

Historical Basis of Modern Ombudsman: A Critical Inquiry

Azizun Nahar¹

Contemporary practice of establishing Ombudsman in different public, private and social sectors to resolve individual grievances is increasing steadily. Critical appreciation of this fact ineludibly generates intellectual thirst to explore its origin. This article endeavours to accomplish such convoluted task in the historical panorama of multicultural grievance mechanisms conventionally perceived as precursors to Ombudsman. Critically dissecting those precursors, this article intends to demonstrate that the establishment of Swedish Hogste Ombudsmannen or the Highest Ombudsman by King Charles XII was influenced by the Ottoman office of Qadi-al-Qudat splendidly assuming the roles of the Islamic Institutions “Diwan-i-Mazalim” and “Hisbah”, pioneered by Islam long ago. To advance arguments in support of this, this article has portrayed the locus, composition, powers, functions and evolution of these institutions in the variegated prism of historicity. More particularly, this article has critically elucidated the historical chronicles along with its trajectories in the intricate tapestry of Ottoman legal system leading Charles XII to establish Hogste Ombudsmannen. Further it is concluded that the very office of Qadi-ul-Qudat playing the roles of Mazalim and Muhtasib has invariably influenced Charles XII, during his exile in Ottoman Turkey, to recast the Ottoman model in Swedish mold.

Introduction

Pedantically appreciating the manifold mechanisms devised by different civilizations to prevent maladministration and to protect the rights of people from the administrative excess, it is not surprising to argue that the modern concept of ‘Ombudsman’ has multicultural roots. Historically, as an indigenous Swedish, Norwegian and Danish term, ‘*Ombudsmand*’ is etymologically embedded in the very Old Norse word ‘*umboosmaor*’ signifying

¹ The author is an Assistant Professor at the Department of Law and Human Rights, University of Asia Pacific. She completed her LLB and LLM from the University of Dhaka. She can be reached at nahar@uap-bd.edu.

“representative”. In modern parlance, ombudsman, ombudsperson or ombud essentially investigates grievances of maladministration in public, private and social sectors though its origin is inextricably related with the investigation of maladministration by government official. Despite the diverse evidence of primordial and multicultural precursors to Ombudsman the very first official Ombudsman, the *Hogste Ombudsmannen* or the Highest Ombudsman was established in Sweden by warrior King Charles XII in 1713. Most importantly, the first formal Parliamentary Ombudsman also took its birth in Sweden in the year of 1809. A critical survey of historical chronicles regarding the establishment of *Hogste Ombudsmannen*, the predecessor of Parliamentary Ombudsman, reveals that King Charles XII lost the battle of Poltova against the Russian Czar, took refuge in Turkey and from there continued to rule Sweden, a country severely suffering from economic degeneration, administrative disarray, territorial clashes with neighbours and so on.

During his exile in Turkey, Charles XII came to learn about the overall functioning of *Qadi-al-Qudat* assuming the roles of *Diwan-al- Mazalim* and *Hisbah*. He was entrusted with the powers to prevent maladministration, remedy the infringements and resultant injuries inflicted upon individuals. Since Sweden was passing through an acute crisis, Charles staying thousands of miles away from his native land, introduced a series of wide-ranging policy and administrative reforms through a decree signed on October 26, 1713. One of the stunning reforms was the establishment of *Hogste Ombudsmannen*. Given this backdrop, this article intends to conduct an inquiry as to whether Charles XII was influenced by the functioning of the aforesaid institutions in establishing the office of Highest Ombudsman. In accomplishing this endeavor, this article will also critically elucidate the historical development of several prime multicultural precursors to Ombudsman especially “Islamic Institutions- *Diwan-al-Mazalim* and *Hisbah*”, composition, powers and evolution of these Islamic institutions and to demystify the journey from these institutions to the establishment of the Highest Ombudsman.

Historical Basis of Modern Ombudsman- A Thorny Enigma

Undeniably each and every generation has, to a certain extent, contributed to the flourishing of different branches of knowledge. Transmission of knowledge from one generation to another has paved the path for further advancement. Meticulously observing this phenomenon containing both vertical and horizontal dimension, one author has rightly asserted:

AS THE SAYING GOES, there is nothing new under the sun. Since time immemorial, human beings have inherited existing knowledge from previous generations, improved upon it by adapting it to their present needs, and transmitted it to future generations. Besides this vertical transmission, the transfer of knowledge also occurs horizontally from one place or culture to another by the continual exchange of ideas. Human civilization has been built over a period of about seven millennia with its beginnings along the banks of Shatt al-Arab, the Nile, and the Indus. Knowledge has been gathered through patient observation, experience, as well as serendipity.²

Scrupulously considering the historical chronicles and its trajectories, it can be articulated that smart ideas always find new avenues to flourish.³ Unsurprisingly this historically proven thought found its recognition in the establishment of ombudsman in Sweden as well. The very concept of Ombudsman in its modern form, by and large, is of Scandinavian origin but it will probably be unwise to deny the existence of certain ancient as well as multicultural roots regarding the idea of having a body like Ombudsman.⁴ One glaring instance can be cited from the Chinese “Ritual of Chou” extant during 3rd or 4th century B.C.

By means of the lung stone he gives an outlet to common people in distress. If anywhere, far or near, there is anyone without brothers or without children, old or young, who wants to report a grievance to the higher authorities, but his headman will not transmit the complaint, such a one is to stand upon the lung stone for three days, and any gentleman (shih) who hears his words must report them to the higher authorities and bring the blame home to the headman.⁵

Grievance bells, a system for redressal of injustice, are reported to be in existence during 3rd and 4th centuries in China, in Japan in 647, in the Khitan or Liao Empire in 1039, writings of Islamic

² Dilnawaz A. Siddiqui, “Middle Eastern Origins of Modern Sciences,” in *Muslim Contributions to World Civilization*, eds. M. Basheer Ahmed, Syed A. Ahsani, Dilnawaz A. Siddiqui, (Richmond: International Institute of Islamic Thought and Association of Muslim Social Scientists, 2005), 53.

³ Government of Islamic Republic of Pakistan, Wafaqi Mohtasib (Ombudsman)’s Secretariat, *Mohtasib(Ombudsman)’s Annual Report* (Islamabad: Wafaqi Mohtasib (Ombudsman)’s Secretariat, 1998), 2.

⁴ Edward A. Kracke Jr., “Early Visions of Justice for the Humble in East and West,” *Journal of the American Oriental Society* 96, no. 4 (1976): 492-498; J. R. Perry, “Justice for the Underprivileged: The Ombudsman Tradition of Iran,” *Journal of Near Eastern Studies*, 37, no. 3, (1978): 203-215; Arthur Waley, “The Lucky Stone and the Lung Stone,” *Bulletin of the School of Oriental and African Studies* 9, no. 3 (1938): 729-732.

⁵ Waley, “Lucky Stone,” 729.

scholars in the 11th century [*though the origin of mazalim can evidently be traced back to the era of Prophet Muhammad (PBUH)*⁶], India in the 12th century and in Siam (Thailand) and Europe in the 13th century.⁷ Another instance of grievance mechanism was documented in the Korean historical records which revealed that all citizens during the reign of Joseon dynasty especially under the leadership of King Taejong could advance the claims for justice for the infliction of injustice or warn the king of dangers by using this drum stationed near the palace.⁸ Apart from the aforesaid chronicles, the Chinese Censorate and the Roman Tribune of the Plebs can also be cited as the antecedents having aspects regarding the concept of Ombudsman.⁹ Prototypes for the Ombudsman were also found in the Middle Eastern civilizations and medieval Germanic tribes.¹⁰ *Mazalim* sessions, as history revealed, were also found in the historical panorama of Persia, especially during the regime of Uzun Hasan who ruled Aqqyunlu in northwestern Iran and Eastern Anatolia from 1457 to 1478.

Pre-Islamic era of Arabia, historically popular as *Ayam-i-Jahiliya* (period of ignorance), did not develop any administrative institution. Rather that period witnessed ignorance, barbarism, fetishism, chaos and turmoil. After the advent of Islam, Prophet Muhammad (PBUH), with the hope and aspiration of establishing a just social order, started his humane mission. After migrating to Madina, he succeeded in establishing an Islamic state, which was essentially a state of ideological nature. When the message of Islam convinced the heart of people beyond this small city state, the natural consequence was the expansion of Islamic state. This development necessitated the appointment of state governors, judges, administrative officers, tax collectors etc. Accordingly, Prophet (PBUH) appointed the most competent persons to different posts who discharged their functions effectively. Apart from this, for the first time in history, a distinct type of institution was established in the state of Madina by Muhammad (PBUH), the Prophet of Islam, to defend and protect the rights of citizens against administrative arbitrariness.¹¹

The Prophet (PBUH) himself inquired into grievances of Juthyma tribe against Commander Khalid ibn al-Walid due to his killing of few members of this tribe even after announcing their

⁶ Muhammad Hashim Kamali, "Appellate Review and Judicial Independence in Islamic Law," *Islamic Studies*, 29, no. 3 (1990): 226.

