

The Concept of Independence of Judiciary in Islam

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Abstract

Independence of judiciary is a vital principle of the rule of law. Judiciary has been given a supreme and vast power in Islam. This article attempted to explain the basic concepts of Independence of the Judiciary, relations with Executive and Legislature in the light of the judicial system introduced by the Prophet Muhammad (PBUH) and his pious caliphs. There are no clear and specific instructions in Quran regarding the relations between the state organs in Islam but the conventions of the Prophet (PBUH) provide us with some guiding principles. It shows that the Head of the State is the supreme power in the state. As such he is the Chief executive and the head of the legislature as well as of the judiciary. However, the three departments operate independently and separately from each other under the supervision of the head of the state. He does not interfere in the people's internal affairs but the final appeal or reference to any matter goes to him. Shafi'i, Mālkī and Hunbalī jurists are of the opinion that the appointing authority or caliph has no power to dismiss a Qadhi without any sound reasons. The most conspicuous characteristic of the judiciary set up by the Prophet (PBUH) was its impartiality. The social, political and religious status of any individual never influenced the administration of justice at Madinah. The concept of the independence of the judiciary in Islam has been elaborated by discussing the significance, Islamic ruling and the basic guiding rules for the independence of Judiciary.

Key words: Independence, Judiciary, Islam, Justice, concept, Prophet, Quran.

Introduction

It is proven historical fact that man cannot live peacefully on this earth unless there is some coercive force to check his aggressive actions. The weak and the poor always suffer at the hands of the strong and the rich in society. Therefore, Allah sent the law with His messenger to guide the people to the right path of Allah and establish a system of justice to protect the rights of the weak in the society. All prophets and scriptures were being sent by God for the establishment of justice on the earth as Quran says:

We sent aforetime 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) Islam, therefore, has attached great importance to justice and to its smooth and impartial administration. Justice demands that it should be upheld in all circumstances even if it goes against own self.

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

1. Brief meaning

Independence of judiciary in Islam means independence of an individual judge or a collective judiciary to decide impartially according to the injunctions of Islam. It also means that the decision of a judge must not be influenced by any kind of pressure from any person and nothing or no one could deviate him from correct and impartial decision which is the basic objective of the administration of justice. Al Fudhailat views that judiciary is an independent and a separate constitutional organ of a state. (Al-Fudhailat, 1991:35).

2. Theory of Separation of Judiciary from the Executive in Islam

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

2.1 A group of jurists says that judiciary is not a separate and independent organ but it is a branch of executive and it has derived its power from caliph or governors of provinces.

2.2 The second School of thought is of the opinion that judiciary is a separate organ and not a branch of executive.

The first school of thought has based its theory on the history of judicial system during the period of the Prophet (Peace be upon him) and the four pious caliphs. The caliphs themselves have practiced judicial power and have also appointed judicial officers, who performed their duties not as a separate organ but were basically under the executive control. All of them were state servants and were performing their duties for the great interests of the state. 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 Sa'd bin Muadh to give his decision. The words as narrated by Bukhari are:

- a) The Prophet entrusted al-Hukm (the word of command) to Sa'd. He said, "I order (Ahkumu) that the active fighters be killed". (Bukhari, hadith book)
- b) The use of Arabic word 'Hukm' indicates that judiciary is a part of executive, and judicial work is in furtherance of the duty of the executive.
- c) 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).
- d) Ibn Umar says that neither Apostle of Allah nor Abu Bakr or Umar had appointed independent judges. Umar, at the end of his caliphate, said to Yazid Ibn Ukht al Namr 'Help me in some affairs of the state.(Al-Wakī, 105)

It proves that Umar had appointed Qadhis (judges) in Madīnah. Umar appointed Zayd bin Thabit as Qadhī after Sā'b and was paid a salary so that he be free for his office.

It is clear from the above-mentioned traditions that Umar had delegated some of his powers to others due to the work load.

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. In fact the caliphs themselves 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.

Ibn Khaldun is also of the opinion that judiciary was under the control of the executive and was supervised by caliphs who themselves were deciding cases. They did not appoint independent judges. (Ibn Khaldun, 220).

The above discussion indicates that the profunders of this theory believed that judiciary was a part of executive. They also believed in their impartiality in performing their judicial functions. Merging of judiciary in the executive does not mean misleading or controlling of judiciary by the executive. (Tamawi, 1979: 286).

