

WAFAQI MOHTASIB(FEDERAL OMBUDSMAN)
INSTITUTION: AN EFFORT OF HARMONIZATION WITH
SHARIAH

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ABSTRACT:

The paper will analyze harmonization of Accountability system in Pakistan with that of Siyasa Shariyyah in Islamic law.

In 1980s when Pakistani government was trying to Islamize civil law system, there was an effort to harmonize the law of accountability with *Shariah*. It was the establishment of the Office of the Wafaqi Muhtasib in 1985. Although the model was taken from the Western Ombudsman but basically this was the concept of *Wilayatul Mazalim* in *Siyasa Shariyyah* which inspired the government to have an independent institution of accountability of the public servants. It is important to note that Sweden pioneered the establishment of the office of Ombudsman in the West but in fact, it took inspiration from the office of *Qazi-ul-Quzat* in Turkey where King Charles, the twelfth, of Sweden took refuge in 1709 and was impressed with the work of that office and on restoration he set up a similar system which was gradually developed into the Office of the Ombudsman.

It goes without saying that accountability of Public servants has been the milestone of Islamic politico-legal system throughout Islamic history right from the period of the Prophet (peace be upon him) to the last Muslim Caliphate in Turkey and the last great Mughal kingdom of Indian sub-continent.

The constitution of Pakistan makes it obligatory upon the rulers to use their authority as a sacred trust of Allah and provide the nation with conducive environment to lead their lives in accordance with *Shariah*. The establishment of the institution of the Wafaqi Muhtasib is an effort in this direction.

The methodology of the paper is that of academic research depending mostly on libraries. The background of the present institution has been stated in the beginning. Then the theory of accountability in *Shariah* has been discussed in some detail. In the conclusion some suggestions have been made as to how the institution may be harmonized with *Shariah*.

Unit 1. Introduction:

Grievance redress role of the government is not a new phenomena. 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 civilisation. 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. 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 existing 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 subjects. The Roman and Persian (Sassanid) rulers had established practices of investigation of complaints against the royal officials.¹

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.²

The realisation 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 to redress their complaints, now depended on the creation of an impartial and functionally independent institution of the Ombudsman.³

The *raison d'être* for setting up the institution of the Wafaqi Mohtasib, thus, was to institutionalise 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.⁴

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 visualised a piece of land where the golden rules of Islam will be brought into practice. There has been a constant effort of Islamising and bringing in harmony with Shariah those laws which the country inherited from British colonial rule. Accountability of public servants is a fundamental feature of Islamic administrative and political system. So the establishment of the office of Wafaqi Mohtasib was a right step in that very direction. Therefore in 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).

¹ Malik, Dil Muhammad, Ombudsman: the development in Pakistan, Pakistan law Journal 1982, p.96

² Annual Report of the Wafaqi Mohtasib for 1985, p. 5, 6

³ Islamuddin, Towards Understanding the Ombudsman Idea (booklet without any publication data available in Wafaqi Mohtasib Library, Islamabad) p.4

⁴ Annual Report of the Wafaqi Mohtasib for 1985, p. 5,

Unit.2. Meaning of the word “Ombudsman”:

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.⁵ 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 1809.⁶

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 ‘mal-administration’. The complaint may not necessarily be confined to illegal action but can cover broader injustices in administrative decisions. Most Ombudsman’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.⁷

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.”⁸

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. From Islamic political and legal history point of view the work of the Ombudsman was done in by an official of the government called as *Wali al Mazaalim* (Incharge of the Grievance Redress Department) and the institution itself

⁵ Wahab, Ibrahim al, *The Swedish Institution of Ombudsman*, Tryck: Centraltryckeriet AD, Boras, Sweden, 1979, P.19

⁶ Islamuddin, *Towards Understanding the Ombudsman Idea* (booklet without any publication data available in Wafaqi Mohtasib Library, Islamabad) p.7

⁷ Crystal, David, ed. *The Cambridge Encyclopedia*, Cambridge University Press, Cambridge, 1990, p.879

⁸ 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, Abedin, Najmul, *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 visited: Oct. 05, 2009.

⁹ {Al Hadeed-25}

was called *Diwan al Mazaalim* or *Wilayat al Mazaalim*. It is therefore, pertinent to discuss the concept of accountability of public servants in Islam.

Unit 3. Concept of Public Servants' Accountability in Islam:

Accountability of public servants is a requirement for the establishment of Just system in the society. It goes without saying that justice is the foundation stone of Islamic legal system. It is the ultimate goal of sending the prophets and messengers by Allah as has been declared in Quran:

لقد أرسلنا رسلنا بالبينات وأنزلنا معهم الكتاب والميزان ليقوم الناس بالقسط

“ Indeed we sent Our Messengers with clear signs and revealed with them the book and the Balance so that they might put people on Justice.”⁹

Quran and Sunnah has emphasised on the establishment of justice repeatedly.

The following texts of Quran are worth mentioning when talking of justice in Islam.

Allah declares:

ياأيها الذين آمنوا كونوا قوامين لله شهداء بالقسط، ولا يجرمنكم شنآن 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...”¹⁰

إن الله يأمر بالعدل

“ Verily Allah enjoins justice...”¹¹

قل آمنتم بما أنزل الله من كتاب وأمرت لأعدل بينكم...

“...say I believe in whatsoever Allah has sent down of the Book and I am commanded to do justice among you...”¹²

إعد لوا هو أقرب للتقوى

“Be just that is nearer to piety.”¹³

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

والسما رفعها ووضع الميزان، ألا تطغوا في الميزان، وأقيموا الوزن بالقسط ولا 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.”¹⁴

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.¹⁵

Allah says:

إن الله يأمركم أن تؤدوا الأمانات إلى أهلها و إذا حكمتم بين الناس أن تحكموا بالعدل، إن الله نعمًا يعظكم به ...

“ 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.”¹⁶

¹⁰ { Al Mae'dah: 8}

¹¹ {An Nahl-90}

¹² {Ash Shura-15}

¹³ {Al Maa'edah-8}

¹⁴ { Ar Rahaman-7-9}

¹⁵ Muslehuddin, Islam and Its Political System, , Dr. M. Muslehuddin Islamic Trust, IIUI, 1988

p. 131

¹⁶ {An Nisa-58,}

Once the Prophet (S.A.W) said to Abdurrahman bin Samurah, “ O Abdurrahman, never ask for a post, if it is given to you without your demand, you will be helped in managing it; but if it is given to you after your demand you will be left to it on your own.”¹⁷

The prophet 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.”¹⁸

Bukhari narrates on the authority of Abu Hurairah that the Prophet said, “if 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 the people not worthy of these offices , it means that the Last day is at hand”

The Prophet also said,

كلكم راع وكلكم مسؤول عن رعيته وإمام راع ومسؤول عن رعيته والرجل راع في أهله ومسؤول عن رعيته والمرأة راعية في بيت زوجها ومسؤولة 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; the youngster is a shepherd in regard to his father’s wealth and is responsible for the money at his disposal; the slave is a shepherd as regards his master’s possessions and is responsible for them. Lo! Every one of you is a shepherd and is responsible for his flock.”¹⁹

The prophet said,

“Any ruler to whom Allah has entrusted His flock who dies one day after having cheated his subjects; Allah will not allow him to smell the fragrance of paradise.”²⁰

According to a prophetic tradition seven categories of believers will be given shelter under Allah’s shade on the Day when no other shade will be available except His. The first of those mentioned is just ruler.²¹

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 and his Companions i.e. the Khulafa-e-Rashideen.