⁷ Kracke, "Visions of Justice," 492-494.

⁸ Han, Woo-Keun, *The History of Korea* (Seoul: Eul= Yoo Publishing, 1970) quoted in C. McKenna Lang, "A Western King and an Ancient Notion: Reflections on the Origins of Ombudsing," *Journal of Conflictology* 2, no. 2 (2011): 57.

⁹ Lang, "Ombudsing," 57.

¹⁰ Ibid.

¹¹ Abdun Noor, *Prohashonic Shechacharita Protirodhey Ombudsman(Protibidhayok)(in Bangla) (Ombudsman As a Safeguard Against Maladministration)*, (Chittagong: Islamic Administration Study Centre, 2001), 9.

allegiance to Islam. The Prophet, after condemning this heinous act, sent Ali ibn Abi-Talib to recompense the tribe's human losses. The Prophet lifted up his hand and turned his face to the sky and said:

*Oh Allah, I denounce Khalid's act.*¹²

After Prophet (PBUH), his successors (*Caliphs*) used to hear appeals from all parts of Islamic territories and investigated into all types of complaints of the citizens. They, while dealing with the complaints fully endeavored to follow the parameters set before them by the Prophet (PBUH).¹³ During the Caliphate of Umar, the second Caliph, a new institution called Hisbah was set up to monitor the adherence to religious principles and values by people in their daily life. He stringently dealt with the problems of citizens and was never hesitant to raise his voice against governors of different parts of the Islamic world. During his Caliphate he ordered Ibn Al-Aiham, the ruler of Ghassan, to reconcile with a Bedouin (tribal, nomad) as he inflicted hurt upon him; otherwise retaliation would be taken.¹⁴ In the same manner, on one occasion he urged one Egyptian to retaliate upon Amr ibn Al-As's son as he whipped the former. Moreover, he ordered another Egyptian to take retaliation upon Amr ibn Al-As, the governor of Egypt, as the latter insulted the former. At this juncture, Umar remarked:

*"Whence did you enslave people who were born free."*¹⁵

Umar, in his address to the governors, said the following words:

*Listen, verily I am not sending you as rulers and potentates; on the contrary, I am sending you as the leaders of guidance so that men may follow you. Render unto Muslims their rights; beat them not, lest you humiliate them; praise them not lest you make them undisciplined. Do not shut your doors against them, lest the strong amongst them devour the weak ones.*¹⁶

¹² Ibraheem Abu-sin Ahmad, *El-edarah fel Islam* (in Arabic) (Administration in Islam) (Dubai: el-Matba'ah el-Asrieh 1980), 35 quoted in Naim Nusair, "The Islamic External Critics of Public Administration: A Comparative Perspective" *The American Journal of Islamic Social Sciences*, 2, no. 1,(1985):109.

¹³ Nusair, "External Critics,"109.

¹⁴ Ibid.,109-110.

¹⁵ Ahmad, *El-edarah*, 35.

¹⁶ Imam Abu Yusuf, *Kitabul- Kharaj*, (in Arabic), (Bulag 1302 A.H), 66, quoted in S.A.Q. Husaini, *Arab Administration*, 6th edition (Lahore: Muhammad Ashraf, 1970), 21.

Hazrat Ali (RA) Ibn Abu Talib, the fourth Caliph of Islam in his administrative policy letter to Malik Ibn Haris Ashter, the Governor of Egypt, mentioned:

I have heard the Holy Prophet saying, “Those peoples and Governments cannot achieve salvation among whom the rights of the depressed, destitute and suppressed are not protected and cannot be recovered from the strong without fear and opposition.”¹⁷

Hazrat Ali (RA) also issued the following instructions:

Set apart some of your time for the needy and oppressed so that you may free yourself from other occupations and sit regularly in public audience to receive their complaints and hear their grievances against your Government. During this audience, for the sake of God, treat them with kindness, courtesy and respect. Do not allow your employees, the Army and sentry to be present during such audience, so that those who have complaints against your officers and Government may approach you freely and talk to you freely and without any embarrassment or fear of harassment.¹⁸

Dissecting the “Islamic” Institutions Influencing the Establishment of Modern Ombudsman

The brisk expansion of the Islamic state required the emergence of formal effective institutions to deal with the grievances of the citizens against governors, administrative staffs, their relatives and so on.¹⁹ Apart from the Qadi (known as judge) whose main function was to interpret the laws as well as to apply them case by case, two formal institutions were formed. Firstly, there was Diwan-i- Mazalim (The Board of Investigation of Grievances) which was presided over by the Caliph himself and worked as the highest administrative tribunal. Another institution was Hisbah (the office of Market Supervision) and Muhtasib. The market supervisor served as an

¹⁷ Ali Ibn Abu Talib, *A Classic Administrative Policy Letter from Hazrat Ali (RA) (Fourth Caliph of the Muslims) To Malik Ibn Haris Ashter*, ed. Shamsul Alam, (Dhaka: Islamic Foundation Bangladesh, 1983), 22.

¹⁸ Ibid.

¹⁹ Nusair, “External Critics,” 110.

agent of the Caliph and executed the judgments of the Qadi.²⁰ We will now focus on these institutions in detail.

(i) *Diwan-i-Mazalim*

The very word *mazalim* is the plural form of *mazlima* which means “extraction” or a “thing wrongfully taken” and the word “*mazlima*” has been derived from “*zulm*”, usually translated as a “wrongdoing” or an “injustice”.²¹ From the perspective of terminology, it signifies a specific institution also known as *wilayat al-mazalim* or *al-nazar fi al-mazalim*, which was entrusted to adjudicate complaints regarding “injustices”.²² Regrettably, one of the prime challenges in appreciating this institution by the western scholarship is the non-existence of a modern legal institution of similar type as well as absence of any equivalent in Occidental languages.²³ Even no Arab author, as Emile Tyan states, ever ventures to offer a satisfactory definition of the word *Mazalim*.²⁴ The first as well as most detailed definition was provided by Al-Mawardi in his legendary work “*Al-Ahkam al-Sultaniyya*” in the middle of the eleventh century and premising on his definition, Amedroz defined *Mazalim* as “compelling those who would do each other wrong- *mutazalimun*- to mutual justice, and restraining litigants from repudiating claims by inspiring fear and awe in them”.²⁵

Following Mawardi, Tyan defined *Mazalim* as a “collegial institution intervening when ordinary justice dispensed by *qadis* was inefficient, mainly because of the power and social position of the defendant”.²⁶ Given the intricacies involved in providing a positive definition of the *Mazalim*, Nielsen made recourse to exclusionary approach. He opined that any judicial case that was not adjudicated by the *qadi*, the *muhtasib* (the market supervisor), the *qadi al-‘askar*

²⁰ Ibn Taymiyah, *el-Siyasatu’ Shari’ayh* (in Arabic) [The Legitimate Policy] (Cairo, Egypt: Dar el- Katub el-Arabieh, 1979), 9, quoted in Nusair, “External Critics,” 110.

²¹ “Mazalim” in *Arabic-English Lexicon* (8 vols.), ed. Edward William Lane, Williams & Norgate, 1863, 1921, 1923.

²² Mathieu Tillier, “The Mazalim in Historiography,” in *The Oxford Handbook of Islamic Law*, eds. Anver M. Emon and Rumea Ahmed (Oxford: Oxford University Press, 2018) accessed January 05, 2020, http://www.academia.edu/download/40730752/Tillier-Mazalim_in_Historiography-Oxford_Handbook.pdf.

²³ Ibid.

²⁴ Emile Tyan, *Histoire de l’organisation judiciaire en pays d’Islam* (Paris: Librairie DU Recueil Sirey, 1938), 145, quoted in Tillier, “Mazalim”.

²⁵ Henry Frederick Amedroz, “The Mazalim Jurisdiction in the Ahkam Sultaniyya of Mawardi,” *The Journal of the Royal Asiatic Society of Great Britain and Ireland* (1911): 635.

²⁶ Tyan, “Histoire,” 145, quoted in Tillier, “Mazalim”.