Muslim jurists opine that Caliphs were Chief Executives as well as the heads of the judiciary of the state. As Chief Executives they were responsible for all state functions including judiciary. Judiciary was considered to be an important organ of the state and the Chief Executive of the State was duty bound for dispensation of justice. Imam ul Haramain stated that it is the duty of the Caliphs to perform all these services by self, but since it is very difficult to performs all duties, therefore, they may appoint competent persons to perform some of these services.

Imam Mawardi opines that Caliph or his governors are the competent authority to appoint or dismiss judges. (Mawardi, 1966: 63).

After relating the Ahadith pertaining to the appointment of Alī as entrusted with judicial powers and functions, Muhammad Sallam Madkur (1960:322) concludes as follows:

“The traditions indicate clearly that *Qadhā'* and *wilayat* were in one hand. To put it in other words, there was no line of separation between the executive and the judiciary”.

Similar views are expressed by Abd al-Hayy al-Fa'sī in Muqaddimah al-Tarātīb al-Idāriyyah. (Al-Fasi, 13).

It is evident from the above discussion that judiciary is not an independent organ but a branch of Executive.

The profounders of the second theory claim that Sharī'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. Muslims adhered to Islamic values and were used to confess for their sins and violations of law before the prophet (PBUH) so that proper punishment be imposed upon them. The cases of Mā'iz and Ghāmidīyyah are very famous examples in the judicial history of Islam (Bukhari, hadith book). This will be appropriate to say that at 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:

- a) 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).
- b) Ma'aqal Ibn Yasar said that the Prophet (PBUH) directed him to judge between the litigants.(Haithami, 193).
- c) Uqbah Ibn Amir, another companion went through such process. (Darqutni, 1892: 203).

These traditions indicate that it does not necessitate that judiciary was considered as part of Executive, because Ma'qal 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 Ma'az 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 Qadhi (Judge) not a *Wālī* (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'awiyah was the first to appoint a Qadhi. Dr Muhammad Muslihuddin (1988:58, 59) preferred the opinion of Imam Malik. Because Mu'awiyah 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'awiyah 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'awiyah 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 relinquish 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'awiyah developed the scheme and he was the first caliph who relinquished himself of the judicial functions by appointing independent judges.

Legal Ruling (Hukm Shar'ee) For Independence of Judiciary

The dispensation of “‘*Adl*” (impartial justice) is the common concern of all Muslims and the *Ummah* is 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 and not from each individual. The ruling for the *Fardh Kifā'ī* is that if it is performed by some individual in the community, the rest are no longer liable for it, as the required act stands performed

The Quran has stressed the importance of “‘*Adl*” 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. It is therefore, necessary to find out first the general meaning of this word and then its meaning and significance in the context of the verses of the Quran and lastly to derive Islamic Legal Rule (Hukm Shar'i) for independence of judiciary.

3. Adl ('Adalah) Means

- a) Straightness, straight forwardness,
- b) Justice, impartiality, fairness, equity, equitableness ,
- c) Honesty, uprightness,
- d) To make equal, to equalize, to place someone on the same footing with others,
- e) To put right, to set in order, to balance
- f) To be equal, equivalent, treat as equal
- g) To be in a state of equilibrium balanced.

According to the Arabic-English Lexicon al '*adl* signifies rating a thing as equal to a thing of another kind so as to make like it the Latter. (Al-Zubaidi, 1966).

Now let us study the verses mentioning '*adl* in the Quran and see what is their real and true significance in the text of independence of judiciary.

The Quran not only prohibits aggression and injustice and the denying of other people's just and fair rights, 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:

“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”. (Quran, chapter 4: verse 58).

“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”. (Quran, chapter 16: verse 90).

“Tell them: "I believe in whatever Allah has revealed from the Book and I am commanded to do justice between you.” (Quran, chapter 42: verse 15).

The word ‘*Amanat*’ (trust) is used in the first verse in a very wide sense and is inclusive of all the rights and duties that fall upon man in consequence of his allegiance to Allah: obligations to Allah and obligations to people. All rights come into the meaning of the word ‘*Amanat*’ of the Divine Code of Law (Shari‘ah) and the authority of the dominant religion, the first instruction that Allah issued to the community was to fulfill justly and fairly the rights and duties that had been entrusted to it.