¹⁷ Muslim, Kitab al Ijarah, Bab: Annahy a’n talab al imarah wal hirs alaihaa, Hadith No 3401, Muslim, Kitab al Aymaan, bab: man halafa yaminan fa ra’aa ghairaha khairan minhaa an ya’tiya, Hadith No 3120, Bukhari, Kitab al aymaan wannuzoor, Baab Qaul Allah taalaa, laa yu’aakhizukumu Allahu bil laghwe fi aymaanikum, Hadith No 6132, Tirmidhi, Kitab al Nuzoor wal aymaan, bab: maa jaa fi man halafa ala yamin fa ra’aa ghairaha khairan minhaa, Hadith No 1449, Nasaai’, Kitab: adaab al Qudhah, bab: annahye a’n masa’alat-e-al imarah, Hadith No 5289, Ahmad, kitab: awwal musnad al Basriyyin, bab: Hadith Abdurrahman bin Samurah, Hadith NO, 19704, 19707, 19709, 19711, 19712

¹⁸ Abu Dawood, Kitab al aqdhiiyyah bab: fi talab al Qadha wa al tassaru’ ilayhe, Hadith No 3107, Tirmidhi, Kitab al ahkam a’n rasulullah bab: maa jaa a’n rasulullahe fi al qadhi, Hadith 1246, Ibn-e-Majah Kitab al ahkam bab: fi talab al qadha wa al tassaru’ ilayhe, Haidth No 3107

¹⁹ Bukhari, Kitab al Istiqradh wa ada’ adduyoon wal hajr wa al taflis, bab; al ‘abd ra’ain fi maal-e-sayyidihi wa laa y’amalu illaa bi iznihi, Hadith No 2232, Muslim, Kitab al Ijarah bab; fadhilat ul Imam al aadil wa uqubat al jaa’r wal hath ala al rifq, Hadith No 3408, Tirmizi, Kitab al Jihad a’n rasulullah, bab: maa jaa; a fi al imam, Hadith No 1627, Abu Dawood, Kitab al Kharaj wal Ijarah wal fay, bab: maa yalzamu al imam min haqq al raiyyah, Hadith NO 2539, Ahmad, Kitab: musnad al mukthirin min al sahabah, bab: musnad Abdullah bin Umar bin al Khattab, Hadith No 4266,

²⁰ Muslim, Kitab al Imaan, bab: Istihqaq al waali al ghaash le ra’iyyatihi annaar, Hadith No 203

²¹ Bukhari, Kitab al Aazaan, bab: man jalasa fi al masjid yantaziru assalah wa fadhl al masajid, Hadith No 620, Muslim, Kitab al Zakah, Bab: fadhl ikhfa al sadaqah, Hadith No 1712

In the famous letter sent by Umar to Abu Musa Ashari the functions of judiciary were laid down as follows.

“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 proofs on the plaintiff and the defendant may be put on oath but let this not defeat the ends of justice and law.²²

In this letter and a few other letters, Umar has explained the basic principle 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 persuade them to bring themselves to justice without any external force making them do that.

The theory behind the administration of justice in Islam is based on unique principles and the fountain head of the same is the Quran 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.²³

As Quran, 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 *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 administrative of justice should be brought in action.

The basic machinery through which justice is administered and for that purpose accountability of public servants is ensured is no doubt the institution of judiciary. In Islam the concept of judiciary is wider than contemporary western concept. The way through which judiciary in its wider Islamic sense is regulated is called *Siyasah Shariyyah*. It is a means to ensure that justice is administered in the society as required by Quran and Sunnah.

Unit 4. *Siyasah Shariyyah* and Its meaning:

A contemporary scholar comments on *Siyasah Shariyyah* as follows:

Administration of justice is called *Siyasah Shariyyah* in Islamic law. In the wider meaning it includes the courts of the *qadi* 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 *mazalim* 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 *Siyasah Shariyyah* of the ruler.²⁴

To understand the concept well, let's first try to explain the meaning of *Siyasah* and then we will try to have the meaning of *Siyasah Shariyyah*.

²² Hamoodur Rahman, Justice, The Administration of Justice in Islam p.6, Kiab Bahavan, New Delhi, 1990

²³ Qadri, Anwar Ahmad, Justice in Historical Islam, p. 2, Shaikh M. Ashraf, Lahore 1974.

²⁴ Nyazee, Prof. Imran A. Khan, Outlines of Islamic Jurisprudence, p.32,33, Centre for Islamic law and Legal Heritage, Islamabad, 2002

4.1. Meaning of the term “*Siyasah*”:

Strictly literally speaking the word ‘*Siyasah*’ means to tend 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.²⁵

The word *Siyasah* has been used in the sayings of the Prophet (S.A.W). It is reported by Abu Hurairah that the Prophet said,

كانت بنو اسرائيل تسو سهم الانبياء كلما هلك نبي خلفه نبي وانه لاني بعدني وسيكون خلفاء فيكثرون، قالوا فما تأمرنا يا رسول الله قال فو بيعة الأول فلاول، اعطوهم حقهم فإن الله سائلهم عما استر عاهم

The *Siyasah* of Banu Israel was conducted by their Propohtes. When one of them passed away antoher succeeded him, but verily there is no prophet after me rather there will be Khulafa (Successors) and they will (sometimes) be many. The Companions asked, “What then should we do?” He replied, “ Fulfill the oath of allegiance to the one whom you gave it firstly and then the next one. You fulfill your duty towards them and Allah will call them to account for the responsibility given to them.²⁶

Here the word تسو سهم means ‘they ran the affairs of the government. So ‘*Siyasah*’ 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-e-Jarir al Tabari while explaining the logic behind the selection of six Companions for Khilafah by Umar bin al Khattab 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 *Siyasah*.”

