; if a complaint was made directly to the government department, the department investigated the complaint ; if a member of Parliament attempted to investigate, he could not gain access to all departmental documentation. Accordingly the report advocated establishing a permanent office independent of the executive and accountable only to parliament. The report also recommended that a Select Committee should be established to consider the Commissioner's reports and to give parliamentary authority to the work of the Commissioner. The report also recommended that the Parliamentary Commissioner for Administration's Office should be one which supplemented rather than undermined existing procedures for complaint.³²⁴

That is why for some years there had been discussion on the suggestion that a

³²³P.P Craig, *Administrative Law*, op.cit. p. 233

³²⁴Hillarie Barnett, *Constitutional and Administrative Law* op.cit. p. 767

Parliamentary Commissioner with an independent status like that of the Comptroller and Auditor-General, should be appointed, whose functions would be similar to those of the Ombudsman known to Scandinavian countries and then recently introduced into New Zealand. Hesitation in the past was due largely to the fear that the appointment of such an independent official would interfere with ministerial responsibility, which is stronger there than in Scandinavia; and to a less extent to the fact that it was difficult to foresee how much work would fall to a Commissioner in a country with much greater than that of any of the Scandinavian countries or New Zealand.³²⁵

3. Establishment of Parliamentary Commission for Administration

It was in the above stated backdrop that the office of Parliamentary Commissioner for Administration was established through an Act of Parliament in 1967. He or She is appointed by the Crown and holds office during good behavior. He or She may be removed from office as a result of an address from both Houses of Parliament and he is excluded from the membership of the Commons. In 1977 the Government agreed that in future before an appointment was made it would consult the Chairman of the Select Committee of the House of Commons on the Parliamentary Commissioner of Administration. His salary is charged on the

³²⁵O. Hood Phillips, Paul Jackson and, Patricia Leopold, *Constitutional and Administrative Law*, op.cit. p. 758

Consolidated Fund. He is an ex-officio member of the council on Tribunals, whose functions overlap his own, and in some cases the citizen may choose whether to complain to the Commissioner or the Council. He is also a member of the Commission for Local Administration. The Parliamentary Commissioners were used to be civil servants earlier but more recently they have been selected from the ranks of lawyers. The Parliamentary Commissioner is assisted by a department staffed by approximately fifty civil servants²²⁶.

The legal title of the office was very cumbersome and in 1994 the government agreed that "the very first opportunity" of legislation it would be changed to "Parliamentary Ombudsman". Although it was derived from the Ombudsman in Scandinavian countries and New Zealand, the British model was designed to fit within existing British institutions, without detracting from existing remedies. While Parliamentary Ombudsman has close links with the executive, the office is designed as an extension of Parliament and it has virtually no links with the judicial service. As Sir Clothier, then the Ombudsman, said in 1994:

"The office of Parliamentary Commissioner stands curiously poised between the legislative and the executive, while discharging an almost judicial function in the citizen's dispute with the government, and yet it forms no part of the Judiciary."

²²⁶ P.P Craig, *Administrative Law*, op.cit. p.234, O. Hood Phillips, Paul Jackson and, Patricia Leopold, *Constitutional and Administrative Law*, op.cit. p. 758, P.A. Read, *A-Level Constitutional Law Textbook* op.cit. p.239

On one view, therefore, the essence of the Ombudsman idea for the ordinary person is accessibility, flexibility and informality. On another view, the Ombudsman provides an authoritative means of "judging" the behavior of officials, thus, helping to maintain standards of administration that are publicly acceptable. In the British version of the Ombudsman, the latter view often seems prevail over the former.³²⁷

The first Ombudsman appointed under the 1967 legislation, operated and the present Ombudsman still operates, under the title of the Parliamentary Commissioner for Administration (PCA) and was empowered to consider central government processes only. The PCA also serves as Health Service Ombudsman, in which capacity they investigate complaints that hardship or injustice has been caused by the National Health Service's failure to provide a service, by a failure in service provided or by maladministration. Since then a number of Ombudsmen have been appointed to oversee the administration of local government in England and Wales, under the Local Government Act 1974. Scotland and Northern Ireland have their own local government Ombudsmen fulfilling the same task. There are also Health Service Commission for England, Wales and Scotland, whose duty is to investigate the administration and provision of services in the health service. These offices were established in 1972. In October 1994, Sir Peter Woodhead was appointed as the first

³²⁷ A.W.Bradley, and K.D.Ewing, , *Constitutional and Administrative Law*, op.cit. p.757

Prisons Ombudsman. Under the Courts and Legal Services Act 1990, Legal Services Commissioner was also appointed.

This proliferation of Ombudsmen has led to some confusion as to which one any particular complaint should be taken to. This can be especially problematic where the complaint concerns more than one public body. In order to remedy this potential difficulty, a Cabinet Office review recommended in April 2000 that access be made easier through the establishment of one new Commission, bringing together the Ombudsmen for Central government, local government and health service.³²⁸

The Ombudsman system has also spread beyond the realm of government administration and there are Ombudsmen overseeing the operation of, amongst other things, legal services, banking and insurance. Some schemes, such as the legal services scheme, have been established by statute, but many others have been established by industry as a means of self-regulation. The Legal Services Ombudsman deals in complaints about solicitors, barristers and other legal practitioners. The Ombudsman is appointed by the Lord Chancellor in accordance with Section 21 of the Central Legal Services Act 1990 and is completely independent of the legal profession. In reflection of this, they cannot be a qualified lawyer. Complaints must first be sent to the relevant professional body of the member who is being complained about and only if the complainant is not satisfied with the way the professional body deals with

³²⁸ Gary Slapper and David Kelly, *The English Legal System*, op.cit. p. 368, Hillarie Barnett, *Constitutional and Administrative Law* op.cit. p. 766

his/her complaint may he refer the matter to the Legal Service Ombudsman. The Ombudsman has powers to recommend that the professional body reconsider the complaint and may also recommend that the professional body and the person complained about pay compensation for loss, distress or inconvenience. Where necessary, any recommendation may be backed by a binding order for the payment of compensation³²⁹

3.1. Main Purpose/ Aim:

As mentioned before that the Parliamentary Ombudsman is appointed by the Crown and holds office during good behavior, although he or she may be removed by the Crown following addresses by both Houses. By a practice dating from 1977, the government consults the Chairman of the House of Commons Committee on the Ombudsman before making an appointment.

The main task of the Ombudsman is to investigate the complaints of citizens who claim to have suffered injustice in consequence of maladministration by government departments and many non-departmental public bodies in the exercise of their administrative functions.

According to the office itself, "The Parliamentary and Health Service

³²⁹ Ibid. p.369

Ombudsman (PHSO)³³⁰ exists to provide a service to the public by undertaking independent Investigations into complaints that government departments, a range of other public bodies in the UK, and the NHS in England have not acted properly or fairly or have provided a poor service³³¹

According to the *Business Plan 2003-4* of the Office of Parliamentary and Health Service Ombudsman the purpose of the Parliamentary Ombudsman is:

- a. to consider and resolve complaints impartially and promptly and to achieve appropriate redress of grievances;
- b. to report the results to complainants, Members of Parliament and the bodies complained about and
- c. to promote improvements in public services by feeding back the lessons learned from casework to policy makers and providers.

3.2. Jurisdiction

The area of jurisdiction is defined by the 1967 Act, Schedule 2 of which (as amended by Parliament in 1987) lists the departments and other bodies subject to

³³⁰ In the beginning the National Health Service was not under the jurisdiction of Parliamentary Ombudsman. In 1993, under the Health Service Commissioners Act, three offices of Health Service Ombudsmen were established for England, Scotland and Wales. In 1996, under Health Service Commissioners (Amendment) Act, the jurisdiction of Parliamentary Ombudsman was enlarged to include in its authority the authority of Health Service Ombudsmen too. The name, uptill now 'Parliamentary Commissioner for Administration' was changed to "Parliamentary and Health Service Ombudsman" (PHSO). In practice the Parliamentary Ombudsman also holds the three posts of Health Service Ombudsman, whose reports in that capacity are considered by the House of commons Committee on the Parliamentary Ombudsman.

³³¹ The Parliamentary and Health Service Ombudsman Report 2007-8 (available at: http://www.ombudsman.org.uk/pdfs/ar_08.pdf) last accessed: 15-1-2010.

investigation. This list may be amended by Order in council a power which is exercised when departments are abolished or created. Section 4 in its 1987 version restricts the bodies which may be entered in Schedule 2 to:

- a. Government departments; this category includes firms to whom work has been contracted out. The 1967 Act does, talk of administrative functions being carried out are acting on behalf of the department and should therefore be regarded as within the ambit of the Act. This view has been taken by the Parliamentary Commission for Administration and truly correct as a matter of principle.³³²
- b. Bodies exercising functions on behalf of the Crown;
- c. Bodies established under an Act of Parliament or Order in council or by a minister that fulfill certain criteria as to the source of their income and the power of appointment to them.³³³

However the jurisdiction of the Ombudsman is restricted in two ways: First, there are the provisions which prevent the Office from investigating any action in respect of which the person aggrieved has or had a right of appeal, reference, or review to, or before a tribunal constituted by, or

³³² Parliamentary Commissioner for Administration Annual Report 1992, p.2

³³³ A.W.Bradley and K.D.Ewing, *Constitutional and Administrative Law*, op.cit, p.758, O. Hood Phillips, Paul Jackson and Patricia Leopold, *Constitutional and Administrative Law*, op.cit. p. 759

under, any enactment or by prerogative, and any action in respect of which the person aggrieved has or had a remedy by way of proceeding in any court of law. This prohibition is subject to an exception where the Ombudsman is satisfied that it would not be reasonable to expect the claimant to resort to such a remedy. While Section 5 (2) of the Act raises issues of general interest as to the role of Ombudsman is and should be performing.

The Ombudsman has no jurisdiction over authorities which are outside central government, for example local authorities, the police and universities, although he or she may investigate complaints about the way in which central departments have discharged their functions in these fields. However many matters are excluded from investigation for which ministers are or may be responsible to the Parliament.

Matters excluded from investigation are set out in Schedule 3. The excluded matters are within the functions of the departments listed in schedule 2.

1. Matters related to foreign relations;
2. Action taken in connection with the administration of the government of any country or territory outside the United Kingdom (except by consular

officials) which forms part of Her Majesty's dominions or in which Her Majesty has jurisdiction;

3. Action taken by the Secretary of State under the Extradition Act 1870 or under Fugitive Offender Act 1881,
4. Action taken by the Secretary of State for the purpose of investigating crime or of protecting the security of the state including action so taken with respect to passports;
5. The commencement or conduct of civil or criminal proceedings in any court of law in the United Kingdom, or proceedings at any place under the Naval Discipline Act 1957, the Army Act 1955 or the Air Force Act 1955, or of proceedings before any international court or tribunal;³³⁴
6. Any exercise of the prerogative of mercy or of the power of a Secretary of State to make a reference in respect of any person to the Court of Appeal, the High Court of Judiciary or the Courts-Martial Appeal Court,

³³⁴ Judicial functions in the sense of the work of tribunals or courts are not in any event within the Ombudsman's powers. It should not, however, be supposed that any matter with the judicial flavor will be excluded. Public inquiries have, for example been the subject of Ombudsman's attention. Provided that the action taken by a body listed in the Act, and the action is taken in the exercise of administrative functions, the Ombudsman is empowered to investigate claims of injustice resulting from maladministration which have been referred by a Member of Parliament.

See: P.P Craig, *Administrative Law*, op.cit. pp.234-235

7. Action taken on behalf of Minister of Health or the Secretary of State by a (regional health authority, an area health authority, a district health authority, a special health authority, except the Rampton Hospital Review Board, a family practitioner Committee, a health board or the Common Services Agency for the Scottish Health Service) or by the Public Health Laboratory Service Board.
8. Action taken by any person appointed by the Lord Chancellor as a member of the administrative staff of any court or tribunal, so far as that action is taken at the discretion, or on the authority of any person acting in a judicial capacity or in his capacity as a member of the tribunal. Similarly, any action taken by any member of the administrative staff of a relevant tribunal;
9. Action taken in matters relating to contractual or other commercial transactions, whether within the United Kingdom or elsewhere, being transactions of a government department or authority to which the Act applies, not being transactions for or relating to the acquisition of land compulsorily or in circumstances in which it could be acquired compulsorily or in the disposal as surplus of land acquired compulsorily.

10. Action taken in respect of appointment or removals, pay, discipline, superannuation or other personnel matters, in relating to service in any of the armed forces of the Crown, including reserve and auxiliary and cadet forces service in any office or employment or under any contract for service, in respect of which employment under the Crown or under any authority listed in Schedule 2 of the 1967 Act; or service in any office or employment or under any contract for service in respect of which power to take action, or to determine or approve the action to be taken in such matters invested in Her Majesty or in any minister of the Crown
11. The grant of honours, awards or privileges within the gift of the Crown, including grant of Royal Charters. ³³⁵

Different policy consideration arises with respect to each exclusion. It was these restrictions which led to the criticism that the legislation sought to carve up areas of possible grievances in an arbitrary way. Those restrictions which have been most criticized are No. (9) and (10) above. The government has power by Order in Council to revoke any of these restrictions but despite frequent recommendations from the House of Commons committee that the restriction on personnel matters, mentioned above, should be removed, successive governments have refused to do so.

³³⁵ P.A. Read, *A-Level Constitutional Law Textbook* op.cit. p. 240, O. Hood Phillips, Paul Jackson and Patricia Leopold, *Constitutional and Administrative Law*, op.cit. p. 759, Michael T Molan, *Constitutional Law: The Machinery of the government*, op.cit. pp.231-232

Another limitation is that the Ombudsman may not normally investigate any action in respect of which the complainant has or had a right of recourse to a tribunal or a remedy by proceedings in any court of law, although he or she may do so if in a particular case the citizen could not reasonably be expected to exercise the right. If a citizen is dissatisfied with the decision about a social security benefit, or an award of compensation on a compulsory purchase of land, he or she should appeal to the relevant tribunal. But the Ombudsman often accepts that a complainant cannot be reasonably expected to embark on the hazardous course of litigation.

The two areas where there has been most pressure for reform have been the exemptions for contractual/ commercial matters and personnel. There have been a number of arguments against any change. The existence of other machinery for scrutiny of these areas and the idea that the Ombudsman

There is no rule that the complainant must be a British citizen, but in general either he or she must be resident in the United Kingdom or have been present in the United Kingdom or on a British ship or aircraft when the offending action occurred, or the action concerned must relate to rights or obligations arising in the United Kingdom.

There is also a time bar the Ombudsman may investigate a complaint only if it is made to an MP within twelve months from the date when the citizen first had

notice of the matter complained of, except where special circumstances justify the Ombudsman in accepting a complaint made after a longer interval.

It is for the Ombudsman to determine whether a complaint is duly made under the Act; in practice, many complaints identify the injustice that has been suffered more closely than the maladministration which caused it. The Ombudsman has an express discretion to decide whether to investigate a complaint. But the Act does not protect the Ombudsman if he or she takes up a complaint on a matter outside jurisdiction and the Ombudsman's acts are subject to judicial review, though the court is unlikely to intervene concerning his or her discretionary decisions. If the Ombudsman were to act outside jurisdiction for instance by investigating the actions of a local authority, no one could be held liable for the obstruction or contempt for refusing to supply information. Questions as to the extent of the Ombudsman's powers may involve difficult legal issues, for example regarding the extent to which the acts of court officials may be investigated.³³⁶

4. Work of the Parliamentary Ombudsman

4.1. Who Can Complain?

An important feature of the idea of the Ombudsman is that the Ombudsman should be accessible to the individual. But in the Britain the citizen has no right to

³³⁶ Bradley and Ewing, *Constitutional and Administrative Law*, op.cit. p.759-760

present a complaint to the Parliamentary Ombudsman. In the first instance the complaint of maladministration must be addressed by the person who claims to have suffered injustice to a Member of Parliament (MP). It is for the MP to decide whether to refer the complaint to the Ombudsman. Usually complainants will send the complaint to their constituency MP but the Act does not require this. When the Ombudsman receives a complaint from a private person that is clearly investigable, it may be sent with the complainant's agreement to his or her MP, with a statement that the Ombudsman will investigate it if the MP wishes this to be done. Although many critics wish to see it removed in favour of direct access, the 'MP filter' was upheld by the select committee of the Commons on the Parliamentary Ombudsman in 1993. Section 6 (1) of the Act spells out who can complain. In essence it provides that complaints can be made by any individual or body of persons, whether incorporated or unincorporated. Local authorities, nationalized industries or other bodies appointed by a Minister or by government department, however, can not make complaints. These exclusions are designed to emphasize the character of the Ombudsman as someone who arbitrates between the government and the governed but who does not hear complaints by one department against the other. The complaint must be made by person aggrieved or a personal representative. It must be submitted through MP, as mentioned before, within twelve months from the date on which the person aggrieved first had notice of the matters alleged in the complaint but the Ombudsman has a

discretion to allow a claim to proceed outside that time limit. The complainant must be resident in the United Kingdom or the complaint must relate to action taken while he or she was present in the United Kingdom.³³⁷

4.2. MP Filter:

Regarding the "MP filter", there has always been a debate in the The United Kingdom. It is normally considered as a hurdle in the way of direct access of the members of public to the Ombudsman's office. This matter was considered by the Select Committee in 1993-94. It conducted a survey of the Members of Parliament in order to ascertain their views on the matter. The majority supported to keep the filter on. The committee commented:

"It is clear that many Members value their role as champions of their constituencies' complaints and are unwilling to see this constitutional function in any way bypassed or diminished."

The Ombudsman himself however argued forcibly that the filter was 'potentially disadvantageous to complainants', in part because individuals may feel that their Member of Parliament would be unwilling to help them and because of the administrative burden on Members of Parliament in transmitting material to the Ombudsman. JUSTIC and National Consumer Council also argued for reform of the

³³⁷P.P Craig, *Administrative Law*, op.cit. p.238, A.W.Bradley, and K.D.Ewing, *Constitutional and Administrative Law*, op.cit, p. 760,
Gary Slapper and David Kelly, *The English Legal System*, op.cit. pp. 369-370

system. The Committee summarized the objections to the MP Filter as follows: The public should have direct access to the Commissioner as a matter of right.

- (a) The filter is an anomaly, almost unknown in other Ombudsman systems (with the exception of Sri Lanka and France). No such requirement exists, for instance, in the case of the Health Service Commissioner.
- (b) Individuals with complaints may be unwilling to approach an MP, while desiring the Ombudsman's assistance.
- (c) The filter means that the likelihood of individuals' cases being referred to the Ombudsman will largely depend on the views and practice of the particular constituency MP. Some look with more favour on the Office of the Commissioner than others.
- (d) The filter acts as an obstacle to the Ombudsman effectively promoting his services.
- (e) The filter creates an unnecessary bureaucratic barrier between the complainant and the Commissioner, involving considerable paperwork for MPs and their offices.

The Committee concluded, however, that the advantages of retaining the filter system over weighed these significant disadvantages.

