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**THE JUDICIAL REVIEW BETWEEN THE CONSTITUTION OF  
PAKISTAN AND THE ISLAMIC LEGAL SYSTEM**

Dr. Abdul Samad Shaikh\*, Basheer Ahmed Dars\*\* Dr. Arshad Munir\*\*\*

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**ABSTRACT:**

*It is difficult to declare a human mental effort to be the final and completely errorless which has no possibility of any flaw and mistake. There are lot of factors which are supposed to be considered to issue a judicial ruling or verdict. Some time it does happen that a judge misses one of these decisive factors which play a pivotal role to give an acute judgment in a case. That is why we see in the modern legal system that a litigant has an option of appeal or review to reach to the actual fact and the right decision. This is the one aspect of judicial review, the second one is that which is against of the administrative action of a state which makes individuals suffer and deprive from their inalienable fundamental rights. So by the notion of judicial review, they can challenge state's decision in higher courts. Relying on this basic need of general public and like a modern state, the constitution of Pakistan has provisions like*

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\*Assistant Professor, The International Islamic University, Islamabad, Pakistan.  
Email: [abdulsamad.shaikh@iiu.edu.pk](mailto:abdulsamad.shaikh@iiu.edu.pk)

ORCID ID: <https://orcid.org/0000-0001-5721-266X>

\*\*Faculty Member, Mehran University, SZAB Campus Khiarpur Mir's, Sindh,  
Pakistan. Email: [Bashirdars@muethkhp.edu.pk](mailto:Bashirdars@muethkhp.edu.pk)

ORCID ID: <https://orcid.org/0000-0003-4664-9633>

\*\*\* Associate Professor/Chairperson, Department of Islamic Studies University of  
Gujrat, Punjab, Pakistan. Email: [arshad.munir@uog.edu.pk](mailto:arshad.munir@uog.edu.pk)

ORCID ID: <https://orcid.org/0000-0002-8446-4077>

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*articles 184(3), 188, 199 and 203E(9) which give the power to the higher courts to review a petition filed against an action of a person or legal authority or legislation of a competent authority or a lower court's decision, if the action, legislation or decision is not in conformity with the basic structure or fundamental character of the constitution the high court can nullify it. The Islamic Legal System has the basic concept of decision's reversal which is the end-result of judicial review if the decision was ruled out by a non-qualified judge or the judge was biased while the issuing of verdict or the decision was in contradiction with the general theme of Quran and Sunnah. These are three basic grounds of judicial review in Islamic legal system. In this article, I will discuss the notion of judicial review and its scope to protect the rights of individuals in perspective of constitution of Pakistan and the Islamic Legal System.*

**KEYWORDS:** Pakistan, Judicial, The Islamic, Legal, System

### **Research question**

In this essay, I have tried to discuss two important questions which are as following: Does the notion of Judicial Review challenge the sovereignty of parliament? Is the provision of Judicial Review compatible with the Islamic Legal System?

### **Previous studies**

In this regard; I have found three most relevant studies which are: The Judicial Review in Islamic Law by David, S. Power, The notion of Judicial Review between the Shariah and the contemporary legal system by Raziyah Aimoor and The components of Justice in the letter of Omar bin Khattab to Abu Musa Asha'ri and their reflection on the judicial system of Saudi Arabia by Saud Salih.

## **The scope of judicial review in the modern legal system**

Judicial review plays a fundamental role in systems of government. There has, however, been little strenuous analysis of its desirable scope or of the circumstances in which limitations on judicial review might be justified. What was so important in *Marbury v. Madison* (1803) that excites the law interpreters, lawyers, and the teachers and the scholars of law? Yes, the Judicial Review. The principle of judicial review has its roots in the principle of separation of powers. Separation of powers was introduced by Baron de Montesquieu in the 17th century, but judicial review did not arise from it in force until a century later. It was not the first time in *Marbury v. Madison* that an act of congress was strike down to let the principles of justice and equality, for the supremacy of the law, prevail.

