

Concept Of Judicial Review: An Islamic Perspective

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Abstract

Judicial review refers to the power of the courts of a country to review the actions of the legislative, executive and administrative branches and determine whether those actions are consistent with the Constitution. Acts that are found to be unconstitutional are declared unconstitutional and therefore null and void. This paper will examine this concept from a Sharia perspective. The paper applies qualitative research methodology. It is found that in Islam, the actions of rulers and the executive were generally controlled. In the regime of the Islamic caliphs, the judiciary was independent and could therefore exercise the power of judicial review. Judicial review thus has a basis in the Islamic perspective, as many actions of leaders or officials in many Islamic jurisdictions were submitted to the caliph for review as a judge.

Keywords: Judicial Review; Constitutionalism; Separation of Powers; Shariah.

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I. Introduction

Judicial review is the power of the courts to review laws and executive orders to determine whether they conform to the rules and principles laid down in a particular constitution. It is based on the notion that a constitution, which defines the nature, functions and limits of a government, is the supreme law (Supperston et al. 1992). Judicial review is a way of challenging the decisions, actions and sometimes the failure to act of a public body because it has not acted lawfully. In the judicial review process, judges examine or review the decision being challenged in the action and consider whether the public body has correctly followed the law. In addition to the claimant seeking a change in the decision and the defendant who made the decision, other parties who wish to be involved in the proceedings because they fear they may be affected by the outcome may also intervene in the proceedings. Public bodies such as central and local authorities must comply with the law in their decisions and actions. If they do not, they can be accused of having acted unlawfully. The type of law that governs the conduct of public bodies is known as "public law". The principles of public law ensure that public bodies comply with their legal duties, do not abuse their powers and are consistent with the human rights of those affected by their actions.

This article examines the concept of judicial review in the Islamic legal system to determine whether the Islamic legal system recognises this concept.

II. Objectives Of The Study:

To examine the concept of judicial review from the Islamic perspective.

III. Methods

The work uses a qualitative research methodology based on secondary data in the form of textbooks, journals, newspapers, websites, etc.

IV. Discussion

Concept of Judicial Review

Judicial review is a process by which the actions of the executive, legislative or administrative branches of a government are reviewed by the judiciary (Mark, 2001). In judicial review, a court may invalidate laws, actions, or government policies that are inconsistent with higher authority. For example, an executive decision may be invalidated because it is illegal, or a law may be invalidated because it violates the provisions of the Constitution. Judicial review is one of the checks and balances of the separation of powers, i.e. the power of the judiciary to monitor the legislature and the executive when they exceed their powers. The doctrine varies from

country to country, so the procedure and scope of judicial review may differ from country to country and within a country.

In judicial review, a court can ensure that the ultra vires principle is observed, i.e. that the actions of a public body do not exceed the powers conferred on it by legislation. The decisions of administrative acts of public bodies subject to judicial review are not necessarily controlled in the same way as judicial decisions, rather a court will enforce that judicial decisions adhere to the principles of procedural fairness (Mark, 2001).

Judicial Review in Islam

This includes an overview of judicial review in Islamic law, the legitimacy of judicial review in Islamic law and the mechanism of judicial review in Islamic law.

Overview on Judicial Review in Islam

Among the most important jurists who dealt with reviewing the constitutionality of laws is Ibn Hazm al-Andalusi, who said: "No ruling is permissible unless it is based on what Allah has revealed to His Prophet Muhammad, and it is the truth, and anything that is not that is considered injustice and tyranny, and any ruling based on it is not permissible and must be overturned if a judge has ruled according to it. Ibn Hazm supported his view with some verses of the Holy Qur'an, such as the revelation of Allah: "... and whoever transgresses the limits of Allah, verily he wrongs his soul..." and "the approval of injustice must not be allowed and injustice must not be permitted" " (MunĒr, 1994).