Ibn-e-Manzoor, a lexicographer of eighth century after Hijrah, says:

والسياسة القيام على الشيء بما يصلحه والسياسة فعل السائس

Siyasah is managing a thing in a befitting manner and it is the job of a leader.²⁷

Ghazali counts knowledge of *Siyasah* as a communal obligation because it is something without that life can not move on smoothly.²⁸

Ibn-e-Abideen defines *Siyasah* as follows:

استصلاح الخلق وارشادهم الى الطريق المنجي في الدنيا والاخرة

Seeking the betterment of people and their guaidance towards the straight path delivering them in this world and in the Hereafter.²⁹

After discussing the punishments and expiations of different crimes he says: وهذا تعريف للسياسة العامة الصادقة على جميع ما شرعه الله تعالى لعباده من الاحكام الشرعية

This is explanation of true public *Siyasah* about all the legal commands of Allah the Exalted for His subjects.³⁰

This is because the purpose of punishments in Islamic law is to protect the basic objectives of Shariah envisaged in Quran and Sunnah. In the same manner other Hanafi Jurists also term the jurisdiction of the government in awarding suitable

²⁵ Encyclopedia of Islam, p. 694 vol.9

²⁶ Muslim, Kitab al Ijarah, bab: wujub al wafa bi bai’ah al khulafa al awwal fa al awwal, Hadith No 3429, Ibn-e-Majah, Kitab al Jihad, bab: al wafa bil bai’ah, Hadith No 2862, Ahmad, Kitab: baqi musnad al mukthirin, bab: musnad Abi Hurairah, Hadith No 7619

²⁷ Ibn-e-Manzoor al Afriqi, Lisan al Arab, 6/108, Dar Saadir, Beirut.

²⁸ Ghazali, Ihya Uloomuddin, 1/9

²⁹ Ibn-e-Abideen, Radd al Muhtar, kitab al hudood, 3/162

³⁰ ibid, 3/203

punishment for crimes where there is no provision of Quran and Sunnah, as *Siyasah*.³¹

Ibn-e-Khaldoon says:

فالسِّيَاسَةُ وَالْمَلِكُ هِيَ كِفَايَةُ الْخَلْقِ وَخِلَافَةُ اللَّهِ فِي الْعِبَادِ لِتَنْفِذِ أَحْكَامِهِ فِيهِمْ

Siyasah and government is the protection of people and being vicegerent of Allah among the subjects to implement His commands upon them.³²

'*Siyasah*' 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.³³

Abu Nasr al Farabi (d.339 a.h.) and Ibn-e-Seena (d. 428 a.h.), in their writings discussed '*Siyasah*' in the sense of 'art of living and dealing with people'. They look to be impressed with the Greek philosophers because in their discussion of '*Siyasah*' one do not find the any reference to the objectives of Shariah 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 '*Siyasah*' of a person with himself, his relation with his Creator, dealing in the affairs of his income and expenses i.e. his economic affairs.³⁴

Another contemporary of Ibn-e-Seena , Al Hussain bin Ali al Maghribi (d. 418) wrote a manual on '*Siyasah*' particularly for rulers. In the very beginning of his book he says that when one writes something on *Siyasah*, he should be very brief because those who are involved in *Siyasah* has very little time to read for their pre occupation in the job of running the affairs of the state.³⁵

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

About the first type, among other things , he suggests to the ruler to have sufficient time for the remembrance of Allah and reminding oneself His great bounties. In this kind of *Siyasah*, he elaborates: " The essence of *Siyasah* is fulfilling promises and proving one's threats true, rewarding the one who does good deed and 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 '*Siyasah*' completely.³⁶

Al Maghribi differentiates between the *Siyasah* for general public and *Siyasah* for the high ranking government officials. Whatever he says about the *Siyasah* for the high ranking government official is compatible with the statement of jurists who discussed '*Siyasah Shariyyah*'. 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 conduct of the officials constantly; correcting their misdeeds through proper means. He should never stop the process [of

³¹ See for example Al Marghinani, Al Hidayah ma' Sharh Fath al Qadeer, kitab al hudood, 5/241-244

³² Ibn-e-Khaldoon, Muqaddimah, p.113

³³ For the use of word "siyasah" through history see "siyasah" by Bernard Lewis in "In Quest of an Islamic Humanism" ed. A.H. Green, pp.3-14

³⁴ Al Dahhan, Saami, preface of the "al Kitab fi al Siyasa" by al Hussain bin Ali al Maghribi p. 38,39

³⁵ Al Maghribi, Al wazeer al kaamil Abul Qasim al Hussain bin Ali, Kitaab fi al siyasah, p.59, ed. Sami al Dahhan,

³⁶ Ibid. p.64

accountability]. He should also take care of their rights and provide them with as much ease as he can.³⁷

He advises to have best manner in dealing with general public i.e. سياسة العامة. 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 Maghribi 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.³⁸

Here the 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.³⁹

From the above discussion it can be concluded that the word "*Siyasah*" literally means to train and to take care of, the meanings which are very much there in statesmanship or statecraft. Therefore *Siyasah* 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 *Siyasah* shows that any measures taken by the Muslim rulers for ensuring the preservation of the objectives of Shariah whether positively or negatively are included in *Siyasah*. 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 Quran and Sunnah as *Siyasah*.

The use of word *Siyasah* by the Muslim jurists also show that by its use they mean only *Siyasah* which is recommended by Shariah i.e. which is in accordance with the general spirit of Quran, Sunnah and the practice of the *Ummah*. That is what is called *Al Siyasah al Shar'iyah*. Most of the Muslim jurists in the past never thought of *Siyasah* as a secular concept which has nothing to do with divine revelation. As we know today *Siyasah* (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 *Siyasah* is "might is right".

4.2. *Al Siyasah al Shar'iyah*:

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

Siyasah Shariyyah, as is evident is composed of two words; *Siyasah* and shariyyah. The former was discussed in detail in the previous unit. Shar'iyah means which emanates from Shariah.

It is basically a broad doctrine of Islamic law which authorizes the ruler to determine the manner in which Shariah 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 shariah is

³⁷ See: Ibid p. 67-72

³⁸ See: ibid p. 73,74

³⁹ Encyclopedia of Islam 9/694

violated thereby. The discretionary powers of the ruler under *Siyasah Shariyyah* are particularly extensive in the field of criminal law. The head of the state and those who are in charge of public affairs, the “*Ulul 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 *Ulul Amr* have power to determine what behavior constitutes an offence and what punishment is to be applied in each case.⁴⁰

Ibn-e-Qayyim is of the view that division of methodology of decision (الحكم) into Shariah and *Siyasah* is like others’ vies of the division of Deen into Shariah and Haqiqah or its division into reason and transmission; all those divisions are invalid. Rather *Siyasah*, Tariqah, haqiqah and Aql all of them are divided into two kinds: valid and invalid. The valid ones are part of Shariah 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 (S.A.w) 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 Prophet except those who convey what the Prophet 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 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 *Siyasah* and we would need some external aid to teach us *Siyasah*. Whoever thinks that there is no *Siyasah* in Deen and people, analogy, Haqiqah or reason are outside it is virtually saying that they need another prophet.⁴¹

According to Ibn al Qayyim, Ibn-e-Aqeel said, ‘the practice of *Siyasah Shariyyah* in the country has been shown to be firm. No Imam disregards relying on it. If a scholar from Shafi school said, ‘there is no *Siyasah Shariyyah* except in a matter which agrees with Islamic law, Ibn-e-Aqeel says, *Siyasah Shariyyah* is an action in which the people are closer to righteousness and away from mischief, even if the Prophet (S.A.W) 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 *Siyasah Shariyyah* 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.⁴²

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.