(military judge) or the non-Muslim Courts, but was placed under the direct sovereign authority of the head of the state must be viewed as a *mazalim* case.²⁷

Islamic tradition, as one scholar discusses, considers the *Mazalim* as embedded in a pre-Islamic background.²⁸ This view predominantly refers the *hilf al fudul* (the Pact of the Virtuous), an alliance established by Prophet Muhammad (PBUH) [before Prophet-hood] with chiefs and members of different tribes during the 7th century. This alliance has a unique place in the history of Islam due to its special emphasis on the principles of justice and supporting the oppressed beyond all sorts of considerations, including kinship or power and more particularly its pledging to intervene in conflicts.²⁹ The origin of the *Mazalim*, can also be traced back to the era of Prophet Muhammad (PBUH) who appointed Rashid ibn Abd Allah to adjudge complaints against government officials.³⁰

Since the assassination of Ali and the attempt on Muawiyah's life, the scenario changed and Caliph, due to security reasons, had become less accessible to the people at large. But the *Umayyad* rulers did not forget to set apart some time for hearing appeals and the investigation of complaints.³¹ Abdul Malik, was the first Caliph to devote a special day for hearing and settling complaints.³² Umar Ibn Abdul-Aziz followed the precedent set by his uncle with great passion and enthusiasm.³³ The Abbasids spontaneously and with great zeal continued this practice and successfully established a regular department which was the highest court of criminal appeal.³⁴ Skeptical scholars criticized this historicity.³⁵ As for instance, Amedroz seemed to distrust the existence of the *Mazalim* during Umayyad dynasty as put forward by Al-Mawardi characterizing Caliph Umar ibn Abd al Aziz, popularly known as Umar II as one of the earliest champions of the *Mazalim*.³⁶

²⁷ Jürgen S. Nielsen, *Secular Justice in an Islamic State: Mazālim under the Bahrī Mamlūks, 662/1264-789/1387*, (Leiden: Nederlands Historisch-Archaeologisch Instituut te Istanbul, 1985): 35.

²⁸ Tillier, "Mazalim".

²⁹ Tariq Ramadan, *The Messenger: The Meanings of the Life of Muhammad* (London: Penguin Books, 2008), 20-21.

³⁰ Kamali, "Appellate Review," 226.

³¹ Ibn Taymiyah, "el-Siyasatu' Shari'ayh," 9.

³² Nusair, "External Critics," 110.

³³ Husaini, *Arab Administration*, 109.

³⁴ Ibn 'l-Athir, *Tariku 'l- Kamil, vol. 1*, (In Arabic), (Leiden, 1851-76), 46, quoted in Nusair, "External Critics," 111.

³⁵ Tillier, "Mazalim".

³⁶ Amedroz, "Mazalim Jurisdiction," 656.

Tyan was the first advocate who criticized the delineation of Islamic sources openly.³⁷ Even he candidly negated to categorize pre-Umayyad and Umayyad Caliphs' verdict as *Mazalim* cases.³⁸ Moreover, he opined that the very institution *Mazalim* developed during Abbasid period was not a model *Mazalim* in the light of any Arabic models, but heavily relied on a similar Sassanid institution.³⁹ Joseph Schacht, a renowned orientalist, supported this stance and followed this accordingly.⁴⁰ Nielsen, however, has argued that Islamic *Mazalim* is moored in broader historical spectacle and apart from the Sassanid model, other pre-Islamic civilizations devised similar institutions to dispense justice e.g. Byzantine Egypt developed a mechanism to prefer appeal to the provincial governor (*dux*).⁴¹ Defying Tyan, Christian Muller argued that justice administered by Andalusian *amirs* in earlier periods (i.e. even before the 10th century) were already a part of a *Mazalim* system.⁴² Mathieu, Tillier in his research on Umayyad period conclusively asserted that the Marwanid Caliphs legal administration and royal justice could inevitably be blended in the *Mazalim*.⁴³

It is also important to mention that the principal legal institutions of the Ottoman Caliphate were the *Shari'a* courts divided into judiciary districts and presided over by a judge (*kadi*) who was assisted by deputy-judges (*naibs*) in the areas of sub-districts.⁴⁴

Most importantly, the Imperial Council (*Divan-ı Hümayun*), essentially the Ottoman version of the medieval *mazalim* courts and a parallel but superior judicial organ, was established to hear petitions, adjudge crucial cases of petitioners in its own court (*divan*) or send imperial orders to provincial governors and judges instructing them to resolve or adjudicate issues accordingly.⁴⁵ In fact, "Imperial Council as a legislative and executive court ran parallel to the *shari'a* courts and administered public order through imperial statutes and decrees which were codified in

³⁷ Tillier, "Mazalim".

³⁸ Tyan, "Histoire,"277, quoted in Tillier, "Mazalim".

³⁹ Tyan, "Histoire,"278, quoted in Tillier, "Mazalim".

⁴⁰ Joseph Schacht, *An Introduction to Islamic Law*, (New York: Oxford University Press,1982), 51.

⁴¹ Nielsen, "Secular Justice," 1-2.

⁴² Christian Muller, "Redressing Injustice. Mazālim Jurisdictions at the Umayyad court of Córdoba (Eighth-Eleventh Centuries CE)" in *Court and Cultures in the Muslim World. Seventh to Nineteenth Centuries* eds. Albrecht Fuess and Jan-Peter Hartung (London: Routledge, 2011): 95.

⁴³ Mathieu Tillier. "Califes, émirs et cadis: le droit califal et l'articulation de l'autorité judiciaire à l'époque umayyade," *Bulletin d'Etudes Orientales* 63 (2014): 154, quoted in Tillier, "Mazalim,".

⁴⁴ E. D. Akarlı, "Islamic Law in the Ottoman Empire," in *The Oxford International Encyclopedia of Legal History*, ed. S. N. Katz (New York: Oxford, 2009) quoted in Başak Tuğ, "Protecting Honor in the Name of Justice" accessed March 28, 2020, https://cems.ceu.edu/sites/cems.ceu.edu/files/basic_page/field_attachment/bt-paper-1.pdf.

⁴⁵ Başak Tuğ, "Honor".

sixteenth-century Ottoman legal practice in the form of “rescripts of justice” (*adaletnames*) or “law books” (*kanunnames*).⁴⁶ The Caliph used to preside over the Council, but afterwards abandoned and delegated it to the grand vizier.⁴⁷ However, during the regime of Sultan Murad II the *kadi-i-asker* was entrusted to administer royal justice.⁴⁸ He was, indeed, the chief judge in charge of the judicial affairs of the Council.⁴⁹ This *divan* maintained a common point with the earlier *mazalim* courts and that any person could bring his grievance through a petition irrespective of its significance⁵⁰ and get remedies thereby⁵¹.

Subjects of the Caliphate used to explore this institution to advance complaint against the infringements committed by other individuals, government officials, tax collectors, *qadis* or governors⁵². Officially the petitions were addressed to the Sultan but in reality dealt with by the *divan* as a whole on behalf of the Sultan or by the grand vizier.⁵³ The methods invoked to submit petitions include courier to Istanbul or through a *qadi* who used to draw up a letter of grievance to the Sultan.⁵⁴ In case of urgency, the *qadi* used to send a spokesman to Istanbul. However, an individual could also submit their complaints as plaintiff or petitioner.⁵⁵

Over the centuries, the institution of petitioning received a bureaucratic shape through a specific mode of petitioning and a record keeping system.⁵⁶ By the 17th Century, “Registers of Complaints” (*Sikayet Defterleri*) was developed to record copies of the *divan*’s responses and other crucial matters and in the 18th Century, a more advanced record-keeping system (*Sikayet Kalemi*) was established.⁵⁷ One scholar asserts that despite the absence of an official appellate

⁴⁶ Ibid.

⁴⁷ Colin Imber, *The Ottoman Empire, 1300-1650: The Structure of Power* (New York: Palgrave Macmillan Press, 2002), 156.

⁴⁸ Fodor Pál, “Sultan, Imperial Council, Grand Vizier: Changes in the Ottoman Ruling Elite and the Formation of the Grand Vizierial Telhīs,” *Acta Orientalia Academiae Scientiarum Hungaricae*, 47, no. 1/2 (1994): 72.

⁴⁹ Honey Nasser El-Moghazi, “The Innovation in the Ottoman Legal Administration: The 16th Century Between Theory and Practice” (Master’s Thesis, The American University in Cairo, 2017), 67.

⁵⁰ Uriel Heyd, *Studies in Old Ottoman Criminal Law*, ed. V. L. Menage (Oxford: Clarendon Press, 1973): 226; Yossef Rapoport, “Royal Justice and Religious Law: Siyasa and Shariah under the Mamluks,” *Mamluk Studies Review*, 16, no. 1 (2012): 81, 85; Halil Inalcik, State, Sovereignty and Law During the Reign of Suleyman,” in *Suleyman the Second and His Time*, eds. Halil Inalcik and Cemal Kafadar (Istanbul: The Isis Press, 1993), 61.

⁵¹ Halil Inalcik, *The Ottoman Empire: The Classical Age 1300-1600*, trans. Norman Itzkowitz and Colin Imber, (New York: Praeger Publishers, 1973): 89.