The words in the first mentioned command “and whenever you judge between people, to judge with justice” (Quran, chapter 4: verse 58) expresses the most important aspect of the ‘*Amanat*’, as well as clarifying the responsibility attached to the authority. The first responsibility that is laid on anyone who is granted authority by Allah is to judge with justice impartially between people and protect their rights on an equitable basis. The word “‘*Adl*’ implies that in the sight of the law there is no difference between people poor or rich, black or white ‘Arab or non Arab. Justice is not and should not be a saleable commodity. No prejudice, compromise, pressure, fear or greed should ever be given an opportunity to enter this field and deny the right of any person.

The Prophet Dawud (David) was given the vicegerency of the earth and was ordered to do justice fairly as Quran says:

“[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”. (Quran, chapter 38: verse 26).

Allah says:

“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”. (Quran, chapter 4: verse 135).

“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”. (Quran, chapter 6: verse 152).

The stress in these verses is that you must not only do justice and protect other people’s rights with equity and justice, but also present a unique example and standard of this justice before all mankind. In other words, it is your moral duty as a member of the best community to prove this by your deeds in setting a standard of justice for the rest of the world. It is you who are assigned the duty of protecting other people’s rights and setting an example of impartiality in this respect. In these verses, the word *Qist* is used to convey the sense of equality and fairness of treatment. So that no one’s rights are transgressed or violated in the least. They emphasize fair and just treatment with absolute impartiality with everyone. The use of the word *Qist* assures everyone that Islam not only protects people’s rights justly and fairly but also guarantees absolute impartiality to all.

The Quran also stress that it is the fundamental duty of the Messengers of Allah to protect the rights of all the people and to establish a society in which the rights of all people are guaranteed on the basis of equity and justice.

The Arabic words used in these verses are “اقيموا الوزن، اعدلوا، كونوا قوامين بالقسط” which have been used in the sense of command. “*Amr*” It is a rule of Islamic jurisprudence that *Amr* indicates to the *Wujub*’ of his proven. (Sadr al Shariah; 680). The term *Wajib* means an act the performance of which is obligatory for the subject. In its technical sense, it is an act whose commission is demanded by the lawgiver in certain and finding terms.

All these verses clearly show 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.

They are enjoined to fear Allah only. Thus the Islamic legal ruling for the independence of judiciary, in the sense of impartiality, is *Wajib*’.

As far as the separation of power is concerned, the judiciary may be separated from the executive if it is necessary for the public interest. Allah has empowered the Caliph/Ruler to exercise administrative power in the great interest of the people. The Quran says:

“O ye who believe! Obey Allah, and obey the messenger and those of you who are in authority.” (Quran, chapter 4: verse 59).

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-ihsan, 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 tranquility and punish those who oppose or violate them”.

Mufti Muhammad Shafi (1987:508) while commenting on the verse 26 of chapter 38 views:

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. David 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.

5. Basic Guiding Rules for the Independence of Judiciary

5.1 Supremacy of Judiciary

The primary judicial function of judiciary is to determine disputes, whether between private persons or between a private person and a public authority. Judges must apply the law and are bound to follow Quranic Injunctions, traditions of the Prophet (PBUH) and the decision of the legislature as expressed in statutes. In Islamic State, judiciary is the guardian of the constitution based on the Injunctions of the Quran and Sunnah of the Prophet (PBUH). The judiciary may declare a statute to be unconstitutional and invalid if it is repugnant to the Injunctions of the Quran and Sunnah of the Prophet (PBUH). (Article 203-D of the Constitution of Pakistan 1973). This inherent power of a Judge is derived from the following Quranic verse:

Indeed We revealed the Taurat to Moses, in which there is guidance and light: By its laws, all the Prophets, who were Muslims, judged those who call themselves Jews and so did the rabbis and jurists of law. They were entrusted the protection of Allah's Book and they themselves were witnesses. Have no fear of people; fear Me, and do not sell My revelations for a petty price: those who do not judge by the law which Allah has revealed are indeed unbelievers. (Quran, chapter 5: verse 44)

This verse indicates that if the judiciary performed these functions adequately and delivered its judgments in the light of Islamic law, the independence of the judiciary must be maintained. Supremacy and independence of judiciary demand that a judge must decide a case without force or reprisals whether from the executive, a wealthy corporation, a powerful trade union or a group of terrorists.