⁴⁰ , Kamali, M. Hashim, ‘Siyasah Shariyah’, The American Journal of Social Sciences 6/1, p.59

⁴¹ Ibn-e-Qayyim, I’alam al Muq’een 4/375-379

⁴² Ibn-e-Qayyim, The Legal Methods in Islamic Administration p.13, trans.

Whoever has a taste of Shariah 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 *Siyasah* is a part and branch of it. And whoever is acquainted with the objectives and understands it well does not need any other *Siyasah* in its presence.⁴³

According to Islamic theory man is a trustee of Allah on earth. The trust which he has to take care of, is '*Khilafah fil Ardh*' (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 "*Siyasah Shariyyah*" which help 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.⁴⁴

Some contemporary jurists consider it to acting on '*maslahah*' (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 Shariah even if it disagrees with the particular rulings of *Mujtahideen*.⁴⁵

A just *Siyasah* 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.⁴⁶

According to the opinion of Muslim jurists *Siyasah* is of two kinds; *Siyasah Aadilah* (just) and *Siyasah Zalimah* (unjust or cruel). The former is recommended and encouraged by Shariah because it helps the oppressed to gain his lost right from the dissolute oppressor and it is a vital part of Islamic legal system. The latter is forbidden by Islam.⁴⁷

Some scholars explain types of *Siyasah* as follows:

1. *Siyasah* [of selfishness] which basically aims at benefiting a particular group of individuals on the basis of colour, area or ethnicity etc. This kind of *Siyasah* 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 *Siyasah* Machiavelli compiled his infamous book 'the Prince' and therefore this kind of *Siyasah* is attributed to him as Machiavellian *Siyasah*. It is neither approved by Islam nor by any good moral standard and it can never be adopted by Islam because it divided 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.
2. Just and Straight forward *Siyasah*: it aims at reaching t the truth and obtaining of welfare for humanity in general. Only legal means are sought to achieve its goals. This is the *Siyasah* which islam promoted during Prophetic era and in the era of the Rightly Guided Caliphs.⁴⁸

⁴³ Ibn-e-Qayyim al Jauziyyah, Al Turuq al Hukmiyyah fi al Siyasah al Shariyyah, p. 5, ed. Hamid al Faqi, Darul kutub al ilmiyyah, Beirut, 1953

⁴⁴ Kamali, M. Hashim, '*Siyasah Shariyyah*', The American Journal of Social Sciences 6/1, p. 63

⁴⁵ Khallaf, Abdul Wahab, As Siyasah ash Shariyyah, p.6

⁴⁶ Taj, Abdurrahman, Assiyasah ash Shariyyah wal fiqh al Islami, p.67

⁴⁷ Ibn-e-Qayyim, The Legal Methods in Islamic Administration p.3 , Ibn-e-Nujaim, Al Bahr al

Ra'iq5/76,

⁴⁸ السياسة الإسلامية في عهد النبوة، عبد المتعال الصعدي، ص ٤٣، دار الفكر العربي،

According to Tarblisi, *Siyasah* is extensive law (شرع مغلظ) and it is of two kinds, unjust *Siyasah* which is prohibited by Shariah and just *Siyasah* which takes the usurped right from the cruel, redress many greivences, deters the mischivious and obtains objectives of Shariah 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 *Hudood* (fixed punishments of public crimes) and encourage evil doers. On the hand to commit an excess in it opens the door of cruelties and injustice which causes blood shed and usurpation of wealth illegally.⁴⁹

The concept of *Siyasah Shariyyah* though in practice since the earliest period of Islamic history, was crystallized by Muslim scholars like Ghazali and others but very particularly by the two Hanbali scholars, Ibn-e-Taimiyyah and his pupil Ibn-e-Qayyim al Jauziyyah. The former thinks that if the divine law or Shariah is duly observed, *Siyasah* 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 *Siyasah* but Ibn-e-Taimiyyah claimed that such "deviation" are imaginary. If the conflict between them appears, it is either because the Fiqh is understood too narrowly, neglecting the rich resources of the Shariah for attaining the public good or because rulers disregard the divine will and act unjustly.⁵⁰

An in depth examination of the statements of the scholars about '*Siyasah Shariyyah*' reveals that from practical viewpoint it denotes extensive 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 Quran and Sunnah although there is no specific evidence for each of such cases. In fact it is the manifestation of the universality of Quran and permanence of great part of Shariah. 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.

The concept of *Wilayat al Mazaalim* is the result of application of *Siyasah Shariyyah*.

Unit 5. *Wilayat al Mazaalim*: Application of *Siyasah Shar'iyyah*

5.1. Meaning of *Mazaalim*

It is a combination of two words; *wilayah* which means department and *Mazalim*. 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 *zulm* (ظلم) also means to deviate from the middle path⁵¹

It is reported that Huzaifah (R.A), Abdullah bin Masood and Salman said that *ظلم* means deviation from the middle path. In a Hadith after explaining the method of ablution the Prophet is reported to have said:

فمن زاد أو نقص فقد أساء وظلم

⁴⁹ الطرابلسي، علاء الدين ابي الحسن علي بن خليل، معين الحكام فيما يتردد بين الخصمين من الأحكام، ص 169، مصطفى الباني الحلبي و اولاده، بمصر، 1973

⁵⁰ Encyclopedia of Islam, 9/695

⁵¹ Ibn-e-Duraid, Jamharatul Lughah, vol.3

“...and whoever adds or leaves something, he is mistaken and he transgresses.’

It also means cruelty and transgression that is an antonym to *adl*.⁵²

Al Mawardi defines (ظلم) as follows:

و في الشريعة عبارة عن التعدي عن الحق إلى الباطل وهو الجور وقيل هو التصرف في ملك الغير ومجازة 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.”⁵³

The word *mazlamah* (مظلومة) means the right which has been usurped by the wrong doer.⁵⁴

It is said in Arabic language:

تظلم فلان إلى الحاكم من فلان فظلمه تظليماً أي أنصفه من ظالمه وأعانه عليه

Mr. So and so complained against a person to the Judge, so he (ظلمه تظليماً) redressed his grievance well, means that he provided him with justice and helped him against the cruel.

According to Al Asfahani⁵⁵, Quran mentions three types of Zulm:

Firstly, the cruelty which is committed by man against Allah like associating others with Allah, disobedience to Him. It is said in Quran:

إن الشرك لظلمٌ عظيم

Associating others with Allah is a great injustice.⁵⁶

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.”⁵⁷

والكافرون هم الظالمون

“and the non-believers are surely the cruel”⁵⁸

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

says:

ومن قتل مظلوما فقد جعلنا لوليه سلطانا نصيرا

“..and whoever is killed unjustly, so we have given his heir the authority which strengthens him.”⁵⁹

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

{فمنهم ظالم لنفسه}

‘and among them are those who do injustice to themselves’⁶⁰

ربّ إني ظلمت نفسي فاغفر لي

“... My Lord, I have committed injustice to myself, so forgive me...”⁶¹

وما ظلمهم الله ولكن كانوا أنفسهم يظلمون

“And we never inflicted any cruelty upon them, rather they did it to themselves”⁶²

⁵² Bustaani, Batras, Muheet al Muheet, vol.3

⁵³ As stated by Thanvi, Muhammad Ali, Kashshaaf Istilaahaat al funoon, word:ظلم

⁵⁴ ابن منظور الاثري، لسان العرب، ج ١٥، الصحاح ج ٥

⁵⁵ Al Asfahani, Al Mufradat fi Ghareeb al Quran, p.316, Noor Muhammad, Karachi (n.d)

⁵⁶ {Luqman: 13}

⁵⁷ {Al Baqarah: 35}

⁶⁴ {Al Baqarah-254}

⁵⁹ {Al Israa-33}

⁶⁰ {Faatir-32}

⁶¹ {Al Qasas: 16}

So literally '*Wilayat al Mazaalim*' means the department of the government responsible for redressing the grievances of the public. It is also called Deewan al Mazalim. The incharge of this department is called *Nazir al Mazalim* or *Waali al Mazalim*.

