

Concept of the Separation of Powers: A Look from the Shariah Point of View

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Abstract

The separation of powers is the division of the government of a state into different branches, each with its own independent powers. The purpose of a system of separation of powers is to prevent the concentration of power by providing checks and balances. This paper aims to investigate this concept from the Shariah point of view. To achieve this, the research adopts a qualitative research methodology. It is found that the principle of the separation of powers in Islamic Shariah was not clearly present at the time of the Prophet (S.A.W), as he held all three powers. After the Prophet's (S.A.W) death, the principle became clearer in the era of the caliphate, especially in the era of Caliph Omar ibn al-Khattab, who separated the judicial authority from the other state powers. However, the books of Islamic history are full of examples showing that the judges throughout the territory of the Islamic caliphate worked without interference from the rulers, even the rulers themselves were appointed by the judges and appeared before the courts. From such examples, the idea of the separation of powers has been derived.

Keywords: Separation of Powers, Shariah, Islam, Caliphate, Constitutionalism.

Introduction

The separation of powers is the division of the government of a state into different branches, each with its own independent powers and responsibilities, so that the powers of one branch do not conflict with those of other branches. The typical division into three branches of government, sometimes referred to as trias politica, comprises a legislative, an executive and a judiciary. It contrasts with the separation of powers in monarchies, but also in parliamentary and semi-presidential systems, in which there can be overlaps in the composition and functions of the various branches, particularly the executive and legislative branches.

The purpose of a system of separation of powers is to prevent the concentration of power by providing checks and balances. The separation of powers model does not always aim to create a completely limited government. It is often inaccurately and metonymically equated with the principle of trias politica. While the trias politica model is a common form of separation of powers, there are governments that have more or less than three powers.

Aristotle first mentioned the idea of a "mixed government" or hybrid government in his work Politics, in which he referred to many of the constitutional forms in the city-states of ancient Greece. In the Roman Republic, the Roman Senate, the consuls and the assemblies were, according to Polybius, an example of mixed government. It was Polybius who described and explained the system of checks and balances in detail.

This paper examines this concept from a Shariah perspective to determine whether the Shariah also supports this concept.

Concept of the Separation of Powers

The principle of separation of powers is considered one of the most important constitutional principles, enabling the three authorities to exercise their statutory functions without interference from other powers (Mojapelo 2013). In popular constitutional theory, it is assumed that all state powers are divided among three branches of government: The legislative branch with the power to make laws, the judicial branch with the power to interpret laws, and the executive branch with the power to implement laws. In a modern constitutional state, all three powers must function equally and independently of each other (Rafeeq, 2023). In short, the principle of separation of powers can be defined as the model that divides the government into different branches, each of which has separate and independent powers (Scalia 1983). By having multiple branches of government, this system helps to ensure that no one branch is more powerful than another (Mojapelo, 2013).

The separation between the legislative and executive branches is clear: the prime minister and the other ministers, the heads of the respective departments, are just as much the legislature as the members of parliament. In administrative law, the idea of the delegation of powers, according to which the basic framework is determined by parliament and the detailed regulations are created by the departments concerned themselves. Making the government accountable to parliament also violates the separation of powers and division of responsibilities. Removing the government by majority vote in parliament is not compatible with the theory of separation. Moreover, the role of the legislature/parliament in almost all states remained limited to reviewing the decisions of the government (Rafeeq, 2023).

The classical formulation of the separation of powers "is most often explained by its tendency to prevent tyranny through the dispersion of powers". Ratnapala notes, however, that "the absence of tyranny is an essential but not sufficient condition for constitutional government, as the democracies of the classical world discovered," and that an additional challenge for the constitutionalist seeking to protect the separation of powers is to find ways to protect democracy from "capture by factions. Protection from the tyranny of majorities, in this sense, is an important element of the protection that the doctrine of separation of powers provides in practice (Ratnapala, 2004).