Modern legal system has given more power to the judiciary like never before. It took around half-century for the democratic states to learn that the administrative as well as the legislative hiccups in the system can be pragmatically solved through the interpreters of law. The notion was rare at the time of World War II and the holocaust. After the World War II, it was only America's legal system that had the thriving constitutional judicial review. But over the last half-century, the democratic regimes have been interested in adopting the subject as it was nukes. Therefore, the power of the court was extended to determine whether the law or the order is valid and consistent with the principles of justice and constitution, especially the fraction dealing with the fundamental rights.

Categorically, judicial review can become active in two circumstances,

**1- In response to any Administrative (executive) action that the court feels that the product or the procedure was unfair.**

The English legal system does not recognize the separate system of courts for the disposition of matters related to the actions of the public /

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governmental bodies. Thus, it considers the aforementioned bodies subject to the ordinary common law courts. On the contrary, France, Germany, and many other European countries have a separate system of administrative courts for the solution of the matters against the spirit of the constitution, justice, and equality.

There are certainly some specific grounds<sup>1</sup> defined by the law, uniform to most of the states with some minor changes, subject to the authority given to administrative or the execution agency in the particular matter. These grounds are particularly divided as,

A, Substantive - because they relate to the substance of the disputed decision, which include illegality and irrationality (Unreasonableness).

B, Procedural - because it is aimed at the decision-making procedure, which include legitimate expectation and procedural impropriety.

It has been suggested that proportionality (which is now expressly cited as a doctrine of review only in human rights cases and cases with an EU dimension) should become a separate general head of review.

The scope of judicial review in the administrative outlook would not only remain to dispose off the issue but in some parts of the world, the court may also assume trespass of the right of the executive is equally justified. This is the due practice of the courts that whenever they cite a case where they feel the actions taken by the administration in the execution of the duty was erroneous. Some territories may include substance; other might only look for the merits of the case only as highlighted below,

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<sup>1</sup> In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, Lord Diplock summarised the grounds for reversing an administrative decision by way of judicial review.

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“If the courts were to assume a jurisdiction to review administrative acts or decisions which are unfair in the opinion of the court – not the product of procedural unfairness, but unfair on the merits – the courts would be assuming a jurisdiction to do the very thing which is to be done by the repository of an administrative power, namely, choosing among the courses of action upon which reasonable minds might differ...If judicial review were to trespass on the exercise of administrative power, it would put its own legitimacy at risk.”<sup>2</sup>

**2- In response to any order or law by the legislative assembly that the court feels is against the spirit of the constitution.**

To much surprise, the staunch believers of the equality and the empowerment of law – English legal system, does not allow the judicial review for the primary acts of parliament. This has reduced the functionality and scope of judicial review of the courts in English legal system to only the secondary legislation and the decisions of the public bodies, as pronounced below,

"The principle of Parliamentary Sovereignty means neither more nor less than this, namely that Parliament thus defined [i.e., as the 'King in Parliament'] has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament".<sup>3</sup>

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2 Attorney-General (NSW) v Quin (1990) 170 CLR 1, 37-38 per Brennan J.

3 AV Dicey, Introduction to the Study of the Law of the Constitution London: Macmillan, 1915.

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There are situations in the other territories where the powers of the courts as well as the parliament are limited by the supreme constitution, as enshrined in below mentioned report by Australian authorities,

“It is equally the case that s 75(v) of the Constitution vests in the High Court a jurisdiction for judicial review that provides an irreducible minimum basis for challenging unlawful Commonwealth activity; That is, Parliament does not have legislative power to remove this jurisdiction.”<sup>4</sup>

Judgments always come with a remedy so that justice would prevail. Similarly, to ameliorate the exacerbated situation in the substantive or the procedural activity of the administration and the hiccups in the legislation of the bodies there are certain remedies available in the legal system,

One or more remedies can be given together, but still in the end, Chris Grayling (Secretary of State (UK) for Transport) told the House of Lords constitutional committee,

"We have seen [judicial review] being used as a tactical tool rather than a vehicle for an individual to right a wrong, increasingly it's being used a political campaigning tool. It's trying to bypass ... the political process.”<sup>5</sup>

### **The provision of judicial review in the constitution of Pakistan and its effectiveness**

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4 The Scope of Judicial Review, Report to the Attorney-General. Report no. 47, April 2006