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 Mawardi, it is judicial investigation of wrongs or abuses and is concerned with leading those who have committed wrongs to just behavior by instilling fear in them and with dissuading litigants from undue obstinacy in their disputes by instilling a feeling of respect in them.⁶³

According to Ibn-e-Khaldoon 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.⁶⁴

The above explanation of the term *Wilayat al Mazaalim* 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 can not be carried out because it is the powerful among the public servants who oppress others or usurp the rights of others.

It is also clear 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 Siyasa shariyyah. The ultimate goal of *Siyasa shariyyah* is to promote the basic objectives of Shariah and it is through normal judiciary, wilayat al Hisbah and wialayat al *Mazaalim* 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 *Wilayat al Mazaalim* has got extensive powers including power of judges and those of executive branch of the government.⁶⁵

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.⁶⁶

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 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.⁶⁷

At an early stage in the development of Islamic institutions of the government Mazalim came to denote the structure through which the temporal authorities took direct responsibility for dispensing justice.⁶⁸

A contemporary scholar describes *Mazaalim* as a judicial authority superior to that of a judge and *Mohtasib* which looks into disputes which are out of the jurisdiction of judges. Thus it is a job that is a combination of the strength of the state and fairness of the judiciary although in reality it comes under judiciary. Its incharge is

⁶² {Al Nahl-33}

⁶³ Mawardi, Al Ahkam al Sultaniyyah, p.58, trans. Dr. Asadullah Yate, Ta Ha Publications, London 1996,

⁶⁴ جورج سوردون، اختيار فصول في الأحكام السلطانية وعلم المجتمع من مقدمة ابن خلدون، المطبعة الرسمية، الجزائر، ١٩٥١

⁶⁵ زيدان، د. عبد الكريم، نظام القضاء في الشريعة الإسلامية، ص ٢٩٩، ٣٠٠، مطبعة العاني، بغداد، ١٩٨٤

⁶⁶ ابن فرحون، تبصرة الحكام، ج ١ ص ٢٠، ٢١،

⁶⁷ زيدان، جرجي، تاريخ التمدن الإسلامي، ج ١ ص ١٨٧، مطبعة الهلال، بمصر، ١٩٠٢

⁶⁸ Encyclopedia of Islam, 6/933

called *Sahib al Mazalim* who is presented with complaints of injustice done by officials or member of royal family or judges.⁶⁹

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 (S.A.W) 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.⁷⁰

5.2 Legal Status of Accountability in Shariah:

Wilayat al Mazalim means the institution of the government which works for the elimination of injustice/ cruelty (ظلم). This word has frequently been used by Quran 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.⁷¹

Consider the following Ayaat of Quran.

والله لا يحب الظالمين

Allah loves not the cruel.⁷²

وتلك القرى أهلكتناهم لما ظلموا وجعلنا لمهلكهم موعدا

“Those were towns that we ruined when they oppressed and we fixed a date for their destruction.”⁷³ لا

إن الظالمين في عذاب مقيم

“Lo! The cruel shall be in constant punishment”⁷⁴

وما للظالمين من أنصار

“And never will wrong doers find any helpers.”⁷⁵

وكذلك أخذ ربك إذا أخذ القرى وهي ظالمة إن أخذه أليم شديد

“Such is the seizure of your Lord when He seizes the towns while they are oppressing, His seizure is painful and severe.”⁷⁶ 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 Quran.

⁶⁹ Madkoo, M. Salam as quoted by Farooq Nabhan, *Nizamul al Hukm fi al Islam*, p.667

⁷⁰ See: Ibn Khaldoon, *Ikhtiaar fusool fi al ahkam al sultaniyyah min Al Muqddimah*, ed. George Sordon,

p. 58, and Al Tahawi, Sulaiman, *Al Sultaat al Salaas*, p. 447

⁷¹ {Al A’araaf 7:44}

⁷² {Aal-e-Imran-57}

⁷³ {Al Kahaf: 59}

⁷⁴ { Al shuraa-45}

⁷⁵ {Aal-e-Imran: 192}

⁷⁶ { Hud 11:102}

There are many sayings of the Prophet (S.A.W) too which lay emphasis on the same theme.

In a Hadith-e-Qudsi, 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.⁷⁷

The basic rule about injustice or *zulm* has been declared by the Prophet (s.A.w) in the following saying:

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

“ 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)”⁷⁸

It is narrated that the Prophet (S.A.W) said:

لعن الله من رأى مظلوماً فلم ينصره

May Allah curse the one who sees an oppressed person and does not help him.⁷⁹

Jabir bin Abdullah narrates that the Prophet (S.A.W) said,

أتقوا الظلم فإن الظلم ظلمات يوم القيام

“Fear from cruelty for it will be sheer darkness on the Judgment day..”⁸⁰

According to a report of Ahmad he said:

إياكم و الظلم فإن الظلم ظلمات يوم القيام

“Abstain strictly from cruelty for it will be sheer darkness on the Judgement Day”⁸¹

It is narrated that there Abu Salamah bin Abdur Rahman had some problem over a piece of land with some people, so Ayeshah (R.A) told her that he should abstain from such things because the Prophet (S.A.W) had said:

من ظلم قيد شبر من الأرض طوقه من سبع أرضين⁸²

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.

The Prophet (S.A.W) is reported to have said,

الظلمة و أعوا نهم في النار

The oppressor and their supporters will be in the Hellfire⁸³

There is more than one saying of the Prophet (S.A.W) warning against the supplication of the oppressed.

أتقوا دعوة المظلوم فإنما يسأل الله تعالى حقه وإن الله تعالى لم يمنع
ذا حق حقه⁸⁴

“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.”