According to Ratnapala, the doctrine of the separation of powers comprises two different concepts, namely the "methodological thesis" and the "diffusion thesis". The methodological thesis "refers to the nature of each power and the manner in which the power must be exercised" and "holds that the legislative, executive and judicial powers each have their own character which requires the power to be exercised in a manner appropriate to that power". In contrast, the diffusion thesis "is concerned with the distribution of power" and states that "the rule of law and constitutional government are secured only when the legislative, executive and judicial powers are vested in different agencies of the state which are to a substantial degree independent of each other". Ratnapala explains that neither thesis is sufficient in itself, but rather both are necessary to protect the benefits to be achieved by the introduction of a constitutionally enshrined separation of powers (Ratnapala, 2004).

Separation of Powers from Islamic Perspective

Taking the historical caliphate as a basis for judgement, it appears that the head of state holds all political power and that the separation of powers, which is a requirement of political democracy, has no basis in an Islamic polity. The proponents of this view claim that the separation of powers is alien to the Islamic system (Kamali, 2014). The principle of the separation of powers in Islamic Shariah was not clearly present at the time of the Prophet (S.A.W), as he held all three powers. After the Prophet's (S.A.W) death, the principle became clearer in the era of the caliphate, especially in the era of Caliph Omar ibn al-Khattab, who separated the judicial authority from the other state powers. Today, Islamic scholars and writers are divided on the permissibility of the principle of separation of powers. There are proponents of this principle in the Islamic political system who refer, among other things, to the actions of the Prophet, who consulted with others before making a decision. Consultation, rather than the assumption of full authority and decision-

making power, is an important constitutional principle. There are also Islamic writers and scholars who reject this principle as un-Islamic and believe that it addresses problems that do not exist in the application of the Islamic system. They stated that the Islamic system is based on the unity of the nation and the unity of interests and thought, and the division of powers does not fit with this unity (Abu-Darwish, 2017).

However, Wahba al-Zuhaily has established that the separation of powers in an Islamic community is maintained not only in functional terms, but as a matter of principle. Zuhaily wrote in a comparative note:

Islam validates the principle of separation of powers. This is because legislation in Islam ensues from the Qur'an and Sunna, consensus (ijmā') of the umma, and ijtiḥād. All of these are independent of the head of state- nay but he is bound by them and by the conclusions drawn from them. The principle of ijmā' in Islam manifests the will of the people ... Both the Islamic and western democracies reject despotism and consider the people as the locus of authority in political and government affairs (Zuhaily, 2006).

As far as the separation of powers is concerned, the judiciary can be separated from the executive if this is necessary for the public interest. Allah has authorised the caliph/ruler to exercise administrative power in the larger interest of the people. The Qur'an says: "O you who believe! Obey Allah and obey the Messenger and those who are in authority among you." (Qur'an, chapter 4: verse 59). The ruler is thus authorised to act in the name of the prophet (S.A.W) and to exercise his power in the great interest of the public. Legal scholars have therefore established the legal maxim that the rule of a ruler over his subjects is based on their welfare. (Amim al-ihsan, 1986: 70).

A contemporary Egyptian scholar, 'Abd al Qadir Audah (Audha, 78), says: "And it is at the discretion of the ruler to declare unlawful any act which he deems harmful to peace and tranquility under the given circumstances. However, a ruler has the power to establish rules and laws to maintain peace and tranquility and to punish those who oppose or violate them".

Mufti Muhammad Shafi (1987:508) comments on verse 26 of chapter 38 as follows: The question whether the judicial power should be separated from the executive power or both can be placed in one hand? Islam has not prescribed any particular legal rule in this regard but has left the question to the discretion of the caliph. If he feels that the executive is very honest and trustworthy, then both bodies can be placed in one hand, and if he feels that the executive is not so honest and trustworthy, then he can order that the judiciary be separated from the executive. David was the Messenger of Allah; he was the head of both the executive and the judiciary. He passed judgement on disputes. The rightly guided caliphs were heads of the executive and at the same time chief judges who passed judgement. This system was later changed, and the judiciary was separated from the executive (Ata ur Rehman et al. 2013).