In Islam, the actions of rulers and the executive were generally controlled. In the regime of the Islamic caliphs, the judiciary was independent and could therefore exercise the power of judicial control. The caliphs not only promoted the independence of the judiciary, but also the power of judicial review. In their time, judges were unbiased and impartial, and they could easily exercise their power of judicial review. The purpose of promoting the power of judicial review was to control the activities of the sovereign and to investigate the compliance of these actions with Islamic law (Akhtar et al., 2022).

According to Al-Omran et al. (2015), several Muslim legal scholars have shown that the Islamic legal system recognizes the system of reviewing the constitutionality of laws in theory but does not practice it. Among them is the Muslim scholar Abu al-Ala al-Mawdudi, who writes: Does Islam allow the judiciary to reject some laws passed by the Legislative Council because they contradict the Qur'an and Sunnah? He replied by saying: I have not found any text on this issue, and there is no doubt that the work of the orthodox caliphs (al-Khulafa' al-Rashidin) indicates that the judiciary had no such authority. At least we have not found an example of this matter until now, but the reason for this, as I see it, is that all the members of the Parliament (Ahl al-Hall wa al-'Aqd) at that time were very knowledgeable in the Qur'an and the Sunnah, and above them were the orthodox caliphs who did not comment in any way on an issue that contradicted the Qur'an and the Sunnah (Al-Mawdudi, 1985). In response to this statement by Al-Mawdudi, Al-Al-Omran et al. (2015) said, although we agree with many aspects of this opinion (al-Mawdudi's opinion), we believe that the Legislative Council consists of ordinary people who are human beings and are concerned with matters that affect all human beings. Therefore, mistakes can be made depending on the circumstances, and passing laws that are not in accordance with the Qur'an and Sunnah is not impossible. On the contrary, it is conceivable. The aim behind the promulgation of such laws is not to contradict the Qur'an and Sunnah per se, but rather could be caused by the lack of insight or the very purpose of their promulgation. We can therefore say that the Islamic judiciary has the authority to reject any law that is not in accordance with the Qur'an and Sunnah. Moreover, the judge is bound by what Allah has revealed when he exercises his function as a judge. The Prophet (SAW) said: "You shall not obey any man and thus disobey the Creator", and Allah revealed: "... Whoever does not judge according to what Allah has revealed is a disbeliever." This shows that the Islamic legal system required verification of the constitutionality of laws before positive legal systems implemented them. They added that one of the functions of "parliament" is ijtihad and legislation, and that in cases where there is no text from the Quran or Sunnah or consensus to derive a Shariah ruling, it uses judicial interpretation. When such derived rulings are formulated as laws to be implemented by the judiciary, judicial review of the constitutionality of the laws and their legitimacy is required, as the judge in the Islamic legal system is not allowed to implement a law that he or she believes contradicts the Qur'an and Sunnah (Al-Omran et al., 2015).

The most important sources of the Islamic political system, the Qur'an and the Sunnah, prescribe the obedience of individuals or groups to the head of state. However, this obedience is not absolute and is limited to the conformity of the behaviour of the head of state, whether in legislation or administration, with the Qur'an, the Sunnah and the consensus of the Shari'ah scholars in jurisprudence (al-Nawawi, 1983). Thus, if government orders contradict the authority of these sources, they are invalid and should not be followed. There are many examples in history where the Islamic judiciary rejected orders, laws or decisions that were not in accordance with Sharia (SulaymĒn, 1976). In the area of judicial review of the constitutionality of laws, one can imagine that the Sharia is implemented on the basis of laws passed by a parliament (*Ahl al-Hall wa al-Aqd*). Legislation here

is based solely on *ijtihad*, as the final rulings in the Qur'an and Sunnah are considered constitutional texts that cannot be reviewed by the judge, and what has been decided by consensus is infallible, and again there is no review. However, the rulings of the source can be reviewed, and that is the *ijtihad* (Mun'Er, 1994).