According to another report the Prophet (S.A.W) said:

أتقوا دعوة المظلوم وإن كان كافراً فإن ليس دونه حجاب⁸⁵

⁷⁷ Muslim, Kitab al birr wa al silah wal adaab, bab: tahrir al zulm, Hadith No 4674

⁷⁸ Bukhari, Kitab al Ikrah, bab: Yamin al rajul li sahibih innahu akhuhu idha khafa alayhi al qatl, Hadith No 6438, Tirmidhi, Kitab al fitan a'n rasulullah, bab: maa jaa' fi annahye a'n sabab al riyaah, Hadith No 2181, Al Hindi, Alauddin al Muttaqi bin Hassam, Kanz al Ummaal, vol.3 Hadith No. 7204, 7205, 7206, 7213

⁷⁹ Al Hindi, op.cit. Hadith No 7207

⁸⁰ Muslim, Kitab al birr wa al silah wal adaab, bab: tahrir al zulm, Hadith No 4675

⁸¹ Ahmad, Kitab al Mukthirin min al Sahaba, bab: baqi al Musnad al Sabiq, Hadith No 5568

⁸² Bukhari, Kitab al Mazalim wal Ghasb, bab: ithm man zalama shay'an min al ardh, Hadith No 2273 Muslim, Kitab al MUSAQAH, bab: tahrir al zulm wa Ghasb al ardh wa ghairaha, Hadith No 3025,

Ahmad, Kitab: baqi musnad al ansaar, bab: Hadith sayyidah Ayesha, Hadith No 23217, 23364, 24947,

⁸³ Al Hindi, vol.3, Hadith No 7589

⁸⁴ Ibid. Hadith No 7597

⁸⁵ Ahmad, Kitab: baqi Musnad al Mukthirin, bab: musnad Anas bin Malik, Hadith No 12091, Al Hindi, vol.3 Hadith No 7602

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

Yet according to another report the Prophet (S.A.W) said:

دعوة المظلوم مستجابة وإن كان فاجراً ففجوره على نفسه⁸⁶

The above ayaat and sayings of the Prophet (S.A.W) prove that cruelty/injustice has been severely condemned by Islam and something which has been condemned in such strong terms has to be eliminated from the human society. This is one side of the matter.

The ultimate purpose of Islamic legal system is administration of justice. This purpose can never be served if there is no accountability of the public servants. It is a principle of Islamic law that something which is essential in fulfilling an obligation i.e. the obligation can not be fulfilled without that, so that is also compulsory. 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 Quran and Sunnah which make enjoining virtue and forbidding evil (al amr bil maroof wannahye anil munkar) an obligation upon the Ummah, are indirectly emphasising the obligation of establishing the institution of Wilayat al Mazalim because that is the best form of Nahye anil 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 accountability of the public servants too.

Some of the Ayaat of Quran in this respect are following:

كنتم خير أمة أخرجت للناس تأمرون بالمعروف وتنهون عن المنكر

“You are the best people raised for the humanity to enjoin virtue and forbid evil”⁸⁷

ولتكن منكم أمة يدعون إلى الخير ويأمرون بالمعروف وينهون عن المنكر وأولئك هم المفلحون

“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.”⁸⁸

يا أيها الذين آمنوا كونوا قوامين بالقسط شهداء لله ولو على أنفسكم أو الوالدين والأقربين

“O those who believe stand out firmly for justice being witnesses for Allah even if it be against yourself or parents or relatives...”⁸⁹

يا أيها الذين آمنوا كونوا قوامين لله شهداء بالقسط، ولا يجرمنكم شنآن قوم على ألا تعدلوا، إعد لوا هو أقرب للتقوى

“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...”⁹⁰

قل أمر ربي بالقسط

“Say! That my Lord has commanded me to do justice”⁹¹

ولا تعتدوا، إن الله لا يحب المعتدين

“...and transgress not for Allah does not like transgressors.”⁹²

⁸⁶ Ahmad, kitab baqi musnad al Mukthirin, bab: al musnad al sabiq Hadith No 8440, Al Hindi vol.3. Hadith No 7627.

⁸⁷ {Aal-e-Imran-3:110}

⁸⁸ {Aal-e-Imran- 3: 104}

⁸⁹ {Al Nisa 4: 135}

⁹⁰ {Al Mayedah 5: 8}

⁹¹ {Al A'araaf 7:29}

Following are some of the sayings of the Prophet (S.A.W) about enjoining virtue and forbidding evil.

عن حذيفة بن اليمان عن النبي صلى الله عليه وسلم قال، والذي نفسي بيده لتأمرن بالمعروف ولتنهون عن المنكر أو ليوشكن الله أن يبعث عليكم عقاباً منه ثم تدعونه فلا يستجاب لكم

Huzaifah bin al Yamaan reported that the Prophet (S.A.W) 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 punishment, then you will ask Him (to remove it) but He will not accept your supplication.⁹³

كلا والله لتأمرن بالمعروف ولتنهون عن المنكر ولتأطرنه 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 same⁹⁴

عن عائشة قالت قال رسول الله صلى الله عليه وسلم مروا بالمعروف وانهو عن المنكر قبل أن تدعوا فلا يستجاب لكم

“According to the report of Ayesah (R.A) the Messenger of Allah (S.A.W) said:

Enjoin virtue and forbid evil before the time comes that you will pray but your prayer will not be accepted.”⁹⁵

إن الناس إذا رأوا المنكر لا يغيرونه أو شك أن يعصمهم الله بعقاب

“When the people see evil and do not change it, it is possible that Allah will punish them all in general.”⁹⁶

عن حذيفة بن اليمان عن النبي صلى الله عليه وسلم قال، والذي نفسي بيده لتأمرن بالمعروف ولتنهون عن المنكر أو ليبعثن عليكم قوماً ثم تدعونه فلا يستجاب لكم

According to the report of Huzaifah bin al Yamaan, 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.⁹⁷

إن الناس إذا رأوا الظالم فلم يأخذوا على يديه أو شك أن يعصمهم الله بعقاب منه

“Indeed when the people see the cruel and don’t stop him, it is possible that Allah may punish them all in general.”⁹⁸

In one of the sayings the Prophet (S.A.W) explains that Allah has commanded the believers with what He has commanded the messengers.⁹⁹

Allah has commanded His Prophet (S.A.W) to decide among people with justice so the same command is true for the believers too. The above mentioned many

⁹² { Al Mayedah 5:87}

⁹³ Tirmidhi, Kitab al Fitan a’n rasulullah, bab: maa jaa fi al amr bil maroof wannahye a’nil munkar Hadith NO: 2095

⁹⁴ Abu Dawood, Kitab al Malaahim, bab: al amr wannahye, Hadith No 3774

⁹⁵ Ibn-e-Maajah, Kitab al fitan, bab: al amr bil maroof wannahye a’nil munkar, Hadith No 3994

⁹⁶ Ibn-e-Maajah, Kitab al fitan bab: al amr bil maroof wannahye a’nil munkar, Hadith No 3995 and Ahmad, Kitab Musnad al a’sharah al mubashsharah bil jannah, bab: Musnad Abi Bakr al Siddiq

⁹⁷ Ahmad, Kitab Baqi Musnad al Ansar, bab: Hadith-e-Huzaifah bin al Yamaan a’n annabiyye, Hadith No 22238

⁹⁸ Tirmidhi, Kitab al Fitan a’n rasulullah, bab: maa jaa fi nuzool al azaab izzaa lam yughayyar al munkar, Hadith No 2094

⁹⁹ 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: Muslim, Kitab al Zakah, bab: Qabool al sadaqah min al kasb al tayyib wa tarbiyyatihaa Hadith No 1686 and Tirmidhi, Kitab: Tafseer al Quran a’n Rasulu Allah, bab: wa min Surah al Baqarah Hadith No 2915

ayaat and ahadith prove that it is the primary duty of Islamic government to have a stable system of the administration of justice where Amr bil maroof wannahye anil 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 accountability of public servants or Wilayat al Mazaalim. Something that is the duty of the government or the Ummah is called in the language of Fiqh as communal obligation كفاية فرض. So the conclusion is that accountability of public servants is a communal obligation of the Ummah.