In the 8th/9th century A.H., a separate class of legal scholars and jurists was established. This facilitated the independence of religious and legal scholars ('*ulamā'* and '*fuqahā'*') and protected them from the dominance and control of secular leaders (caliphs, sultans and shahs). In this way, a true separation of powers was maintained, limiting the discretion of the rulers and protecting the people to a great extent from arbitrary control. Hallaq states: "It was this reality [of separation of powers] – which made the consent of the men of law indispensable to the actions of politics – that gave formative Islam what we now call the rule of law." In this sense, it can also be said that the emergence of the concept of the rule of law rode on the back of the separation between "church" and "state", as the authority of the '*fuqahā'*' and '*ulamā'*', independent of the political leaders, only gained legitimacy among the people/citizens through the increasingly secular nature of the governors (Hallaq, 2003, 1708).

Thus, the separation of powers was specified to the effect that the judge/*qāḍī* had the task of settling disputes, passing judgement and administering the law. The caliph/ruler played a minimal role in this quasi-judicial administrative function. However, the caliph was not above the law and did not have the authority to issue laws or judgments. The caliph was himself subject to the laws and customs of the land as they had been handed down from previous generations and recorded by precedent in the so-called sunan. From the

8th to the 9th century, law was therefore clearly the domain of the judges and scholars, not the caliphs/rulers. The rulers exercised extensive executive powers and could issue supplementary regulations to the shariah, but their legitimacy and survival depended on the support of the scholars, who preserved the only law that enjoyed the "civic reverence" of the people (Balala, 2023). Whereas the caliph had previously been both ruler and judge and had extensive knowledge of Islam, the roles were now separated, partly because the judges and scholars had developed their own identity of piety, upright character, and ascetic inclinations, which earned them the respect of the people. Judges were usually, and sometimes famously, independent of political control (Abou El-Fadl, 2004, 16).

The books of Islamic history are full of examples showing that the judges throughout the territory of the Islamic caliphate worked without interference from the rulers, even the rulers themselves were appointed by the judges and appeared before the courts. From such examples, Kamali derived the idea of the separation of powers and thus that of "Islamic constitutionalism". The fact is that the idea of the separation of powers is not fully implemented in democratic states it is because, as already mentioned, all state powers, although they have different responsibilities, are interdependent. The separation of powers between the branches is merely a matter of naming; it is based on the specialization of each branch. Each branch is assigned certain powers based on its expertise in that area; otherwise, it has no monopoly on it. This dependence opens the door to the violation of the essence of the theory of separation (Rafeeq, 2023).

According to some scholars, there is no separation of powers in Islam because there was a fusion of powers (legislative, executive and judicial) at the time of the Prophet. However, another group argues with a stronger argument that such assumptions are invalid because they only apply to the Prophet (S.A.W) (Gjorshoski et al. 2020). Secondly, there are several Qur'anic verses and hadiths that suggest the judges (*qadi*) have been assigned a role to fulfill this function. For example, in Surah Al Ma'idah (The Table), Allah warns those who are entrusted with judging: "And those who do not judge according to what Allah has revealed are disbelievers!" (Qur'an, 5:14). Thirdly, he also refers to the extensive empirical experience of the Islamic states (caliphates and sultanates) in which the institution of the judge or *qadi* was known. The second Rashidun Caliph Omar was the first Islamic leader who started appointing *Qadi* to remove the obligation of personal arbitration in disputes. Thereafter, the Islamic State adopted the custom that the ruler had to appoint a *Qadi* to administer justice. And finally, for Muhammad Hamidullah, the ruler of the Islamic State (caliph, i.e. the executive) can never be a judge in his own dispute, except in the case of the Prophet Muhammad (S.A.W) (Velic 2009, 644).

There is, of course, no reason why contemporary shari'ah thinkers cannot take up the challenge of elaborating a position regarding the separation of the various branches of government. One can refer to the political theory of Abū l-Hasan 'Alī al-Māwardī (972 – 1058 CE), which in a sense represents the "political sphere" as understood by the traditional shari'ah. In his *Tadwīn ad-dustūr al-islāmī*, Abū l-A'ālā al-Mawdūdī recognizes an existing but "unwritten" Islamic constitution, and in his *al-Qānūn al-islāmī wa-turuq tanfīdhihi* he explains different types of laws (constitutional and otherwise) that Islamic legislators must draft. Abū l-A'ālā al-Mawdūdī (1970) paves the way for a discussion on the importance and role of parliament ("legislative assembly") in the Islamic order, as he takes the decisive step by advocating a popular government in which people can freely elect their representatives. Adapting an ancient term to modern usage, Abū l-A'ālā al-Mawdūdī often refers to the members of parliament as "those who resolve and bind" (*ahl al-hall wa-l-'aqd*). He raises the question of what position they have, whether they serve the caliph merely as advisors or whether the caliph is "bound" by their decision. His answer is: "We have no choice but to subject the executive to the majority decision of the legislative council" (Elliesie, 2010).