According to Umar (n.d.), judicial review in positive law differs from that in Islamic law and from the nature of the judgment. Judgments rendered in *absentia* can be reviewed on appeal by challenging them before the issuing court. Trial judgments rendered in person may be reviewed by appeal to the court of second instance. Final judgments can be challenged with two extraordinary legal remedies: Cassation and retrial. Final judgments that can no longer be appealed are final by operation of law (*res judicata*). The court or judge who issued the judgment cannot set it aside or make a new decision on the matter. Once a final preliminary decision has been issued, the judge has exhausted his jurisdiction over the case and is therefore no longer authorized to change his decision. In Islamic law, on the other hand, the judge may return to a ruling he has made and reconsider it if it is contrary to the provisions of Islamic law, i.e. if it contradicts the Qur'an, the Sunnah or the consensus (*ijma'*), or if a doubt arises that averts the *hudud* (prescribed punishments for certain offenses). The judge reconsiders the case and must not be inhibited by his previous ruling on the matter.

Muslim jurists agree that the judgment issued by a judge is in principle final and binding on both parties. Nevertheless, they allow for judicial review and appeal because the judgment may be erroneous, since the judge is only human (Waşil, n.d, 259), and since the error itself is implied in a hadith of 'Amr ibn al-Aṣ (ra.) that he heard the Messenger of Allah (peace be upon him) say: "If a judge passes a correct judgment, he shall receive two rewards; if he passes a wrong judgment, he shall receive a single reward" (al-Bukhari, 1423). The review and reversal of a judicial verdict by the judge himself is an achievement of truth, an affirmation of justice and a recognition of the judge's duties as prescribed by Islamic law. The judge is the first and last person responsible for the judgment and its content in this world and in the hereafter (Salim et al., 2021). Therefore, a court judgment can be reviewed before a higher authority, such as the supreme judge, the ombudsman or the caliph and guardian *per se*. This provides a greater guarantee that the judgment is indeed closer to the truth and correctness and is in accordance with the noble law of Allah ('Aymur, 2004-2005).

Al-Māwardī (1996) says that many actions of leaders or officials in many Islamic jurisdictions were submitted to the caliph for review as a judge. Regardless of their status or rank, cases against officials were brought before this court. This practice was further institutionalized during the Umayyad period. The actions of public officials were submitted to the court (Mazālim presided over by the caliph) for review. In the Abbasid period, the institution gained in importance. Its jurisdiction was extended to ethical and religious tasks. This was also headed personally by the caliph and practiced in Baghdad. In the Islamic tradition, there are some precedents in which a judicial review can take place. It can take place for certain categories of actions by the executive or public officials. Firstly, if the executive mistreats or oppresses the public, it is the duty of the judges to conduct a judicial review, regardless of the status of the person concerned. Judges therefore have the right to stop a tyrannical government. He reports that one day Umar ibn 'Abd al-Aziz, on his way to prayer, met a man who had just come from Yemen to make a complaint. The man said: "You call people to you who are in need and who have been wronged, and now a victim of oppression has come to you from a distant land! When he was asked what he had complained about, he said, "Al-Walid ibn 'Abd al-Malik has taken away my farm." 'Umar said, "Mazālim, bring me the book of confiscations. The book contained records of the confiscation of farms. Then he said, "Remove him from the books and let him not only return the farm but also double his regular payments.

Legitimacy of Judicial Review in Islamic Law

We would examine the evidence for the legitimacy of judicial review in the Noble Qur'an, the evidence for the legitimacy of judicial review from the Prophetic Sunnah, and the evidence for judicial review from the Consensus (*Ijma'*).