In Islamic State judiciary has been given a supreme and vast power and on this regard the position of judges is very significant and respectful and the reason is that the administration of justice consists of the application of the sacred principles of the Shariah in the name of God without any temporal consideration. The eminent Hanafi jurist’s al-Sarakhsi (59) has described the supremacy of the judiciary in these words:

Verily to judge rightfully is the most essential obligations after the belief in Allah and is a worship of the highest rank.

The text explores the facts that judges exercise the authority of Allah and implements His commandments.

It is fundamental principle of Islam that everyone is equal before the law. No one how high so ever is immune from the law. Allah says:

“We have revealed to you the Book with the Truth so that you may judge between people in accordance with the Right Way which Allah has shown you.” (Quran, chapter 4: verse 105).

The main purpose of sending prophets to this world was the impartial administration of justice as Allah Says:

“We sent aforetime our apostle with clear signs and we sent down with them the book and the balance (of right and wrong) so that the man may stand forth in justice”. (Quran, chapter 57: verse 25)

A number of the verses of the Quran indicate that administration of justice had been remained one of the most important duty of the Prophets.

The Prophet Muhammad (PBUH) was the executive head, legislature and Chief Justice of the Islamic State. He did not consider himself to be above the law. He sought to establish this by his own acts and precepts and established an important rule of law that head of an Islamic State could be sued both as a private individual and also in respects of his public acts. During his last Sermon at the *Hajjatul Wadā* the Prophet (PBUH), in fact testified to his love for justice and equality by publically declaring to community that if he owed anything to anyone or had misappropriated any one's property or had done any harm to anyone's life or reputation so he was there for compensation. The audience was amazed and out of the whole assembly there was only one person who claimed some *Dirhams* which were paid promptly. (Abd al Razzaq, 1970: 465,466).

The Prophet (PBUH) was the apostle and very near to Allah. He never committed a sin. He submitted to the supremacy of law which is the supremacy of judiciary.

After the Prophet (PBUH), the *Khulafa-e-Rashidin* (rightly guided caliphs) also followed the same practice. Abu Bakr paid great respect to the supremacy of law and judiciary even he decided a civil case regarding the garden of Fadak (a place in Arabia) against the beloved daughter of the Prophet (PBUH). In a civil dispute between Umar and Ubayy ibn Ka'b both the parties went to Qadhi Shuraih who delivered his judgment against the Caliph and he submitted to his decision. No special changes took place in the time of the 3rd and 4th Caliphs and they too upheld the supremacy of the judiciary.

The supremacy of judiciary also depends upon the competency of judges. If they are competent and well equipped with the knowledge of Islam. They are capable to maintain the supremacy.

5.2 Appointment of Competent Judges

Independence of judiciary can hardly become reality unless competent judges are appointed in the judiciary. The role of a judge is very crucial and critical because he has the power to award proper punishment to the criminals and also to decide civil cases on merits.

To ensure full and impartial justice according to the law of Islam in consonance with the will of Allah, qualified, powerful and fearless persons should be appointed as judges. Because a position of authority in the judiciary is a trust for the benefit of public. The person appointed to it is a trustee and is accountable for the proper performance of the duties attached to such trust. Consequently, a wise person will strive his maximum to avoid such a responsibility and will never ask for it. Because if he is not successful in the performance of the duties attached to it will cause him troubles during this life as well as in the life hereafter, the following event reported by Abu Dhar support this view:

I said to the Prophet (PBUH) O, messenger of Allah, will not you appoint me to a public office? The Prophet (PBUH) stroke my shoulder with his hand and said, “O, Abu Dhar, You are weak and this responsibility is a trust, on the Day of Judgment, it will be a cause of loss of honour and ignominy except for those people who will have accepted it with all the responsibilities attached to it and would have fulfilled those responsibilities properly. (Sahih Muslim, hadith book)

Muslim jurists have thoroughly discussed the question of the competency and qualifications that must be possessed by a person who holds judicial positions in their distinguished works on the Islamic law.

5.3 None Interference of Executive and Legislature in Judicial Matters

Judges can do justice only when they are absolutely autonomous to decide according to their own conscious and comprehension. It necessitates that there should neither be any interference in the affairs of the office of a judge nor should there be any sort of influence over the decision-making authority of judge from anybody. If the judiciary is under the influence of executive or legislature, it will hardly be able to do justice.

A judge who is apprehensive about the adverse repercussions of his decisions can hardly be effective in translating the ideals of legal theory into day to day decisions. Similarly, an effective mechanism for judicial independence cannot be expected to function in an environment where rulers and governors have the power not only to appoint and dismiss judges but ever have the power to exercise judicial powers themselves.