According to Abdelaal (2011), the best way to serve the separation of powers in the Islamic system of government is to ensure that an infallible person occupies the highest position in the political hierarchy. Once such a person occupies the highest governmental post, he will naturally serve as the fulcrum of unity and coordinator of the various powers and resolve any friction, differences and discord between the powers. Moreover, since it is immune to any form of selfishness, profit-seeking and partisanship, it will never be under the influence of ungodly motives and intentions. This is exactly what happened in the first Islamic government, the "era of the Prophet Muhammad (S.A.W)." The infallibility of Prophet Muhammad

(S.A.W) meant that there was no impeachment process or the principle of separation of powers. As an infallible messenger who ruled on the basis of Allah's revelations, Prophet Muhammad (S.A.W) was immune to error. Therefore, neither tyranny nor dictatorship was to be expected from Him. Consequently, there was no need for a principle of separation of powers (Abdelaal, 2011).

In the early days of the Islamic state, Prophet Muhammad (S.A.W) had all power in his hands; he was the governor, the legislator and the judge. Indeed, this was a reasonable consequence of his infallibility. As we know, the principle of separation of powers was developed to combat dictatorial governments and to preserve each authority's sphere of operation. Since Prophet Muhammad (S.A.W) was infallible, he was not susceptible to tyranny or dictatorship, so there was no need for the principle of separation of powers. For the same reason, and as a normal consequence, the principle of impeachment was also unnecessary. When Prophet Muhammad (S.A.W) established the first constitution in the whole world called the "Constitution of Al-Medina", this constitution stated that Prophet Muhammad (S.A.W) is the formal legislator in the Islamic land, the one who instructs Muslims how to fulfill Islamic laws, and the one who resolves all disputes between Muslims. However, the infallibility of Prophet Muhammad (S.A.W) should only apply to actions that He took based on a revelation from God. In other situations where he tried to find a solution or a decision, he applied the so-called shura principle. He discussed the matter with the Muslims and listened to their opinions in order to reach a fair conclusion, and Islamic history is full of incidents in which Prophet Muhammad (S.A.W) excluded his own opinion and adopted one proposed by another. The era of infallibility ended immediately after His death. Therefore, every governor is prone to error. With the end of infallibility, there were numerous changes in the political systems of Islamic countries. The most important changes were the introduction of the principle of separation of powers and the principle of impeachment of the president (Abdelaal, 2011).

After Prophet Muhammad (S.A.W) and during the era of his companions and the Islamic caliphs, the principle of the separation of powers found its place in the Islamic political system. In Islam, this principle is based on an organic separation between the legislative power and all other political authorities, from the president and parliament to the administrative authorities. The Islamic governors, be they Companions or caliphs, held executive power. They sent judges to the various Islamic states to settle disputes between people and exercise judicial power. Legislative power was vested in a body called "*Ahl al Hel w al Aqed*." This body was responsible for drafting the legislation and laws of the Islamic state, and the governor had to consult its members before making decisions on important matters. To date, the independence of legislation from the state and its political authorities prescribed by Islam has not been achieved by any democratic system, ancient or modern. The crucial point is that, unlike all ancient or modern legal systems, the Islamic state is the only one that has declared that the law does not express its will. Unlike modern legal systems where the president can change laws, in Islam there is no ruler who enacts laws (Abdelaal, 2011).