The idea is that the institution of Parliamentary Ombudsman is viewed as an adjunct to Parliament. He aids Parliament in performance of its traditional function of protecting the citizen, but is not intended to be an independent citizen protector. The argument against allowing direct access has been bolstered by more practical considerations. It is felt that in a country with a large population direct access would place an impossible burden upon the Parliamentary Ombudsman. The disadvantages in not allowing direct access have partly been overcome by a system whereby the Parliamentary Ombudsman passes onto the relevant MP a complaint which he receives directly from an individual, as discussed above. But ultimately, no doubt, it is preferable if individuals could have direct access to the Parliamentary Ombudsman.³³⁸

4.3. Procedure of Complaint Handling:

The Parliamentary Ombudsman has a considerable choice as to the method of investigation and possessed wide powers in relation to the obtaining of evidence. In fact this is a three-stage procedure which is divided into screening, investigation and report. When the Parliamentary Ombudsman receives a complaint from an MP, it is his discretion to decide whether it is to be investigated or not. If he deems proper to investigate it then he has to determine whether it falls within jurisdiction. This process is called screening where principally those cases are removed which Parliamentary

³³⁸Hillarie Barnett, *Constitutional and Administrative Law* op.cit. pp. 779-780, P.P Craig, *Administrative Law*, op.cit. p.238, A.W.Bradley, and K.D.Ewing, , *Constitutional and Administrative Law*, op.cit, p. 760, Gary Slapper and David Kelly, *The English Legal System*, op.cit. pp. 369-370

Ombudsman lacks jurisdiction. If he does decide to carry on with the investigation, he must afford the principal officer of the department or authority concerned, and any other person alleged to have taken or authorized the action complained of, any opportunity to comment upon the allegations. Investigations are conducted in private but the Parliamentary Ombudsman has a broad discretion as to the type of information required, the persons who are questioned and whether any person may be represented by counsel, solicitor or otherwise in investigation.³³⁹

Normally one of the Parliamentary Ombudsman's staff examines the relevant department files. The Ombudsman has wide powers of compelling ministers and officials to produce documents and has the same powers as the High Court in England or the Court of Sessions in Scotland to compel any witness to give evidence. The Parliamentary Ombudsman's investigation is not restricted by the doctrine of public interest immunity. No obligation to maintain secrecy, whether derived from any enactment or any rule of law, applies to the disclosure of information for the purposes of an investigation under the Act, nor can the Crown claim Crown privilege in respect of such documents. The only documents which are statutorily privileged are those certified by the Secretary of the Cabinet, with the approval of Prime Minister, to relate to proceedings of the Cabinet, or a committee of the Cabinet. Willful obstruction of the investigation is treated as the contempt of court. Provision is made

³³⁹ Section 7 (1) and (2) The Parliamentary Commissioner for Administration Act 1967, available at <http://www.statutelaw.gov.uk/> last accessed: 17-1-2010

for the payment of expenses to the complainant or to a person involved in the investigation. An investigation by the Parliamentary Ombudsman does not, however, invalidate or suspend action taken by an authority.³⁴⁰

Section 10 of the Act lays down the procedure of reporting about the investigation as following.³⁴¹

- In any case where the Commissioner conducts an investigation under this Act or decides not to conduct such an investigation, he shall send to the member of the House of Commons by whom the request for investigation was made (or if he is no longer a member of that House, to such member of that House as the Commissioner thinks appropriate) a report of the results of the investigation or, as the case may be, a statement of his reasons for not conducting an investigation.
- In any case where the Commissioner conducts an investigation under this Act, he shall also send a report of the results of the investigation to the principal officer of the department or authority concerned and to any other person who is alleged in the relevant complaint to have taken or authorised the action complained of.

³⁴⁰ The Parliamentary Commissioner for Administration Act 1967, Section 8. See also: Gary Slapper and David Kelly, *The English Legal System* p.370, P.P Craig, *Administrative Law*, op.cit. p. 239, A.W.Bradley, and K.D.Ewing, , *Constitutional and Administrative Law*, op.cit, p. 760

³⁴¹ Section 10, The Parliamentary Commissioner for Administration Act 1967

- If, after conducting an investigation under this Act, it appears to the Commissioner that injustice has been caused to the person aggrieved in consequence of maladministration and that the injustice has not been, or will not be, remedied, he may, if he thinks fit, lay before each House of Parliament a special report upon the case.
- The Commissioner shall annually lay before each House of Parliament a general report on the performance of his functions and may from time to time lay before each House of Parliament such other reports with respect to those functions as he thinks fit.
- For the purposes of the law of defamation, any such publication as is hereinafter mentioned shall be absolutely privileged, that is to say—
 1. the publication of any matter by the Ombudsman in making a report to either House of Parliament;
 2. the publication of any matter by a member of the House of Commons in communicating with the Commissioner or his officers for those purposes or by the Commissioner or his officers in communicating with such a member for those purposes;
 3. the publication by such a member to the person by whom a complaint was made, of a report or statement sent to the member in respect of the complaint;

4. the publication by the Ombudsman to such a person as is mentioned above of a report sent to that person.

A minister has no power to veto an investigation, but may give notice to the Parliamentary Ombudsman that publication of certain documents or information would be prejudicial to the safety of the state or against public interest; this notice binds Parliamentary Ombudsman in making his or her report.³⁴²

4.4. Implementation of Decisions:

The Parliamentary Ombudsman has no executive powers and no formal power to award a remedy. Thus he or she cannot alter a departmental decision or award compensation to a citizen, although an appropriate remedy may be suggested. If the recommendations are not complied with, a special report can be submitted to the Parliament, but the Parliamentary Ombudsman can do nothing formally beyond this.

This should not lead to the supposition that the investigations are fruitless. On the contrary the Parliamentary Ombudsman's reports have led to a wide range of remedies. This is apparent from the annual report of the institution.³⁴³

³⁴² Ibid. Section 11 (3)

³⁴³ Those reports are available at: http://www.ombudsman.org.uk/improving_services/index.html last accessed: 18-1-2010

A minister will usually be under strong obligation to accept the Parliamentary Ombudsman's findings and take corrective measures, but a report might have such political implications that a minister could come under pressure not to accept the recommendations. To support the Parliamentary Ombudsman in such a situation, and to watch over the office, a Select Committee is appointed by the House of Commons to examine the reports laid in the Parliament. This committee takes evidence from the departments concerned and reports to the House on the Parliamentary Ombudsman's work. However, it should not be taken as a court of appeal from the Parliamentary Ombudsman's decisions. This committee in its first annual report criticized the narrow way in which the Parliamentary Ombudsman was interpreting his jurisdiction. It recommended an extension of the Parliamentary Ombudsman's powers to cases where the departmental procedure for reviewing a rule, or the grounds for maintaining it, could be shown to be defective. It has more than once recommended that Parliamentary Ombudsman's should be given powers to investigate personnel matters and staffing within the Civil Service. Nonetheless it has been more successful in helping to ensure the provision by departments of adequate remedies and the improvements of defective procedures than in effort to remove limits upon the Parliamentary Ombudsman's jurisdiction. In 1993, the

committee made a valuable study of the powers and work of the Parliamentary Ombudsman following this in 1995 with an excellent report on the theme of maladministration and redress.³⁴⁴

5. Evaluation of the Performance of Parliamentary Ombudsman

5.1. Analysis of the Role of Parliamentary Ombudsman:

According to the Parliamentary Ombudsman's office itself the role of this office is the following:

"We provide a service to the public by undertaking independent investigations into complaints that government departments, a range of other public bodies in the UK, and the National Health Service in England, have not acted properly or fairly or have provided a poor service"³⁴⁵

The role of Parliamentary Ombudsman has developed considerably since the office was first introduced in the United Kingdom. The scope of bodies within the Parliamentary Ombudsman's jurisdiction has been expanded, and we have seen creation of commissioners for health and local government. The idea of

³⁴⁴ A.W.Bradley, and K.D.Ewing, , *Constitutional and Administrative Law*, op.cit, p. 761, P.P Craig, *Administrative Law*, op.cit. p. 240

³⁴⁵ http://www.ombudsman.org.uk/pdfs/ar_05.pdf last accessed: 20-1-2010

an Ombudsman has taken hold more generally and has been applied in area such as banking and insurance. The role of Parliamentary Ombudsman still however, is a matter for debate. There are at least three ways in which the Parliamentary Ombudsman can be viewed.

The first is to see the Parliamentary Ombudsman's main task as the remedying of individual grievances caused by neglect, bias or inattention within the administration. In performing this role the Parliamentary Ombudsman operates as an adjunct to Parliament aiding that body in the protection of the individual. The MP filter, the absence of the power to award remedies and the duty to report to Parliament, all reinforce this perspective. This picture of Parliamentary Ombudsman sees the job as essentially or primarily concerned with the avoidance of mistakes. The jurisdictional divide between the court and the Parliamentary Ombudsman serves to emphasise this. Each is responsible for ensuring the avoidance of mistakes within its own sphere of responsibility, and this is so even accepting that there is some overlap in this respect. There is no doubt that correction of individual grievances constitutes an important aspect of the Parliamentary Ombudsman's work. It is facilitated by the adoption of a two-track system, with a more and less intensive type of investigation depending upon the nature of the complaint.

The existence of a fast track procedure will, hopefully, make the system more attractive to MPs who sends the references.³⁴⁶

A second way in which the Parliamentary Ombudsman could be viewed preserves the mistake avoidance approach, but seeks to expand the existing jurisdiction. There are suggestions that citizens should have direct access to the Parliamentary Ombudsman, and that the discretion to take cases even if they are within the jurisdiction of the ordinary courts should be generously exercised. Some advocate this as a means of obtaining the expeditious and cheap disposition of justice. There are in addition suggestions that the Parliamentary Ombudsman should have remedial power, directly or indirectly. The Parliamentary Ombudsman would be able to give remedies in his own capacity or be able to apply to the court for grant of relief. The image of the Parliamentary Ombudsman as a small claims administrative court emerges.

The attractions of this second approach are obvious, but it is problematic. The suggestion that the Parliamentary Ombudsman should be a form of small claims court would involve a fundamental re-orientation of the Parliamentary Ombudsman 's original role. This is not logical bar to proceeding further, but is worth stating nonetheless. The effects of such a change need to be thought through. It is clear that any move in this direction

³⁴⁶P.P Craig, *Administrative Law*, op.cit. p. 243

would entail an expansion in personnel and the transformation of the Parliamentary Ombudsman into a judicial figure with a bureaucratic hierarchy. Benefits of the present system particularly those of informality of procedure and negotiated settlement, would be lost or placed in jeopardy. There would be a tendency for the process to become adversarial in nature. Procedures would become more rigid. Many of these comments apply with equal force to suggestions that Parliamentary Ombudsman should have power to award a remedy himself. Such a power is bound to generate demands for more formal hearings before being condemned, the right to representation and other safeguards normally associated with judicial proceedings.³⁴⁷

The suggestion that the Parliamentary Ombudsman should liberally exercise the discretion to hear complaints that are within the courts' purview also has important implications. There is bound to be some overlap between the Parliamentary Ombudsman and the courts. The nature of administrative law precludes rigid statement that a matter is or is not within the purview of the courts. The reason for caution is the danger of there being two inconsistent views upon the same subject-matter or the application of the same view in an inconsistent manner. There is a link between this point and the possibility of the Parliamentary Ombudsman applying to a court for the award of a remedy. If the Parliamentary Ombudsman did have this power and also liberally interpreted the discretion to take cases that could come before the court, we would be

³⁴⁷ Ibid. p.244

faced with the following complex situation. Let us assume that in some cases the Parliamentary Ombudsman might reach a result inconsistent either with the principle, applied it in a way in which court would not. The Parliamentary Ombudsman approaches the court claiming maladministration. Either the court accepts the charge and grants the remedy, in which case the dual system of jurisprudence would be a reality, or the court would look to the substance of the charge and reassess whether maladministration had taken place. If the court re-examined the matter and found that the action called maladministration could not be thus dubbed because, for example, estoppels should not bind the Crown, then the dual system of jurisprudence would be avoided, but a cumbersome and partial form of review would have taken place.³⁴⁸

It might be argued that these fears are misconceived because the courts and the Parliamentary Ombudsman are doing different things. The courts are concerned with the limits of jurisdiction and the principles on which discretion should be exercised, while the Parliamentary Ombudsman focuses on principles of good administration. We are in danger of allowing form to blind us from substance. Whether, for example, a representation should bind is the substantive question. The conclusion may be expressed in the affirmative or negative. To imagine that there is no conflict if the conclusions are reached under different labels called *ultra vires* or good administration

³⁴⁸ Ibid. p.244

is short-sighted. We are back once again with a dual system of jurisprudence or to put it more neutrally, a dual set of values being applied to the same problem.

If this second view of the Parliamentary Ombudsman is indeed felt to have deficiencies, the office could still be expanded in a third direction. Proponents of this view accept the limited mistake avoidance role of the Parliamentary Ombudsman, outlined as the first view, but advocate an expansion of the jurisdiction in a different direction. This is to ask the Parliamentary Ombudsman to draw attention to lessons that should be learned from individual cases in order to improve administrative practice generally. This would not mean neglect of individual cases. It would be an additional task. The investigation of individual cases would be a catalyst for discovering more general administrative deficiencies. This could be particularly helpful given that MPs do not at present seem to pay undue regard to the Parliamentary Ombudsman's role in addressing individual grievances.³⁴⁹

It is clear that the Parliamentary Ombudsman already fulfills this general function to some degree, as a glance at any of the annual reports will confirm. Problems in individual cases lead to the discovery of a more general concern and result in recommendations for changing the administrative practice that gave rise to the initial problem. The Select Committee has emphasized that the Parliamentary Ombudsman may have a role in assessing whether an agency's performance has

³⁴⁹ Ibid.p.245

matched up to the standards laid down in the Citizens' Charter³⁵⁰. It has, moreover, been accepted that reports of good administrative practice should be circulated to the departments, and that departments should provide a response to a finding of maladministration, indicating the publication of the Parliamentary Ombudsman's newsletter, *Insight*, which is designed, inter alia, to raise awareness of the lessons to be learned from past investigations.³⁵¹

5.2. Performance:

In library research we have only one possible way of judging the performance of the Parliamentary Ombudsman Office; by studying the annual reports which it has been publishing at the end of the year and presenting them in the Parliament. They are deemed to be a reliable source because they are presented in the Parliament and the Parliament does not accept any reports without due debate and scrutiny. Thus in the following pages we will try to evaluate the performance of this Office by looking into the number of enquiries it dealt with, the investigations it conducted and concluded and the outcome of its reports and recommendations about those cases it dealt with. We will also try to know if there have been any judicial reviews of its

³⁵⁰ The Citizens' Charter initiative was launched by the Conservative Government in July 1991. It basically sought, inter alia, the improvement of service provided by the public bodies, to create more effective complaints procedures and to provide better redress for the individual when services go badly wrong. One outcome of this initiative has been the appointment of so-called "lay adjudicators" to deal with claims for redress which have not been dealt with satisfactorily by the officials concerned. The Inland Revenue was the first in the field to appoint a "Revenue Adjudicator" in 1995, the Home Office appointed "Prisons Ombudsman" for England and Wales and in 1997 the Child Support Agency appointed an Independent Case Examiner. See: A.W.Bradley, and K.D.Ewing, , *Constitutional and Administrative Law*, op.cit, p. 766,

³⁵¹P.P Craig, *Administrative Law*, op.cit. p.245

recommendations and what the outcome of those reviews has been. The annual reports which are available are very detailed and discussed many other relevant things to the Office too but we are only concerned with the facts and figures indicated to above to judge the performance of the department as a whole.

In 1992 the Parliamentary Ombudsman received 945 complaints, which were 144 more than in 1991. Twenty eight percent of these were accepted for investigation. The main reason for rejecting the complaints was because they did not come under the categories mentioned in the Act. More specifically 43 percent were rejected because they did not concern with administrative action as required by the law. Twenty four percent were rejected because the applicants had the rights of appeal to a tribunal. Ten percent of complaints failed because the authority was not within the scope of the Parliamentary Ombudsman's jurisdiction, and interestingly a large number of the complaints were against the courts and other legal bodies. Six percent were rejected because they concerned with personnel matters and six percent were rejected in the exercise of Parliamentary Ombudsman's discretion. In 103 of the completed cases the complaint was found to be fully justified; it was held to be partially justified in 74 cases.³⁵²

³⁵² The facts and figures in this part have been mainly taken from the annual reports available at the official web site of the Parliamentary Ombudsman(now called Parliamentary and Health Service Ombudsman PHSO) . See: http://www.ombudsman.org.uk/about_us/our_plans/archive.html last accessed: 20-1-2010

Another way of looking at the performance is to look into the number of cases concluded and the number of reports issued. In

1997-98, 2,055 cases were concluded as compared with 1,047 in 1992. The number of reports of full investigations in 1997-98 was 376, while the comparable figure for 1992 was 190. In 2001-2002, there were 2,139 complaints, an increase of 24 percent the previous year while 1,988 complaints were concluded

In the year 2004-5 the Parliamentary Ombudsman office accepted 4,189 new complaints for investigation, an increase of 988 (30%) from the past year. This number included 1,017 cases already in hand from the previous session taking the total to 5,206. Although out of that number 2,886 cases were concluded during the year, the increase in the number of new cases accepted for investigation meant that the office began 2005-06 with 2,320 cases in hand. This presented a major challenge and the Parliamentary Ombudsman had to put in place a number of measures to cope up efficiently with the situation.

To make the targets easier to understand and the performance easier to measure and assess, the Parliamentary Ombudsman Office introduced a set of simple, clear operational targets based on the length of time it takes for a case to be completed - measured from the time complaint is received until a decision is reached.

At the start of the year the Office recognized that if it were to engage staff fully in the changed programme, it should expect to complete between 5-10% fewer

complaints. But it exceeded the target by reaching decisions on 2,886 cases compared with 2,895 in 2003-04 .During 2004-05 the Office reached a decision on 94.9% of Parliamentary cases within 12 months (against a target of 95%) and exceeded the target for Health Service complaints reaching a decision for 86.8% of cases while the target was 80%.

The Office met all its service standards with the exception of its aim of completing 80% of Parliamentary complaints within three months. This was due to a significant increase in the number of complaints received and it has implemented a range of measures to respond to this situation. In addition to the work on complaints Parliamentary Ombudsman office dealt with 11,689 enquiries and requests for information within the target response times. Enquiries include complaints which could not be investigated because they were not within the Parliamentary Ombudsman's jurisdiction or were premature, for example because they have not been referred by a Member of Parliament or have not been considered locally under the NHS complaints system. In addition to grievance redress the Office of the Parliamentary Ombudsman published various report making recommendations to the government to for the improvement of services of various departments, particularly National Health Service.³⁵³

³⁵³ See detailed Annual Report of Parliamentary Ombudsman for the year 2004-5 at: http://www.ombudsman.org.uk/pdfs/ar_05.pdf last accessed: 20-1-2010

During the next session of 2005-6 Number of enquiries the Parliamentary Ombudsman dealt with was 21,397. Among them Requests for information were 16,527 (77%), Premature complaints 3,553 (17%), Body out of jurisdiction 649 (3%), Subject out of jurisdiction 439(2%), and Other discretionary closures were 229 (1%).

The Office began 2005-06 with 2,320 cases in hand. During the year 3,162 further cases were accepted for investigation. The output of completed cases fell during the first half of the year as the Office embedded its new business approach and case management system. The number of cases in hand reached its highest point of 2,700 in October 2005. The Office implemented an action plan to clear the backlog of cases awaiting allocation and, as a result, by the year end it had concluded 25% more cases than it did in 2004-05 and reduced its overall caseload by 20%. The number of cases accepted was 4,189. The Office reported on 2,886 cases. Among this total number 1,715 cases were of parliamentary nature while rest of them were related to National Health Service.

Of the complaints that were investigated in 2005-06, 37% were upheld in full, 30% upheld in part and 33% not upheld. A single case referred to Parliamentary Ombudsman on behalf of a complainant may include complaints about more than one body - for example, a complainant might complain about the actions of the Disability and Careers Service and Job centre Plus. It is therefore important that, as

well as recording the number of cases concluded, the number of bodies complained about should also be recorded.³⁵⁴

The cases accepted by the Parliamentary Ombudsman in the year 2006-7 were lesser than that of the previous year. First, the Office introduced a more robust process for deciding whether it could and, if so, whether it should accept a case for investigation. Its aim has been to ensure that its decisions to accept cases for investigation are correct in law, consistent, speedy and strategic –in line with the Ombudsman’s role as a complaint handler of last resort.

