

Independence of Judiciary in Islamic Perspective: An Analysis

Sabah Farag Saad Madi

Department of Shari'ah and Law
Academy of Islamic Studies
University of Malaya
50603 Kuala Lumpur
Malaysia

Munazza Saeed

Department of Shari'ah and Management
Academy of Islamic Studies
University of Malaya
50603 Kuala Lumpur
Malaysia

Assoc. Dr. Ruzman Md. Noor

Department of Shari'ah and Law
Academy of Islamic Studies
University of Malaya
50603 Kuala Lumpur
Malaysia

Ibrahim Meftah Alfellage

Department of Shari'ah and Law
Academy of Islamic Studies
University of Malaya
50603 Kuala Lumpur
Malaysia

Abstract

This rational behind this study is to discuss the concept of the independence of judiciary through the lens of Islam for justice in human society. This is a conceptual study in which we gathered the knowledge about independence of judicial system from two strands. The first belongs to The Holy Quran and Islamic scholars and second strand based on journal articles indexed in web of knowledge (ISI). Islam has not prescribed any particular legal ruling in this respect but has left the question to be resolved on the discretion of the Caliph. The main objective of Islamic Judiciary is to achieve justice or al-'adl. If the executives are very honest and trustworthy persons then both the organs may be put in one hand and if the executive are not so much honest and trustworthy and cannot handle judicial responsibility, then the judiciary be separated from the executive.

1. Introduction

Independence of judiciary means an individual judge or a collective judiciary take decisions, without getting influenced by any (social, political, cultural and economical) pressure, neutrally based on the injunctions of law. Al Fudhailat (1991:35) views that judiciary is an independent and a separate constitutional organ of a state. Judicial independence is critically important to three dimensions of governance. First is the protection of human rights. This duty requires, independent judges not for their own sake but for the sake of the society that they serve. In the Second dimension, judicial independence facilitates political stability and fairness.

Rule of Law is an important political ideal today (Tamanaha 2004; Waldron, 2008). Finally, judicial independence is critical for the development of healthy and sound economies.

In an increasingly complex economies and societies, judicial independence can help to ensure the rule of law. It is also necessary to avoid inefficiency, injustice, and arbitrary rule. According to Feld and Voigt (2003, 2006) judicial independence is both statistically and economically highly significant for explaining economic growth.

For the above mentioned reason, international development institutions have evinced a growing interest in judicial independence. The interest in judicial independence is quite welcomed from organizations that have historically devoted more attention to economic development and have a need to develop expertise in an area that might have been deemed too political in the past. Moreover, there is a need of academic writings as well. In addition to this, the judicial Independence is not studied fully through the lens of Islam yet.

In Islam, Allah has sent the law through His messenger to establish the system of justice in order to protect human beings from each other. Quran says: We sent foretime our apostles with Clear Signs and sent down with them the Book and the Balance (of Right and Wrong) that men may stand forth in justice (Quran, Chapter, 57: verse 25). The sovereignty of Justice that it should be upheld in all circumstances even if it goes against own self. Prophet Muhammad taught theological and eschatological dogmas to his adherents. He also gave them laws concerning all activities of life, individual as well as collective, temporal as well as spiritual. In addition, he created a State out of nothing, which he administered, built up armies which he commanded, set up a system of diplomacy and foreign relations which he controlled; and if there were litigations, it was he who decided them among his subjects. So, it is to him rather than anyone else that one should turn in order to study the origin of the Islamic law.

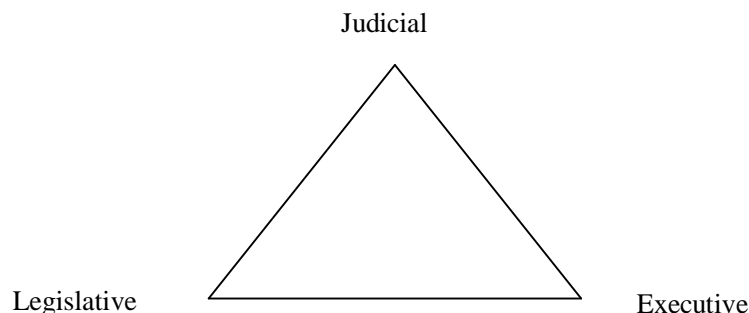
This paper attempts to discuss the concept of the independence of judiciary in Islam for the dispensation of impartial justice in human society.