The Prophet (PBUH) was the executive head as well as the Chief Justice of the Islamic State. He had strongly opposed the interference of any person, may be very close to him, in the judicial proceedings. A number of his judicial decision and his teachings prove the complete impartiality in his judgments.

After the Prophet (PBUH), his pious Caliphs also maintained the same practice. The Islamic history is witness to the fact that the Muslim judges had always enjoyed complete freedom and refused the interference of executives. Umar ordered his governors not to interfere in the proceedings of the judiciary. Umar and Ali both the Caliphs submitted to the decisions of their judges passed against them. (Al- Wakī, 108,109).

It is clear that judiciary had always been independent and free from the influence of the executive. The Muslim judges never yield to any sort of influence or interference into their authority from their executive and the Muslim rulers were also conscious about the independence of their judiciary. However, the rulers can issue general rules for the guidance of the Qadhis (judges) as done by the early caliphs. This is not against the independence of judiciary.

5.4 Head of the State Having no Immunity

Islam does not allow any discrimination because of race, colour, language, and religious affiliation or social economic status. All the human beings, for the purpose of the enforcement of law, are equal in the sight of Allah. In the same way, they must also be equal before a judge who decides their disputes even if one of the parties to litigation is head of the state and his opponent is his subject. The companions of the Prophet (PBUH) used to observe strictly the equality among the litigants.

Once there was a dispute between Ubai Ibn Ka'ab and Umar the Caliph. Zayd bin Harithah was the judge. Zayd spread carpet for Umar and during proceeding requested Ubay Ibn Ka'ab to excuse the Caliph from oath. Umar noticed this injustice and sworn and said:

“He would never let Zayd to be a judge until Umar and an ordinary Muslims are treated equal by him”. (Al-Waki, 108,109).

This event indicates that Muslim rulers used to realize and respect the independence of their judges. And they were so conscious about the integrity of their judges that if they showed some undue respect or favour to their rulers, they used to resist such distinctive treatment. Another famous case is that of Ali versus a Jew where the judge decided the case against the caliph. And the Jew got so impressed by the impartiality of the Islamic judiciary that he embraced Islam saying “*Amir al-Mu'minīn* brought me to his judge and his judge decided against him, I stand witness that this faith is the true one and I bear witness that there is no God except Allah and Muhammad is his Apostle.”(Waki, 200).

5.5 Judge Must be free in passing any Judgment

The judiciary in the Islamic System enjoys full freedom and work quite independently without being influenced by any quarter. According to Ameer Alī (1975: 62) the administration of justice was perfectly equal and the Caliphs set the example of equality by holding themselves amenable to the orders of the legally constituted judges

The judiciary was free in passing judgments. The first Caliph Abu Bakr, his successor Umar bin Khattab, third Caliph Uthman, Ali the fourth Caliph and other companions have all adjudicated cases on the basis of their personal reasoning (*Ijtihad*). They disagreed with one another, but such disagreements have, on no occasion, affected the validity of their judicial decisions. None of the leading companions have reversed on ground of mere difference of opinion and personal judgment.

A case is cited in particular which occurred during the caliphate of Umar. It is reported that the Caliph was approached by one of the parties in the dispute already adjudicated by two prominent companions Ali bin Abi Talib, and Zayd Ibn Thabit. When the Caliph heard the nature of their decision, he said that had he himself been the judge, he would have decided differently. This remark invoked the response; what is there to stop you? You are the leader; to this Umar replied; Had it been a question of applying the book of Allah and the Sunnah of his Messenger, I would have intervened, but this is not the case and the decision is based on personal opinion in which we all stand on the same footing. (Al Maqdasi, 1981: 180).

The Caliph thus refused to review a decision, which he thought was based, not on the textual ruling of the Quran or Sunnah, but on juristic construction and personal *Ijtihad* of competent judges.

It is thus concluded that judges are free in their judicial decisions to pass any judgment based on personal *Ijtihad*, this principle uphold the immunity of *Ijtihad* against arbitrary intervention and review.