Secondly, promoting better local complaints handling and resolution was one of our key objectives. The assessment process therefore ensured that the body complained about had an opportunity to resolve the complaint. Also, where appropriate, it ensured that the complainant had made use of any appropriate second tier complaint handler, such as the Adjudicator or the Healthcare Commission.

Before the Parliamentary Ombudsman Office accepted a case for investigation it wanted to be satisfied that:

- A. the complaint was properly within the Ombudsman’s remit and the body complained about had not been able to resolve it;
- B. There was evidence of maladministration leading to un-remedied injustice;
- C. There was a reasonable prospect of a worthwhile outcome to its investigation.

³⁵⁴ Detailed Annual Report of 64 pages available at: http://www.ombudsman.org.uk/pdfs/ar_06.pdf
last accessed: 20-1-2010

The Parliamentary Ombudsman Office had also established a much clearer distinction between cases where it intervenes to secure a positive outcome for a complainant without the need to launch an investigation, and cases where it investigated and reported. Therefore, in future it will be able to report more accurately and comprehensively on those cases where its intervention short of an investigation had secured the resolution of a complaint, which was an important aspect of its work. Such cases were then recorded as concluded enquiries.

A substantial number of cases were initially accepted for investigation but afterwards closed as an enquiry. This was because the Office reassessed all cases in hand when it adopted the assessment process described above. Thus, 373 cases were closed as enquiries rather than as investigations. Overall, while the number of investigations reduced, our overall workload remained substantially unchanged as more work was being done at the enquiry stage. The changes were more of presentation than of substance. So it dealt with over 14,000 enquiries during the year. Of these, around 4,400 (31%) were requests for information and just over 9,800 (69%) were requests to investigate. Of the requests to investigate: 17% were accepted for investigation, 28% were not properly made (for example, not referred by an MP) 23% were premature, 18% were out of remit, 3% were withdrawn by the complainant, In a further 11% of cases we decided not to investigate (for example, because there was no evidence of maladministration).

The year 2006-07 began with 1,862 cases in hand. During the year the Parliamentary Ombudsman Office accepted a further 1,682 cases for investigation. The output of completed cases of 2,927 in 2006/07 exceeded the number of cases accepted for investigation during the year by 1,245 and as a result the in hand figure reduced by 67% to 617. This year particular emphasis was laid on reducing the number of in hand investigations that were over a year old, which resulted in a 69% reduction in the number of these cases from 234 to 73.

In 2007 March the Parliamentary Ombudsman Office celebrated its 40th anniversary of its establishment. Of the complaints investigated in 2006-07, 34% were upheld in full (compared with 37% in 2005-06), 28% were upheld in part (30% in 2005-06) and 38% were not upheld (33% in 2005-06). The increase in the not upheld rate reflects the changing profile and nature of the complaints the Office reported on. For example, continuing care cases have high uphold rates. In 2005-06, these made up 33% of complaints reported on (pushing up the overall uphold rate), but in 2006-07 the proportion of continuing care cases had reduced to just 15% of complaints reported on.

All the recommendations Parliamentary Ombudsman made during that year have been accepted or are currently being considered by the body or practitioner complained about. The majority of recommendations in our health investigations focused on an apology or some action to prevent a recurrence (for example, a review

of or changes to procedures, or staff training). Others included action to remedy the failure identified, or reconsideration of the decision. The majority of recommendations in the Parliamentary investigations focused on financial compensation for inconvenience or distress. Others included an apology, financial compensation for loss or an action to remedy the failure identified.³⁵⁵

In the year 2007-8, in line with the new robust assessment processes introduced in 2006-07, enquiry cases were closed, following decisions on whether the Parliamentary Ombudsman Office could accept the complaint for investigation (that is, if it is within its jurisdiction); and, if it can, whether it should, through assessment of:

- a. whether the body complained about has had a proper opportunity to resolve it;
- b. whether there is evidence of maladministration leading to an unremedied injustice;
- c. whether there was a reasonable prospect of a worthwhile outcome to an investigation.

In some cases, it might be possible to resolve cases through intervention short of an investigation by working with the relevant parties to the complaint and the Parliamentary Ombudsman would do this wherever possible.

During the year, the Office:

³⁵⁵ For all those facts and figures and many other aspects of the work of Parliamentary Ombudsman in the year 2006-7 see Annual Report of 2006-7 at : http://www.ombudsman.org.uk/pdfs/ar_07.pdf, last accessed: 20-1-2010

- a. closed 11,698 enquiries (assumption 16,000);
- b. closed 3,551 of these after further detailed assessment of whether the complaint should be accepted for investigation (assumption 5,000);
- c. ended the year with 1,316 enquiries in hand (forecast at or around 750); .
- d. had a further 191 enquiries in hand which had been referred back to complainants for further information.

The shortfall in cases closed and increase in cases in hand was partly due to the reduction in enquiries received and partly to other factors, such as productivity and resourcing issues which are now being addressed. As a result of this, only 76% of enquiries were closed within 40 days against our service standard target of 90%.

During the year, :

- 951 cases were accepted for investigation (assumption 1,400);
- completed 959 investigations (assumption 1,400);
- ended the year with 618 investigations in hand at 31 March 2008 (forecast aim at or around 620); and
- had 73 cases over 12 months old at 31 March 2008 (target 60).

Overall, the Office improved completion of cases within six months from 43% in 2006-07 to 45% but remained short of our target of 55%, reflecting the increasing complexity of cases taken on for investigation; and it also improved overall

performance against its standard for completion at 12 months from 79% to 87%, exceeding its target of 85%.

As a whole, during the year the Office fully upheld 37% of complaints investigated (34% in 2006-07); partly upheld 18% (28%); and did not uphold the remaining 45% (38%). The picture was quite different for Parliamentary and Health investigations. The Office upheld the complaint in full or in part in 68% of Parliamentary investigations. In Health investigations it upheld the complaint in full or in part in 49% of cases. Over 99% of the recommendations it made during the year have been accepted or considered by the body or practitioner complained about. The majority of recommendations in its Parliamentary investigations were for financial compensation for inconvenience or distress, underlining an apology. Others included financial compensation for loss, or some action to remedy the failure identified.

The majority of recommendations in its Health investigations focused on an apology or reconsideration of the decision. Others included action to remedy the failure identified, or some action to prevent a recurrence (for example, a review of or changes to procedures, or staff training). Financial remedies have also featured, for example as compensation for direct financial loss or in recognition of the distress and inconvenience caused by poor complaint handling.

During the year the Parliamentary Ombudsman Office received 207 requests for information under the Freedom of Information Act and Data Protection Act

(over 250 were received in 2006-07). It reported last year that due to the volume of requests and specific difficulties with responding to many of these (due to the special legislative position of the Ombudsman), it did not always meet the statutory timescales for responding to requests. In 2007-08 the Office addressed this issue and significantly reduced both the volume of cases in hand to 13 and the time taken to reply.

As a measure of the performance of its own service, over the year the Parliamentary Ombudsman Office received 773 complaints about it (significantly down from 1,219 in 2006-07); resolved 964; and ended the year with 99 in hand (296 in 2006-07), exceeding the target of having no more than 120 in hand at the year end.

Since 1 January 2008 all complaints about Parliamentary Ombudsman have been handled within a new 'single-tier' system, the service standard for which was to provide a substantive response on 90% of these within 16 weeks. During the year the Office achieved 58%.

Of the complaints Parliamentary Ombudsman received about his own Office, 431 were about its handling of enquiries; 137 were about health investigations; 190 were about parliamentary investigations; and 15 were about the Freedom of Information Act and the Data Protection Act. Of these, 107 were fully or partly upheld, a significant improvement over the 157 in 2006-07, within which, errors

upheld about its decisions were down from 34 to 22 while errors partly upheld were down from 69 to 32 and service complaints were reduced from 54 to 53.

There were ten applications for judicial review of Parliamentary Ombudsman's decisions and two county court claims in the year. Of the ten judicial reviews, nine were refused permission to proceed. The other judicial review was granted permission to proceed but was dismissed by the court.

One of the county court claims was dismissed by the court; the other was withdrawn by the claimant³⁵⁶

During the year 2008-9 the Office dealt with 16,317 enquiries and concluded 713 investigations, meeting five of its six operational targets.

Being accountable for its performance against the plans and targets it had set itself was important to it. It continued to make big strides against its priorities, delivering a significant programme of change in readiness for the new NHS complaints system whilst at the same time managing its workload to meet five out of six of the operational targets set out in its 2008-09 Corporate Business Plan.

Its Corporate Business Plan identified a number of key corporate priorities and activities for the year. These were grouped into five areas as follows:

1. deliver an independent, high quality and accessible complaint handling service;

³⁵⁶ For a more detailed analysis of the performance of the Parliamentary Ombudsman and various issues related to the performance during the year 2007-8 see the 95-page Annual Report of Parliamentary Ombudsman available at: http://www.ombudsman.org.uk/pdfs/ar_08.pdf, last accessed: 20-1-2010

2. capture and share the evidence from our casework and on our performance, and use the expertise to drive improvements in public services and to inform public policy;
3. plan, deliver and manage change to achieve continuous improvement;
4. attract, positively engage and develop its people so that they drive the achievement of its objectives; and
5. Use its systems and resources to effectively support and manage the service that it provided to the public.

During the year it received 16,317 enquiries against a planning assumption of 14,000. Enquiries to Parliamentary Ombudsman can be initiated by telephone, email or in writing and its response time was monitored as part of our performance reporting framework. Both its service standards for acknowledging email and written enquiries (100% in one and two days respectively) were met. Of the enquiries received, 7,608 related to parliamentary bodies, 6,229 were about health bodies and 2,480 were about bodies outside its jurisdiction.

Enquiry cases were closed following decisions on whether it can accept the complaint for investigation (that is, if it is within its jurisdiction); and, if it can, whether it should, through assessment of:

- a. whether the body complained about has had a proper opportunity to resolve the complaint;
- b. whether there is evidence of maladministration leading to an unremedied injustice;

c. Whether there is a reasonable prospect of a worthwhile outcome to an investigation.

If possible, Parliamentary Ombudsman seeks to resolve cases through intervention, short of an investigation, and this was a growing area of its work. During the year, it closed 108 enquiries in this way (47 in 2007–08).

During the year the Office achieved its operational target of closing 80% of enquiries within 40 days (76% in 2007–08); closed 15,639 enquiries against a planning assumption of at or around 14,000 (11,698 in 2007–08), of which 108 were resolved through intervention short of an investigation (47 in 2007–08); while closed 12,026 of these after an initial assessment of whether the complaint could be accepted for investigation against a planning assumption of at or around 10,700 (8,147 in 2007–08). It closed 3,613 of these after further detailed assessment of whether the complaint should be accepted for investigation against a planning assumption of at or around 3,300 (3,551 in 2007–08). It ended the year with 2,175 enquiries in hand against a forecast aim of at or around 1,350 (1,497 at 31 March 2008).

As part of the transition arrangements for the new NHS complaints system, 1,042 enquiries were forwarded to Parliamentary Ombudsman directly by the Healthcare Commission during the last quarter of the year, and 961 of these were in hand at the year end. If these 961 transited cases were excluded from the total of 2,175 enquiries in hand at the year end, this would leave a total of 1,214 enquiries in hand, i.e. below the forecast of 1,350 in the 2008–09 Corporate Business Plan.

Overall, 79% of enquiries were either not properly made (that was, cases that had not been put to PHSO in writing or, in parliamentary cases, had not been referred by an MP), or were premature, or about a body or matter that was outside our jurisdiction. This remains a cause of continuing concern for Parliamentary Ombudsman as he aims to ensure that people know whether PHSO is the right place for them to bring their complaints, and, if it is, when the right time to do so is.

During the year Parliamentary Ombudsman Office concluded 72% of its investigations within 12 months against its operational target of 80% (87% achieved in 2007–08). It accepted 401 cases for investigation against a planning assumption of at or around 750 (951 in 2007–08). It concluded 713 investigations against a planning assumption of at or around 750 (959 in 2007–08). It ended the year with 308 investigations in hand at 31 March 2009 against a forecast aim of at or around 620 (620 at 31 March 2008 – this was a restatement from 618 due to the re-opening in the year of 2 cases following complaints about its decision). It had 50 cases over 12 months old at 31 March 2009 against a target of no more than 60 (73 at 31 March 2008).

The outturn for its investigation work differed from its planning assumptions, in respect of both the number of cases accepted for investigation and the number of investigations concluded; and also from its target for the percentage of investigations it hoped to conclude within 12 months.

The reduction in the number of cases accepted for investigation reflects a more rigorous approach to its assessment of cases when they first come to it, together with an increase in the number of interventions short of an investigation that it undertook.

It concluded 713 investigations against a planning assumption of at or around 750. This lower figure reflects the change in the nature of health investigations in the second half of the year, when it extended the scope of a number of investigations about poor complaint handling by the Healthcare Commission to include the underlying initial complaint about the NHS body concerned, rather than refer the case back to the Commission for further work, as it would have done previously. As well as reducing the number of investigations it was able to conclude in the year, this also increased the length of time that these investigations needed to take.

Whilst the failure to achieve its 80% throughput target for investigations was primarily a result of the changes to the system for handling NHS complaints, it remains concerned about the length of time that many of its investigations take to conclude. It planned to review its investigation processes in 2009–10 with the aim of reducing investigation throughput times in future years.

During the year the Office of the Parliamentary Ombudsman fully upheld 37% of complaints investigated (37% in 2007–08) while partly upheld 15% (18% in 2007–08) and did not uphold the remaining 48% (45% in 2007–08).

It upheld the complaint in full or in part in 60% of parliamentary investigations (68% in 2007–08) and in 48% of health investigations (49% in 2007–08).

Over 99% of the recommendations it made during the year have been accepted or are currently being considered by the body or practitioner complained about (99% in 2007–08).

The majority of recommendations in its parliamentary investigations were for financial compensation for inconvenience or distress, underlining an apology. Others included financial compensation for loss, or some action to remedy the failure identified.

The majority of recommendations in its health investigations focused on an apology or reconsideration of the decision, usually by the Healthcare Commission. Others included action to remedy the failure identified, or some action to prevent a recurrence (for example, a review of or changes to procedures, or staff training). Financial remedies have also featured, for example as compensation for direct financial loss or in recognition of the distress and inconvenience caused by poor complaint handling.

As a measure of the performance of its own service, over the year it received 910 complaints about its own self (773 in 2007-08). It resolved 768 (964 in 2007-08) and ended the year with 238 in hand (96 at 31 March 2008, restated from 99 due to a small number of data errors).

It provided a substantive response on 91% of these within 16 weeks, exceeding its customer service standard and operational target of 90% (58% in 2007-08).

Of the complaints it received about itself

- a. 732 were about its handling of enquiries (431 in 2007-08)
- b. 122 were about health investigations (137 in 2007-08);
- c. 38 were about parliamentary investigations (190 in 2007-08); and
- d. 18 were about requests for information under the Freedom of Information Act 2000/Data Protection Act 1998 (15 in 2007-08).

Of the total number of complaints about itself

- a. 103 (13%) was fully or partly upheld:
- b. 74 were complaints about its service;
- c. 18 were about enquiry decisions;
- d. 5 were about health investigation decisions;
- e. 3 were about parliamentary investigation decisions; and
- f. 3 were about decisions relating to requests for information under the Freedom of Information Act 2000/Data Protection Act 1998.

There were seven applications for judicial review of its decisions (ten in 2007-08) and no county court claims (two in 2007-08). Of the judicial review applications, six were refused permission to proceed. The other application is still pending the court's decision.³⁵⁷

6. Conclusion:

- The reason of establishing the Parliamentary Ombudsman Office is that before its establishment there were a few remedies available to the common citizen in case of any grievance caused by the maladministration.. However those remedies had their own limitations and problems. They were either expensive, taking a long time or not well trusted by the common citizen.
- The main and foremost purpose was to check maladministration in the government bodies.
- With the passage of time and realization of the significance of the its work the office was established in many other spheres as well like Health Ombudsman, Local government Ombudsman and Legal Services Ombudsman etc.
- Jurisdiction of Parliamentary Ombudsman included government departments, bodies functioning on behalf of the Crown and bodies established under an Act of Parliament.

³⁵⁷ http://www.ombudsman.org.uk/pdfs/ar_09.pdf, last accessed: 20-1-2010

- The complaint must be presented to a Member of Parliament who in turn sends it to the office of Parliamentary Ombudsman.
- Sending complaint through MP has been a point of debate. There is a strong opinion against it but after much deliberation by the Parliament over the issue, finally it has been decided to keep this filter.
- The performance of the Office of Parliamentary Ombudsman has been satisfactory and improving year by year. Benefiting from past experience the office gradually kept bringing changes and improvements in its way of handling the complaints. Though its jurisdiction has been expanding, but it has managed successfully to tackle the situation.
- Its performance over the years and improvement in the quality of its work shows that it has been true to its vision that is to make its service available to all who need it; to operate open, transparent, fair, customer-focused processes; to understand complaints and investigate them thoroughly, quickly and impartially and secure appropriate outcomes and share learning to promote improvements in public service.

Chapter five

Application of

Wilāyat al Mazālim in

Pakistan: Office of *Wafaqi*

Mohtasib

Chapter five:

Application of *Wilāyat al Mazālim* in Pakistan: *Wafāqī Mohtasib*

(Federal Ombudsman)

1. Introduction:

Pakistan is a country which came into existence in the name of Islam. Its constitution stipulates in its provisions that the government would make efforts to enable its citizen to lead their lives in accordance with the teachings of Islam. If in reality teachings of Islam are followed, it will certainly result in good, clean and transparent system of governance. Unfortunately good and transparent governance system is an unfulfilled dream of the Pakistani nation for the last many decades since the inception of this country in 1947. After the 1977 Martial Law, the then ruler General Muhammad Ziaul Haq began steps of Islamization and like every new ruler promised the nation to provide it with a corruption free system of government. Among many steps which his government took for this purpose, one was the establishment of the institution of *Wafāqī Mohtasib* which has been, no doubt, a successful institution which has achieved its goal of providing a forum to the common citizen where he or she can bring forth a complaint against any misuse of power or maladministration by the government officials with an ease which is not

available to him or her in judicial system. The performance reports which have been discussed in this chapter are a proof that the institution has been successful in building the confidence of common citizen in its working.