Evidence for the Legitimacy of Judicial Review in the Noble Quran

Allah says, "And [remember] when Dawud and Sulayman passed judgment regarding the crops ruined [at night] by someone's sheep, and We were witness to their judgments" (al-Anbiya', 21: 78). Imam al-Qurtubi interprets this verse as follows: "His word: 'And [remember] when David and Solomon passed judgment,' that is, let them remember them when they passed judgment. The phrase "passed judgment" does not mean the combined judgments of Dawud and Sulaiman on the case, even though they are mentioned at the same time. There cannot be two rulings on a single case; instead, each of them ruled separately. Sulayman understood the case as well as Allah had enabled him to understand it. there are two opinions about the meaning of *al-ḥarth*. Qatadah said it meant a plantation, while Ibn Mas'ud and Shurayḥ said it meant a vineyard with dangling grapes. *Al-ḥarth* is used for both, but it is more than a metaphor for a plantation. 'Ruined [at night] by someone's sheep' means that the sheep grazed the vineyards at night (*al-nafash* means to graze at night), and We were witnesses to their judgments": a proof that the minimum number for a plural is two. Some thought it referred to the two judges and the object of judgment, i.e. "their judgments" (Salim et al., 2021).

“And We made Sulayman understand” means that We made him understand the case and the jurisprudence. Neither was mentioned directly, as was indicated earlier. Sulayman’s judgment was favored over his father’s because he made sure that each party kept their property, and so he kept well. Dawud (peace be upon him) ruled that the sheep should be given to the owner of the vineyard. When the two disputing parties came before Sulayman, who was sitting at the door through which they had gone out (they had come through another door to meet Dawud), he asked, ‘What judgment did the Prophet of Allah Dawud make for both of you?’ They replied, ‘He ruled that the sheep should be given to the owner of the vineyard.’ Sulayman said, ‘The judgment should not be. Come with me.’ Then he met his father and asked, ‘O Prophet of Allah, you have judged so and so, but I have a judgment that suits everyone better.’ Dawud asked, ‘What is it?’ Sulayman said, ‘You should give the sheep to the owner of the vineyard so that he can benefit from its milk, fat and wool. Give the vineyard to the owner of the sheep so that he can cultivate it. The next year, when it returns to the state it was in before the sheep grazed it, they shall return their property to each other.’ Dawud said, ‘You are on the right path, my son. Allah has not circumcised your mind.’ Thereupon he submitted to the judgment of Sulayman. Ibn Mas‘ud, Mujahid and others have paraphrased this narration” (al-Qurṭubi, n.d.). The verse and its interpretation show that it is permissible for a ruler or judge to reconsider a judgment that he bases on his own ijtihad (conclusion) if there is a stronger ijtihad. In this way, truth and justice can be achieved (Salim et al., 2021).

Evidence for the Legitimacy of Judicial Review from the Prophetic Sunnah

Judiciary is the means of executing and implementing the laws of Allah, the Exalted. The judge bases his judgment on the Book of Allah. If he finds no reference in it, he refers to the Sunnah of the Messenger of Allah (peace be upon him). It was narrated from the companions of Mu‘adh ibn Jabal from the people of Homs that when the Messenger of Allah (peace be upon him) wanted to send Mu‘adh to Yemen, he said, “How will you judge when the opportunity arises to decide a case?” Mu‘adh replied, “I will judge according to the Book of Allah.” He asked, “What will you do if you do not find guidance in the Book of Allah?” He replied, “I will act according to the Sunnah of the Messenger of Allah (peace be upon him).” He asked: “(What will you do) if you do not find guidance in the Sunnah of the Messenger of Allah (peace be upon him) and the Book of Allah?” He replied: “I will do my best to form an opinion and I will spare no effort.” The Messenger of Allah (peace be upon him) then patted him on the chest and said, “Praise be to Allah, Who has helped the Messenger of the Messenger of Allah (peace be upon him) to find something that pleases the Messenger of Allah” (peace be upon him)” (Salim et al., 2021).

If the judgment of a judge contradicts the Qur'an or the Sunnah, the judgment becomes invalid. It was narrated that the Mother of the Believers, ‘A’isyah (ra.), said: “The Messenger of Allah (peace be upon him) said: ‘Whoever invents in this matter of ours (i.e. Islam) something that is not from him, it will be rejected (by Allah) (al-Bukhari, 1423). This means that such an innovation is invalid; one cannot refer to it and find an argument. It follows from this hadith that a ruling that contradicts the Qur'an, the Sunnah, consensus, obvious analogy (qiyas jali) or general principles must be rejected (al-Shafi‘i, 1990).