The above discussion clearly shows that the institution of Wafaqi Mohtasib which was established in Pakistan with the aim of public servants accountability is purely something which is demanded by Shariah. Therefore the establishment of this department itself is an effort of harmonization of the accountability system with that of Shariah. Nonetheless there are gaps to be filled to bring this institution in complete harmony with Shariah. Now therefore it is imperative to describe the institution

Unit 6. Wafaqi Mohtasib Institution:

6.1. Qualifications:

The law does not provide for any specific qualifications of the Wafaqi Mohtasib. It only says that there will be a Wafaqi Mohtasib to be appointed by the President of Pakistan.¹⁰⁰ However the practice has been of appointing normally a former member of the higher judiciary or at least a person of very good repute and known integrity. This is understandable because of the nature of job which the Mohtasib has to perform. 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 good repute.

He is appointed for an unextendable fixed period of four years.

6.2. Jurisdiction:

According to the pertinent law jurisdiction, functions and powers of the Mohtasib are as below:

1. The Mohtasib may, on a complaint by an aggrieved person, on a reference by the President of Pakistan the Parliament 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 mal-administration¹⁰¹ on the part of any agency or any of its employees.¹⁰²

There are, however, certain exceptions to this provision.

- a. Matters 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; or
- b. Matters relating to external affairs of Pakistan or relations or dealing of Pakistan with any foreign state or government; or

¹⁰⁰ Article 3 (1) of the Establishment of Wafaqi Mohtasib Order 1983

¹⁰¹ Mal-administration has been defined by the law as a decision, process, recommendation, act of omission or commission which is contrary to law, rules or regulations or is a departure from established practice or procedure, unless it is bona-fide and for valid reasons, or which is perverse, arbitrary or unreasonable, unjust, biased, oppressive or discriminatory or is based on irrelevant grounds or involves the exercise of powers or the failure or refusal to do so, for corrupt or improper motives, such as bribery, jobbery, favouritism, nepotism and administrative excesses and neglect, inattention, delay, incompetence, inefficiency and ineptitude in the administration or discharge of duties. Ibid. article 2(2)

¹⁰² Ibid, article 9.

- c. Matters relating to defence of Pakistan or any part thereof, the military, naval and air forces of Pakistan or the matters covered by the laws related to those forces.

6.3. Independence:

Independence from the executive branch of the government is essential for the success of the institution of Mohtasib. That is why this institution has been made fully independent of the executive. The law provides that all executive authorities throughout Pakistan shall act in aid of the Mohtasib.¹⁰³

6.4. Powers/ Authority: The Wafaqi Mohtasib institution basically aims at rooting out corruption, mal administration and abuse of power from the government departments which work under federal government. For this purpose it has been given vast powers as is clear from its jurisdiction and the details that the relevant law has provided in this regard.

1. The Mohtasib has been given same powers as are vested in a civil court under Pakistani law (Code of Civil Procedure 1908). It can:
 - a. Summon, enforce attendance of any person and examine him on oath;
 - b. Compell the production of document,
 - c. Receive evidence on affidavits,
 - d. Issue commission for the examination of witnesses.¹⁰⁴

The Mohtasib or any member of his staff authorised by him may for the purpose of making investigation enter any premises where there is a reason to believe that any article book of accounts or any other document relating to the subject matter of inspection may be found. He has also the power to impound or seal such material.¹⁰⁵

2. Among other things, the law provides that: ;¹⁰⁶
 - a. The Mohtasib may obtain information from such person and in such manner and make inquiries as he thinks fit
 - b. He may require any officer 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 investigation;
 - c. There shall be no obligation to maintain secrecy in respect of disclosure of any information or document for the purpose of such investigation; provided the President may in his discretion on grounds of its being as a State secret, allow claim of privilege with respect to any information or document.
3. He may recommend:¹⁰⁷
 - to modify or cancel the decision, process recommendation act or omission or to take any other steps specified by the Mohtasib;
 - to explain more carefully the act or decision in question;
 - to take disciplinary action against any public servant of any agency under relevant laws applicable to him.
4. If there is a defiance of the recommendations by the public servant in any agency with regard to the implementation of a recommendation given by the Mohtasib, the Mohtasib may refer the matter to the President of Pakistan who

¹⁰³ Ibid. article 3(3)

¹⁰⁴ Ibid article 14(1)

¹⁰⁵ Ibid article 15(1)

¹⁰⁶ Ibid, article 10(9)

¹⁰⁷ Ibid article 11

may in his discretion direct the concerned department to implement the recommendation and inform the Mohtasib.¹⁰⁸

5. The Mohtasib, like the Supreme Court of Pakistan, has also the powers to punish for its contempt any person who abuses, interferes with, impedes, imperils, the process of the Mohtasib in any way or disobeys any order of the Mohtasib or scandalise the Mohtasib or therewise does anything which tends to bring the Mohtasib, his staff or nominees or any person authorised by him in relation to his office, into hatred, ridicule or contempt.¹⁰⁹

Unit. 7. Conclusion and Recommendations

- a) The institution of Wafaqi Mohtasib is no doubt, an important step in the direction of accountability of public servants which is distinguished than other tools of accountability that are mainly part of the executive.
- b) Quran and Sunnah has laid enormous emphasis over the administration of Justice in the society and justice without accountability of people in authority is impossible
- c) Though the present model of the Ombudsman was taken from Sweden, the concept of the accountability basically comes from the *Siyasah Shariyyah* which is important part of Islamic law left to Muslim ruler/ government.
- d) Sweden itself took this concept from Ottoman Empire when one of its kings took asylum there and observed the accountability system and was impressed to the extent that when he was restored, he started the same system in his country.
- e) The establishment of the institution of Wafaqi Mohtasib is in fact continuity of the department of *Mazaalim* which remained in existence through the ages in many different Muslim governments.
- f) The establishment of the institution of Wafaqi Mohtasib is a step to harmonize civil law and Shariah but to make it in complete harmony with Shariah the following steps should be taken:
 1. The qualifications of the Mohtasib should be legislated upon and they should be made like those explained by the jurists of Islam for this important post.
 2. The provision that a person may be appointed as Mohtasib only for one term which is unextendable may have some logic but this should not be a permanent law and if the performance of a Mohtasib is outstanding, the President of Pakistan should have the authority to extend his tenure.
 3. The exclusion of certain government departments from the purview of the Mohtasib should be removed and all departments should be included in his purview. Only in this way across the board accountability can be ensured.
 4. In addition to criminal jurisdiction for punishing contemptuous behaviour of any public servant, this institution should be given general criminal jurisdiction as used to be the case of *Wilayat al Mazaalim* during successive Muslim governments in the past.
 5. Wafaqi means federal which means that the institution has only power to check mal administration in departments under federal government. Although now in some province of Pakistan the Provincial Mohtasib institution have been established but ideally there should be one Mohtasib and he should have under his jurisdiction all federal and provincial

¹⁰⁸ Ibid article 12 (1)

¹⁰⁹ Ibid article 16

Wafaqi Mohtasib Institution

Ziaullah Rahmani

department. He can manage his work with the help of his staff in regional offices.