<sup>5</sup> <https://www.theguardian.com/law/2014/mar/26/judicial-review-cases-undermine-parliament-chris-grayling>

In the constitution of Pakistan, we have two kinds of legal provisions which can be discussed in this regard; the articles 184(3), 188 and 203E (9) of the constitution allow the higher court to review all its own previous decisions or the legislations made by the parliament. Article 199 allows the higher court to stop the administrative action of the executive to work, or can invalidate the legal effect of an action in case of no other adequate remedy is provided by law. By these article, the constitution of Pakistan authorizes the higher courts of the state can review any action or its legal effect of the state and the individuals.

Actually the purpose of this provision is to maintain the dominance of the constitution and ensure the separation of power of every state institution that on one of them intervenes in other jurisdiction.

The article 237 of the constitution authorizes the parliament for the legislation. The article 239 (5) of the constitution states no amendment of the constitution shall be called into question on any ground in any court. Moreover, the Clause 6 of the same article says for the removal of any doubt it is hereby stated that there is no limitation whatsoever on the powers of the Mājlīs-e-Şhūrā (parliament) to amend any of the provisions of the constitution. So the parliament is sovereign according to the constitution of Pakistan, but it has some restrictions on legislature as well such articles 8 and article 227. Above all, the parliament can not legislate what goes against the fundamental structure of the constitution.

In recent years, we have seen the massive practice of judicial review by the higher courts of the state in cases such rental power etc... in fact these were appreciated and declared as the optimum utilization of the legal provision.

### **The basic concept of judicial review in Islamic**

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## **Legal System**

In the Islamic legal system, the justice and its all applications are given much importance due to maintain the law and order and not to let anyone be deprived of his/her basic and fundamental rights. To understand the concept of justice and its importance, this seems useful to go through some useful relevant details.

### **A- Justice and its importance in Islam:**

In the holy Quran, there are lot of verses which talk about the justice and its role in the promotion of peace and prosperity. Here are some of them being mentioned:

- 1- “Surely Allah enjoins justice, kindness and the doing of good to kith and kin...” (Al-Nahl; 90)
- 2- “Believers! Be upright bearers of witness for Allah, and do not let the enmity of any people move you to deviate from justice. Act justly, that is nearer to God-fearing...” (Ma’edah; 8)
- 3- “If were you to judge between them, judge with justice. Surely Allah loves the just.” (Ma’edah; 42)
- 4- “Say to them: 'My Lord enjoins justice.’” (Al- A’raf; 29)
- 5- “We have revealed to you this Book with the Truth, so that you may judge between people in accordance with what Allah has shown you. So do not dispute on behalf of the dishonest.” (Al-Nisa’; 105)

These are few verses from the holy Quran which talk about the justice and its related different issues. More importantly, the justice is one of the names of God which indicates its importance.<sup>6</sup>

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6 Al-maqsad ul asna fi sharh ma'ani asma'ai Allah il husna, al-ghazali, p. 98, Qabras, 1987



There are much narratives quoted from the prophet (PBUH) which talk about the justice and the important role of the judges.<sup>7</sup> The prophet (PBUH) declared the justice to be the criterion of God for the survival of a nation, and nothing is more harmful than the injustice for the destruction of a nation.<sup>8</sup> Imam Mawardi and Imam Ibn e Temiyah have much talked about the justice and its importance for the survival and prosperity of a nation and state.<sup>9</sup> It has been clearly elaborated that no one is above the

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<sup>7</sup> Few them are being mentioned here:

- “The Dispensers of justice will be seated on the pulpits of light beside God, on the right side of the Merciful, Exalted and Glorious. Either side of the Being is the right side both being equally meritorious. (The Dispensers of justice are) those who do justice in their rules, in matters relating to their families and in all that they undertake to do.” Sahih Muslim 1827
- “Indeed, the most beloved of people to Allah on the Day of Judgement, and the nearest to Him in the status is the just Imam. And the most hated of people to Allah and the furthest from Him in status is the oppressive Imam.” Jami` at-Tirmidhi 1329
- “Allah is with the judge so long as he is not unjust, but if he rules unjustly, He entrusts him to himself.” Sunan Ibn Majah 2312
- “How can Allah purify any people (of sin) when they do not support their weak from their strong?” Sunan Ibn Majah 4010
- “The strongest among you to me is the weak until I take his right, and the weakest among you to me is strong until I take from him.” Tabaqa't ibn e sa'ad (3/182)
- “Umair bin Sa'ad said in his first speech when he was appointed as governor of Hims: Islam is a well-fortified wall and a firm gate. As for the wall, that's justice; and the gate is truth. If the wall is torn down and the gate destroyed, then Islam loses its protective strength. Islam remains well-fortified as long as its reign is mighty. The might of its reign cannot be realized by killing with swords or by slashing with whips; rather by the fulfilment of truth and justice!” Tabaqa't ibn e sa'ad (4/375)

<sup>8</sup> Sahi Bukhari (3478)

<sup>9</sup> Adab ud dunya wad deen, Mawardi, Beirut, 1986, p. 139, just ponder this beautiful quotation from Ibn E Taimiyah;

law; everyone has to respect and obey the law. Whoever violates or breaks the law is accountable and consequently punishable.<sup>10</sup>

At the time of prophet (PBUH), he was the one who used to give rulings and decisions because of his prophecy and being the supreme leader of the state of Madinah. When the state of Madinah expanded, he sent his representatives to other provinces as governor or administrator. His representatives were performing the duty of judge as well. He sent the Ali to the Yaman<sup>11</sup> and Abu Ubaidah to the Najran.<sup>12</sup>

After his death, the first Muslim Caliph Abu Bakr had lot of issues to deal with, so he assigned the duty of judge to the Umar.<sup>13</sup> It should be remembered that till this time the chief judge was the supreme leader of the state. After the death of Abu Bakr, the second Muslim Caliph Umar bin Khattab got the judiciary recognized as an independent organ of the state.<sup>14</sup> He appointed judges for different provinces. He appointed the Zaid bin Sabi. The third Caliph Usman bin Affan continued the same practice except appointment of some new judges. Till this time, the

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"فَهِىَ عَدْلٌ شَامِلٌ يَدْعُو إِلَى الْأَلْفَةِ، وَيَبْعَثُ عَلَى الطَّاعَةِ، وَتَتَعَمَّرُ بِهِ الْبِلَادُ، وَتَنْمُو بِهِ الْأَمْوَالُ، وَيَكْتُمُرُ مَعَهُ النَّسْلُ، وَيَأْمُرُ بِهِ السُّلْطَانُ. فَقَدْ قَالَ الْمَرْزُبَانُ لِعُمَرَ، حِينَ رَأَاهُ وَقَدْ نَامَ مُتَبَدِّلاً: عَدَلْتَ فَأَمِنتَ فَبِنْتَ. وَلَيْسَ شَيْءٌ أَسْرَعُ فِي خِرَابِ الْأَرْضِ وَلَا أَفْسَدُ لِضَمَائِرِ الْخَلْقِ مِنَ الْجَوْرِ؛ لِأَنَّهُ لَيْسَ يَتِفَتُّ عَلَى حَدٍّ وَلَا يُنْتَهَى إِلَى غَايَةٍ، وَلِكُلِّ جُزْءٍ مِنْهُ قِسْطٌ مِنَ الْفَسَادِ حَتَّى يَسْتَكْمَلَ"

Al-hisba, Ibn e Taimiyah, Saudia, 2005, p. 178

<sup>10</sup> Sahi Bukhari (6787)

<sup>11</sup> Musnad Ahmad (1281), later, Muaz bin Jabal was sent to replace him.

<sup>12</sup> Seerat un nabi, ibn e Hisham, 1/ 584, Egypt, 1955

<sup>13</sup> Actually the establishment of a state institution bases on the need and the requirement of the general public. At the time of first caliph Abu Bakr, there was a need of establishing this institution but not too much. There were lot of challenges for him to deal with, even when Umar bin Khattab was appointed by him as judge, he says that even a complete one year I faced one or two issues to deal with them as judge.....