⁵² James E. Baldwin, “Petitioning the Sultan in Ottoman Egypt,” *Bulletin of the School of Oriental and African Studies* 75, no. 3 (2012): 499; Inalcik, *State*, 61; Ibid, 89.

⁵³ Baldwin, “Petitioning,” 510; Colin Imber, “Government, Administration and Law,” in *The Cambridge History of Turkey, Volume 2: The Ottoman Empire as a World Power, 1453-1603*, eds. Suraiya N. Faroqhi and Kate Fleet, (New York: Cambridge University Press, 2013), 225.

⁵⁴ Baldwin, “Petitioning,” 511.

⁵⁵ Inalcik, *Ottoman*, 91.

⁵⁶ Baldwin, “Petitioning,” 503.

⁵⁷ El- Moghazi, *Innovation*, 77.

system, a scope existed to reassess the capital punishment by the Sultan or the *divan* if a petition is rendered before the execution of the sentence.⁵⁸

Cancelling the Mamluk tradition of having a quadruple judicial system, the Ottomans substituted it with a single Hanafi Chief *qadi* (*qadi al-qadat*) who was required to be appointed by the Sultan.⁵⁹ Despite the abolition of the pluralistic system of the Mamluks, there existed deputy *qadis* (*na'ibs*) representing the four schools placed in each courthouse ordinarily serving for life.⁶⁰ One scholar contends that appointment to an important province functioned as a medium for the Chief *qadi* to secure higher positions in the future such as becoming *qadi-i-asker*.⁶¹

Since the Ottoman Caliphate amalgamated “the functions of the *mazalim* and *shari'a* courts into one court under the *qadi's* jurisdiction, the *qadi's* role was broadened to include that of a “civil administrator” besides his role as an enforcer of the religious law”.⁶² This ensured the superiority of *Shariah* courts.⁶³ Apart from the administration of court, he was authorized to deal with criminal and secular matters not falling within the purview of *Sharia strictu sensu*.⁶⁴ The amplification of the functions and role of the *qadi* positioned him at the kernel of the judicial system, a unique Ottoman innovation.⁶⁵ Most strikingly, the *qadi*, as the representative of the Sultan remained first and foremost his subordinate to implement and enforce the sultanic decrees.⁶⁶ He was so powerful that he used to obtain authority and instructions directly from the sultan without the mediation of anybody.⁶⁷ In the 16th Century, Sultan Suleyman I's series of reforms empowered the *qadis* to examine the legality of the actions of government officials.⁶⁸ He was entrusted to supervise financial affairs, to collect local taxes and to hand them over to

⁵⁸ Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century*, (Cambridge: Cambridge University Press, 2005), 91-92.

⁵⁹ Nelly Hanna, “The Administration of Courts in Ottoman Cairo,” in *The State and its Servants: Administration in Egypt from Ottoman Times to the Present*, ed. Nelly Hanna, (Cairo: The American University in Cairo Press, 1995), 45.

⁶⁰ Jane Hathaway and Karl K. Barbir, *The Arab Lands Under Ottoman Rule, 1516-1800*, (London: Pearson PLC, 2008), 117.

⁶¹ Hanna, “Administration,” 45.

⁶² Maurits H. Van Den Boogert, *The Capitulations and The Ottoman Legal System*, (Leiden: Brill, 2005): 47; Heyd, *Criminal*, 225; Albert Howe Lybyer, *The Government of the Ottoman Empire in the Time of Suleiman the Magnificent*, (New York: Russell & Russell, 1966), 42.

⁶³ Heyd, *Criminal*, 215.

⁶⁴ Boogert, *Capitulations*, 42.

⁶⁵ Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective*, (Albany: State University of New York Press, 1994), 77.

⁶⁶ Inalcik, *Ottoman*, 118.

⁶⁷ Heyd, *Criminal*, 220.

⁶⁸ El- Moghazi, *Innovation*, 113.

the governor or to the military.⁶⁹ He, in fact, in discharging the financial activities assumed the role of *muhtasib*.

Composition, Powers and Functions of Diwan-i-Mazalim

Due to the expansion of state affairs, the Caliph appointed other persons as Mazalim. To be appointed as Mazalim, the persons had to be just and trustworthy, possessors of adequate knowledge of the Qur'an, following authentic Sunnah of the Prophet (PBUH), and having knowledge of Islamic jurisprudence. Hazrat Ali (RA) in his administrative policy letter to Malik Ibn Haris Ashter clearly instructed that:

*You should appoint honest and trustworthy persons to inspect, watch and guard over the activities of ... officers.*⁷⁰

The extent of disagreement regarding the historical composition of *Diwan-i-Mazalim* is very meagre. This fact is evident from the research of Tyan, Sourdel and Nielsen. One scholar has epitomized their findings in the following way:

Abbasid caliphs presided over hearings until al Ma'mun (r. 198–218/813–833), and al-Muhtadi (r. 255–256/869–870) was the last one who did so. Viziers already played an important role in the mazalim process under al-Rashid (r. 170–193/786–809). During the mihna—an inquisition demanding qadis, witnesses, and scholars to adhere to the doctrine of the created Qur'an (c. 218–234/833–848)—the chief qadi took over the supervision of mazalim. He was replaced by the vizier, who retained this function until the beginning of the Buyid period (334–447/945–1055), and reprised this role under the Fatimids (especially when the vizier belonged to the military) and the Seljuks. The vizier was succeeded by the na'ib under the Ayyubids and the early Mamluks. The Buyids entrusted this task to the naqib al-ashraf, head of the 'Alid family. Under the Mamluks, the sultan often presided over

⁶⁹ Ronald C. Jennings, "Kadi, Court, and Legal Procedure in 17th C. Ottoman Kayseri: The Kadi and the Legal System," *Studia Islamica*, no. 48 (1978):158.

⁷⁰ Talib, "Letter,"15.

*mazalim sessions, but this ceased in periods of troubles or political weakness.*⁷¹

To Syed Ameer Ali, during the Abbasid regime a separate investigation department named *Diwan-al-Nazr-fil-Mazalim* was established.⁷² It used to include the following different groups:

- (1) *Protectors and Assistants who were responsible for disciplinary action against individuals who tended to use violence or escape from the law.*
- (2) *Judges (Qadis) and arbitrators who were responsible for finding the best ways of giving back the rights of people with grievances.*
- (3) *Jurists (faqih) to whom the judge referred in order to interpret judicial questions.*
- (4) *Clerks who recorded the complaints or petitions of the people and stated their rights and duties.*
- (5) *Witnesses who witnessed that the decision of the judge is not against truth or against justice.*⁷³

Shaikh Muhammad Abu Zahra, former Shaikh of Al-Azhar, after meticulously scrutinizing the nature and composition of the office of Diwan-i-Mazalim, opined that the investigation of grievances was not a mere judicial function; it was judicial as well as an executive function.⁷⁴ The cases of grievances included:⁷⁵ (1) official accesses, (2) excessive collections, (3) omission of names in the register, (4) misappropriation, (5) unjust confiscation of property, (6) non-payment of salaries, (7) withholding of conjugal rights, (8) non-compliance with the *Qadi's* (Judge) judgment, (9) non-performance of public prayers, and (10) improper behaviour in public.

⁷¹ Tyan, "Histoire," 208–215; Dominique Sourdel, *Le Vizirat 'abbāside de 749 à 936* (Damascus: IFEAD, 1959–60), 641–644; Nielsen, "Secular Justice," 4–7, quoted in Tillier, "Mazalim".

⁷² Syed Ameer Ali, *The Spirit of Islam* (London: Christophers, 1961), 284.

⁷³ Nusair, "External Critics," 111.

⁷⁴ Suleman Muhammad el-Tamawi, *Umar Ibn al Khatab Wa Uswole el-Seyasah Wal-edarah el-Hadithah* [Umar Ibn al Khatab and the principles of Modern Politics and Administration] (Cairo: Dar el-Eiker el-Arabi, 1967), 342, quoted in Nusair, "External Critics," 111.

⁷⁵ Al-Mawardi, *el-Ahkamu's- Sultaniyeh* (Chapter VII) (In Arabic) (Cairo, Egypt, 1289, A.H.), quoted in Nusair, "External Critics," 111; Reuben Levy, *The Social Structure of Islam*, (Cambridge: Cambridge University Press, 1957), 348-49.