It is important to emphasize that after Prophet Muhammad (S.A.W), the Muslims tried to select from among them a person most similar to the infallible Prophet Muhammad (S.A.W). Apart from having the necessary qualifications, the president in Islam should have the highest level of piety and sense of justice after the infallibility. This person is the pivot of the unity of society and government, the coordinator of the three powers and the observer of the performance of public servants. He is the overall head of the government and the most important decision-maker. To prevent those in power from abusing their authority, Montesquieu and others have put forward the theory of the separation of powers, which is generally accepted and effective to a certain extent. However, it does not solve the main problem. If the government officials in the three branches do not have true piety and moral integrity, corruption in society and government will also mutate and permeate the three branches of government. In this case, if we find that corruption in the executive branch has declined, it is because it has been curtailed and is now only one of the three powers. However, we should not believe that corruption has decreased in the government, because it has permeated both the judiciary and the legislature, which is usually subordinate to the executive. Therefore, the only way to prevent corruption and the interference of one power in the affairs of other powers is that we should put more emphasis on piety and moral virtue. Any administrator or official who has a certain level of responsibility must have a certain level of piety commensurate with the importance and level of his position. Of course, the one who holds the highest office of government must be the most pious of all men, officials

and administrators. Likewise, he must be superior in knowledge of the laws and administration. Thus, if there are shortcomings and deficiencies in the three powers, the matters will be put in order through the exalted efforts and blessings of the leader and the problems will be gradually resolved (Abdelaal, 2011).

After the death of Prophet Muhammad (S.A.W), the Islamic leaders realized that in order to maintain the stability and continuity of the Islamic state, the power of governance should be distributed among several authorities and should not be concentrated in one person or a single authority. In restructuring the Islamic state according to the new circumstances, the flexibility of Islamic rules helped Islamic leaders to adapt them to the new circumstances. When the Islamic caliphs decided to divide the powers among several authorities, they did not encounter any contradiction or resistance from the Islamic rules (Abdelaal, 2011).

The idea of the separation of powers was implemented in the Islamic state in the same way as in any secular modern state. In other words: After Prophet Muhammad (S.A.W), the Islamic state was divided into three branches of government - executive, legislative and judicial” - thus making the first attempt to adopt the well-known constitutional principle of separation of powers. But not only that, Islam went further and established the idea of cooperation between the branches of government and ruled out the idea of strict separation. Like any secular legal system, the Islamic caliphs divided the Islamic state into three branches of government and assigned specific officials to carry out their duties as derived from the Quran and Sunnah. The Islamic leaders recognized that the task of implementing laws and decrees required an executive with sufficient power to carry out this task successfully. With this in mind, the Islamic constitutional aspects laid down the idea that the executive power should be vested in the powerful president and his cabinet. In the Islamic state, the caliph “president” is authorized to exercise some powers. The caliph is authorized to select the members of his cabinet, appoint the most important officials of the state, and carry out the will of the legislature. The Islamic state has recognized that one of the most important pillars of government is the legislature. Therefore, it vested legislative power in an elected body, which serves as a parliament in modern legal systems and is known as *Ahl al Hel w al Aqed*. The members of this body sit together and are authorized, after discussion and deliberation, to enact laws that regulate and determine certain issues in Islamic society. After the death of Prophet Muhammad (S.A.W), the power to settle disputes between people was given to a number of people who were appointed by the caliph and then sent to the various Islamic cities and communities. In Islam, a judge should have certain qualifications, for example, a person who has sufficient knowledge of the Quran, Sunnah and Qiyas, who enjoys a certain level of acceptance and respect among people, who is able to listen and analyze complicated issues, and who has a strong sense of justice can be appointed as a judge (Abdelaal, 2011).

Islam, even before any modern legal system, excluded the idea of strict separation between the branches of government and allowed a kind of cooperation between the three branches, in the belief that this cooperation will contribute to a better administration of the functions of government. This cooperation can be derived from the relationship between the executive and legislative branches. In/ the Islamic state, the caliph can discuss with the committee of *Ahl al Hel w al Aqed* about the enactment of certain laws if he thinks that they will have a bad effect or impact. In addition, the caliph may write to this committee for advice on certain legislative issues, as they are the most knowledgeable people regarding the Qur’an and Sunnah, which are considered the constitution of the Islamic state. A type of this cooperation is also found in the relationship between the executive and the judiciary. As mentioned earlier, the caliph has the right to appoint the judges and send them to the Islamic cities. On the other hand, the caliph can seek the opinion of the judges on certain new issues concerning the better implementation of the laws after some new situations have arisen as a result of constant development and progress. Moreover, the Islamic political theory is clear that it does not emphasize Montesquieu’s strict separation of powers between the different organs of the state. However, the independence of the judicial authority under Islamic law is understood to mean that the caliph can order a retrial if he believes that injustice has been done. Western political theory places great emphasis on separation or checks and balances. In practice, however, neither strict separation nor checks and balances work well in most liberal democracies. On the other hand, Western constitutional theory allows the head of state to pardon or excuse the accused, but under Islamic law the right to pardon does not exist. Thus, the power of the caliph to order a retrial serves as a fair alternative to the right to pardon (Abdelaal, 2011).