2. The Background of the Institution

Grievance redress role of the government is not a new phenomenon. The idea of investigating complaints against the government officials is rooted deep into the ancient times. It has existed in one form or another throughout the history of human civilization. Heads of a clan, tribe a dynasty had exercised this role in various phases in human history with different scope and varying degrees of effectiveness. As an institution to investigate complaints against administrative machinery the idea of Ombudsman is as old as public administration itself.³⁵⁸ Many countries of the world established such institutions throughout the ages with different names varying functions and powers to achieve the objective of redressing public grievances arising against the state functionaries. The Ombudsman like institutions in one or other form had remained in existence throughout the history of human civilization. In fact it had been familiar to all rulers who were concerned with the happiness and welfare of their

³⁵⁸ For the history of grievance redress mechanism within Muslim states see chapter two of this dissertation.

subjects. The Roman and Persian (Sassanid) rulers had established practices of investigation of complaints against the royal officials.³⁵⁹

It must be kept in mind that the institution of *Wafaqi Mohtasib* has its foundations in the Islamic concept of accountability. In fact accountability is the cardinal feature of Islam, the very spirit of our faith. All of us are accountable to Allah for each and every moment of our lives and shall have to give an account of all our deeds on the Day of Resurrection. Further, Islam being the complete code of life not only concerns itself with man's spiritual life but encompasses every sphere of his activities. It lays equal emphasis on fairness of man's relationship and dealings with his fellow beings. Especially those who are in a position to exercise authority on others are required to do so with utmost honesty, justice and equity.³⁶⁰

The realization of the need for a grievance redress mechanism initially prompted the setting up of internal grievance redress system by the government agencies themselves but soon it became clear that these systems were not reliable. Instead of redressing public complaints impartially, these institutions tended to protect the culprit. Restoration of public confidence in the government's ability and sincerity

³⁵⁹ Malik, Dil Muhammad, *Ombudsman: the development in Pakistan*, Pakistan law Journal 1982, p.96

³⁶⁰ Annual Report of the *Wafaqi Mohtasib* for 1985, p. 5, 6

to redress their complaints now depended on the creation of an impartial and functionally independent institution of the Ombudsman.³⁶¹

The *raison d'être* for setting up the institution of the *Wafāqī Mohtasib*, thus, was to institutionalize a new mechanism for redressing injustice done to citizens by public functionaries. It was sought to set up a system which combines judicial impartiality, adequate investigative capability, pragmatic flexibility in its procedures and professional insight into the labyrinth of the modern administrative structure.³⁶²

The modern society is a bureaucratic society. Over time, there has been a stupendous expansion in the size, functions and importance of public bureaucracy. This has brought about an immense increase in the degree and range of interaction between administration and citizens. In today's world, the welfare and happiness of an individual citizen greatly depends on decisions, acts and omissions of the administrators. Hence there is a need of effective control of the bureaucratic apparatus. The sheer size and the range and scope of bureaucracy has however, dwarfed the traditional mechanisms of control. So the need for providing an institutional forum with much wider functional sweep, to which the citizens may turn without expenses or formalities, has become all the more evident. Setting up the

³⁶¹ Islamuddin, *Towards Understanding the Ombudsman Idea* (booklet without any publication data available in *Wafāqī Mohtasib* Library, Islamabad)) p.4

³⁶² Annual Report of the *Wafāqī Mohtasib* for 1985, p. 5,

institution of the Ombudsman represents a response to this need which has been universally felt both in the developed and the Third world Countries.³⁶³

The problems facing the under developed third world countries are however, much more complex. Mostly, they are new nations, which won independence from colonial rule after the Second World War and are still engaged in a difficult struggle to find solid footing. These countries are politically under developed, socially and economically backward. Hence within these countries the bureaucracy has come to play a pivotal role and exhibits at times a tendency to become a state into itself. Its structure has to a great extent remained the same as designed by the alien rulers to serve their own purpose. Similarly in many cases the administrators' attitude towards people is still like that of their colonial masters. So here the need of an institution like that of the Ombudsman is utmost necessary. In the developed societies the complaints may be about the quality of life, here they are about the life itself.³⁶⁴

Without disputing the wielding of discretionary powers by the administrator, the Ombudsman aims at ensuring that the power is exercised justly, equitably and for the good of the general public. It supplements and does not supplant the role of the Parliament and the internal redress system of the agency. It represents the Parliament in the administrative domain and effectively institutionalizes the principle of administrative accountability to the Parliament and the people. However the desired

³⁶³ Wafaqi Mohtasib (Ombudsman)'s Annual Report of 1984, p. 7

³⁶⁴ Ibid. p.8

results cannot be achieved without completing the circle. Special interest Ombudsman for the judiciary, the Provinces, health, education, local bodies, prisons and civil servants, along with the general purpose Ombudsman can deliver the goods. Otherwise mal-administration would thrive in areas which remain outside the jurisdiction of, or inadequately covered by, the general purposes Ombudsman. Thus the system of accountability, to be meaningful, should extend to all spheres of governmental activity. In fact all the civilized and democratic countries have special interest Ombudsmen alongside the general purpose Ombudsman.

Again the process of accountability would remain half-hearted in a society which lacks the element of self-accountability among its citizenry. Self-accountability should start from childhood and at educational institutions. A society devoid of it loses its sense of guilt. Everyone tends to find justification for his evil deeds in others' actions. As society consists of individuals and if everyone refuses to accept principle of self accountability, that society would degenerate into a breeding ground for mafia and characterless people.

The Ombudsman therefore remains as the only ray of hope for the citizens in distress. It also plays the role of image builder for the bureaucracy by humanizing and personalizing it, which so far was considered as a remote and impersonal institution to be dreaded rather than respected. It bridges the yawning gap between the government

and the governed and thereby strengthens people's trust in the democratic dispensation.³⁶⁵

Today injustice, inequality and economic imbalance has assumed dangerous proportions and is threatening society, as the common man comes to be marginalized in gaining access to the administration for redress of his grievances. To bridge this inequality, minimize the inaccessibility, inform and educate the citizen and alleviate his sufferings at the hands of the administration, and to make it more humane and responsive to the needs and grievances of the common citizens, institution of the Ombudsman is a dire necessity.³⁶⁶

Keeping in mind the above background one must also not forget the Pakistan is the only Muslim state on the world map, which owes its existence to Islamic theory of nationhood. The fore fathers of this country visualized a piece of land where the golden rules of Islam would be brought into practice. There has been a constant effort of Islamizing and bringing in harmony with *Shari'ah* those laws which the country inherited from British colonial rule. Accountability of public servants is a fundamental feature of Islamic administrative and political system. A society or state lacking accountability which is a means of establishing a just order can never be an Islamic society or state. That is why the establishment of the office of Wafaqi Mohtasib

³⁶⁵ Islamauddin, *Towards Understanding the Ombudsman Idea*, op.cit. p.5

³⁶⁶ Welcome Speech of Mr. Imtiaz Ahmad Sahibzada, President, Asian Ombudsman Association at the 8th Asian Ombudsman Association Conference (26-29th April 2004) at Seoul, Republic of Korea See: Annex 2 to *Wafaqi Mohtasib (OMBUDSMAN) Of Pakistan Annual Report 2004*

(Federal Ombudsman) was a right step in that very direction. So in the year 1983 the institution was established by the then President General Mohammad Ziaul Haq under the President Order No. 1 of 1983 regarding the Establishment of the Office of Wafaqi Mohtasib (Ombudsman).³⁶⁷

3. Meaning of the words “*Mohtasib*” and “Ombudsman”:

The word *Mohtasib* is an Arabic word, from the root word “*Ḥasiba, yaḥsabū, ḥisab and Iḥtisāb*” which means to call to account. The terminology has been used for the Ombudsman although in Islamic history the word “*Mohtasib*” has been used for Market Inspector i.e. the official who was in charge of enjoining virtue and forbidding evil in the public places. The term which has been in use for the official who was in charge of Accountability of the public servants, was *Walī al Mazālim*. However, literally, there seems to be no problem in using the word “*Mohtasib*” as it means the one who calls to account and the Ombudsman’s job is truly calling to account the public officials for their maladministration. So in Pakistan the term *Mohtasib-i-A‘lā* or

³⁶⁷ Now in the year 2010 there is the Office of *Wafaqi Mohtasib* (Federal Ombudsman) having headquarters in Islamabad, with eight regional offices in Karachi, Lahore, Peshawar, Quetta, Faisal Abad, Multan, Sukkur and Dera Ismail Khan. There are provincial Ombudsmen each in Punjab, Sindh, Baluchistan and Azad Kashmir. Besides that there is a Federal Tax Ombudsman, Insurance Ombudsman and Banking Ombudsman as well. This growth and expansion of the Ombudsman’s institution is indicative of the success of this experiment.

Wafaqī Mohtasib has been introduced keeping in mind the meaning of accountability in this word.

The term "Ombudsman" has been derived from the Swedish language and has several meanings. This term is used to denote a representative, agent, delegate or a person authorized by others to act on their behalf and serve their interest.³⁶⁸

It means a person who represents or protects the interests of another person or persons. The word assumed its specific meaning when an institution of Ombudsman was set up in Sweden in 1809.³⁶⁹

It is for this reason that now in ordinary dictionary meaning; it denotes an official who investigates complaints regarding administrative action by governments- so called 'maladministration'. The complaint may not necessarily be confined to illegal action but can cover broader injustices in administrative decisions. Most Ombudsmen's powers are of necessity widely defined, but they normally do not investigate issues that can be considered by the courts or tribunals. Their findings do not have the force of law, and are put in form of reports from which it is hoped remedial action will result.³⁷⁰

³⁶⁸, Ibrahim al Wahab, *The Swedish Institution of Ombudsman*, (Sweden: Tryck, Centralryckerict AD, Boras, , 1979), P.19, Islamuddin, *Towards Understanding the Ombudsman Idea*, p.7

³⁶⁹Crystal, David, ed. *The Cambridge Encyclopedia*,(Cambridge: Cambridge University Press, , 1990), p.879

³⁷⁰ *Annual Report of International Bar Association*, 1974, p. 7

Defining the term "Ombudsman" the International Bar Association, in one of its reports, inter-alia said:

The Ombudsman is a rectifier of individual grievances against administration, a watch-dog and reformer of administration, custodian of rectitude.³⁷¹

The Ombudsman Committee of the International Bar Association suggests that the term Ombudsman is employed only to those grievance handling mechanisms which comes within the scope of the following definition: An Ombudsman institution is an office provided for by the constitution or by action of the Legislature or Parliament and is headed by an independent, high level public official, who is responsible to the Legislature or Parliament who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his own motion and who has the powers to investigate, recommend corrective action and issue reports.³⁷²

The definition given by International Bar Association is quite comprehensive one as it covers almost all aspects of the work of the institution of the Ombudsman. In the context of citizen-administrator interaction the Ombudsman is a person to whom

³⁷¹ *Ibid.* p. 7

³⁷² Frank, Bernard, "The Ombudsman: Revisited" in *International Bar Journal*, May 1975, p. 55. The above statement by Bernard Frank, former Chairman of the Ombudsman Committee of the International Bar Association, are actually based on the Resolution passed by this Association, as quoted by, Najmul Abedin, Ombudsman Institution and Conflict Resolution in the Contemporary Third World Societies, *Journal of Third World Studies*, Spring 2006, http://findarticles.com/p/articles/mi_qa3821/is_200604/ai_n17179246/?tag=content;coll Accessed: Oct. 05, 2009.

people may come for redress of their grievances arising out of injustice done through maladministration. He stands between the citizen and the administrators acting as a bridge between the two. He is the citizen's protector and representative, a sympathetic interceder on their behalf.³⁷³

Maladministration is a terminology open to interpretation. It has been interpreted and explained by the Ombudsman as an administrative action or decision which is contrary to law or rules and regulation, unjust, perverse, arbitrary, biased, unreasonable, oppressive, discriminatory based on nepotism, favouritism, jobbery (based on private advantage which prevailed over duty or public interest) administrative excess, neglect, inattention, ineptitude, delay and incompetence etc.³⁷⁴

It may be said here that the Office of *Wafaqi Mohtasib* has been established basically to check maladministration that is related mainly to the implementation of rules and regulations and which manifests in the form of abuse of one's authority. It works in aid of the Parliament and supplements it. It is not an institution which surpasses the jurisdiction of Parliament. The Mohtasib Office is not really concerned with the defined crimes which are punishable under criminal or any other law of the

³⁷³ Annual Report of Wafaqi Mohtasib for 1984, p.6-7

³⁷⁴ All these terminologies are mentioned in Article 2 (2) of Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order 1983 and each has been elaborated in accordance with investigations of the Mohtasib by himself. These elaborations are available at the official website of the Wafaqi Mohtasib. See: <http://www.mohtasib.gov.pk/site/knowledge-products/maladministration-definitions.php> last accessed: 31-1-2010

land. It has a special jurisdiction distinguished from that of Police or other law enforcing agencies.

There is a difference in the concept of justice dispensed by the normal Judiciary and that dispensed by the *Wafaqi Mohtasib* institution. The normal judiciary only fulfills the requirements of legal justice i.e. whether something has been done within the rules. But the *Wafaqi Mohtasib* looks deep into the matter and tries to find out if there has been any maladministration in the form of neglect, undue delay, inattention, nepotism or favouritism and if so, he tries to compensate the oppressed in the real sense of word "compensation". Following is a glaring example of this concept of justice.

A person complained to the *Wafaqi Mohtasib* that he applied to the Capital Development Authority (CDA) Islamabad for participating in bidding of commercial plots in 1982. For a plot of 3500 square feet he offered the highest bid but he was informed that the official concerned in the CDA has rejected his bid. He claimed that the said plot has been allotted to a person for much less price than what he offered. After investigation it was proven that the department rejected the bid on unjust and unreasonable grounds. Terming this as an act of maladministration the *Wafaqi Mohtasib* recommended that the complainant should be allotted another plot within the existing plots. This matter was settled in 1987.

After the retirement of the *Wafāqī Mohtasib* who decided the case, CDA submitted an application to review the recommendation. The acting Mohtasib after hearing the statement of the Chairman CDA rejected the appeal.

CDA submitted another application stating that the complainant did not purchase the substitute plot as its price was higher. The acting *Mohtasib* held that he should be allotted the plot on the old price and possibly in the same area where the plot in question was located. He added that in a case where the injustice was manifest, the redress should be such as if the complainant had never suffered any loss.³⁷⁵

4. Appointment and Qualifications of the *Wafāqī Mohtasib*.

The *Wafāqī Mohtasib* is appointed by the President of Pakistan.³⁷⁶ The law does not provide for any specific qualifications of the *Wafāqī Mohtasib*. It only says that there will be a *Wafāqī Mohtasib* to be appointed by the President of Pakistan.³⁷⁷

³⁷⁵ Abdul Hafeez, *Wafāqī Mohtasib: Tāruf aur Ifādiyat kā Tanqīdī Jāyezab* (Wafaqi Mohtasib: Introduction and Critical Appraisal of its Usefulness), (Lahore: Al Farooq Book Foundation, 1990) pp.30-31

³⁷⁶ There has been a debate about matter of appointment of the *Wafāqī Mohtasib*, whether this should be the authority of the President or the Parliament should do that. The former *Wafaqi Mohtasib*, Chief Justice (retired) Sardar Muhammad Iqbal was of the opinion that the present mode i.e. appointment by the President should continue as is the practice in France and in Australia. According to him the Judges of high judiciary are also appointed by the President but in no way it impair their independence. The autonomy given to the Ombudsman and the assured security of tenure make him an Ombudsman in the true sense of the word. See: *Wafaqi Mohtasib (Ombudsman)'s Annual Report 1985*, p. 18-19. In my opinion the authority should be better vested in the Parliament where the process should be carried out transparently through collective thinking or at least the appointment by the President should be made subject to the approval of the Parliament. This will be more in line with the spirit of Parliamentary form of government that is ordained by the Constitution of Pakistan 1973. A select

However the practice has shown that certain qualifications have been kept in view while appointing him. Usually a former member of the higher judiciary or a Muslim person of high caliber, very good repute and known integrity from the civil service is appointed to this post. Up till now it has also been the practice that no woman has been appointed as the *Wafaqi Mohtasib*.

This is understandable because the nature of job which the *Mohtasib* has to perform is such that a person lacking integrity and strong character, perhaps, will not be successful in fulfilling the purposes. So from the practice we can derive that the qualification for the Mohtasib is that he must be qualified to be a judge of higher judiciary and a man of high integrity and strong character. He is appointed for an unextendable fixed period of four years. It seems that the purpose of the rule of one fixed term appointment is that the person who is appointed as the Wafaqi Mohtasib should not show any flexibility in calling to account the high public officials for gaining a soft corner for his re-appointment in the next term. It also means that he has only that chance to perform or do whatever service he wants to render for the nation and he will not have any other chance in future where he might compensate the shortcomings of the current tenure. Thus he has to be vigilant and pro active in performance of his duties..

committee of the Parliament for reviewing the performance of the Mohtasib's Office will also be useful as it will work as safety valve for the abuse of power or lack of efficiency in the Office itself.

³⁷⁷ Article 3 (1) of Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order 1983

The fixed four year term gives him surety that he is not going to be removed within that period by anyone so he should do his job without the fear of any threat of removal as is the case of other departments where the head is appointed and can be removed by the government for any reason and sometimes, even without a reason.

The only way through which he may be removed during the tenure is by the President of the Country on the basis of misconduct or of being incapable of properly performing the duties of his office because of physical or mental incapacity.

In such a case also the Mohtasib has the option of refuting such allegation and he can request an open public evidentiary hearing before the Supreme Judicial Council³⁷⁸ and, if such a hearing is not held within thirty days of receipt of such request or not concluded within ninety days of its receipt, the Mohtasib will be absolved of any and all allegations whatever. In such circumstances, the Mohtasib may choose to leave his office and shall be entitled to receive full remuneration and benefits for the rest of his term.³⁷⁹

On the other hand if he chooses, he can remain on the post till the end of his tenure. This is yet another safeguard against any threat of removal to the the Wafaqi Mohtasib even by the highest authority of the state. From the above discussion we

³⁷⁸ Supreme Judicial Council is the highest judicial forum of the country. According to Article 209 of the Constitution of Islamic Republic of Pakistan, it shall consist of the Chief Justice of Pakistan, the two next senior judges of the Supreme Court of Pakistan and the two most senior Chief Justices of High Courts. See: M. Mahmood, *The Constitution of Islamic Republic of Pakistan, 1973 with Commentary* (Lahore: Pakistan Law Times Publications, 2007).

³⁷⁹ Article 6 (2) of *Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order 1983*

may conclude that there is a need for legislating clear rules about the qualifications of the Mohtasib and the matter should not be left to the discretion of the President. As we know that there are different political parties in the country and majority of the voters are illiterate, therefore one should not expect any perfect selection of leadership i.e. the government by the public. In such circumstances discretionary powers should be restricted to the maximum possible extent so that there is no chance of misuse of powers just to buy the political loyalty of a group of people or a political party. The fixed one term appointment may also be reconsidered and in exceptional cases it may be allowed to be made at least two terms because at times a Mohtasib's vision and performance might be extraordinary excellent and the nation may be benefited from his services for another four year term.

It may be observed at this point that it will also be befitting if the qualifications of Mohtasib are legislated upon keeping in view the rules of *Siyāsah Shar'īyyah* in this regard. It will also be in line with the spirit of the Constitution of Pakistan, that requires that there should be no law against the injunctions of Qur'ān and Sunnah. So the least qualifications should be what was deemed necessary for a *Qāḍī* (judge) in accordance with the Islamic Law. And as the job of a Mohtasib is equal to that of *Wāli al Mazālim* in Islamic legal system, so he must have the additional qualification of being a prominent personality and commanding respect of the society as well.³⁸⁰

³⁸⁰ Besides many classical and contemporary books on what is called in Islamic Law as *Adab al Qāḍī* (Law of Judiciary), a very good work which discuss the qualifications, appointment and functions of

In case of comparison among the systems of the *Diwān al Mazālim* of Saudi Arabia and Wafaqi Mohtasib it is clear that both the President of *Diwān al Mazālim* and the Wafaqi Mohtasib are appointed by the Head of the State and can be removed only by the same authority. While in case of Parliamentary Ombudsman in the the United Kingdom, though he is appointed by the Crown but the distinction is that he may be removed by the Crown or by the Parliament.

5. Jurisdiction and Complaint handling Procedure of the Mohtasib

5.1. Jurisdiction:

The Mohtasib may, on a complaint by any aggrieved person, on a reference by the President³⁸¹, the Senate or the National Assembly, or on a motion of the Supreme Court or a High Court made during the course of any proceedings before it or of his own motion, undertake any investigation into any allegation of maladministration on the part of any department or any of its officers or employees.³⁸²

The following matters are excluded from the jurisdiction of the

Judiciary including *Wilāyat al Mazālim* is, *Al Ahkām al Sulṭāniyyah* (The laws of Governance) by Abū al Ḥasan Alī bin Muḥammad bin Ḥabīb al Māwardī (d.450 A.H) trans. Dr. Asadullah Yate, Ta, Ha, Publishers, London, UK. 1416/1995.

³⁸¹ The President may refer any matter, report or complaint for investigation and independent recommendations by the Mohtasib. In such case the Mohtasib shall promptly investigate any such matter, report or complaint and submit his findings or opinion within a reasonable time.