The duties of *Diwan-i-Mazalim* were not confined to hearing complaints and conducting investigations but also included executing decrees. It was so powerful that it could initiate investigation *suo motu* and take decision without having the complaints from the aggrieved regarding the aforesaid matters.⁷⁶ This significant feature has led Grunebaum to consider *Diwan-i-Mazalim* as Court.⁷⁷ Apart from these, *Mazalim* used to send regular reports to the Caliph or head of the state regarding his activities.⁷⁸

The definite role played by the sovereign was also put under trial.⁷⁹ Though “the *mazalim* were supposed to represent his direct justice, the sovereign (the caliph, later the sultan) ceased presiding over hearings during long periods, across dynasties”.⁸⁰ While Tyan, on the basis of the outward organization of the institution, claimed that Fatimid Caliphs played no active role in the *mazalim*⁸¹, Stern argued that they were still dealing with petitions “when solicited during their administrative treatment, even though they did not preside over hearings”⁸². On the other hand, Nielsen remarked that the role of sultan at *mazalim* sessions was typically restricted to the signature of the decrees.⁸³

Historians are also in agreement that *mazalim* lost its original vigour and soon lower officials were entrusted with the charge of *mazalim*.⁸⁴ Tyan pointed out that the title of *sahib al-mazalim*, an assistant of *mazalim* judge during the early Abbasid regime, assumed the role of a delegate judge in the tenth century.⁸⁵ Under the Fatimid dynasty, a *sahib al-bab* was in charge of *mazalim* and the vizier did not belong to the military.⁸⁶ The very title of *na'ib dar al-'adl* as devised under the Ayyubids and the Mamluks along with the institution of *dar al-'adl* (house of justice) was working as the prime delegate of the Sultan and could be handed over to Scholars.⁸⁷ Challenging the stance of al- Maqrizi as advocated by Tyan regarding the disappearance of the title *sahib al-mazalim* under the Mamluks and passing of his functions to the *hajib*

⁷⁶ Noor, *Shechacharita*, 10.

⁷⁷ G. E. Von-Grunebaum, *Islam: Essays in the Nature and Growth of a Cultural Tradition*, (London: Routledge, 1969), 133.

⁷⁸ Ameer, “The Spirit,” 284; S.M. Imamuddin, *Arab Muslim Administration*, (Karachi: S.M. Khurshid Imam, 1976), 5-6.

⁷⁹ Tillier, “Mazalim”.

⁸⁰ Tillier, “Mazalim”.

⁸¹ Tyan, “Histoire,” 213, quoted in Tillier, “Mazalim”.

⁸² Samuel M. Stern, “Three Petitions of the Fatimid Period,” *Oriens 15, no. 1* (1962):194.

⁸³ Nielsen, “Secular Justice,” 1-2.

⁸⁴ Tillier, “Mazalim”.

⁸⁵ Tyan, “Histoire,” 221-222, quoted in Tillier, “Mazalim”.

⁸⁶ Tyan, “Histoire,” 233, Nielsen, “Secular Justice,” 10, Stern, “Petitions,” 197 quoted in Tillier, “Mazalim”.

⁸⁷ Nielsen, “Secular Justice,” 14.

(chamberlain),⁸⁸ Nielsen argued that the *hajib* as a military judge was entrusted to settle the disputes between soldiers and had played no part in *mazalim* sessions.⁸⁹ Encapsulating the respective stances of the aforesaid researchers and critically dissecting them, one scholar has aptly remarked:

...the *mazalim* organization in provincial cities could be different from that of the capital during the Abbasid period, and argued that *qadis* were irregularly entrusted with this institution, on a temporary basis, in order to solve a particular crisis. In Baghdad, from the early Abbasid period onwards, *qadis* often joined *mazalim* sessions held by rulers in order to provide decisions (sometimes political ones) with an aura of legitimacy.⁹⁰

Diwan-i-Mazalim, as one interpretation submits, was in fact a powerful tribunal designed to accomplish “the dual function of a general administrative tribunal to hear disputes between the citizen and the state as well as to entertain appeals from decisions of the *Shariah* Courts”⁹¹. It was empowered “to hold public officials, including the chief executive, to strict legal accountability for their acts”⁹². Not surprisingly enough, the Caliph was not entitled to avail any preferential treatment.⁹³ The history of Islam bore the testimony that the ruling Caliph, on several occasions, was strictly ordered to appear in person before the court as a mere defendant.⁹⁴ However, the Court lacked the power to depose the Caliph.⁹⁵

(ii) *Al-Hisbah* / Office of *Muhtasib* (Market Supervisor).⁹⁶

Apart from *Diwan-i-Mazalim* another institution which was active to protect and ensure the interests of the citizen in Islamic administration was known as *al-hisbah*.⁹⁷ The very Arabic

⁸⁸ Tyan, “Histoire,” 234, quoted in Tillier, “Mazalim”.

⁸⁹ Nielsen, “Secular Justice,” 83-85.

⁹⁰ Tillier, “Mazalim”.

⁹¹ Shad Saleem Faruqi, “Constitutional Law, the Rule of Law and Systems of Governance in Islam,” in *The Ummah at the Crossroads: The Role of the OIC*, eds. Ahmad Murad Merican, Ahmad Suhaimi Ismail, R. Jeevaratnam, Rahmat Mohamad, Rozita Hajar, Umminajah Salleh, Zaini Abdullah, (Selangor: Institute of Knowledge Advancement and Institute of Diplomacy and Foreign Relations Malaysia, 2005), 91.

⁹² Abdul Rashid Moten, *Political Science: An Islamic Perspective* (London: Macmillan Press Ltd. 1996), 117.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ For a critical scholarly discussion on Hisbah and Muhtasib see Kristen Stilt and M. Safa Saracoglu, “Hisba and Muhtasib,” in *The Oxford Handbook of Islamic Law*, eds. Anver M. Emon and Rumea Ahmed (Oxford: Oxford University Press, 2018).

⁹⁷ Noor, *Shechacharita*, 10.

word “*hisbah*” has derived from the root “*h.s.b*” and connotes multifarious meanings namely calculation, sum, accountability, verification, reward, take into consideration etc.⁹⁸ From a technical perspective, it signifies the state institution designed to promote the proper conduct and to prohibit all sorts of evil deeds.⁹⁹ The eminent Islamic scholar and political thinker Abū al-Hasan 'Alī Ibn Muḥammad Ibn Habīb al-Māwardī defined *hisbah* as “commanding what is good when it is being neglected, and forbidding what is bad when it is being practised”¹⁰⁰. In essence, *hisbah* is seen as “a collective effort in assisting the Muslim community”¹⁰¹ as mandated by the Quranic injunction: “*help one another in furthering virtue and God consciousness, and do not help one another in furthering evil and enmity*”¹⁰².¹⁰³ *Muhtasib*, the officer in charge of *hisbah*, was entrusted with a wide array of functions though the supervision of market transactions remained his pivotal responsibility.¹⁰⁴ Within the strict Islamic legal and administrative framework it is usually viewed as an obligation on the part of the chief executive to appoint qualified person/s as *muhtasib*.

An authentic exploration of historical chronicles revealed that during the reign of Fatimid rulers, the significance of *hisbah* became very evident in terms of enforcement of prescribed rules and regulations.¹⁰⁵ The scope of authorities and duties of *Muhtasib* had also been proliferated.¹⁰⁶ Even, in later stage of the Fatimid dynasty, enforcement officers’ institutions like police force had been established to impose as well as enforce prescribed penalties among the wrongdoers.¹⁰⁷ Appallingly, the dignity of the institution of *hisbah* was lost its importance due to the weakening of the government during the Mamluk reign of Egypt in the early 16th

⁹⁸ Hamza Ateş, “A Pioneering Institution For Ombudsman: Hisbah,” *Ombudsman Akademik* 6 (2017): 22.

⁹⁹ Ates, “Hisbah,” 21.

¹⁰⁰ A. M. Al-Mawardi, *Al- Ahkam al – Sultaniyyah: The Laws of Islamic Governance*, trans. Asadullah Yate, (London: Ta-Ha Publishers Ltd. 1996), 337.

¹⁰¹ Mustapha Sidi Attahiru, Al-Hasan Al-Aidaros and Syarifah Binti Md Yusof, “Moderating Role of Hisbah Institution on the Relationship of Religiosity and Islamic culture to Islamic work Ethics in Nigeria,” *International Review of Management and Marketing* 6, no. 8S (2016):127-128.

¹⁰² Qur’an 5:2, Muhammad Asad, *The Message of the Qur’an*, accessed December 16, 2019, <http://www.muhammad-asad.com/Message-of-Quran.pdf>.

¹⁰³ Attahiru et al. “Hisbah Institution,” 128.

¹⁰⁴ Abubaker Aliu Gwandu, *Abdullahi b. fodio as a Muslim jurist*, Durham Theses, (Durham University, 1977). See also Abdul Azim Islahi, *Economic Concepts of Ibn Taymiyyah*, (Leicester: The Islamic Foundation, 1988) quoted in Chika Umar Aliyu, Abubakar Muhammad, and Muhammad Mu’azu Yusuf. “An Empirical Study of Roles of Hisbah and Zakah Institutions in Promoting Pro-poor Economic Growth in Kano State, Nigeria,” *Journal of Islamic Philanthropy & Social Finance* 1, no. 1 (2017): 41.