This is an analytical study in which we gathered the knowledge about independence of judicial system from two strands. The first belongs to The Holy Quran and Islamic scholars such as Ibn Khaldoon, Sadr al Shariah, Ubaidullah Ibn Masud and Al Wakī etc. The second strand based on journal articles indexed in web of knowledge (ISI).

2. Theoretical Discourse on Judiciary in Islam

The government has acquired the image of a pyramid since the beginning. Aristotle portrayed government as having three dimensions. The first dimension is called legislative power, composed of those who used to ratify necessary ordinances for the political system by using their intellect. The other dimensions are executive (the governors and administrators of society) and judicial powers (those who rendered justice). In earlier time, Western political philosophers had also subscribed to the triple dimensions of government, and finally, Montesquieu identified the three branches of government: legislative, judiciary and executive. For this purpose, he wrote the book *The Spirit of the Laws* (1748; trans. 1750) in which he elaborately discussed the structure and framework of each of these powers. His intellectual effort and new ideas popularized the theory of separation of power so much so that some have identified him as the founder of the theory.

Contemporary, the constitutions of most countries are codified based on the theory of separation of powers, considering the independence of three powers from one another as one of the principles of democracy. Internationally, a country is considered democratic if its legislative, judicial and executive powers are independent and no single power dominates the other two.



In view of the continuous change in social life and the need to formulate appropriate laws for every change, a group of individuals sit together and after discussion and deliberation, enact laws and regulations for the management of society, which are official and binding, called legislative power of Government. After the codification of laws and their official recognition and accreditation, there is a need to consider a branch of government and apparatus to adapt general laws to particular cases, to identify rights and duties, and to remove differences and disputes.

Mere ratification of laws in parliament cannot solve any problem, and judicial power executes all laws. The executive power is expected to implement laws, deter violations and implement judicial decrees passed in judicial courts.

During the last centuries there were intense disputes and conflicts among legal philosophers over concentration or separation of powers. These were on whether all powers should be in the hands of an individual or group, or powers should be separated from one another and every person or group should be concerned with only one power. It is necessary to consider the theory of separation of powers generally and judicial power specifically, mentioned in the philosophy of law with a lens of Islam.

There are two schools of thoughts regarding separation of judiciary from the executive:

The first school of thought, based on theory on the judicial system during the period of the Prophet (Peace be upon him) and the four caliphs. The caliphs themselves have practiced judicial power and have also appointed judicial officers, who performed their duties for the great interests of the state under the executive control, not as a separate organ. They refused the theory that caliphs had appointed independent judicial officers and argued: In a battle with Banu Qurayzah, the Messenger of Allah (PBUH) appointed Saad bin Muadh to give his decision. The words as narrated by Bukhari are: The Prophet entrusted al-Hukm (the word of command) to Saad. He said, "I order (Ahkumu) that the active fighters be killed" (Bukhari, hadith book). The word Hukm indicates that judiciary is a part of executive. Wakī has reported that Abu Bakr and Umar have not appointed separate judicial officers until the period of Muāwiya, who had appointed separate judicial officers. (Al-Wakī, 105). But Umar had delegated some of his powers to others due to the work load, and appointed Qadhis (judges) in Madīnah.

According to Al-Turaifi (1986: 170) Dr. Ali Hasan Abdul Qadir, one of the profunder of this theory believes that there were no independent judges in the early days of Islam, the caliphs were used to decide cases and may consult the learned jurists (Fuqaha) when required. Although he admits that the caliphs and their governors had appointed independent judges in their later age. In contrast to Dr. Ali hasen, Ibn Khaldun also believes that judiciary was under the control of the executive, but they did not appoint independent judges. (Ibn Khaldun, 220). The merging of judiciary in the executive does not mean it was controlled by the executive (Tamawi, 1979: 286). Imam Mawardi opines that Caliph or his governors are the competent authority to appoint or dismiss judges (Mawardi, 1966: 63). Therefore, no line of separation between the executive and the judiciary. Similar views are expressed by Abd al-Hayy al-Fa'sī in Muqaddimah al-Tarātib al-Idāriyyah (Al-Fasi, 13). Therefore, judiciary is not an independent organ but a branch of Executive.