³⁸² Article 9(1) of *Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order 1983*.

Wafāqī Mohtasib i.e. he can not undertake any investigation or inquiry in the following matters:³⁸³

- (a) Cases which are *sub-judice* before a court of competent jurisdiction or tribunal or board in Pakistan on the date of the receipt of a complaint, reference or motion by him;
- (b) Cases which relate to the external affairs of Pakistan or the relations or dealing of Pakistan with any foreign state or government; or
- (c) Matters related to, or are connected with the defence of Pakistan or any part thereof, the military, naval and air forces of Pakistan, or the matters covered by the laws relating to those forces.
- (d) the *Mohtasib* shall not accept for investigation any complaint by or on behalf of a public servant or functionary concerning any matters relating to the department in which he/she is, or has been, working in respect of any personal grievance relating to his service in that department.
- (e). According to Article 31 of the Order of Establishment of Wafaqi Mohtasib the President is empowered to exclude any matter from its operation and purview. In pursuance of these powers, the President in 1984 excluded any matter relating to or connected directly or indirectly with the Federally Administered Tribal Areas from the jurisdiction of this institution. In 1985

³⁸³ Ibid. Article 9 (2), See also Article 31 (3) whereby the President may, by notification in the official Gazette, exclude specified matters, public functionaries or Agency from the operation and purview of all or any of the provisions of *Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order 1983*.

orders of detention made under Section 3 of the Security of Pakistan Act, 1952, and the cases of persons detained under such orders were excluded from the operation and purview of *Wafāqī Mohtasib* too.³⁸⁴

If we compare the jurisdiction of *Wafāqī Mohtasib* with the institution of *Wilāyat al Mazālim*, we can easily conclude that the institution of *Wafāqī Mohtasib* has a very restricted jurisdiction. On the other hand the institution of *Wilāyat al Mazālim* used to have a very wide jurisdiction. There was no department which was out of its jurisdiction. Even the institution of Judiciary itself was under the supervision of *Wilāyat al Mazālim*. So it was an institution which was the most powerful to check maladministration in the state machinery. Nonetheless, one should also keep in mind that in the previous times the state institutions were not multifold as is the case today. Today there are many institutions for accountability and checking maladministration.³⁸⁵ Therefore the jurisdiction has to be restricted. Anyway there are certain exclusions from the jurisdiction of *Wafāqī Mohtasib* which may be reconsidered in the larger public interest of justice. Prime examples in this respect are matters related to Defence and those related foreign affairs.

For carrying out the objectives stated in the relevant law and, in particular for ascertaining the root causes of corrupt practices and injustice, the Mohtasib may

³⁸⁴ *Wafāqī Mohtasib (Ombudsman)'s Annual Report 1985* p.23

³⁸⁵ Example of such institutions in Pakistan are National Accountability Bureau, Pakistan Electronic Media Regulatory Authority (PEMRA), Oil & Gas Regulatory Authority (OGRA), National Electric Power Regulatory Authority, Various Standing Committees of the Parliament etc.

arrange for studies to be made or research to be conducted and may recommend appropriate steps for their eradication.³⁸⁶

During the course of four years (2002 to 2005) a number of studies were conducted by the Office of the Wafaqi Mohtasib on important issues in terms of Article 9(3) of the Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order, 1983, under which the Mohtasib may arrange for studies to be made or research to be conducted regarding any aspect of the functioning of an 'Agency' of the Federal Government so as to root-out corrupt practices and injustice.

For example in 2002 a total of 62 % complaints were received about WAPDA. Though in the year 1984 this percentage was 17 and in the year 1993 it had reached to 24% only. In consultation with WAPDA, a four member committee, comprising officers of the Office of Wafaqi Mohtasib was formed to conduct a study regarding the issue.

The terms of reference for the committee were as follows:

To examine the existing organizational structures, arrangements, policies and procedures of WAPDA relating to billing in general and detection billing in particular and the internal systems available for redress of grievances arising therefrom and suggest measures for bringing about improvements therein.

A detailed study was conducted after thorough investigation which included a number of field tours; recommendations were formulated and handed over to the

³⁸⁶ Article 9 (3) of *Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order 1983*

concerned department. However those recommendations are yet to be implemented.³⁸⁷

Another study was conducted by the Office in 2004 regarding the maladministration in Works Department and recommendations were formulated and handed over to the department concerned. Likewise studies were conducted in the year 2004 about Pakistan Telecommunications Ltd and Zari Taraqati Bank (Agricultural Development Bank)³⁸⁸

The *Mohtasib* may set up regional offices as, when and where required.³⁸⁹ There are eight regional offices of the *Wafaqi Mohtasib*. They are in Karachi, Lahore, Quetta, Peshawar, Faisalabad, Multan, Sukkar and Dera Ismail Khan. All of those offices receive complaints about the federal government departments.

The point which is not mentioned in the Order under the jurisdiction clauses but can be derived from definition clauses³⁹⁰ is that *Wafaqi Mohtasib* can only investigate matters under federal departments and has no jurisdiction over the provincial departments. However now there are Provincial Ombudsmen in all provinces and Azad Jammu and Kashmir except North West Frontier Province Where the office is yet to be established.

³⁸⁷ *Wafaqi Mohtasib (Ombudsman)'s Annual Report 2005*, p. 8, chapter 1.

³⁸⁸ *Ibid.* pp. 8-9

³⁸⁹ Article 9 (4) of *Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order 1983*.

³⁹⁰ Article 2 (1) of *Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order 1983* says: "Agency" means a Ministry, Division, Department, Commission or office of the Federal Government or statutory corporation or other institution established or controlled by the Federal Government but does not include Federal Shariat Court or a High Court. In 2002 through an amending ordinance the words "statutory body" were also added to the clause.

5.2. Complaints Handling Procedure:

(1) A complaint is supposed to be made on solemn affirmation³⁹¹ or oath and in writing addressed to the *Mohtasib* by the aggrieved person or, in the case of his death, by his legal representative and may be lodged in person at the office or handed over to the *Mohtasib* in person or sent by any other means of communication to the office.

(2) Complaints without name and other relevant information of the complainant are not entertained.

(3) A complaint should be made within three months from the day on which the complainant first had the notice of the matter alleged in the complaint. However the *Mohtasib* has the powers to conduct any investigation based on a complaint which is not within time if he considers that there are special circumstances which make it proper for him to do so.

(4) When the *Mohtasib* proposes to conduct an investigation he issues a notice to the principal officer of the department concerned, and to any other person who is alleged in the complaint to have taken or authorised the action complained of, calling upon him to answer the allegations contained in the complaint, including rebuttal.

³⁹¹ That the allegations contained in the complaint are correct and true to the best of knowledge and belief of the complainant; (b) previously no complaint on the subject was filed at the Head Office or any of the Regional Offices; (c) no suit, appeal, petition or any other judicial proceedings in connection with the subject matter of the complaint is pending before any Court, Tribunal or Board; and (d) a representation to a competent authority of the Agency in respect of the allegations contained in the complaint was made, but either no reply thereto was given within a reasonable time or the representation had unjustly been turned down. (Article 3 (4) of *Wafaqi Mohtasib (Investigation And Disposal Of Complaints) Regulations, 2003* (amended upto 30.06.2007) Wafaqi Mohtasib (Ombudsman)'S Secretariat, Islamabad)

However the *Mohtasib* may proceed with the investigation if no response to the notice is received by him from such principal officer or other person within thirty days of the receipt of the notice or within such longer period as may have been allowed by the *Mohtasib*.

(5) Every investigation is to be conducted in private, but the *Mohtasib* may adopt such procedure as he considers appropriate for such investigation and he may obtain information from such persons and in such manner and make such inquiries as he thinks fit.

(6) A person is entitled to appear in person or be represented before the *Mohtasib*.

(7) The *Mohtasib*, in accordance with the rules, pays expenses and allowances to any person who attends or furnishes information for the purposes of any investigation.

(8) The conduct of an investigation is not to affect any action taken by the Agency concerned, or any power or duty of that Agency to take further action with respect to any matter subject to the investigation.

(9) For the purposes of an investigation the *Mohtasib* may require any office or member of the Agency concerned to furnish any information or to produce any document which in the opinion of the *Mohtasib* is relevant and helpful in the conduct of the investigation, and there is to be no obligation to maintain secrecy in respect of

disclosure of any information or document for the purposes of such investigation. However the President may, in his discretion, on grounds of its being a State secret, allow claim of privilege with respect to any information or document.

(10) In any case where the *Mohtasib* decides not to conduct an investigation, he is supposed to send to the complainant a statement of his reasons for not conducting the investigation.³⁹²

(11) The *Mohtasib* is authorized to regulate the procedure for the conduct of business or the exercise of powers under the Order of establishment of *Wafaqi Mohtasib*.³⁹³

(12) The *Mohtasib* or a member of the Staff have the authority to informally conciliate, amicably resolve, stipulate, settle or ameliorate any grievance without written memorandum and without the necessity of docketing any complaint or issuing any official notice. He may appoint for purposes of liaison counselors, whether honorary or otherwise, at local levels on such terms and conditions as he deems proper.³⁹⁴

After having read the Complaints handling procedure of the *Wafaqi Mohtasib* it is clear that the procedure is easy and uncomplicated for a common man. It is in

³⁹² On the other hand if an investigation is conducted the Complainant is kept updated about the progress of the case. In case of long term complicated cases it is a requirement that the Complainant must be updated of the progress in case at least every three months. See: Article 20 (2) of *Wafaqi Mohtasib (Investigation And Disposal Of Complaints) Regulations, 2003 (Amended Upto 30.06.2007)*, Wafaqi Mohtasib (Ombudsman)'S Secretariat, Islamabad.

³⁹³ Article 10 (1)-(11) of *Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order 1983*.

³⁹⁴ *Ibid.* Article 33.

strong contrast with the procedures of formal judiciary where it is not easy for a common man to think of going there for the protection of his rights merely because of the complicated nature of the formalities and expenses involved there. The absence of court fee and that of the formalities to hire a lawyer etc. really encourages a common man having no resources even, to come and apply just on a plain piece of paper for the protection of his rights on the condition that some abuse of power, negligence on the part of public servants or any other form of maladministration is involved.

6. Powers of the *Mohtasib*:

6.1. Recommendations for implementation.

(1) If, after having considered a matter on his own motion, or on a complaint or on a reference by the President, the Senate or the National Assembly, or on a motion by the Supreme Court or a High Court, as the case may be, the Mohtasib is of the opinion that the matter considered amounts to mal-administration, he communicates his findings to the Agency concerned:

- (a) to consider the matter further,
- (b) to modify or cancel the decision, process, recommendation, act or omission;
- (c) to explain more carefully the act or decision in question;
- (d) to take disciplinary action against any public servant of any Agency under the relevant laws applicable to him;

- (e) to dispose of the matter or case within a specified time;
- (f) to take action on his findings and recommendations to improve the working and efficiency of the Agency within a specified time; or
- (g) to take any other steps specified by the Mohtasib.

(2) The Agency is supposed to inform him, within such time as may be specified by the Mohtasib, about the action taken on his recommendations or the reasons for not complying with the same.

(3). If after considering the reasons of the Agency in respect of his recommendations, the Wafaqi Mohtasib is satisfied that no case of mal-administration is made out he may alter, modify, amend or recall the recommendations:

However if the order is made on a complaint, no order is passed unless the complainant is given an opportunity of being heard.³⁹⁵

(4) In any case where the Mohtasib has considered a matter, or conducted an investigation, on a complaint or on a reference by the President, the Senate or the National Assembly or on a motion by the Supreme Court or a High Court, the Mohtasib forwards a copy of the communication received by him from the Agency to the complainant or, as the case may be, the President, the Senate, the National Assembly, the Supreme Court or the High Court.

(5) If, after conducting an investigation, it appears to the Mohtasib that an injustice has been caused to the person aggrieved in consequence of maladministration

³⁹⁵ This clause was inserted as (2A) vide Ordinance No. LXXII of 2002.

and that the injustice has not been or will not be remedied, he may, if he thinks fit, lay a special report on the case before the President.

(6) If the Agency concerned does not comply with the recommendations of the Mohtasib or does not give reasons to the satisfaction of the Mohtasib for noncompliance, it is treated as "Defiance of Recommendations" and is dealt with as follows.³⁹⁶

6.2. Defiance of Recommendations:

(1) If there is a "Defiance of Recommendations" by the public servant in any Agency with regard to the implementation of a recommendation given by the *Mohtasib*, he may refer the matter to the President who may, in his discretion, direct the Agency to implement the recommendation and inform the *Mohtasib* accordingly.

(2) In each instance of "Defiance of Recommendations" a report by the *Mohtasib* becomes a part of the personal file or Character Roll of the public servant primarily responsible for the defiance on the condition that the public servant concerned had been granted an opportunity to be heard in the matter.³⁹⁷

7. Reference by *Mohtasib*.

Where, during or after an inspection or an investigation, the Mohtasib is satisfied that any person is guilty of any allegations, the Mohtasib may refer the case to the concerned authority for appropriate corrective or disciplinary action, or both

³⁹⁶ Article 11 (1)-(5) of *Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order 1983*

³⁹⁷ *Ibid.* Article 12 (1)-(2)

corrective and disciplinary action and the said authority shall inform the Mohtasib within thirty days of the receipt of reference of the action taken. If no information is received within this period, the Mohtasib may bring the matter to the notice of the President for such action as he may deem fit.³⁹⁸

8. Judicial Powers of the *Mohtasib*.

(1) The Mohtasib has the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (Act V of 1908), in respect of the following matters, namely:

- (a) Summoning and enforcing the attendance of any person and examining him on oath;
- (b) Compelling the production of documents;
- (c) Receiving evidence on affidavits; and
- (d) Issuing commission for the examination of witnesses.

(2) The Mohtasib has the powers to require any person to furnish information on such points or matters as, in the opinion of the Mohtasib, may be useful for, or relevant to, the subject matter of any inspection or investigation.

(3) The powers referred to above exercised by the Mohtasib or any person authorised in writing by the Mohtasib in this behalf while carrying out an inspection or investigation under the provisions of the concerned law.

³⁹⁸ Ibid Article 13

(4) Where the *Moh̄tasib* finds the complaint referred to above to be false, frivolous or vexatious, he may award reasonable compensation to the Agency, public servant or other functionary against whom the complaint was made; and the amount of such compensation shall be recoverable from the complainant as an arrears of land revenue: However the award of compensation under this rule shall not debar the aggrieved person from seeking civil and criminal remedy.

(5) If any Agency, public servant or other functionary fails to comply with a direction of the *Moh̄tasib*, he may, in addition to taking other actions under the law, refer the matter to the appropriate authority for taking disciplinary action against the person who disregarded the direction of the *Moh̄tasib*.

(6) If the *Moh̄tasib* has reason to believe that any Public servant or other functionary has acted in a manner warranting criminal or disciplinary proceedings against him, he may refer the matter to the appropriate authority for necessary action to be taken within the time specified by the *Moh̄tasib*.

(7) The staff and the nominees of the Office may be commissioned by the *Moh̄tasib* to administer oaths for the purposes of the concerned law and to attest various affidavits, affirmations or declarations which are admitted in evidence in all proceedings under the law without proof of the signature or seal or official character of such person.³⁹⁹

³⁹⁹ Ibid. Article 14 (1)-(7)

9. Power to enter and search any premises.

(1) The *Moh̄tasib*, or any member of the staff authorised in this behalf, may, for the purpose of making any inspection or investigation, enter any premises where the *Moh̄tasib* or, as the case may be, such member has reason to believe that any article, book of accounts, or any other document relating to the subject matter of inspection or investigation may be found, and may:

- (a) search such premises and inspect any article, book of accounts or other documents;
- (b) take extract or copies of such books of accounts and documents;
- (c) impound or seal such articles, books of accounts and documents; and
- (d) make an inventory of such articles, books of accounts and other documents found in such premises.

(2) All searches made, referred to above, are carried out, *mutatis mutandis*, in accordance with the provisions of the Code of Criminal Procedure, 1898 (Act V of 1898).⁴⁰⁰

10. Power to punish for contempt.

(1) The *Moh̄tasib* shall have same powers, *mutatis mutandis*, as the Supreme Court has to punish any person for its contempt who:

⁴⁰⁰ Ibid Article 15 (1)-(2)

(a) abuses, interferes with, impedes, imperils, or obstructs the process of the *Mohtasib* in any way or disobeys any of his orders;

(b) scandalises the *Mohtasib* or otherwise does anything which tends to bring the *Mohtasib*, his staff or nominees or any person authorised by the *Mohtasib* in relation to his office, into hatred, ridicule or contempt;

(c) does anything which tends to prejudice the determination of a matter pending before the *Mohtasib*; or

(d) does any other thing which, by any other law, constitutes contempt of court:

However fair comments made in good faith and in public interest on the working of the *Mohtasib* or any of his staff, or on final report of the *Mohtasib* after the completion of the investigation shall not constitute contempt of the *Mohtasib* or his Office.

(2) Any person sentenced under the concerned law may, within thirty days of the passing of the order, appeal to the Supreme Court.

(3) This power of the *Mohtasib*, however, does not take away from the power of the President to grant pardon, reprieve or respite and to remit, suspend or commute any sentence passed by any court, tribunal or other authority.

11. Review of the *Wafāqī Mohtasib*'s Decisions:

According to the concerned law any person who is aggrieved by a decision or

order of the *Wafaqi Mohtasib* may go in appeal to the President within thirty days of the decision or order and the President may pass an order about that case as he thinks fit.⁴⁰¹

The rule of review of the decision of *Wafaqi Mohtasib* is a requirement of justice but it has been misused by the political governments as a means of escape from the implementation of the orders of *Wafaqi Mohtasib*, particularly those orders which go against the government.⁴⁰² The reason is that once representation against a decision is filed to the President, the matter goes to cold storage because the President does not decide the representation on his own but waits for the advice of the Prime Minister, the Cabinet or practically speaking the Law Ministry. None of these authorities is in any hurry to render such advice and in any case, if at all such advice is rendered, it is bound to go in favour of government. Thus it is noticeable that representations filed by the federal government are generally accepted by the President.

⁴⁰¹ Article 32 of *Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order 1983* states: Representation to President.—Any person aggrieved by a decision or order of the Mohtasib may, within thirty days of the decision or order, make a representation to the President, who may pass such order thereon as he may deem fit.

⁴⁰² Although according to Article 29 of *Establishment of Wafaqi Mohtasib (Ombudsman) Order* courts are barred to question the validity of any decision of *Wafaqi Mohtasib* or grant an injunction or stay or interim order in relation to any case heard by the *Wafaqi Mohtasib* but the superior courts of Pakistan have generally interpreted such ouster of jurisdiction clause as ineffective and inapplicable to the exercise of constitutional/ writ jurisdiction of the High Courts. Thus the High Courts and Supreme Court have reviewed the orders passed by the *Wafaqi Mohtasib* or by the President in representation against the orders of the *Wafaqi Mohtasib*. Although the High Courts have generally refused exercise of judicial review against the order of Ombudsman where a person files writ petition without availing the remedy of representation before the President of Pakistan. See for example: *Water and Power Development Authority V. Commissioner Hazara Division*, 1992, SCMR, p.2102, and *Pakistan International Airlines Corporation V. Wafaqi Mohtasib*, 1994, MLD p.244

Delay in disposing of the representation is, nevertheless, worse than decision in favour of the government. The aggrieved party can at least seek judicial review of the order of the President. There have been instances where representations made before the President have remained undecided for more than five years. The government assumes that after it files a representation before the President, the order of the *Wafaqi Mohtasib* stands suspended and every effort is then made to keep such representation in cold storage. Actually, these representations languish in the Ministry of Law for a long time and are not sent to the Presidency for consideration of the President.⁴⁰³

The Supreme Court of Pakistan, in *Federation of Pakistan V. Muhammad Tariq Pirzada*, 1999, took serious notice of this practice and issued a *suo moto* notice to the federal government as to why a direction be not issued for disposal of the representation as expeditiously as possible but ordinarily not later than 90 days of the receipt of a representation by the President. The Court proceeded to determine this matter under Article 37 of the Constitution of Pakistan which makes it incumbent upon the State to ensure inexpensive and expeditious justice. The Court eventually decided the *suo moto* review petition on 1st of July 1999 holding that the President should decide a representation within 90 days from its receipt.