<sup>14</sup> Tareekh ul Madina, Qadi ibn e Shubbah, 2/694, Saudia, 1979

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mosque was the place where a judge used to sit and give the rulings. The fourth Muslim Caliph Ali bin Abi Talib was the first one who specified the special place for the judiciary.<sup>15</sup>

In the regime of Umayyad and banu Abbas, The emperors in both regimes were responsible for the appointment of the chief judges and judges for lower courts. They established the special courts which were called Nazar ul Maza'lim.<sup>16</sup> Their basic function was to implement the court's decisions and review the decisions in which the unsuccessful litigant filed the petition for review.<sup>17</sup> Later, in the regimes of Fatimid and Ottoman empires, the courts were further expanded. They established the judicial system and benefitted from the prevalent surrounding systems as well. The thing should be noticed here that the judiciary (in one and other form) was existing from the very first day of Islam's advent on the earth. The teaching of Islam was very clear in this regard.

### **B- Court jurisdiction**

“Allah commands you to deliver trusts to those worthy of them; and when you judge between people, to judge with justice. Excellent is the admonition Allah gives you. Allah is All-Hearing, All-Seeing.” (Al.Nisa; 58)

Islam emphasized on the individuals to respect the law and the decisions taken by the state. It declared it prerequisite for the maintenance of law and order and the promotion of peace. It clearly stated that the nothing is superior then the divine law, everyone is accountable to it. In

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15 Tareekh, Kahlifah bin Khayyat, p. 200, Beirut, 1977

16 Qudat Qurtubah, Muhammad bin haris al-khushani, p. 54, Cairo, 1415 A.H

17 Muqaddimah, Ibn e Khuldun, p. 222, Beirut, 1988

Islamic legal system, the court's decision is fully protected and legitimized if it is based on divine law.<sup>18</sup> The Quran states in this regard:

“But no, by your Lord, they cannot become true be-lievers until they seek your arbitration in all matters on which they disagree among themselves, and then find not the least vexation in their hearts over what you have decided, and accept it in willing submission.” (Al.Nisa; 65)

This is applicable on all which is based on divine law. The Muslim jurists considered all rulings and verdicts which base on the texts of Quran and Sunnah (traditions of Prophet) to be the unchallengeable. Even if the Caliph of Muslims says or does something which contradicts the basic teaching of Quran and Sunnah, he would be asked to clear his instance or position. This is all about what is based on Quran and Sunnah.<sup>19</sup>

The general decisions of the judiciary which are based on the benefit of a common man and the state, these are considered to be having as much importance as the divine one, but, they can be challenged in the higher courts.<sup>20</sup> The traditions of Prophet (PBUH) which talk about the obedience of a ruler and not to disobey his orders, they can be placed in this category. It is just because of the ruler was the chief judge at that time,<sup>21</sup> so his decisions must be given due respect. But later when the judiciary was recognized as an independent institution, so the ruler was supposed to respect the judiciary's decisions.

If the ruler is accused to violate the rules, he can be called by judiciary. This is his legal and moral responsibility to clarify himself. If

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<sup>18</sup> Al-idarah fi Asr ir rasool, Ahamd Ujjaj, p. 231, Cairo, 1427 A.H

<sup>19</sup> Sahi Bukhari (7055), mujam al-kabi'r, Tabarani (381)

<sup>20</sup> Al-Baqarah; 188-189, Sahi Bukhari (6967)

<sup>21</sup> Al-Amwa'l, ibn e Zanjawaih, 1/77, Saudia, 1996

the decision comes not in his favour, he must respect the decision and obey it.<sup>22</sup> Here are few precedents from the history in which the caliph appeared to the chief judge of the capital territory in a prosecution. These precedents indicate that the court has the jurisdiction on the ruler; it can call him for the clarification if he is alleged in a case, it can subsequently dismiss him through the supreme council.