References

1. Abu Dawood, Ahmad Muhammad Ali, Sunan Abi Dawood, (Soft copy)
2. Ahmad, Abu Abdullah, Ibn-e-Hanbal, Musnad Ahmad bin Hanbal, (Soft copy)
3. Al Asfahani, Al Mufradat fi Ghareeb al Quran, Noor Muhammad, Karachi (n.d)
4. Al Hindi, Alauddin al Muttaqi bin Hassam, Kanz al Ummaal, Haidar Abad, India (n.d.)
5. Al Maghribi, al Hussain bin Alij, 1948, Al Kitab fi al Siyasaah, ed. Sami al dahan, Al Ma'had al Fransi, Damascus,
6. Al Marghinani, Burhanuddin Ali bin Abi Bakr bin Abdul Jalil, Al Hidayah, 1417.A.H., Idarat ul Quran wal Uloom al Islamiyyah, Karachi,
7. Al Saeedi, Abdul Muta'aal, Al Siyasaah al Islamiyyah fi Ahd al Nubuwwah, Dar al Fikr al Arabi,
8. Al Tahawi, Sulaiman, Al Sultaat al Salaas,
9. Al Tarablisi, Alauddin Abi al Hasan Ali bin Khalil, 1973, *Mueen al Hukkaam fima yataraddadu bayna al khasmayn min al ahkaam*, Mustafa al Baabi al Hilabi wa Awlaaduhu, Egypt,
10. Annual Report of the Wafaqi Mohtasib for 1985
11. Bernard Frank, 1975, "The Ombudsman: Revisited" in International Bar Journal, as quoted by Najmul Abedin, 2006, Ombudsman Institution and Conflict Resolution in the Contemporary Third World Societies, Journal of Third World Studies, Spring, http://findarticles.com/p/articles/mi_qa3821/is_200604/ai_n17179246/?tag=content:coll
12. Bukhari, Muhammad bin Ismael, Sahih al Bukhari, (soft copy)
13. Bustaani, Batras, Muheet al Muheet,
14. David Crystal, ed., 1990, The Cambridge Encyclopedia, Cambridge University Press, Cambridge
15. Ghazali, Muhammad bin Muhammad Abu Hamid, Ihya Uloomuddin, Dar al Ma'rifah, Beirut, Lebanon. (n.d.)s
16. George Sordon, Ikhtiaar fusool fi al Ahkaam al Sultaniyyah wa Ilm al Mujtama' min Muqaddimah (Selection of Chapters on Constitutional law from Ibn-e-Khaldoon's Al Muqaddimah)
17. Gibb, H.A. R, and others, 1991, The Encyclopedia of Islam, E.J. Brill, Leiden,
18. Hamoodur Rahman, Justice, 1990, The Administration of Justice in Islam, Kiab Bahavan, New Delhi,
19. Ibn-e-Abideen, Muhammd Amin bin Umar, 1399.A.H, Radd al Muhtar ala addurr al Mukhatar, Maktaba Majidiyyah, Quetta, ,
20. Ibn-e-Duraid, Jamharatul Lughah
21. Ibn-e-Farhoon, Tabsiratul Hukkaam, Dar la Ma'rifah, Beirut, Lebanon. (n.d.)
22. Ibn Khaldoon, Ikhtiaar fusool fi al ahkam al sultaniyyah min Al Muqddimah, ed. George Sordon,
23. Ibn-e-Majah, Abu Abdullah Muhammad bin Yazid Al Qazwini, Sunan Ibn-e-Majah, (Soft copy)
24. Ibn-e-Manzoor al Afriqi, Lisan al Arab, Dar Saadir, Beirut.
25. Ibn-e-Nujaim, Al Bahr al Ra'iq, Maktaba Majidiyyah, Quetta, (n.d.)
26. Ibn-e-Qayyim al Jauziyyah, 1953, *Al Turuq al Hukmiyyah fi al Siyasaah al Shariyyah*, ed. Hamid al Faqi, Darul kutub al ilmiyyah, Beirut,¹
27. Ibn-e-Qayyim, 2000, The Legal Methods in Islamic Administration, trans. Dr. Ala'eddin Kharofa, International Law Book Services, Kualalampur
28. Ibrahim al Wahab, 1979, The Swedish Instituiton of Ombudsman, Tryck: Centralryckeriet AD, Boras, Sweden,
29. Islamuddin, Towards Understanding the Ombudsman Idea (booklet without any publication data available in Wafaqi Mohtasib Library, Islamabad)
30. Khallaf, Abdul Wahab, 1988, *As Siyasaah ash Shariyyah*, Dar al Qalam, Kuwait,
31. Madkoo, M. Salam as quoted by Farooq Nabhan, Nizamul al Hukm fi al Islam,
32. Malik, Dil Muhammad, 1982, Ombudsman: the development in Pakistan, Pakistan law Journal
33. Mawardi, 1996, Al Ahkam al Sultaniyyah, trans. Dr. Asadullah Yate, Ta Ha Publications, London,
34. Muslehuddin, Islam and Its Poliltical System, , Dr. M. Muslehuddin Islamic Trust, IIUI, 1988
35. Muslim, Ibn al Hajjaj Al Qushairi, Sahih Muslim

36. Nyazee, Prof. Imran A. Khan, 2002, Outlines of Islamic Jurisprudence, Centre for Islamic law and Legal Heritage, Islamabad,
37. Qadri, Anwar Ahmad, 1974, Justice in Historical Islam, Shaikh M. Ashraf, Lahore.
38. Syed Qutub, 2000 Social Justice in Islam, Trans. John B. Hardie, Islamic Publications International, NY, USA
39. Thanvi, Muhammad Ali, Kashshaaf Istilaahaat al funoon,
40. The American Journal of Islamic Social Sciences, Association of Muslim Social Scientists, VA, USA.
41. The Establishment of Wafaqi Mohtasib Order 1983
42. Tirmidhi, Jami Tirmidhi, (Soft copy)
43. Zajdaan, Abdul Kareem, 1984,,Nizam al Qadha fi al Shariah al Islamiyyah, Al Aani Press, Baghdad,
44. Zaidan, Jurji, 1902, *Tarikh al Tamaddun al Islami*, Al hilaal Press, Egypt,