Another aspect which was taken notice of by the Supreme Court of Pakistan was that such representation was not decided by the President through application of

⁴⁰³ Hamid Khan, *Principles of Administrative Law: A Comparative Study* (Lahore: PLD Publishers, 2000), pp 333-334

his own mind. No reasons were assigned by him while deciding the case. The Court held that the words "as he may deem fit" used in Article 32 of the Establishment of Wafaqi Mohtasib (Ombudsman) Order, 1983, clearly signify that the President has full and complete powers to arrive at a conclusion in order to do justice but in the exercise of such powers, he must act justly and fairly and if the recommendations made or findings recorded by the Ombudsman are intended to be interfered with, in the interest of justice, valid reasons must be assigned. The Court repelled the argument on behalf of the federal government that while disposing of a representation, the President can pass any order without assigning reasons. The Court held that the statute of Ombudsman is a self-contained code and provides methodology and manner of enforcement of the findings recorded and the recommendations made by the Mohtasib on complaints lodged by any person against maladministration and injustices suffered by him.⁴⁰⁴

12. Some Other Relevant Powers:

12.1. Inspection Team:

(1) The *Mohtasib* may constitute an Inspection Team for the performance of any of the functions assigned to him by law.

(2) An Inspection Team consists of one or more members of the staff and is assisted by such other person or persons as the *Mohtasib* may consider necessary.

⁴⁰⁴ Federation of Pakistan V. Muhammad Tariq Pirzada, 1999 as quoted by Hamid Khan in *The Principles of Administrative Law*, op.cit. pp.334-335

(3) An Inspection Team exercises such of the powers of the Mohtasib as he may specify by order in writing and every report of the Inspection Team is first be submitted to the Mohtasib with its recommendations for appropriate action.⁴⁰⁵

12.2. Standing Committees:

The Mohtasib may, whenever he thinks fit, establish standing or advisory committees at specified places with specified jurisdiction for performing such functions of the Mohtasib as are assigned to them from time to time, and every report of such committee shall first be submitted to the Mohtasib with its recommendations for appropriate action.⁴⁰⁶

12.3. Delegation of Powers:

The Mohtasib may, by order in writing, delegate such of his powers as may be specified in the order to any member of his staff or to a standing or advisory committee, to be exercised subject to such conditions as may be specified, and every report of such member or committee shall first be submitted to the Mohtasib with his or its recommendations for appropriate action.⁴⁰⁷

12.4. Appointment of advisers:

The *Mohtasib* may appoint advisers, consultants, fellows, bailiffs, interns, commissioners and experts or ministerial staff with or without

⁴⁰⁵ Ibid. Article 17(1)-(3)

⁴⁰⁶ Ibid. Article 18

⁴⁰⁷ Ibid. Article 19

remuneration, to assist him in the discharge of his duties under the concerned Law.⁴⁰⁸

This provision aims at the availability of manpower which is required by the *Wafaqi Mohtasib* in carrying out his job.

12.5. Authorisation of Provincial functionaries:

The Mohtasib may, if he considers it expedient, authorise, with the consent of a Provincial Government, any agency, public servant or other functionary working under the administrative control of the Provincial Government to undertake the functions of the Mohtasib under clause (1) or clause (2) of Article 14 of the Establishment of Wafaqi Mohtasib Order in respect of any matter falling within the jurisdiction of the Mohtasib;⁴⁰⁹ and it is the duty of the agency, public servant or other functionary so authorised to undertake such functions to such extent and subject to such conditions as the Mohtasib may specify.⁴¹⁰

12.6. Award of costs and compensation and refunds of amounts:

(1) The *Mohtasib* may, where he deems necessary, call upon a public servant, other functionary or any Agency to show cause why compensation be not awarded to an aggrieved party for any loss or damage suffered by him on account of any maladministration committed by such public servant, other functionary or agency,

⁴⁰⁸ Ibid. Article 20

⁴⁰⁹ Whereas the matters which fall under the provincial government may be dealt with now by the provincial Mohtasibs in the provinces where the institutions are working

⁴¹⁰ Ibid. Article 21

and after considering the explanation, and hearing such public servant, other functionary or Agency, award reasonable costs or compensation and the same shall be recoverable as arrears of land revenue from the public servant, functionary or Agency.

(2) In cases involving payment of illegal gratification by any employee of any Agency, or to any other person on his behalf, or misappropriation, criminal breach of trust or cheating, the *Mohtasib* may order the payment thereof for credit to the government or pass such other order as he may deem fit.

(3) An order made under the above mentioned rule against any person does not absolve such person of any liability under any other law.⁴¹¹

12.7. Assistance and advice to *Mohtasib*:

(1) The *Mohtasib* may seek the assistance of any person or authority for the performance of his functions under the concerned law.

(2) All officers of an Agency and any person whose assistance has been sought by the *Mohtasib* in the performance of his functions is supposed to render such assistance to the extent it is within their power or capacity.

(3) No statement made by a person or authority in the course of giving evidence before the *Mohtasib* or his staff shall subject him to, or be used against him in any civil or criminal proceedings except for prosecution of such person for giving false evidence.⁴¹²

⁴¹¹ Ibid. Article 22 (1)-(3)

⁴¹² Ibid. Article 23 (1)-(3)

13. Administrative Powers

13.1. Conduct of business.

The *Mohtasib* conducts his business with full immunity and independence.⁴¹³

Following are important points in his conduct of business.

(1) The *Mohtasib* is the Chief Executive of the Office and enjoys administrative and financial autonomy as may be prescribed by the Federal Government.

(2) The *Mohtasib* is the Principal Accounting Officer of the Office in respect of the expenditure incurred against budget grant or grants controlled by the *Mohtasib* and , for this purpose, exercises all the financial and administrative powers delegated to him.

13.2. Requirement of affidavits:

(1) The *Mohtasib* may require any complainant or any party connected or concerned with a complaint or with any inquiry or reference, to submit affidavit attested or notarised before any competent authority in that behalf within the time prescribed by the *Mohtasib* or his staff.

⁴¹³ According to the same law of the *Establishment of the Office of Wafaqi Mohtasib (Ombudsman)* no court or other authority has any jurisdiction to question the validity of any action taken, or intended to be taken, or order made, or anything done or purporting to have been taken, made or done under this law; or to grant an injunction or stay or to make any interim order in relation to any proceedings before, or anything done or intended to be done or purporting to have been done by, or under the orders or at the instance of the *Mohtasib*. Likewise no suit, prosecution or other legal proceeding can be initiated against the *Mohtasib*, his Staff, Inspection Team, nominees, member of a Standing or Advisory Committee or any person authorised by the *Mohtasib* for anything which is in good faith done or intended to be done under this Law. See: Article 29 and 30 of *Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order 1983*

(2) The *Mohtasib* may take evidence without technicalities and may also require complainants or witnesses to take lie detection tests to examine their veracity and credibility and draw such inferences that are reasonable in all circumstances of the case, especially when a person refuses, without reasonable justification, to submit to such tests.⁴¹⁴

13.3. Remuneration of advisers, consultants:

(1) The *Mohtasib* may, in his discretion, fix an honorarium or remuneration of advisers, consultants, experts and interns engaged by him from time to time for the services rendered.

(2) The *Mohtasib* may, in his discretion, fix a reward or remuneration to any person for exceptional services rendered, or valuable assistance given to the *Mohtasib* in carrying out his functions:

However the *Mohtasib* may withhold the identity of that person, if so requested by the person concerned, and take steps to provide due protection under the law to such person against harassment, victimisation, retribution, reprisals or retaliation.⁴¹⁵

14. Evaluation of the Performance of *Wafāqī Mohtasib*:

In this section we will try to evaluate the performance the institution of *Wafāqī Mohtasib* by analyzing some of the facts and figures about the complaints handled by

⁴¹⁴ Ibid. Article 24 (1)-(2)

⁴¹⁵ Ibid. Article 26 (1)-(2)

the institution. These facts and figures have mainly been taken from the annual reports of the institution which are available either in hard or soft form. The efficiency or its lack in an institution like that of the *Mohtasib* can be gauged from an analysis of the admission and disposal of cases by it within a specified time frame and its comparison with the statistics of the previous years.

In the first year of its establishment i.e. 1983, the *Wafaqi Mohtasib* Office received 587 complaints of which 334 were redressed and 253 were rejected for various reasons. The Office had started functioning only in August 1983. So this figure is of the complaints received and worked out during August-December 1983.

In the year 1984 a total number of 38,030 complaints were received by the institution. This figure includes many complaints where either no allegation of maladministration was made out or they pertained to actions or omissions of government functionaries in their private capacity. There were also many complaints about provincial subjects which do not come under the jurisdiction of the *Wafaqi Mohtasib*. After initial examination of complaints pertaining to the Federal Agencies/ functionaries 12,009 complaints were rejected while 6,397 of them were admitted for investigation. The reasons for rejection of complaints were as follow:

- | | | |
|----|----------------------|-------|
| 1. | Anonymous complaints | 1,054 |
| 2. | Subjudice matters | 192 |

3.	Service matters	4,043
4.	Beyond jurisdiction	905
5.	Not relating to maladministration	4,824
6.	Confirmation not received	991

It is important to note that even in the case of Federal complaints; only 35.12% could be admitted for investigation while 64.88% had to be rejected for lack of jurisdiction. This proportion was in fact larger than the corresponding figures of previous year. While knowledge about the existence of this grievance-redress institution is spreading there is a lack of matching awareness about the jurisdictional and functional limitations within which it is to work. It is also noteworthy that much smaller number of complaints would have qualified for admission, had the *Mohtasib* been rigid in the application of time limit (i.e. three months) prescribed in the law. As there was no impartial forum for grievance redress before the establishment of this institution, the *Wafaqi Mohtasib* had, particularly, in the first years, been very flexible with respect to time limit. Using its discretion, the Office of the *Wafaqi Mohtasib* have been admitting cases as old as 24 years for investigation. Likewise a large number of cases were informally resolved by the *Wafaqi Mohtasib* exercising the powers conferred upon him under Article 33 of the *Wafaqi Mohtasib Establishment law*. This provision not only widens the ambit of the Ombudsman's activity but also provides a positive means for settlement of disputes through

conciliatory proceedings and mutual satisfaction of the parties. The rationale underlying this provision is to effect settlements through discussion and persuasion enabling the parties to understand each other's point of view. Generally speaking the parties voluntarily contract that they are willing to submit themselves to the Ombudsman's good offices for the resolution of a dispute or controversy. It is something in the nature of a settlement out of court. This provision has been found very useful and have been invoked to secure relief to complaints. The agencies concerned in all such complaints agreed to accept the Office of Wafaqi Mohtasib although in most cases it had no jurisdiction and could not take up the matter formally. The proceedings were based on goodwill and left very pleasant impressions of satisfaction. The number of complaints taken up for investigation is 6, 397. In addition, investigations proceeded further in respect of 1, 354 complaints carried over from last year. Among all the 7, 751 complaints 2, 048 were redressed, 1, 942 were rejected after investigation and 3, 761 were still under investigation at the end of the year.⁴¹⁶

In the year 1985 total number of complaints received by the Wafaqi Mohtasib was 38, 801 including the carried on complaints from the previous year which were 3, 761, as mentioned above. Among them 19, 546 (55.95%) were related to federal agencies, 15, 391 (44.05) were related to provincial agencies and the remaining were those brought forward from the previous year. Out of 38, 801 cases

⁴¹⁶ For more details see: Wafaqi Mohtasib (Ombudsman)'s Annual Report for 1984

33, 499 cases were disposed of which makes 86.34 % of total number. Among the cases which related to federal agencies 7, 419 (37.76%) were admitted for investigation and 11, 903 (60. 58%) were rejected. The detail of the reasons for rejection is as follows:

1.	Anonymous	1,490	12.52%
2.	Sub judice	412	3.46%
3.	Service Matters	4, 940	41.50%
4.	Not relating to Maladministration	4,381	41.50%
a.	Confirmation not received	680	5.715

On the implementation side the response of the government functionaries in the year 1985 has been remarkable. There has been not a single case of what may be termed as "difiace of recommendations". From the discussion above it appears that in both the years the pace of work of the institution remained almost the same. And the number and percentage of complaints rejected is also the same which shows that the unawareness about the limitations of the institution were also at the same level as before.⁴¹⁷

During the year 1987 a total of 50,576 complaints were received. Among them 39, 396 were disposed of after initial examination/preliminary investigation. 7,337 were redressed after detailed investigation while 3, 925 were

⁴¹⁷ *Wafaqi Mohtasib (Ombudsman)'s Annual Report for 1985*

rejected after full investigation. 5, 918 were still under investigation at the end of the year.

During the year 1989 the proportion of complaints against the federal agencies to the over all total registered an upward trend compared to the previous year. The proportion this year was 74% of the total as compared to 67% the previous year. This trend can be explained by the fact that public are now getting progressively educated in the matter of jurisdiction of the institution from which the provincial agencies are ousted. As a result only 6, 826 complaints against them were received this year, which compared with a much higher figure of 9,977 in the previous year. This in turn led to a substantial decrease in the over all total of complaints received, which was 26, 634 as against 30, 007 the previous year. The monthly average receipts were therefore 2, 220 that year, as compared to 2, 500 in the previous year and to 3, 179 which was the average in the very first year of the establishment of the Office to December 1987. There has been a small decrease of 1 % in the number of complaints against federal agencies. 19, 808 complaints were received during 1989, as against 20, 030 in 1988. Insignificant though it is, it would suggest that there was at least no further deterioration in the performance of agencies. Actually, the Wafaqi Mohtasib's intervention would be seen to have had a salutary effect if it is kept in mind that the interaction between public and the federal agencies is not static; it is steadily on the increase day by day; thus if the agencies and not

pulled up their socks, a larger number of complaints might have been registered that year than the year before.

In the year 1989 a total of 11, 737 complaints were entertained for investigation as compared to 9, 601 in 1988; an increase of 22%. This incidentally was also the highest number of complaints since the inception of the Office in 1983. This number is 59% of the total complaints received against federal agencies which compared with 48% for 1988 and an average of 37% for the period from 1983 to 1987. This is indicative of a better understanding of the complainants of the limitations of the Wafaqi Mohtasib's jurisdiction. The increase in number of complaints admitted has meant an increase the work load of the Office.

During the year a total of 11,142 complaints were disposed of as compared to 10,104 in the previous year and 6, 913 which was the annual average for the period 1983-87. The total number of cases in which relief was provided also registered some increase over the previous year i.e. 68% as compared to 67% the previous year and 61% for the period 1983-87.

The Ombudsman is vested with the powers to undertake *suo motu* action into any matter where he feels that injustice is being done to the society ,or any number thereof, thorough excesses of any federal agency. During the year 22 such cases were taken up for investigation.Likewise 375 cases were taken up for

informal conciliation and 261 were resolved.⁴¹⁸ Moving forward to the year 2004, a total number of 25,327 complaints were received, of which 10,581 i.e. 42% were disposed after preliminary scrutanisation process, and 14,746 were registered for detailed investigation. While 15,617 complaints were carried over from the previous year. Hence the total workload during the year 2004 was 30,363 complaints. Of this the total disposal, after detailed investigation, was 22,030 or 73% as compared to 59% last year. Relief was provided in 18,433 complaints i.e. 84% as compared to 77% during the year 2003. The rejected complaints were 3,597, which is 16% of the disposal as compared to 23% in the year 2003. Thus, relief was provided in a greater percentage of complaints during the year under report.

Decisions received from the President on representations against the 'Recommendations' of the Wafaqi Mohtasib during the year 2004 were 806. Of this the President accepted 207 representations, which is 26% of the representations decided. In 545 representations i.e. 68% 'recommendations' of the Wafaqi Mohtasib were upheld. This is an indication of the improved quality of 'Findings', brought about by the measures taken during the two preceding years. Only 24 cases were remanded for fresh 'Findings' in the light of the guidelines given in the President's decisions, while the Agency or the complainant withdrew 30 representations.

⁴¹⁸ For full detailed report see: *Wafaqi Mohtasib (Ombudsman)'s Annual Report for 1989*

During the year, the high percentage of complaints i.e. 90% instituted against the Federal Government Agencies indicated that there was a better awareness and understanding of the Wafaqi Mohtasib's jurisdiction among the public. Only in 2,554 cases, the citizens having a grievance against the Provincial Agencies approached this office instead of lodging their complaints before the concerned Provincial Mohtasibs. However, such cases instead of being rejected *ab initio* and creating further frustration in the complainants were referred to the concerned offices of the Provincial Mohtasibs under intimation to the complainants to correspond further with them.

While finalizing the investigation of a complaint, efforts are made to base the recommendations, in most cases, on the understanding reached between the complainant and the Agency's representative, within the context of the law and the rules, so that there is no difficulty experienced in the implementation process and the according of relief. However, in quite a number of cases the Agencies complained against do not agree to the relief, or its quantum, contained in the recommendations of the findings. In such cases they have the option of reverting to the Wafaqi Mohtasib for reconsideration of his recommendations under Article 11(2A) of President's Order No. 1 of 1983, and/or of exercising their right conferred on them by Article 32 thereof through preferring representations against the findings to the President.

Taking into account the over-all number of complaints decided during the year i.e. 22,030, the number of representations decided by the President i.e. 806, constitute

3.7%. Out of these, 207 representations were accepted i.e. only 0.9%, which is a positive reflection on the quality of the findings/recommendations of the Wafaqi Mohtasib and their acceptance by the Agencies of the Federal Government. This fact is further re- endorsed by the rejection of the representations preferred to the extent of 68% by the President.

The registration and disposal of complaints is a continuous process spread over the course of each calendar year. As a consequence there are always complaints registered in one year which, of necessity, have to be carried over to the next as the time available for their disposal during the year of registration, particularly those instituted in the last quarter, is understandably inadequate keeping in view the procedure for the investigation process prescribed by the Wafaqi Mohtasib (Investigation and Disposal of Complaints) Regulations, 2003. However, efforts were made to ensure that the pendency at the close of each calendar year reflected complaints instituted only during that year and the preceding calendar year. These efforts have led to the clearance of almost the entire pending cases relating to the years upto, and inclusive of 2002.⁴¹⁹

During the year 2005, 15,136 complaints were registered, of which 8,867 were disposed of after preliminary scrutiny leaving 6,269 cases to be investigated in detail. With the carry-over of 8,333 complaints from the previous year, the total workload

⁴¹⁹ See: *Wafaqi Mohtasib (Ombudsman)'s Annual Report for 2004*

for detailed investigation during the calendar year under discussion came to 14,602 complaints. Of these 10,713 complaints (73%) were disposed of leaving a balance of 3,889 (27%) complaints as carry-over to the next calendar year i.e. 2006.

Over the years it has been the consistent policy of the Office to bring down the number of complaints pending finalization at the end of the year by ensuring an excess of disposal over institution. In this context the pendency over the four years has been brought down from 22,219 in 2002 (55%) to 15,617 in 2003 (41%), 8,333 in 2004 (27%) and 3,889 in 2005 (27%).

Article 9(4) of P. O. No. 1 of 1983, authorises the Mohtasib to set-up its regional offices when and where required. Consequently, in order to provide relief to the common citizens at their doorstep, seven Regional Offices are functioning all over the country besides the Headquarters Office at Islamabad. Registration and investigation of complaints at these Regional Offices not only provides easy access to the citizens but also saves them the inconvenience of travelling to the headquarters at Islamabad and the consequential financial liability involved therein. So many cases were instituted there at the regional offices and were disposed of.