- Muawia vs Ubadah bin Samit (Tareekh Dimishq 26/196)
- Abu ja'far al Mansoor vs Siwar bin Abdullah (Tareekh ul khualafa by Suyu'ti; p.197 )
- Abu ja'far al Mansoor vs Mhmd bin Imran Tualhi (Tareekh ul khualafa by Suyu'ti; p.198 )
- Khalifa Mahdi Mhmd bin A.Allah vs A.Allah bin hasan al-Anbari (Adab ul Qadi by Mawardi 1s/248)
- Khalifa Mutawakkil billah vs Abu Hamid Isfra'eni (Tabaqat ul Shafiyyah al Kuybar 4/64)

Ibne farhoon al maliki and Abul Hasan al hanafi explicitly wrote that the judiciary is independent and has jurisdiction of the executive as well.<sup>23</sup> Here is the question that a court can punish the ruler (in case of capital

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<sup>22</sup> The Caliph Umar bin Khattab respected the decision of Zaid in spite of having different point of view. Tareekh ul Madinah; 2/693, The Caliph Umar bin Khattab appeared in the court of Qazi Sharaih and lose his case. Akhbar ul Quza't; 3/ 189, Qadi Shuraih reversed the decision of Caliph Usman. Akhbar ul Quza't; 2/336, The Caliph Ali bin Talib appeared in the court of Qazi Sharaih and lose his case. Akhbar ul Quza't; 3/200

<sup>23</sup> Tabsirat ul Hukkam, ibn e Farhoon, 1/14, Egypt, 1986, Mueen ul hukkam, Abul Hasan Tarablusi, p. 9, Cairo, 1883

punishment)? Hanafi School of law says: the ruler will not be punished.<sup>24</sup>

Shafi School of law says: he will be punished like the ordinary citizen.<sup>25</sup>

So the court has an independent body and its authority is sovereign and protected by the divine law until it issues a ruling against the divine law, then its ruling would be nullified.

### **C- Hierarchical structure of the court:**

It seems difficult to state that the hierarchical structure of the courts like the modern judiciary was existing in Islamic legal system in 1st century of the Islamic calendar. The modern hierarchical structure of the judiciary is not contradictory to the injunctions of the Quran and Sunnah, but it's more effective to let the justice prevail in a systematic way.<sup>26</sup>

As I mentioned earlier, the caliph used to be considered the supreme leader as well as the chief justice of the state. In fact, there was a tribal system in whole Arabian Peninsula, in which the tribal lord was supposed to resolve the issues of his respective tribe raised to him. So most of the time, issues were sort out on this stage. Very few of them used to be put up to the higher level. So that was the practice till the time of third Caliph Umar bin Khattab. Later, when the judiciary was established and given legal authority, so there was a chief judge in the capital particularly and in every province generally appointed by the caliph. There were town and city judges as well, but they were appointed by the chief judge.

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<sup>24</sup> Fath ul Qadeer; ibn e Hammam, 4/160, Beirut, 1984

<sup>25</sup> Mughni al-Muhtaj, Muhammad Sharbeeni, 4/152, Beirut, 1994

<sup>26</sup> Al-fiqh ul islami wa adillatuhu, Wahaba Zuhaili, 8/6248, Damascus, 1428 A.H

So the basic form of hierarchy was: town or city judge, the chief judge of the province, the chief judge of the capital territory and the Caliph who was the supreme leader of the state and the chairman of the supreme council as well.<sup>27</sup> The chairman of supreme council was the ultimate authority in Islamic legal system but his decision could be challenged if it was not in conformity with the Quran and Sunnah.

### **D- Judicial review or the reversal of the judicial decision**

The term of Judicial Review is a modern one. It means the power of higher courts to review the administrative actions of state whether they are according to the basic framework of the constitution or not.<sup>28</sup> This is the actual understanding of this term. Later, it was applied on the court's right to review its own decision, or the decision of a lower court on the demand of a litigant through appeal.<sup>29</sup>

In Islamic Legal System, the judge can review his own decision, or the decision of lower court or judge, consequently he can reverse or invalidate the decision as well but on some grounds. These are as follow:

- 1- The previous decision was explicitly contradict to the Quran, Sunnah or the Ījmā (unanimously agreed upon decision by Muslim jurists)
- 2- The judge was biased and prejudiced while giving the judgment.
- 3- The judge was not competent and capable for his designation.