¹⁰⁵ Mohd Ab Malek bin Md Shah, Mohd Harun Shahudin, Sulaiman Mahzan, Rani Diana Othman, and Jeniwaty Mohd Jody, “The Institution of Hisbah: In the Purview of Its Significances and Development,” *Global Journal of Business and Social Science Review* 1, no. 2 (2013), quoted in Ates, “Hisbah,” 26.

¹⁰⁶ Ibid, quoted in Ates, “Hisbah,” 26.

¹⁰⁷ Ibid, quoted in Ates, “Hisbah,” 26.

century.¹⁰⁸ The situation became so bad that the office of *muhtasib* was obtained by bribe and therefore persons lacking qualifications held the office.¹⁰⁹

It was the Ottomans who successfully reinstated the dignity of *hisbah* and amplified its jurisdiction.¹¹⁰ Under Ottoman Caliphate's administration, the institution of *hisbah* (*ihṭisab* in Ottoman official resources) was vested with the authority to levy dues and taxes on traders and artisans in addition to its traditional functions.¹¹¹ One of the most notable contributions the Ottoman Caliphate brought was the codification of the functions and duties of the *Muhtasib* through the adoption of the *Ihtisab Qanunnameleri* for the first time in the history of Islam. This codification commenced its gallant journey under the rule of Sultan Bayazid II (ruling period 1481-1512) and continued under the rules of succeeding Sultans. Commenting on the functions of *muhtasib* as embodied in the *Ihtisab Codes* one scholar asserted:

*The ihtisab codes... regulated the operation and production of different trades, and determined the duty of the ihtisab agasi. The code of Istanbul dated 1501 served various functions such as, fixing the prices, regulating the provisions for the city population, describing the proper process of production for various trades, establishing covenants of guarantee for the products, regulating the distribution of raw materials, banning the malpractices among the esnaf and the men of muhtesib and inspecting the prices, as well as the classical hisbah practices.*¹¹²

The institution of *hisbah* underwent severe and drastic decline during the 18th century since most of the Muslim states were colonised.¹¹³ However, emulating several functions of *hisbah* Ombudsman was established in the West.¹¹⁴

¹⁰⁸ Ates, "Hisbah," 27.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid, 36.

¹¹³ Muhammad Akram Khan, *An Introduction to Islamic Economics* (Islamabad: International Institute of Islamic Thought and Institute of Policy Studies, 1994) , Monzer Kahf, "Principles, Objectives and Tools of Market Regulation in Islamic Perspective", (Seminar on Islamic Approach to Market Regulation and Economic Stability, Tehran, Iran, 2000) accessed November 15, 2019, http://www.monzer.kahf.com/papers/english/market_regulation.pdf quoted in Ates, "Hisbah," 25.

¹¹⁴ Ibid.

Composition, Powers and Functions of Al-Hisbah

The officer appointed in accomplishing the job of *hisbah* was called *Muhtasib*. His position was between the offices of *Qadi* and *Mazalim* but his status and dignity was less than the offices of those two.¹¹⁵ The office was formally created by Al-Mahdi, an Abbasid Caliph, and continued under his successors.¹¹⁶ To Mawardi, market supervisors were of two kinds:

- (1) volunteers and
- (2) paid officials.¹¹⁷

Al-Muhtasib and/or his deputies as full judge (s) must enjoy high qualifications of being wise, astute, judicious mature, virtuous, well-poised, sane, free, empathic, far sighted and erudite scholar (*faqih*).¹¹⁸ He usually requires to be well versed with the state affairs, law and Shariah in juxtaposition of in-depth knowledge of customs and usages of given society.¹¹⁹

The *Muhtasib* was fundamentally appointed for the preservation of law, especially the religious and moral. His duty was to monitor that the religious and moral precepts of Islam were duly complied with.¹²⁰ Islam prescribes a standard conduct for all individuals. Qur'anic injunction commands everyone whether he is a citizen or Caliph to enjoin good and forbid wrong. The Holy Qur'an says:

*[well aware of] those who, [even] if We firmly establish them on earth, remain constant in prayer, and give in charity, and enjoin the doing of what is right and forbid the doing of what is wrong; but with God rests the final outcome of all events.*¹²¹

The office of *Muhtasib* requires to command good and forbid evil, which rests with the state authority in modern times.¹²² Ibn Khaldun asserted the following duties of the *Muhtasib*:

¹¹⁵ Husaini, "Arab Administration," trans. Md. Abdul Huq and Suraiya Zebunnessa, (Dhaka: Adhunik Prokashoni, 2008),122. Noor, *Shechacharita*, 10.

¹¹⁶ Nusair, "External Critics,"112.

¹¹⁷ Husaini, "Arab Administration," trans.,121.

¹¹⁸ Husaini, "Arab Administration," trans.,122. Noor, *Shechacharita*, 10.

¹¹⁹ Muhammad Akbar Khan, "The Role of Islamic State in Consumer Protection," *Pakistan Journal of Islamic Research* 8 (2011): 39.

¹²⁰ Nusair, "External Critics,"112.

¹²¹ Quran 22:41..

¹²² Nusair, "External Critics,"112.

(1) he prohibited the obstruction of roads;(2)he forbade porters and boatmen to carry heavy loads;(3)he ordered the owners of the buildings threatening to collapse to tear them down and thus remove the possibility of danger to passersby;(4)he prevented teachers in schools and other places from beating young pupils too much;(5) and he had authority over everything relating to fraud and deception in connection with food and other things that do not require hearing of evidence or a legal verdict.

This is not the comprehensive or exhaustive list of the duties of *Muhtasib*. He is authorized to deal with any matters *suo motu* or anything reported to him.¹²³ In addition to the aforesaid matters, Al-Mawardi also enlisted the following duties of *Muhtasib*, the market supervisor:

(1) prevention of cruelty to servants and animals; (2)encouraging regular attendance at the mosque;(3) preventing public eating in the month of Ramadan; (4) enforcement of *al-iddat*¹²⁴;(5) encouragement of the marriage of unmarried girls;(6) preventing man consorting with women in public;(7) chastising anyone found in a state of drunkenness and supervision of games.¹²⁵

During the reign of Caliph at-Muqtadi *Muhtasib* was empowered to prevent medical negligence¹²⁶ and environmental pollution specially the prevention of water pollution.¹²⁷

Unveiling the Historical Journey from *Diwan-al-Mazalim* and *Hisbah* to Swedish Ombudsman

Since Sweden, during the regime of Charles XII, was regarded as a major power in Europe at the end of the 17th century, Denmark, Poland and Russia united in an alliance in 1700 to defeat Sweden. Unexpectedly Charles XII took the members of the alliance by surprise and he received the nick name ‘the Swedish Meteor’ due to this magnificent victory.¹²⁸ After this Charles XII soon started waging war known as the ‘Great Northern War’ in Europe which lasted eighteen years. One of the very first battle he fought was the Battle of Narva, in 1700 where he

¹²³ Ibn Khaldun, *The Mugaddimah: An Introduction to History*, trans. Franz Rosenthal, (Princeton: Princeton University Press, 1967), 178-179.

¹²⁴ The waiting period prescribed for widows and divorcee before remarriage.

¹²⁵ Husaini, “Arab Administration,” trans., 121-122.

¹²⁶ Caroline Stone, “The Muhtasib,” *Aramco World* 28, no. 5 (1977) accessed August 28, 2019, <https://archive.aramcoworld.com/issue/197705/the.muhtasib.htm> .

¹²⁷ Ibid.

¹²⁸ Jean Cooke, Ann Kramer, and Theodore Rowland-Entwistle, *History's timeline: a 40,000-Year Chronology of World Civilization* (Crescent, 1981), 144.

defeated Peter the Great.¹²⁹ Despite repeated requests by his allies to engage in or to conclude peace accord, Charles continued his battle with the declining resources of Sweden until decisively being defeated by Peter the Great at the Battle of Poltova in 1709.¹³⁰ This loss marked the downfall of the Swedish Empire¹³¹ and the establishment of the Russian Empire.¹³²

At the invitation of the Ottoman Empire, the injured Charles along with around 1000 *Caroleans* (Soldiers of Kings Charles XI and Charles XII) took refuge in the village of Varnitsa near Bender, a city part of the Ottoman Empire. His expenses during his long stay in Turkey were covered by the Ottoman State budget, as part of the fixed assets (*Demirbas* in Turkish) and for this reason he earned the nickname *Demirbas* Sarl (Fixed asset Charles) or 'Iron head Charles'.