The decisions of the Wafaqi Mohtasib, against which representation were made to the President, were 1,079, of which a total of 320 were accepted and 718 were rejected, 1 was withdrawn and 40 were remanded by the President to the Wafaqi Mohtasib for reconsideration.

It can be seen from figures above that of the representations preferred against the findings of the Wafaqi Mohtasib collectively by both the Agencies of the Federal Government and the complainants, 1,079 were decided by the President during the year of which in 718 (66%) cases the decisions of the Wafaqi Mohtasib were upheld.

In only 320 cases i.e. 30% the view point of the Agencies was accepted and in 40 representations the cases were remanded to the Wafaqi Mohtasib for further investigation keeping in view the guidelines provided. The total number of representations to the President (1,079) represents just 10% of the total number of complaints (10,713) disposed of by the Wafaqi Mohtasib after detailed investigation. This, along with the fact that the rejected representations (718) were 66% of the total number of representations (1,079), is indicative of the quality of the findings.

In the early part of the year 2002 it was realised that whereas large numbers of complaints were decided after detailed investigations containing recommendations for implementation, no systematic account was kept of the number of findings in which the recommendations had been implemented. It was generally left to the complainants to individually pursue the Agencies for the early implementation of the recommendations.

This was not a satisfactory state of affairs as it was the responsibility of the Office to ensure a follow-up of the recommendations in each case and not leave it solely to the

concerned complainants to do so. Consequently as of April 2002 a system was introduced, both at the Headquarters and at the Regional Offices, to systematically monitor the position in this respect every quarter. This has proved to be of great benefit in terms of reminding the Agencies for early implementation of findings to the immense satisfaction of the complainants. The implementation percentage of recommendations

over the four- year period (2002 to 2005) is as follows:

From 01-04-2002 to 31-12-2003 it has been 69%, from 01-01-2004 to 31-12-2004 it was 72%, from 01-01-2005 to 31-12-2005 it was 76%.

It is apparent from the above figures that the percentage of implementation has progressively increased. This is a satisfactory state of affairs which it is hoped will improve further.⁴²⁰

The calendar year 2006, was a rather unusual year in that the office of Wafaqi Mohtasib remained vacant for nearly eight months. This absence of top leadership had severe implications for the performance of this office, as is clearly reflected in the annual report of the Office, particularly in relation to the rate of disposal of complaints. This was so because, after investigation, each complaint is ultimately disposed of at the level of Wafaqi Mohtasib. For the same reason, the pace of

⁴²⁰ *Wafaqi Mohtasib (Ombudsman)'s Annual Report for 2005*

investigation in the pending complaints also slowed down, as the required supervision and guidance to the investigation officers was unavailable for a good part of the year.

Another important feature was the unusually low number of complaints received and admitted during the year. This was mainly on account of the fact that the Office stopped receiving complaints against electricity and gas distribution companies—which used to constitute the bulk of the total complaints (68% in 2004)—with effect from 15 March, 2005, on the understanding that as these companies were regulated by their respective regulatory authorities, namely, NEPRA (National Electric Power Regulatory Authority) and OGRA (Oil and Gas Regulatory Authority), which had set up their own complaint handling and disposal mechanisms and procedures under their respective laws, such complaints were to be handled by the said authorities. Consequently, the number of complaints fell considerably in 2005, but the full impact of this decision became manifest in 2006, when the total number of complaints admitted during that year fell to less than one-fourth of the pre-2005 level. Towards the close of the year, it was decided to review the issue of jurisdiction of Wafaqi Mohtasib with regard to complaints against electricity and gas companies. Consequently, a reference was made to the Ministry of Law, Justice and Human Rights, who advised that entertainment of complaints against maladministration in any Federal Agency, including WAPDA and the electricity and gas distribution companies, remained in the domain of the Wafaqi Mohtasib and that the

establishment of NEPRA and OGRA had no implications for either the jurisdiction or the exercise of powers of the Wafaqi Mohtasib.

In the year 2006 a total of 3,889 cases were already under investigation at the beginning of the year, while 11, 887 new cases were received. Among them 8,431 were disposed of after preliminary scrutiny and 3, 456 were admitted for detailed investigation which brought total workload of the year to 7,345. After detailed investigation a total of 1,734 cases were disposed i.e. 227 were rejected and relief was provided in 1, 507 cases making 87% of the total disposal as compared to 83% in the previous year.

From the above figures a declining trend of complaints filed with the Wafaqi Mohtasib appears clearly and indeed this had been the trend over the years. One of the elements from which the office of the Ombudsman derives its strength and influence is the number of people who approach it for the redress of wrongs done to them by government agencies. The use of the Ombudsman is very much in the hands of the public. The more people avail themselves of its services, the more is the demonstration effect that a level of confidence exists in the institution, and the more likely it will influence the public sector bureaucracy.

It would not be wrong to say that a considerable gap existed between potential complainants and complaints actually made. The declining numbers of complaints filed over the year was, therefore, a matter of concern, though a number of factors and

developments, not necessarily related to the performance of the office, explained this phenomenon to a substantial degree.

In the years following the setting up of the Wafaqi Mohtasib's office in 1983, the institution had the jurisdiction to deal with a far larger number of agencies than it does presently. In addition, there did not exist any provincial Ombudsmen and complaints against provincial agencies were entertained in routine by the Wafaqi Mohtasib. Over the years that followed, offices of the provincial ombudsman were set up in Sindh in 1991, in the Punjab in 1996 and in Balochistan in 2001. Also, over time separate institutions of the Tax Ombudsman in 2000, the Banking Ombudsman in 2005 and the Insurance Ombudsman in 2006 came into being. The emergence of all these offices considerably reduced the number of complainants who were earlier filing complaints with the Wafaqi Mohtasib.

Another contributory factor was the appointment of part time Wafaqi Mohtasib over the years from 1998 to 2001 of persons who held responsibility in this office in addition to their full time appointments as judges of the superior judiciary. This arrangement understandably gave them restricted time to attend to the affairs of this office.

A more pronounced decline in the number of complaints received was, however, evident in the years 2005 and 2006 and this had an independent explanation. With effect from 15 March 2005, this office stopped entertaining complaints against

electricity and gas distribution companies on the ground that separate regulatory authorities had been set up in these two sectors which could entertain complaints against the concerned agencies under the regulatory laws. A notice was published in the press for the information of the general public that since the National Electric Power Regulatory Authority (NEPRA) and the Oil and Gas Regulatory Authority (OGRA) had set up their own complaint handling mechanisms and procedures within their respective laws, all complaints against the companies under their regulatory control should be directed to these regulatory bodies. This issue was settled afterwards, as stated above.

Lastly, the Office of the Wafaqi Mohtasib remained vacant for nearly eight months in 2006 which could be an additional factor in discouraging complainants, bringing down the volume in the year.⁴²¹

The year 2007 marked the beginning of a new phase for Wafaqi Mohtasib's Office, one that focuses on a strategic approach towards improving service delivery. Indeed, business was unusual during the year as the Office began to put in place requisite systems and procedures and equip itself with the resources, tools and enabling frameworks that would help it become a more responsive, responsible and accountable institution. Indeed, it has analysed its performance in 2007, using a

⁴²¹ For more details see: *Wafaqi Mohtasib (Ombudsman)'s Annual Report for 2006*

Responsive Governance Framework, that includes measures for assessing its efficiency, effectiveness, inclusiveness and accessibility.

The efforts of the Office at undertaking Business Process Re-engineering (BPR) entailed taking a fresh, self-critical look at our procedures, work flows, performance benchmarks and service standards, legal instruments and their fit with its new managerial ethos. As a result of this reflection, it was able to identify several opportunities for improving the level and quality of its responsiveness, both internally and to its clients.

As an institution charged with the responsibility of cutting red tape in the federal government agencies; Wafaqi Mohtasib's Office consciously set out to lead from the front by simplifying its own procedures first. A key task towards achieving this administrative simplification was a review of its legal and administrative instruments.

On the operational aspects, its subject of review during the year was the *Wafaqi Mohtasib (Investigation and Disposal of Complaints) Regulations 2003*, which govern and guide the complaint management processes. With the aim of removing redundancies and rigidities in these Regulations, the task was assigned to the newly established Research & Analysis Wing whose Additional Secretary headed a committee which included the end users of the Regulations, namely the Investigating Officers and Registrar. After considerable deliberations and consultations with the

regional offices, the Regulations were revised and now provide simpler processes and reduced timeframes for specific actions, which will help increase productivity and efficiency of the institution. The amendments in the Regulations marked a first, but important, step towards administrative simplification; its benefits have already started accruing, as was evident from the fact that disposal of complaints per Investigating Officer was higher than it had been over the past three years and that nearly one fifth of the complaints were then disposed of within 3 months.

Although the process of developing customized software and implementing IT-enabled operations had been in the wings since 2005, it was only during the first quarter of 2007 that the Wafaqi Mohtasib's Office finally overcame the impediments that had severely delayed going online. Its Management Information System (MIS) covers several components—including Human Resource, Accounts, Inventory Control and Library software applications—but the centre piece is the online Complaint Management Information System (CMIS), which serves as the platform for streamlined, integrated complaint management processes. From a managerial perspective, it was important to press ahead with the CMIS application as it is an instrument for improving its responsiveness to the public, the complainant, whereas the other modules were for internal consumption; hence the focused managerial attention towards operationalization of the CMIS.

Since July 2007, the CMIS has been fully operational and minus the predictable early-life glitches, had worked well. All complaint records from 1998 onwards and final Findings from July 2007 are now available on the online database of the Office, with plans afoot to bring all records and Findings since the establishment of this institution on this database shortly; in the wake of the CMIS launch, the cycle of receiving, finalizing and issuing Findings has been reduced from a few weeks to 24 hours or less in most cases, raising the institutional efficiency levels.

The Office of Wafaqi Mohtasib has also initiated the use of emails for intra and inter office communication. Every officer and official of Basic Pay Scale 14 and above has an official email account and communication over email is encouraged; so far, the use is limited—old habits die hard—but within the office it is hoped that endless paper and file trails will slowly replace with emails as the preferred form of communication. The Office now also accepts complaints via email, although the number remains very small due to lack of public awareness about this feature.

To arrive at fair, equitable and measurable performance standards for Investigating Officers, the Office carried out, in 2007, a detailed exercise of reviewing case load, productivity and efficiency trends over the past ten years. Based on this analysis, it determined that the optimal caseload of every Investigating Officer at any given time was 250 cases, while the standard for disposal per month was 35 cases. Besides these productivity standards, it set an average of three months as the standard

timeframe for completion of a case; this timeframe was arrived at by considering the telescoped processing timelines contained in the revised *Wafaqi Mohtasib (Investigation and Disposal of Complaints) Regulations 2003* for specific actions leading to the disposal of a complaint.

A key development during 2007 was the operationalisation of the Research & Analysis and the Implementation Wings. These additions to the governance structure of the Office provide appropriate focus for evidence-led operations and for effectively achieving compliance with the recommendations of the Office. Admittedly, the Office needed to bolster the human resource base in both Wings to enable them to fulfil their assigned roles in an even better fashion, but the inputs of these Wings—the Research & Analysis Wing in particular—have already sharpened the ability of the Office to sift the facts from perceptions and thus improved the quality of its decision making and planning.

The Investigating Officer is the lynchpin of this institution, performing the primary task of investigating a complaint and providing fair and speedy redress of a grievance. While there is always room for improvement in the output of the Investigating Officers, their contribution in providing relief to thousands of people every year is admirable. As part of the new strategy, a need was however; felt to empower the Investigating Officer to enable them to comply with newly set performance standards. This empowerment took several forms ranging from provision

of IT tools to better policy guidance, to improved legal instruments. The outcome of this empowerment is reflected in relatively improved performance of this institution.

A measure of the public's confidence in the institution of the Wafaqi Mohtasib (Ombudsman) is the number of complaints filed every year. The downward trend witnessed over the past few years in the number of complaints filed, was arrested in 2007, and with more than 23,000 complaints filed by the public —double the number in 2006 and one and a half time more than in 2005.

A key factor for the increased institution was the decision to readmit complaints against the PEPCO , SNGPL and SSGCL, in the light of the clarification on jurisdiction by the Ministry of Law, Justice & Human Rights. Other factors contributing to this significant rise in complaints included efforts made to raise the public profile of Wafaqi Mohtasib through regular press releases, which played a useful role in creating greater public awareness about services offered by the Office. While recognizing that rising public complaints are indicative of poor governance at the federal level, it should be viewed as a positive indicator from a client-provider perspective, since it also reflects the increasing trust that the public has in this institution.

Besides the increase in sheer volume of complaints, an interesting aspect of the complaints filed was that 10% were filed by women, double the percentage in 2003. In sharp contrast to their male counterparts whose complaints tended to be

predominantly against WAPDA/PEPCO, complaints by females accounted for majority of complaints against SLIC (State Life Insurance Corporation), (51%), more than a third of complaints against Pakistan Bait ul Maal and AIOU (Allama Iqbal Open University) and nearly a quarter of those filed against Pakistan Railways.

During the year 2007 a total of 23,290 complaints were received while 5, 611 were carried over from the previous year. 5, 472 (23%) were disposed before in the preliminary stage while 17, 818 were admitted for investigation which brought the workload for the year at 23, 429 cases. A total of 13, 387 (87%) were disposed of: providing relief in 11, 657 cases and rejecting 1,731. Disposal as a proportion of workload, an important and perhaps a more equitable measure of productivity, rose from 24% in 2006 to 57% in 2007.

During 2007, 423 representations were filed with the President, out of which 188 were decided in 2007, with 76% rejected, reflecting well on the output of the Office's work. Of the 46 representations that were upheld in 2007, fourteen were accepted on grounds of merit, while the remaining 32 were accepted on grounds of jurisdiction, interpretation of law, rules and regulations, contractual disputes, and time barred cases. In the light of the President's decisions the Office aim to strike a balance between its objective to be more citizen-friendly and flexible in its approach within the confines of law and the need to improve the screening functions in the Office.⁴²²

⁴²² The basis of the above discussion is facts and figures taken from the annual report of the Office. For a detailed analysis see: *Wafaqi Mobtasib (Ombudsman)'s Annual Report for 2007*

The gravity and extent of acts of maladministration in the public bodies of our government is well known. In a situation where the rate of literacy is low and the formal judicial system is expensive, the role of an administrative justice institution like that of the Wafaqi Mohtasib becomes of crucial importance for such strata of society that cannot afford to seek remedies through the formal courts system. However, the success of this institution in providing administrative justice depends, to a large extent, on the measure of confidence the people have in this institution. Therefore, the trend of complaints received from year to year provides an important indicator of the level of confidence this institution enjoys in the eye of general public.

During the year 2008, 23, 323 complaints were received while 10, 154 cases were carried over from the previous year. Among the received complaints 5, 753 (25 %) were disposed after preliminary scrutiny. 17, 354 were admitted for detailed investigation which brought the total workload to 27, 508 cases. Out of that 21, 368 cases were disposed. Relief was recommended in 4, 105 while those closed with relief were 9, 263 which brought total number of cases where relief was provided to 13, 368. 5, 287 cases were closed without relief and 2, 713 were rejected after investigation.

The year 2008 was a year of building on the reform efforts and consolidating the gains of 2007. A number of additional initiatives were also taken which will be pursued for improved performance in the coming years. The Office continued with its efforts to provide a more conducive work environment for the organization's

personnel and to improve their skills and capacity for improved delivery. To improve morale and provide career paths to employees, service rules were framed for the first time and have been sent to the government for approval. Transparency in recruitment of contract employees was introduced, increased delegation of powers was made and training for lower staff was organized.

On the operational side, enhanced efficiency and higher productivity was aimed at through greater use of IT enabled complaint processing and monitoring. Further, emphasis was placed on the process of mediation for the resolution of complaints, investigation procedures were streamlined by telescoping timeframes for quicker disposal and implementation of findings was vigorously pursued.

The impact on the organization's performance of the initiatives taken has been very heartening. Compared to 13,388 cases disposed of in 2007, the Office disposed of 21,368 cases in 2008. Disposal within the target timeframe of 3 months stood at 28% of disposed of cases. It was 19% in 2007 and 3% in 2006. Cases decided through mediation rose to 67% as compared to 48.6% in 2007. Implemented findings stood at 75% in 2008 in contrast to 38% during the previous year.

During 2008, a total of 729 representations were filed against the *Wafaqi Mohtasib's* decisions to the President. Out of the decisions received by the Office, the President upheld 77% of the *Mohtasib's* findings and recommendations. The President's decisions are a source of guidance on important points of law and policy and form a

touchstone on which investigation officers place reliance in the complaint handling process.⁴²³

After separate discussion on yearly performance of the *Wafaqi Mohtasib* Office, it will not be improper to have a collective look on the last eight year performance of the Office. This analysis will include the details of complaints received every year, the preliminary disposal before detailed investigation, number of cases admitted for proper investigation, the carry over cases from the previous year and total work load each year. This will also include the disposal of the cases after investigation; among those the cases where relief was provided to the complainant and the cases where the claim of the complainant was rejected. Following is a table to this effect. It will make the job of comparison and observation of the progress or decline in the work of *Wafaqi Mohtasib* easier.

Table of Complaints Reception and Disposal during years 2000-2008.

Year	Received	Rejected at the outset	Admitted for Investigation	Carry Over	Total Work Load	Relief Given	Rejected after inquiry	Total Disposed	Percentage of disposal
2000	41,080	14,138	26,942	11,793	38,735	18749	3994	22743	59 %

⁴²³ See: *Wafaqi Mohtasib (Ombudsman)'s Annual Report for 2008*

200	33,385	10,534	22,851	15,99	38843	15,64	3916	19557	50%
1				2		1			
200	31,613	10,636	20,977	19,28	40,26	13,56	4,477	18,044	45%
2				6	3	7			
200	25,761	10,346	15,415	22,21	37634	16,92	5,096	22,017	59%
3				9		1			
200	25,327	10,581	14,746	15,61	30,36	18,43	3,597	22,030	73%
4				7	3	3			
200	15,136	8,867	6,269	8,333	14,	8,934	1,779	10,713	73%
5					602				
200	11,887	8,431	3,456	3,889	7,345	1,507	227	1,734	23%
6									
200	23,290	5,472	17,818	5,611	23,	11,	1,731	13,388	57%
7					429	657			
200	23,332	5,753	17,354	10,15	27,50	11,36	8000	21368	78%
8				4	8	8			

It may be concluded that the institution of *Wafaqi Mohtasib* has been passing through different phases of efficiency and productivity. In the above discussion the performance of the institution over the year has been analyzed. The analysis shows

that at the beginning there were a greater number of complaints which was received by the Office. In the year 2005 and 2006 a decline in the reception of complaints may be noticed. But afterwards in the last two years of the discussed figures, in 2007 and 2008 the number of complaints received again rose up. Another important fact which may be observed easily is that in the beginning a greater number of the complaints was rejected but gradually there seems to be a downfall in the number of rejected complaints at the outset. This shows a greater awareness among the public about the limitations of the Office of *Wafāqī Mohtasib*. Generally the above discussion is about the disposal of complaints at the headquarters level. The performance of provincial *Mohtasib* is out of the domain of this work as very little material is available in this regard.