Findings

1. The principle of separation of powers is considered one of the most important constitutional principles, enabling the three authorities to exercise their statutory functions without interference from other powers. In popular constitutional theory, it is assumed that all state powers are divided among three branches of government: The legislative branch with the power to make laws, the judicial branch with the power to interpret laws, and the executive branch with the power to implement laws.
2. The principle of the separation of powers in Islamic Shariah was not clearly present at the time of the Prophet (S.A.W), as he held all three powers. After the Prophet's (S.A.W) death, the principle became clearer in the era of the caliphate, especially in the era of Caliph Omar ibn al-Khattab, who separated the judicial authority from the other state powers.
3. Wahba al-Zuhaily has established that the separation of powers in an Islamic community is maintained not only in functional terms, but as a matter of principle.
4. The separation of powers was specified to the effect that the judge/*qāḍī* had the task of settling disputes, passing judgement and administering the law. The caliph/ruler played a minimal role in this quasi-judicial administrative function. However, the caliph was not above the law and did not have the authority to issue laws or judgments. The caliph was himself subject to the laws and customs of the land as they had been handed down from previous generations and recorded by precedent in the so-called sunan.
5. The books of Islamic history are full of examples showing that the judges throughout the territory of the Islamic caliphate worked without interference from the rulers, even the rulers themselves were appointed by the judges and appeared before the courts. From such examples, Kamali derived the idea of the separation of powers and thus that of "Islamic constitutionalism".
6. The best way to serve the separation of powers in the Islamic system of government is to ensure that an infallible person occupies the highest position in the political hierarchy. Once such a person occupies the highest governmental post, he will naturally serve as the fulcrum of unity and coordinator of the various powers and resolve any friction, differences and discord between the powers.

Conclusion

The separation of powers is the division of the government of a state into different branches, each with its own independent powers and responsibilities, so that the powers of one branch do not conflict with those of other branches. The typical division into three branches of government, sometimes referred to as *trias politica*, comprises a legislative, an executive and a judiciary. It contrasts with the separation of powers in monarchies, but also in parliamentary and semi-presidential systems, in which there can be overlaps in the composition and functions of the various branches, particularly the executive and legislative branches. The purpose of a system of separation of powers is to prevent the concentration of power by providing checks and balances.

The principle of the separation of powers in Islamic Shariah was not clearly present at the time of the Prophet (S.A.W), as he held all three powers. After the Prophet's (S.A.W) death, the principle became clearer in the era of the caliphate, especially in the era of Caliph Omar ibn al-Khattab, who separated the judicial authority from the other state powers. The books of Islamic history are full of examples showing that the judges throughout the territory of the Islamic caliphate worked without interference from the rulers, even the rulers themselves were appointed by the judges and appeared before the courts. From such examples, Kamali derived the idea of the separation of powers and thus that of "Islamic constitutionalism". The separation of powers was specified to the effect that the judge/*qāḍī* had the task of settling disputes, passing judgement and administering the law. The caliph/ruler played a minimal role in this quasi-judicial administrative function. However, the caliph was not above the law and did not have the authority to issue laws or judgments. The caliph was himself subject to the laws and customs of the land as they had been handed down from previous generations and recorded by precedent in the so-called sunan. The best way to serve the separation of powers in the Islamic system of government is to ensure that an infallible person occupies the highest position in the political hierarchy. Once such a person occupies the highest

governmental post, he will naturally serve as the fulcrum of unity and coordinator of the various powers and resolve any friction, differences and discord between the powers.

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