Though Charles was cordially invited by Sultan Ahmet III of Ottoman Empire, their relationship in course of time got weakened due to the conduct of Charles himself. Since Charles XII started to provoke wars from within Turkey he was asked to leave but obstinately refused.¹³³

Charles was put under house arrest at the castle of Timurtasch, "a stately and well-appointed old castle close to Pruth"¹³⁴, after fighting with and being defeated and captured by Turkish Army in a battle referred to as the Skirmish at Bender or popularly as the "Kalabalik" in the month of February, 1713. During this period Charles passed his time "in playing chess, reading romances, and dictating dispatches"¹³⁵. Charles XII himself outwardly denoted this time as "our lazy dog days in Turkey"¹³⁶.

During the period of Charles exile in Turkey, Sweden was passing through an acute crisis fueled by different socio-economic, military and health reasons¹³⁷. Since Charles XII had been staying far away from Sweden and continuing to rule from abroad it was beyond his reach to appreciate the real theatre of problems engulfing his Empire and to unknot those enigmas appropriately.

¹²⁹ Lang, "Ombudsing," 58.

¹³⁰ Lang, "Ombudsing," 58.

¹³¹ Kalevi J. Holsti, *Peace and War Armed Conflicts and International Order, 1648-1989* (Cambridge: Cambridge University Press, 1991), 69.

¹³² Dominic Lieven, ed., *The Cambridge History of Russia vol. 2 Imperial Russia, 1689-1917* (Cambridge: Cambridge University Press, 2006), 29.

¹³³ Robert Nisbet Bain, *Charles XII and the Collapse of the Swedish Empire, 1682-1719* (London: GP Putnam's Sons, 1906), 210.

¹³⁴ Ibid.

¹³⁵ Bain, *Swedish Empire*, 220.

¹³⁶ Ragnhild Marie Hatton, *Charles XII of Sweden* (London: Weidenfeld & Nicolson, 1968), 314.

¹³⁷ Lang, "Ombudsing," 59.

Being cognizant of the deplorable condition of Sweden, Charles XII devised a series of substantial policy and executive reforms from Timurtasch. His massive reforms embraced, *inter alia*, six ‘state expeditions’ or departments. Of the six departments, two dealt with foreign affairs and three dealt with domestic affairs covering military, state economy and trade. The sixth department was a separate one and known as the ‘revisions expedition’. Each of the five expedition was headed by an *ombudsrad* whose prime function was to: “[...] take the initiative and to lay before the King plans which would be for the service of His majesty and benefit of the State.”¹³⁸ The sixth expedition was served by the ‘Highest Ombudsman’ as its head. He was entrusted to monitor the “proper, efficient and fair functioning of the administration”¹³⁹.

Focusing on the authority of this Ombudsman Bengt Wieslander, former member of the Swedish Justice of the Supreme Administrative Court and President of the Supreme Administrative Court critically stated:

*This ombudsman had no political authority but was to ensure that laws and regulations were observed, and that officers of state discharged their duties. Should the Ombudsman find that this was not the case, he had the right to prosecute for negligence.*¹⁴⁰

Elucidating the function of the Highest Ombudsman, former Swedish Ombudsman Against Ethnic Discrimination Frank Orton asserted:

*The task of this Ombudsman was to ensure that the judges, military officers and civil servants in Sweden were observing the laws of the country and the rules laid down for them. Having at that time been away from Sweden since he felt thirteen years earlier on his campaign against Russia, the King obviously felt a need to have someone monitoring things in his home country on his behalf.*¹⁴¹

The position of *Hogste Ombudsmannen*, as one scholar argued, was labelled as a central authority:

¹³⁸ Hatton, *Charles XII*, 343.

¹³⁹ Ibid.

¹⁴⁰ Bengt Wieslander, *The Parliamentary Ombudsman in Sweden*, trans. David Jones, (Stockholm: Bank of Sweden Tercentenary Foundation & Gidlunds Bokforlag, 1999), 13.

¹⁴¹ Frank Orton, “The Birth of the Ombudsman” *Sarajevo: The Human Rights Ombudsman of Bosnia and Herzegovina*,(2001): 1 accessed June 23, 2011, http://europeandcis.undp.org/files/uploads/John/Ombuds_HISTORY.doc>.

...someone to see that orders and regulations were carried out not only by administration (that was the field of the Hogste Ombudsman) but also among the population at large. In 1718 a 'Hogste Ordningssmannen' was designated to be in charge of 'order' in the broadest senses in cooperation with local authorities.¹⁴²

Though the aforesaid administrative reforms were sent to Stockholm in 1713 those were not put into operation until the return of King Charles XII to Sweden in 1714. The success of the reforms as geared by the new administrators and trusted advisors had found its recognition in the pages of literature.¹⁴³

After the death of Charles, monarchy grew weaker while the strength of Parliament increased considerably. In May 1719, the very *Hogste Ombudsmannen*, with the instrument of Government, was renamed as *Justitiekanslern*, the Chancellor of Justice¹⁴⁴ and thereby it became an institution of Parliament¹⁴⁵. In pursuance of the recommendations of a Constitutional committee regarding the formation of a Parliamentary Ombudsman, relevant provision was embodied in Article 96 of the Instrument of Government, 1809 and the first Parliamentary Ombudsman was drawn up accordingly. After the establishment of first Parliamentary Ombudsman in Sweden in 1809 other states started to follow the same tradition through the establishment of this institution in their respective territories. For instance, Finland, Denmark, Norway, New Zealand and Great Britain established Ombudsman in 1919, 1953, 1962, 1962, 1967 respectively.¹⁴⁶

Recognizing that intricacies exist regarding the exact origin of Ombudsman, one scholar claimed that King Charles XII might have been influenced by the Turkish culture since he met representatives from multifarious cultures, schooled in the classics and had the scope to be acquainted "with other cultural representations of intermediaries for the government".¹⁴⁷ Another scholar, however, doubted the influence of Turkish grievance mechanisms on Charles XII in establishing the institution of Swedish Ombudsman. He enumerated that though the

¹⁴² Hatton, *Charles XII*, 440.

¹⁴³ *Ibid.*, 439-440.

¹⁴⁴ Reka Friedery, "The Role of the European Ombudsman in Dispute Solving," *Acta Juridica Hungarica* 49, no. 4 (2008): 360-361.

¹⁴⁵ Orton, "Ombudsman", 2.

¹⁴⁶ For details see Stanely V. Anderson and Kent M. Weeks, *Ombudsman Papers: American Experience and Proposals* (Berkeley: Institute of Governmental Studies, University of California, 1969).

¹⁴⁷ Lang, "Ombudsing," 61.

Record Book of Complaints evidenced the disputes, petitions and grievances of citizens along with their different sort of redressal mechanisms including *Mazalim*, these records dated post exile period of Charles XII.¹⁴⁸ Lamenting on the attitude of the Europe in underestimating the influence of Ottoman Empire in Europe one scholar aptly remarked:

*...the early modern Ottoman Empire constituted an integral component of Europe and that neither the Ottoman polity nor Europe make a lot of sense without the other.*¹⁴⁹

Mats Melin, former Swedish Chief Parliamentary Ombudsman also spoke of the influence of *Diwan-i-Mazalim* while reflecting on the election of Ombudsman for the first time by Swedish Parliament. He commented:

*Even if the first of Ombudsmen was elected by the Swedish Parliament, the very essence of the idea of an Ombudsman – an independent official with the power to investigate complaints from members of the public and who can criticize illegal, unfair or improper actions by public authorities and make recommendations – is not unknown in other, even older cultures. Within the Islamic legal system, for example, during the era of the Abbasids, complaint handling agencies called Diwan al Mazalim were established.*¹⁵⁰

The very fact of Charles' being attracted as well as influenced by the overall effective functioning of the *Diwan-al-Mazalim* extant in Turkey was quite evident. One report endeavoured to critically explore the inferences drawn by King Charles XII in this regard. It runs as follows:

*if the grievances of people are attended to and redressed they will not be disgruntled or prone to rebel, nor any neighbour or enemies would be able to take advantage of the dissatisfaction or resentment.*¹⁵¹

¹⁴⁸ Michael Ursinus, *Grievance Administration (Sikayet) in an Ottoman Province: The Kaymakam of Rumelia's Record Book of Complaints of 1781-1783* (Oxfordshire: Routledge, 2005) quoted in Lang, "Ombudsing," 61.

¹⁴⁹ Daniel Goffman, *The Ottoman Empire and Early Modern Europe* (Cambridge: Cambridge University Press, 2002) xiv.

¹⁵⁰ M. Melin, "The Ombudsman and the Citizens-Lessons to be Learned from the Scandinavian Experience", *Speech to the Doha Democratic Forum*, (2006), quoted in Lang, "Ombudsing," 61.

¹⁵¹ Pakistan, *Mohtasib*, 3.