The purpose of the appointment of the *Wafāqī Mohtasib* as stated in the preamble to the Presidential Order 1 of 1983 is to "diagnose, investigate, redress and rectify injustice done to a person through maladministration." The jurisdiction of the *Wafāqī Mohtasib*, however, is limited in Federal agencies but subjudice matters as well as matters relating to foreign relations and defence are kept out of his jurisdiction. Since the Institution of the Ombudsman is often the only forum to which a citizen can turn for seeking redress against administrative injustice, there is a strong case to put more resources and staff at the its disposal so that it is enabled to handle a larger volume of work more speedily. Also at present the orders passed by the Mohtasib are

recommendatory in nature. His exertions can be made much more productive if his powers to investigate and decide are extended to cover enforcement of his decisions as well. This will invest the institution with a new sense of purpose and greatly increase its usefulness for the aggrieved citizens.⁴²⁴

15. Significance/Impact of the Wafaqi Mohtasib's Institution:

The Ombudsman is the mechanism of democratic control over the bureaucracy, and the influence it wields over the latter is directly proportionate to the utilization of its services by the people. By setting up this institution the ruler not only accepts his obligation towards the ruled but also acknowledges the fact that Government functionaries are fallible and susceptible to maladministration either out of malice or otherwise. The Ombudsman takes corrective measures by cutting through the bureaucratic red tape, and by publicizing his actions, he focuses public attention on correctable wrongs and preventable mistakes.

⁴²⁴ The evaluation of the performance of *Wafaqi Mohtasib's* Office is based mainly on the facts and figures available in the annual reports of the Office itself. There is very little, in fact, equal to none, independent evaluation of the institution from the outside. In this regard the comments by National Accountability Bureau are worth mentioning here: "The Ombudsman's role is to check maladministration, in order to provide relief and redress for public complaints. ... The Ombudsman should play two important roles with regard to corruption. First, it can refer cases of corruption, which come to its attention to Anti-Corruption Agencies; Secondly, it aims to tackle the culture of poor service delivery, which either directly or indirectly can provide the environment of low accountability in which corruption flourish. However the Ombudsman is generally held to be insufficiently effective, mainly due to limited institutional capacity. There is no centralised database or networking between Ombudsman's Office which leads to delay, duplications, contradictions etc. Adequate training facilities are not available to the officers/staff of the Ombudsman. There is no defined time frame for disposal of representations against Ombudsman's findings, which negates the principle of speedy justice. (See: National Anti Corruption Strategy of National Accountability Bureau, Islamabad, 2002)

establishing an Ombudsman Office to control this tendency is not enough. What is required is an office which should not only be visible, accessible and functionally independent, but should also have the expertise, authority and representative character to dig into the cases of maladministration to correct individual wrongs. In a modern democratic country, the Ombudsman's capability to prevent bureaucratic abuse of authority, introduction of administrative reforms and vindication of civil servants when unjustly accused, depends on the support that it gets from political branch of the government. It is because of this that most of the Ombudsmen enjoy linkage with the national Parliament through constitutional provision, a goal still to be achieved in Pakistan.⁴²⁵

The Office of the Ombudsman embodies the concept of administrative accountability and fills the sorry gap left open by legislature, courts of law, press and other similar forums. It is a judicial post but is different from a court of law. In a court of law as suit is contested by two opposing parties while in a complaint before the Ombudsman it is a citizen against a Federal agency.⁴²⁶

The Office has proved to be a great success. It is because of its informality, flexibility and its ability to enforce a decision without resorting to long procedure. Any citizen can write any application on simple paper and may send it by ordinary post to the office of the Wafaqi Mohtasib. NO counsel needs to be engaged. If

⁴²⁵ Islamuddin, *Towards Understanding the Ombudsman Idea*, op.cit. pp.10-11

⁴²⁶ Dr. Liaqat Ali Khan Niazi, *The Institution of Muhtasib(Ombudsman)* (Lahore, Dyal Singh Trust Library, 1994), p.306

maladministration is found, relief is invariably provided. The popularity or usefulness of the institution can be gauged from the fact that an average 300 applications are received daily in the Head Office of *Wafaqi Mohtasib* in Islamabad.⁴²⁷

The impact of the work of *Wafaqi Mohtasib* is two fold. One is visible and quantifiable while the other is invisible. The statistics about the received and disposed of complaints only show the visible impact but the invisible impact possesses greater significance and potential to influence the conduct of government business. The discussion and analysis in previous section about the performance of the *Wafaqi Mohtasib* in terms of figures is an indicator of its visible impact. Although very impressive by all standards, the figures do not convey the whole truth about the impact; which goes beyond tangible and quantifiable aspect.

The Ombudsman everywhere has been instrumental in guaranteeing certain rights to citizens such as:⁴²⁸

1. The right to be treated with due observance of the rule of law, and with justice, impartiality and reasonableness in all his dealings with the administration.
2. The right of review of administrative decisions as a protection against arbitrary and biased treatment and to obtain justice.

⁴²⁷ Ibid. pp.308-309

⁴²⁸ S.M.Haider, *Pakistan: Administrative Staff, Ombudsman and Administrative Courts*(Lahore, The Book House, 1983), p.vii (preface)

3. The right to know what the laws and regulations are, and his own privileges and duties in regard to them.
4. The right to information on the purposes, organization and aspirations of his government.

Some manifestations of the invisible impact may be the following:⁴²⁹

- a. Multiplier Effect: In many cases the relief afforded on one complaint has had a multiplier effect and a large number of people with similar grievances have simultaneously or subsequently benefitted without coming on record.
- b. Careful attitude of Public Servants and Fear of Accountability: The work of the Ombudsman has made the public servants of the Federal agencies more alert to the problems of the citizens and more vigilant to their duties as they know that any maladministration will be called to account by the *Wafāqī Mohtasib* on the basis of a mere plain paper complaint.
- c. Better and Quick Decisions: The above mentioned effects have in turn produced another effect i.e. sound decision making, fair use of discretion, speedier disposal of cases and in fact an uplifting of the whole administrative environment.
- d. Proper Vigilance: Through the *Wafāqī Mohtasib's* work the administrative incharges are taught to exercise proper vigilance over the work output of

⁴²⁹ In this part of "invisible impact" some help has been taken from Muhammad Zafar Iqbal, *Institution of Ombudsman (Wafāqī Mohtasib) in Pakistan, Analysis of Performance And Achievements*, (Unpublilshd thesis, Islamabad, Allama Iqbal Open University, 2000)

- their subordinates because any loophole left by any subordinate will cause embracement for the head of department.
- e. Identification of Procedural deficiencies: Another important impact is that investigation of recurring complaints of similar nature had highlighted many a shortcomings, procedural or organizational lacunae and deficiencies which are ultimately removed or reformed.
- f. Improvement of the Rules/ Regulations: On the basis of findings the *Wafaqi Mohtasib* has recommended remedial measures which in turn resulted in improvement of many rules/regulation, procedure, systems and time schedules which finally reduced the incidence of complaints on these particular accounts.
- g. Public friendly Administration: As a result of the grievance redress system of the *Wafaqi Mohtasib* the administrative staff of the government departments have gradually become more public friendly or at least they try to give such an impression as they know that in case of any misconduct there is an easy to access forum for the public to go and complain.
- h. Satisfied Citizenry: This should be the ultimate impact of the work of *Wafaqi Mohtasib*. Means that in a society where the citizens are satisfied that no one can withhold his right or deprive him of his due, must be a society where the citizens live in peace and would consequently, happily

work for the progress of that society. It is because of this fact that the Western societies are advanced and there is no sense of deprivation from due rights among the public.

- i. Poor man's court: *Wafaqi Mohtasib* can be regarded as a poor man's court. A large number of complainants who come to *Wafaqi Mohtasib* for redress of their grievances belong to the poor and downtrodden sections of the society. Most of them are widows, orphans, students and old age pensioners. Those are the classes who cannot afford to go to a court of law where one has to bear a lot of expenses and complicated procedure.

16. Conclusion:

To conclude this chapter the main points are summed up in the following lines:

- The bureaucracy in the so called Third World countries in the post colonial era particularly needs to be controlled by a powerful institution like that of Ombudsman which therefore remains the only ray of hope for the common citizens; aggrieved by the maladministration of the bureaucracy.
- According to the Constitution of Pakistan, all laws are to be brought in conformity with the injunctions of Qur'an and Sunnah and an atmosphere is to be provided to the citizens to lead their lives in accordance with the principles of Shari'ah. Thus checking mal administration is one of the requirements for both the goals mentioned above.

- There are no specific qualifications mentioned in law for the post of *Wafaqi Mohtasib*, however, the practice shows that a person of high social stature like that of a retired member of the higher judiciary or a person equal in status is normally appointed by the President.
- There is undoubtedly a need for legislation on the qualifications for this post, keeping in view the relevant rules of *Shari'ah* in this respect. In this way the institution may be brought nearer to the concept of *Wilayat al Mazalim*.
- As the word "*wafaqi*" (federal) shows that only federal government departments are under the jurisdiction of *Wafaqi Mohtasib* except for the matters related to Defence and foreign affairs.
- If the jurisdiction of *Wafaqi Mohtasib* is compared with that of *Wali al Mazalim*, who existed in the Islamic history, the later had very wide powers and vast jurisdiction which included all government machinery including even the judiciary.
- In other recommendations of *Wafaqi Mohtasib* there are no rules providing for judicial review, but practically there have been cases in which the higher Courts have had hearing for judicial review of the *Mohtasib's* decisions.
- While gauging the significance and impact of the institution's work it is concluded that there is a considerable social impact of its work on the society and on the governmental departments. The important side is the invisible

impact that cannot be calculated in figures but can be understood by the nature of work the institution is doing.

Chapter Six

Conclusions

And

Recommendations

Chapter 6

Conclusions and Recommendations

At the end of this dissertation the important conclusions which were drawn and the recommendations which come to mind are submitted in the following:

Justice is the corner stone of Islamic politico-legal system. Islam has paid due attention to the administration of justice as is evident from the texts of Quran and Sunnah and the practice of the *Ummah* through the ages. *Wilāyat al Mazālim*, a mixed job of executive and judiciary, is one of the manifestations of *Siyāsah Shar'īyah* i.e. in fact a department of the government which take care of the grievances arising out of the injustice or cruelty of government officials which take place in when authority is abused or maladministration takes place.

Injustice or cruelty is *hārām* (proscribed) as it is one of the biggest *munkar* (evil) of the society. There are many texts of Quran and Sunnah stating prohibition of this evil. It may therefore be derived that it is a communal obligation to prevent it and *Wilāyat al Mazālim* is one the most important mechanism to do this job, hence its establishment is a collective responsibility i.e. a communal obligation of the *Ummah*.

Islamic history is a witness to the fact that *Wilāyat al Mazālim* has been there, if

not with its particular name, with its essence, from the period of the Prophet till the last Muslim empires; the Ottoman and the Mughals.

There is no doubt that the period of *Khulafā-i-Rāshidūn*; the immediate successors of the Prophet (peace be upon him) were a model with respect to the curb on maladministration of the government officials. So we know from the history that Abū Bakr during his short period of two years was very strict in the matter of checking the maladministration of the government officials.

He was followed by 'Umar. His rule that lasted for nearly ten years was the best with respect to grievance redress and checking maladministration of the government officials. In this regard he did not forgive anyone, whatever may be his status in the society. His period is full of glaring examples accountability of government officials on account of abuse of power or maladministration.

'Uthman bin Affān was equally watchful in this matter and he never tolerated any maladministration. Alī bin Abī Ṭālib, though mainly remained busy during his rule in the unrest caused by the rebellion of Mu'āwiyah bin Abī Sufyān and then confrontation with Khawārij, paid due attention to the grievance redress and accountability of government servants for any maladministration.

During the Umayyad period, in reality, the Caliphate system based on popular will was converted to hereditary rule but the system of grievance redress was

notwithstanding, in place. The first Umayyad Caliph M'āwiyah bin Abī Sufyān made himself available to the common citizens in the mosque so that anyone who wanted a direct approach for complaining to the Caliph might do so.

Among other Umayyad rulers Abdul Malik and 'Umar bin 'Abdul Azīz were known for their love of providing justice to the common man of Islamic state. 'Umar bin 'Abdul Azīz, who ruled only for round about two years established best example in this respect. He was given the title of "fifth *Khalifa-i-Rāshid*" by the Muslim historians because of his piety and love for justice.

The Abbasid dynasty, which ruled the Muslim state for a long time were more organized than many governments with respect to the mechanism of grievance redress. It seems that they took full advantage of the past experiences in this matter.

They were the first in Islamic history who established a formal department for this purpose known as *Dīwān al Naẓar fī 'l Mazālim*. Among the Abbasids Mahdī, Hādī, Al Rashīd, Manṣūr, Mu'taṣim and Muhtadī are mentioned by the historians for their love to help out any common citizens of the state having a grievance against any government official caused by maladministration or abuse of power.

During Muslim rule in *Al Andalus* there has been a period of progress and prosperity. In that period history shows that among other government institutions the department of grievance redress was very much active performing its duties.

During Ottoman Caliphate there has been a department with the name of *Diwān-i-humāyūn*, which played the role of *Wilāyat al Mazālim* besides the superior judiciary which was also responsible for any such complaints.

In the Mughal empire generally there has been a good system of administration of justice and grievance redress. Those who were known for their exceptional love of justice were Akbar, Shah Jehan, Jehangir and Alamgir. They, in their respective periods made sure that the common man is empowered to make any complaint against the government officials or any influential person of the state. Those kings made themselves available in one way or another to the common citizens, so that if any one liked to say something directly to the monarch he would have an opportunity of that.

There have been many other Muslim governments and states in different areas and for sure they had some mechanism of grievance redress but it was difficult to cover all of them in this work. So only the most known were covered here.

In the contemporary Muslim world Saudi Arabia is the only Muslim country which has a system of grievance redress with the traditional name of *Diwān al Mazālim*. Presently *Diwān al Mazālim* in Saudi Arabia is in fact administrative judicial system which works like Services Tribunal System in Pakistan, besides working for grievance redress of citizens too. From the number of complaints lodged and the

decisions taken by the Courts of *Diwān al Mazālim*, it appears that the department is working successfully in the Kingdom and that it has given courage to the citizens to register complaints against maladministration of the government departments and high officials of the governments. Complaining against the government officials is something not very usual in Kingdoms like that of Saudi Arabia but the performance of *Diwān al Mazālim* is gradually breaking this taboo.

In the West the institution of the Ombudsman is working nearly in all countries of Europe, Americas and Australia and New Zealand. For the purpose of analysis we have covered in this work only the Ombudsman of The United Kingdom. The system is working actively in the UK. In the beginning Parliamentary Commission for Administration with a limited jurisdiction was established that was expanded with the passage of time and now it is called Parliamentary and Health Service Ombudsman (PHSO) with a wide jurisdiction. Other Ombudsmen are also working in other spheres like local government, banking and legal profession in the UK.

In the year 1983 the Institution of *Wafāqī Mohtasib* was established in Pakistan as the prime grievance redress mechanism for general public. Within a few years the Office of *Wafāqī Mohtasib* made a good progress that is evident from the number of cases it solved and from the expansion of its work manifested in the opening of its branches in other cities of Pakistan.

The work of *Wafāqī Mohtasib* has a very positive impact with respect to the attitude of government officials towards the common citizens. Although according to the provisions of the Establishment of the Office of *Wafāqī Mohtasib* Order the decisions of *Wafāqī Mohtasib* are not subject to judicial review but in practice the superior judiciary have been hearing cases to review the decisions of *Wafāqī Mohtasib*

Keeping in view the vast treasure of literature on Islamic law prepared through the centuries by Muslim jurists and lack of focus on the department of *Wilāyat al Mazālim*, it can easily be concluded that the department has not received due attention of the Muslim jurists with regard to expounding its detailed rules and elaborating the qualifications for its incharge. We only find two main works in this regard i.e. *Al Ahkām al Sulṭāniyyah*; one written by Al Māwardī and the other with the same name written by Abū Ya'la. They have discussed these topics in detail.

This is a historical fact that every Muslim state has been managing the grievance redress department according to its own circumstances in the limits prescribed by *Sharī'ah*. However in the classical history the Abbasids have been the best in organizing this department as their era is considered to be the glorious one in the Muslim history in all other fields of life too.

In the contemporary world a common understanding is that this department was initiated by Sweden. However it is said that actually Sweden took the idea of

grievance redress from the Ottoman Empire where one of the Swedish Kings in eighteenth century took asylum; impressed with the grievance redress system there, he established the Ombudsman office in his country after reinstatement.

Whereas in the contemporary Muslim world Saudi Arabia took the idea from Islamic history and named the department with the traditional name of *Diwān-al-Mazālim*, while Pakistan took the Western model of Ombudsman.

As has been the case in the history in the contemporary world also there is no uniformity in the department in different Muslim countries except for one thing that in Saudi Arabia and Pakistan the incharge of this department is appointed by the head of state.

A comparison of the three models in the United Kingdom, Saudi Arabia and Pakistan reveals that there is not much difference among the three with respect to the structure and scope, except for Saudi Arabia which has assigned *Diwān al Mazālim* the job of formal administrative judiciary as well. As regards the scope all the three models, it is almost the same as some important matters like defence, foreign affairs etc. have been excluded from their scope in all three countries.

With respect to efficiency the Parliamentary Ombudsman of the United Kingdom seems to be the most efficient because of the obvious reason that the citizens

of that country are more aware of their rights and as a whole the machinery of the government is more efficient there as compared to Saudi Arabia and Pakistan.

With respect to the Islamic character of the institution in both Saudi Arabia and Pakistan there are no specific qualifications for the incharge of the department, which is a loophole and there must be legislation in this regard in accordance to the Islamic principles to bring the department completely in the fold of Shariah. To determine the qualifications for incharge of *Wilāyat al Mazālim* is of utmost importance because in this way the appointment of the person to this important post is streamlined and less is left to the jurisdiction of the rulers who often use their discretion keeping in view political gains. Therefore once the qualifications are determined and there is some law which is clear on the matter, the appointment will become institutionalised and there will be no very little chances of abuse of merit.

One of the most important point is that the jurisdiction of the institution must be expanded to include all departments of the government, a characteristics which will make it truly capable to carry out accountability across the board something which will be in line with the teachings of *Shari'ah*.

As compared to Pakistan, the system in Saudi Arabia is having more formalities as it is working as a formal administrative judicial system. While in Pakistan it is more informal and easy for a common citizen to approach it because no formal procedures or a lawyer is required. This informality is something nearer to the

Islamic character of the institution. Thus it is recommended that in Saudi Arabia the formalities involved in the process of lodging and pursuing the case of a complaint against a government functionary should be reconsidered and changes should be made in this regard so that a common citizen does not find it complicated and is more encouraged to come forward with any complaints.

Regarding the Pakistani system of Ombudsman, it is recommended that its name should be changed to either *Dīwān al Mazālim* or *Wilāyat al Mazālim* as a first step to divert it towards *Sharī'ah*. This will be something which will give the first impression that the institution is coming from the *Sharī'ah*. However changing of name is not something which will change the reality, so to change the reality, the Council of Islamic Ideology should be assigned the task of reviewing the whole system of the Ombudsman and propose changes in it so that it is brought completely into the fold of *Sharī'ah*.

To conclude it is submitted humbly that unless the political system is completely brought in the fold of *Sharī'ah*, it is difficult to expect that an organ of the government would be Islamized truly in isolation. So to achieve the goal of Islamizing the society and its institutions all the political system has to be established according to the true spirit of Islam.

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97	والذي نفسي بيده لتأمرن بالمعروف و لتنهون عن المنكر أو ليعذبن عليكم قوماً ثم تدعو نه فلا يستجاب لكم	18
95	والذي نفسي بيده لتأمرن بالمعروف و لتنهون عن المنكر أو ليوشكن الله ان يعث عليكم عقاباً منه ثم تدعو نه فلا يستجاب لكم	19
97	يا أيها الناس إن الله عزوجل يقول مروا بالمعروف وانهاوا عن المنكر من قبل ان تدعوني فلا أجيبكم وتسالوني فلا أعطيكم وتستصروني فلا أنصركم	20
89	يا عبادي إني حرمت الظلم على نفسي وجعلته بينكم محرماً، فلا تظالموا	21