Evidence for Judicial Review from Consensus (Ijma‘)

The jurists agree that an unjust judgment is invalid (Ibn Farḥun, 2002) and that it must be overturned in accordance with the provisions of Islamic law. This can be done by the judge who issued the judgment himself if he has discovered the error. Judges have withdrawn their judgments if they are unjust. Reversing a judgment is obligatory if the judge clearly states that it contradicts the agreed Shariah evidence or is far from truth, justice and correctness (Raḍiyah ‘Aymur, 2004-2005, 36). Therefore, the most important evidence for judicial review in Islamic law is clear to us. The reason for judicial review is the contradiction of court rulings to the Qur'an, Sunnah, consensus, obvious analogy or general principles, or the presence of error and injustice in the ruling. In this case, the judge himself or a judge of a higher instance must overturn the judgment (Salim et al., 2021).

Judicial Review Mechanism in Islamic Law

As discussed above, scholars agree that a court judgment is void if it contradicts the texts of the Shariah or contains an error or injustice. Nevertheless, jurists hold at least three views on the mechanism for reviewing and overturning a court judgment (Salim et al., 2021).

The first view

A judge cannot overturn a judgment that he has issued himself. Instead, he corrects his opinion in subsequent judgments without influencing previous judgments (Salim et al., 2021). Umar bin al-Khaṭṭab (ra.) said in his advice to Abu Musa al-Ash‘ari (ra.): “It is permissible for you to reconsider a judgment that you made yesterday after you have received guidance in this matter. The truth is constant, and it is better to reconsider it in order to reach the truth than to persist in falsehood” (al-Bayhaqi, n.d.).

Ibn Qayyim al-Jawziyyah says in his interpretation of this statement: “The first judgment does not prevent him from reconsidering the second, and the second judgment cannot cancel the first. The Imams of Islam after him have adhered to these two principles” (Ibn Qayyim al-Jawziyyah, 1991). Thus, according to the scholars who hold the first view, it is clear that there are two bases or principles for judicial rulings (‘Allam, 2012):

- a. The judgment is firm and should not be withdrawn;
- b. If the judge discovers an error in a judgment he has rendered, then he must avoid this error in subsequent judgments. It was narrated from ‘Umar ibn al-Khattāb that he once passed a certain judgment on an incident, but then passed another judgment on a similar incident. He was asked about this and explained: “This is how we used to judge, and this is how we judge now” (al-Kasani, 1987).

The second view

If a judge discovers an error in his judgment, he must immediately set it aside and declare it null and void (Salim et al., 2021). This is the opinion of ‘Umar ibn ‘Abd al-‘Aziz. Yahya ibn Sa‘id and Rabi‘ah ibn Abi ‘Abd al-Rahman said, “‘Umar ibn ‘Abd al-‘Aziz said, ‘No sound is easier for me to resolve; and no book is easier for me to refute than a book with which I judge after I have found the truth in another, and so I abrogate it’” (al-Bayhaqi, n.d.).