Even scholars like Al-Wahab¹⁵² and Pickl¹⁵³ have gone so far to claim that there exists sufficient reasons to assume that the Islamic Legal system, to a greater extent, has invariably influenced the establishment of the first ombudsman in Sweden.¹⁵⁴ Ibrahim al-Wahab emphatically stresses:

*Of course one could not draw definite conclusion regarding the origin of any institution anywhere But being aware of the history of complaint handling in the Islamic law system and the fact that during the time of King Charles XII in Turkey this system was existing, the influence seems to be evident.*¹⁵⁵

EU Enlargement Commissioner Olli Rehn emphatically stated that Ombudsman was the brain child of Ottoman Empire and Charles XII, during his exile in Turkey, recognized the Ottoman institution and imported that idea to Sweden.¹⁵⁶ *Hisbah*, it can aptly be argued, pioneered the role of Consumer Ombudsman, Health Service Ombudsman, Tax Ombudsman are Business Ombudsman in modern times as well.

Depicting a Comparative Picture of Swedish *Hogste Ombudsmannen* and *Diwan-i-Mazalim* as well as *Hisbah*

Not surprisingly enough, the legal system of Ottoman Empire was interpreted in diverse ways. Amidst this diversified elucidation, it can be deduced that during the regime of Sultan Ahmet III of Ottoman Caliphate the *Quadi-ul-Qudat* (the judge of judges) used to preside over the session of *Diwan-al-Mazalim*.¹⁵⁷ He was authorized to ensure that Islamic law were complied with and applied by government officials including the Sultan (head of the Ottoman Caliphate) in maintaining the affairs of the people “in their relations with the state and among themselves”.¹⁵⁸ The *Quadi-ul-Qudat* (the judge of judges or Chief Justice) was also mandated to play the role of *muhtasib*, as chief of the *Hisbah*, to regulate market practices and to ensure evasion of conflict

¹⁵² Ibrahim Al-Wahab, *The Swedish Institution of Ombudsman-An Institution of Human Rights*, (Stockholm: LiberForlag, 1979).

¹⁵³ V. Pickl, The Islamic Roots of Ombudsman Systems, *The Ombudsman Journal*, no. 6 (1987), 101-8.

¹⁵⁴ Md. Nojibur Rahman, *Ombudsman in Bangladesh: A Step towards Good Governance*, (Dhaka: Hakkani Publishers, 2001), 18.

¹⁵⁵ Government of Islamic Republic of Pakistan, Wafaqi Mohtasib (Ombudsman)’s Secretariat, *Mohtasib(Ombudsman)’s Annual Report* (Islamabad: Wafaqi Mohtasib (Ombudsman)’s Secretariat, 1990), 9-10.

¹⁵⁶ The Ombudsman was a creation of the Ottoman Empire, October 19, 2008, <https://merryabla64.wordpress.com/2008/10/19/the-ombudsman-was-a-creation-of-the-ottoman-empire/>.

¹⁵⁷ Pakistan, *Mohtasib*, 9.

¹⁵⁸ Ibid.

in commercial dealings.¹⁵⁹ The Caliphate, as mentioned earlier, appointed *qadi* in district levels who were assisted by deputy judges in the sub-districts.

Due to the amalgamation of the *mazalim* and *Shariah* courts into one court under the *qadi*'s jurisdiction, the functions of *qadi* received wider shape and therefore played the role of a civil administrator and dealt with many issues not pertaining to its traditional jurisdiction. The *qadi* system including the Qadi ul Qudat worked as the representative of Sultan and received instructions from him and implemented Sultanic decrees accordingly. People could submit petitions to the Sultan against the violations by individuals, maladministration by government officials, tax collectors, injustice by *qadis* and governors. The Sultan earlier dealt with these complaints directly but afterwards by Imperial Council (*Divan-ı Hümayun*), an equivalent of medieval *mazalim* courts and more importantly *qadi-i-asker*, one of the members and chief judges of this *divan* dispensed royal justice since the regime of Sultan Murad II. Different methods were used to submit petitions namely courier to Istanbul, through a *qadi* and even by individuals directly. Despite these varied mechanisms, during the exile of Charles XII in Ottoman Turkey, he examined the role of *Qadi al Qudat* assuming the functions of *Diwan-i-Mazalim* as well as *Hisbah* and as the close representative of Sultan and decided to cast it in Swedish mold.

After scrupulously observing the functioning of the affairs of *Diwan-i-Mazalim* and *Hisbah* in the topography of Ottoman Caliphate for 5 years, Charles XII established six 'state expeditions' or departments. Out of the six departments two were entrusted with foreign affairs and three were in charge of domestic affairs embracing military, state economy and trade. Each of the five departments was headed by an *ombudsrad* whose primary responsibility was to submit plans for the service of the King and welfare of the state. Most notable and crucial was the establishment of sixth expedition namely 'revision expedition' headed by the *Hogste Ombudsmannen* and his prime responsibility was to ensure that King's wishes and laws were complied with by the aforesaid expeditions and to play the role of a watchdog regarding their functioning. Though he was not endowed with any political authority, he had the right to send the report regarding maladministration to the King and to initiate legal proceedings against the accused for negligence. The office of the *Hogste Ombudsmannen* in fact, was not independent and reported directly to the Charles XII, an absolute monarch.

¹⁵⁹ See Sodiq Omoola Olalekan and Nurah Sabahiah Mohamed, Ombudsman (*Muhtasib*) in Business Regulation: A Cross Cultural Analysis, *Journal of Islamic Thought and Civilization*, 7, no. 2 (2017): 18-40.

While the Ottoman model of Ombudsman held enormous and diversified power, the Swedish model possessed very little power and was relatively weak. The former enjoyed more independence than the latter. Since justice constituted the bedrock of Ottoman Caliphate, the Sultan could not interfere in the judicial administration and he himself was not above the law.¹⁶⁰ For instance, the Shaikh al- Islam, the Supreme Judge and highest Official Ebussuud Efendi objected to the orders of the Sultan and asserted: “If the customary law goes against ecclesiastical law, even the sultan's orders aren't valid.”¹⁶¹ On the contrary, the Highest Ombudsman did not enjoy this sort of independence. As an absolute monarch Charles XII enjoyed unfettered power as regards everything. The Ottoman model being a complex blend of legislative, administrative and judicial authorities discharged their mammoth functions magnificently but the Swedish model being a creature of monarchial order could only function within their narrow periphery in accordance with the wishes of King Charles XII.

Conclusion

The aforesaid discussion inevitably evidences that the very idea of having mechanisms to prevent maladministration and resolve grievances of individuals is firmly rooted in ancient, medieval and multicultural antecedents. Despite the existence of different types of precursors to modern ombudsman, this article has demonstrated that the very Ottoman office of *Qadi- al-Qudat* assuming the role of *Diwan-al-Mazalim* and *Hisbah* had substantively influenced Charles XII, exiled in the territory of Ottoman Caliphate, to establish the *Hogste Ombudsmannen*, predecessor of Parliamentary Ombudsman with the prime objective of saving his native land. Though institutions like *Hisbah* and *Mazalim* sessions had existence in other civilizations, Charles XII hatched his idea of establishing an ombudsman while staying in the Ottoman Caliphate and this fact necessarily geared the impression that he was probably influenced by the extant Ottoman office of *Qadi-al-Qudat* discharging the functions of *Diwan-al-Mazalim* and *Hisbah*”. For Charles XII, the possibility of being familiar with other cultural representations was not impossible but the fact of being influenced by any or all of these cultures was definitely less probable in comparison with the aforesaid office.

King Charles XII while exiled in Ottoman territory had all the likelihoods to be aware of the functioning of the aforesaid office. Before being exiled in Turkey, Charles XII as a warrior king

¹⁶⁰ Erhan Afyoncu, “Justice for Everyone: The Ottoman Judicial System,” *Daily Sabah*, January 19, 2018, <https://www.dailysabah.com/feature/2018/01/19/justice-for-everyone-the-ottoman-judicial-system> .

¹⁶¹ Ibid.

could not concentrate on the issue of administrative reforms except waging war against the foes of Sweden. He” finalized his decision to bring about massive administrative reforms including the establishment of the Highest Ombudsman while in exile. Further, the efficacy of the aforementioned office positively lured him to establish such type of office. Moreover, he unflinchingly deciphered the strength of Ottoman Caliphate in juxtaposition of Ottoman administration and ultimately decreed the establishment of modern Ombudsman.

Further, no concrete and pragmatic evidence is found regarding the influence of other ancient and multicultural roots on Charles XII regarding the establishment Ombudsman. Since Sweden was plummeted into acute crisis during his exile in Turkey, it was not implausible that he painstakingly mused the working of the “Islamic Institutions” efficaciously discharging their duties just before him, remodeled his idea and decreed the establishment of the office of the Highest Ombudsman to “make (Swedish) government more efficient and just”¹⁶².

¹⁶² Hatton, *Charles XII*, 314.