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<sup>27</sup> The case in which Ali referred the heirs of the victim to the Prophet PBUH for their complete satisfaction,

See; Akhbar ul Quza't, 1/95, Muhammad bin Khalaf, Saudia, 1947

<sup>28</sup> See; Saikrishna B. Prakash and John C. Yoo, "the Origins of Judicial Review", University of Chicago, Law Review, Vol. 69, Summer; 2003

<sup>29</sup> See: Powers, S. David, "the Judicial Review in Islamic Law", Law & Society Review, Vol. 26, No. 2 (1992), p. 315

4- The judge was not fully aware of the situation.

5- The judge mistakenly gave the wrong decision.<sup>30</sup>

These are five grounds for the review appeal in Islamic Legal System. The unsuccessful litigant can file a petition for the review on the basis of one of them. He will have to initially prove the reason and justification for the review. If the litigant was unable to prove one of the above mentioned reasons for the review, the decision will remain valid.

The option of judicial review can not be availed if the decision was based on *Ijtihād* from the Quran and Sunnah. Because if the door is open for the review of all decisions based on *Ijtihād*, there will be an endless uncertain state of confidence. No decision could be declared the final. This was about the option of review for the judicial decision.

Theoretically the court has the authority to review the administrative actions of the state.<sup>31</sup> If they seem apparently not to be in conformity with the teaching of Quran and Sunnah, The court can invalidate them. The Quranic verse says:

“Believers: Obey Allah and obey the Messenger, and those from among you who are invested with authority; and then if you were to dispute among yourselves about anything refer it to Allah and the Messenger if you indeed believe in Allah and the Last Day; that is better and more commendable in the end.” (Al-Nisa; 59)

Here is the indication that if there is a difference of opinion between the

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<sup>30</sup> Adab ul Qazi, Ali Mawardi, p.689-692, Baghdad, 1971, al-Ashbah wa nazai'r, Taj ud din Subki, 1/406-408, Beirut, 1991, al-Mughni, ibn e Qudamah, 10/50-52, Cairo, 1968, Al-bada'e al sana'e, Abu Bakr Kasani, 7/5, Beirut, 1986

<sup>31</sup> The administrative actions of the state have never been challenged in the courts. This is the general picture of Muslim judicial history. This is because of the Muslim emperor possessed the chairmanship of supreme council, if he is the chairman, so who will make him accountable in front of law.



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ruler and anyone else, both of them will be supposed to return somewhere where they will be giving ruling according to the injunction of Quran and Sunnah. In my point of view, the meant body in the verse is the highest court or the supreme council of the state. In a Prophet's tradition, we find a narrative which says:

Ubada bin As-Samit said, "The Prophet PBUH called us and we gave him the Pledge of allegiance for Islam, and among the conditions on which he took the Pledge from us, was that we were to listen and obey (the orders) both at the time when we were active and at the time when we were tired, and at our difficult time and at our ease and to be obedient to the ruler and give him his right even if he did not give us our right, and not to fight against him unless we noticed him having open Kufr (disbelief) for which we would have a proof with us from Allah." (Sahi Bukhari; 7055)

Here is the clear instruction when to remove a Muslim ruler from his position, but not mentioned how to remove him and who will be the responsible to declare whether his deed is Kūfr E Bāwwāḥ or not! If the matter was left to the general messes, it will lead the state to the chaos, anarchy and unimagined destruction. So the addressee in all verses and traditions which talk about the notion of accountability of the ruler is the highest court or supreme council of the state.

## **Conclusion**

Judicial review definitely plays an important role to balance the power among the different state institutions, but it is observed that the misuse of it can lead the state to the conflict of interest among the different institutions, so there is the dire need of its restriction to the some technical grounds.

In Islamic legal system, this notion has not been institutionalized by the Muslim rulers and Jurists although there were lot of verses of Quran and traditions of Prophet (PBUH) (divine law) which were compatible with

this notion. That is why we have seen a lot of time the occurrence of Kḥūrooj<sup>32</sup> against the ruler which later led the whole state to chaos and anarchy. If there was such a legal provision so it may have prevented it and played a constructive and positive role.



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<sup>32</sup> A rebellion against the ruler on some grounds which disqualify him (in the mind of rebellious)