The third view

A judge cannot return to his judgment unless he discovers an error that contradicts the Qur'an, the Sunnah or the consensus. He cannot go back to a judgment that was made on the basis of his *ijtihad* (Salim et al., 2021). Imam al-Sarakhsi of the Hanafi school said: “If a judge makes a judgment and then finds that he should retract it: If the error in the judgment relates to something that is not in dispute, then he should withdraw it and set it aside. That is, if the judgment contradicts the *naṣṣ* [i.e. Qur'an and Sunnah] and the consensus. A judgment that contradicts the *naṣṣ* and the consensus is invalid and is an oversight on the part of the judge. A hadith says: “Return what is unknown to the Sunnah” If the error relates to a disputed matter, the judge should leave the judgment as it is and judge the following cases based on what his *ijtihad* reaches and what he thinks is best. The reason for this is that the judgment falls within the scope of *ijtihad* and thus becomes effective and necessary, so it cannot be annulled. This is based on a tradition according to which ‘Umar (ra.) passed a certain judgment for an incident, but passed a different judgment when a similar case was brought before him. When he was asked about this, he said, “This is how we used to judge, and this is how we judge today. Al-Sha‘bi (ra.) said: “I have memorized 70 hudud cases from ‘Umar (ra.), each one different from the other. It is therefore clear that one *ijtihad* cannot be overturned by a similar *ijtihad*. Instead, the judge makes his judgment in subsequent cases based on what his *ijtihad* has revealed. The basis for this is the examination of the qibla direction. It was narrated that Shurayḥ (ra.) once issued a ruling whose error then became apparent, so he reconsidered it. But he did not return to rulings that had been made on the basis of his *ijtihad*. If he changed his mind, he based his judgment in future cases on what his *ijtihad* prescribed for him, and he did not abrogate his previous rulings” (al-Sarakhsi, 1993).

Sheikh Khalil al-Maliki stated in his *Mukhtaṣar*: “The judgment of an unjust judge or an ignorant judge who has not consulted with the scholars should be rejected. But if the ignorant judge consults with the scholars, [then his rulings should not be rejected outright, but] they should be re-examined [for the purpose of review]. The judgment of a judge who is not unjust should be left as it is. The judgment of a just, learned judge should not be reconsidered. It may be overturned by the judge himself or by another judge, but he should explain the reason for it, whether it contradicts clear evidence [i.e. clear parts of the Qur'an, Sunnah or consensus] or obvious analogy. The judge may set aside his own judgment if he sees that another judgment is more correct or the judgment is outside [the scope of] his own opinion [e.g. due to an oversight] or the opinion of his imam” (‘Ilish, 1989).

V. Conclusion: Findings

1. Judicial review is a process by which the actions of the executive, legislative or administrative branches of a government are reviewed by the judiciary.
2. Muslim legal scholars agree that the judgment of a judge is generally final and binding on both parties. Nevertheless, they allow for judicial review and appeal because the judgment can be flawed, as the judge is only human.
3. In Islam, the actions of rulers and the executive were generally controlled. In the regime of the Islamic caliphs, the judiciary was independent and could therefore exercise the power of judicial review. The caliphs not only promoted the independence of the judiciary but also the power of judicial review. In their time, judges were unbiased and impartial, and they could easily exercise their power of judicial review. The purpose of promoting the power of judicial review was to control the actions of the sovereign and to verify the conformity of these actions with Islamic law.
4. The main sources of the Islamic political system, the Qur'an and the Sunnah, prescribe the obedience of individuals or groups to the head of state. However, this obedience is not absolute and is limited to the

conformity of the behavior of the head of state, whether in legislation or administration, with the Qur'an, the Sunnah and the consensus of the Shari'ah scholars in jurisprudence. Therefore, if government orders contradict the authority of these sources, they are invalid and should not be followed. There are many examples in history of the Islamic judiciary rejecting orders, laws or rulings that were not in accordance with Shari'ah.

5. Judicial review has a basis from an Islamic perspective, as many actions of leaders or officials in many Islamic jurisdictions were submitted to the Caliph as judge for review. Regardless of their status or rank, cases against officials were brought before this court. This practice was further institutionalized during the Umayyad period. The actions of public officials were brought before the court (Maẓālīm presided over by the caliph) for review. In the Abbasid period, the institution gained in importance. Its jurisdiction was extended to ethical and religious tasks. This was also headed personally by the caliph and practiced in Baghdad. In the Islamic tradition, there are some precedents in which a judicial review can take place. It can take place for certain categories of actions by the executive or public officials. First, if the executive mistreats or oppresses the public, it is the duty of the judges to conduct a judicial review, regardless of the status of the person involved. Judges therefore have the right to stop a tyrannical government.

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