References

- Abd al Razzaq. (1970). *Al Mussanaf*. Vol.9. Beirut: Al Maktab al Islami.
- Al Fudhailat, Jabr Mahmood. (1991). *Al Qadha fi al Islam wa adab al qadhi*. Omman: Dar Ammar lil nashr wa al Tauzee.
- Al Qushari, Muslim Ibn Hajjaj. (n.d.). *Al-Sahih*. Beirut: Dar ihayaal turath al arabi.
- Al Wakī, Muhammad Ibn Khlaf. (n.d.). *Akhhbār al-qudhāt*. Vol.1. Beirut: Ālam al Kutub.
- Al-Fasi, Muhammad Abd al-Hayy. (n.d.). *Muqaddimah al-tratib al-Idariyah*. Beirut: Darul arqam littebaah.
- Ali, Ameer. (1975). *History of Saracen*. Karachi: National Book Foundation.
- Al-Maqdasi, Abd Allah Ibn Qudamah. (1981). *Al-Mughni*. Vol.6. Riyadh: Maktabah al-Riyad al-hadithah.
- Al-Sarakhsi, Muhammad Ibn Ahmed. (n.d.). *Al-Mabsut*. Vol.16. Beirut: Dar al Ma'rifah.
- Al-Turaiifi, Nāsir aqil Ibn jasir. (1986). *Al-qadha' fi 'ahd 'Umar*. Vol. 1. Jeddah: Darul madani.
- Al-Zubaydi, Muhammad Murtadha. (1966). *Taj al-'arus*. Beirut: Dar al Sadir.
- Amim al Ihsan, Muhammad. (1986). *Qawā'id al Fiqh*. Lahore: Sadaf Publisher.
- Asqalani, Ibn hajar. (1959). *Fath al-Bari*. Vol.3. Egypt: Matbaa al salafiah.
- Asqalani, Ibn hajar. (n.d.). *Al-Isabah*. Vol.3. Beirut: Dar al sadir.
- Audah, Abd al Qadir. (n.d.). *Al-Tashrī' al-Janāy' al-Islami*. Vol.1. Beirut: Darul Kitab al arabi.
- Bukhari, Muhammad Ibn Ismail. (2001). *Al-Jami' al-Sahih*. Vol.4. Beirut: Darul Turuq al Najat.
- Dar al qutni, Ali Ibn Umar. (1892). *Al-Sunan*. Vol. 4. Delhi: Al matbaa al ansariah.
- Guraya, Muhammad Yusuf. (1982). *Judicial system under the Prophet (S.A.W) and the first two pious caliphs*. Lahore: Anjuman Himaya-e-Islam.
- Haithami. (n.d.). *Majma' al Zawā'd wa Manba' al Fawa'd*. Vol.4. Beirut: Dar al Kitab al Arabi.
- Hattab, Muhammad Ibn Muhammad. (1911). *Mawahib al Jalil*. Vol.6. Egypt: Matba'ah al Sa'adah.
- Ibn Abidin, Muhammad Amin. (1966). *Rad al Muhtar*. Vol.5. Cairo: Mustafa al Babi al Halabi.
- Ibn Khaldoon, Abdur rahman. (n.d.). *Muqaddimah*. Beirut: Dar ihya al turath al arabi.
- Ibn Sa'd, Muhammad Sa'd. (1957). *Al-Tabaqa al kubrat*. Vol.2. Beirut: Daru al sadir.
- Kindy, Muhammad Ibn Yusuf. (1908). *Kitab al-Wulat wa Kitab al-Qudhat*. Beirut: Matbaah Al aaba al yasuiyin.
- Mawardi, Ali Ibn Muhammad Ibn Habib. (1966). *Al-Ahkām al-Sultaniyya*. Cairo: Matbaa Mustafa al babi al halabi.
- Mudkur, Muhammad Salam. (1960). *Al-Madkhal il' il fiqh al Islami*. Cairo: Dar al Nahadhat al arabiyyah.
- Muslehuddin, Muhammad. (1988). *Judicial System of Islam*. Islamabad: International Islamic University.
- Sadr al Shariah, Ubaidullah Ibn Masud. (n.d.). *Al Taudhih*. Vol.2.
- Shafi, Muhammad, Mufti. (1987). *Ma'ārif al-Quran*. Vol.7. Karachi: Idarah Maarif.
- Shetreet, Shimon. (1976). *Judges on trial*. North Holland Publishing Co.
- Tamāvie, Sulyman Muhammad. (1997). *Al-Sultat al-Thalath*. Cairo: Dar al-Fikr al Arabi.
- The Constitution of Pakistan. (1973). Article 203-D.