Second school of thought

The second School of thought is of the opinion that judiciary is a separate organ and not a branch of executive. The founders of the second theory claim that Shari'ah has granted complete independence to the judiciary. They argued: In the early days of Islam the Prophet (PBUH) himself was the only judge among believers and non-believers. That time there was no need of specialized judiciary. Besides this situation, the Prophet (PBUH) delegated some of his judicial powers to his companions and referred some of the cases to them, such as:

The Prophet (PBUH) asked Amr ibn al'As to adjudicate between the disputant parties. He replied as to how be it possible while the Prophet (PBUH) was among them. The Prophet (PBUH) said to him "judge between them if you reach the right conclusion. You get ten times rewards and if you erred in your Ijtihad you get a single reward" (Haithami, 195). Maaqal Ibn Yasar said that the Prophet (PBUH) directed him to judge between the litigants. (Haithami, 193). Uqbah Ibn Amir, another companion went through such process. (Darqutni, 1892: 203).

The above examples indicate that it does not necessitate that judiciary was considered as part of Executive, because Maaqal and Amr Ibn al'Ās did not remain governors of any province during the era of the Prophet (PBUH). Indeed they were assigned judicial duties. Ibn Hajar al-Asqalani said that Maaz worked as judge in Yemen till the caliphate of Abu Bakr than he was sent to Syria where he died. Ibn 'Abdl Barr has stressed that he was a Judge not a Governor (Asqalani, 358). Wakī, said that when Abu Bakr became the Caliph he appointed

‘Umar as a judge and Abū ‘Ubaydah as treasurer.(Al-Waki,104). It is argued that Umar was only a judge, not a governor.

Therefore this action was a preliminary step to the separation of judiciary from executive. Abu Bakr had referred criminal cases to Umar for disposal. (Al-Waki, 102-104).

Wakī has also narrated that there were six companions of the Prophet (PBUH) who exercised Qadha. They were: Umar, Alī, Ubay Ibn Ka,,b, Ibn Mas,,ud, Abu Musa and Zayd Ibn Thabit. (Al-Waki, 105).

This tradition indicates that these six judges were not assigned any executive duty during the life time of the Prophet (PBUH). Some of the jurists have opined that they worked both as judges and executive, but this opinion is not supported for the reason that they remained with the Prophet (PBUH) at Madina and not departed elsewhere. It means that they performed the function of judges in the presence of the Prophet (PBUH).

It is also an established fact that Umar appointed independent judges inside Madina and also in various provinces of the state. Caliph Umar bin al-Khattab was the first who separated judiciary from the executive and entrusted the Qadhis (judges) with power of deciding suits of purely civil nature. Al-Fasi (259) quotes Muhammad Sallam Madkur in this connection: Umar b. al-Khattab separated the judiciary from the administration and appointed for judiciary persons who were not the administrators and separated the two offices. He appointed Abu Darda with him at Madinah, Qadhi Shurayh at Basrah, Abu Musa al-Ashāri at Kūfah and Uthmān Ibn Qays Ibn Abi al-‘Ās at Egypt as Qadhis.

According to Sallam Mdkur (1960:352) the powers of the Qadhis appointed by Ibn Khattab were confined to monetary disputes and that pertaining to punishments and awarding of compensation for damages remained in the hand of the Caliph. Imam Malik says that Mu’aawiyah was the first to appoint a Qadhi. Dr Muhammad Muslihuddin (1988:58, 59) preferred the opinion of Imam Malik. Because Mu’aawiyah was so much absorbed in political affairs that he could not spare time to look after justice, hence he might have appointed Qadhi or group of Qadhis, independent and on permanent basis to carry out the duties of imparting justice. But the keen sense of justice did not allow the first Caliphs, to do so. They took upon the duties of a Qadhi and therefore, did not appoint anyone to the post of Qadhi permanently.

The contradiction of the arguments advanced by both the groups of the jurists may be reconciled by saying that the Prophet (PBUH) and the pious caliphs were executive heads of the state and were also judging among the disputants beside appointment of independent judges while Mu’aawiyah due to load of executive work did not find time for adjudication. Therefore, he appointed independent judges. These narrations are also interpreted that the caliphs had not appointed judges in the capital of the state while Mu’aawiyah was the first who appointed independent judges there. (Al-Turifi, 1986: 179).

It is, therefore, concluded that the Prophet (PBUH) appointed independent judges and assigned them the duty of adjudication, but he did not relinquished himself of the judicial functions. The same was the position of the first Caliph Abu Bakr. Umar had appointed judges independent of the executive and also gave them vast jurisdiction and prohibited his governors from interference in the judicial affairs of the judges. These judges were not under the control of the executive/ governors. Mu’aawiyah developed the scheme and he was the first caliph who relinquished himself of the judicial functions by appointing independent judges.

3. Legal Ruling in Islam for Independence of Judiciary

The dispensation of “‘Adl” (impartial justice) is common concern of all Muslims and they are collectively responsible for its administration and thus it is *Fardh Kifayah* (Sadr al Shariah, 681). The *Fardh Kifā’i* is an act which performance is required from the whole community. The Quran has stressed the importance of impartial justice in various contexts on various occasions, indicating its great and deep significance in social relationships. In the light of chapter *Al Hadid* from the holy Quran, it is the very purpose and objective of all the Prophets of Allah to establish a system of justice and goodness on earth. Therefore, it is necessary to find out its meaning and significance in the context of the verses of the Quran and lastly to derive Islamic Legal Rule for independence of judiciary.

The Quran not only prohibits aggression and injustice, but also enjoins the Muslims to deal with all people with equity and justice and to respect their rights as guaranteed by Allah: Quran Says:

Verses regarding justices

Chapter 4: verse 58	“BEHOLD, God bids you to deliver all that you have been entrusted with unto those who are entitled thereto, and whenever you judge between people, to judge with justice”
Chapter 16: verse 90	BEHOLD, God enjoins justice, and the doing of good, and generosity towards [one's] fellow-men; and He forbids all that is shameful and all that runs counter to reason, as well as envy; [and] He exhorts you [repeatedly] so that you might bear [all this] in mind”.
Chapter 42: verse 15	Tell them: "I believe in whatever Allah has revealed from the Book and I am commanded to do justice between you.”
Chapter 4: verse 58	“and whenever you judge between people, to judge with justice”
Chapter 38: verse 26).	“[And We said:] "O David! Behold, We have made thee a [prophet and, thus, Our] vicegerent on earth: judge, then, between men with justice, and do not follow vain desire, lest it lead thee astray from the path of God”.
Chapter 4: verse 135	“O believers! Stand firm for justice and bear true witness for the sake of Allah, even though it be against yourselves, your parents or your relatives. It does not matter whether the party is rich or poor - Allah is well wisher of both. So let not your selfish desires swerve you from justice. If you distort your testimony or decline to give it, then you should remember that Allah is fully aware of your actions”.
Chapter 6: verse 152	Give full measure and just weight - We never charge a soul with more than it can bear. Whenever you speak, be just, even if it affects your own relatives, and fulfill your covenant with Allah. These are the things which He has enjoined on you so that you may be mindful”. (
Chapter 4: verse 59	The Quran says: “O ye who believe! Obey Allah, and obey the messenger and those of you who are in authority.”

All above verses demonstrate the importance of the impartial administration of justice. Impartial justice is possible only when judges do their duties without any fear or favour of any person. Thus the Islamic legal ruling for the independence of judiciary, in the sense of impartiality, is crucial. The judiciary may be separated from the executive if it is necessary for the public interest.

4. Discussion and Conclusion

The ruler is thus empowered to act on behalf of the Prophet and exercise his power for the great interest of the public. The jurists have therefore laid down a legal maxim that the ruling of a ruler over his subject is based on their welfare. (Amim al-ihسان, 1986: 70). A contemporary Egyptian Scholar ‘Abd al Qadir Audah (Audha, 78) writes: “And it has been left to the discretion of the ruler to declare any act unlawful which he deems prejudicial to peace and tranquility under prevailing circumstances. However, a ruler has the power to frame rules and regulate laws for the maintenance of peace and tranquillity and punish those who oppose or violate them” Mufti Muhammad Shafi (1987:508).

Hazrat Daoud was the messenger of Allah; he was head of the executive as well as of the judiciary. He was delivering judgments on disputes. The rightly guided Caliphs were heads of the executive and were also Chief Justices delivering judgments. This system was afterward changed and the judiciary was separated from the executive.

The question whether judiciary should be separated from the executive or both may be put in one hand? Islam has not prescribed any particular legal ruling in this respect but has left the question to be resolved on the discretion of the Caliph. If he feels that the executives are very honest and trustworthy persons then both the organs may be put in one hand and if he feels that the executive are not so much honest and trustworthy, then he may direct that the judiciary be separated from the executive.

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