



A study on the boundaries of powers independence in the legal system of the Islamic Republic of Iran

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ABSTRACT: The purpose of this paper is to explore the boundaries of powers independence in the legal system of the Islamic Republic of Iran. Theory of powers separation is one of the basic issues of political thought and political philosophy, although it is discussed in the legal opinions and public law. It has been studied in terms of the relationship between the society and the power and the government institutions and it is related to the political sociology. There are several reasons for the proposal of powers separation theory. The history of the proposal of this discussion in ideas and political philosophy can be seen in the works of Aristotle. But this theory was developed by the writings of John Locke and with the extension of this theory by Montesquieu it became a prominent theory in politics and made Montesquieu known as the father of powers separation. Theory of powers separation is a modern phenomenon and concept and has its requirements. In the Constitution of the Islamic Republic of Iran the name of so-called separation is not mentioned, although its principles are based on the separation of powers. Article 57 of the Constitution of the Islamic Republic of Iran says the (legislative, executive and judicial) powers are independent of each other. If only there was this statement, the absolute separation could be concluded. The paragraph 7 of Article 110 of the Constitution says, "Resolving the conflict and regulating the trilogy powers relations" is undertaken by the Leadership; that is to say it pointed to the other power. What can be understood from the previous discussions is that in general the absolute separation of powers has no place in the Constitution. However, what can be found from the independence of powers is that in Iran there is a relative separation between the three powers (and the independence of powers means the relative separation). According to Article 57 of the Constitution, this principle has accepted the legislative, executive, and judiciary separation system, relatively and in a particular method. On the basis of this fact, each power is in charge of an affair among the country administration affairs.

Keywords: Powers separation- Powers independence- Legislative power- Executive power-

INTRODUCTION

To study the legal structures, specifically from the fundamental rights domain, the first and most important and perhaps the only way is to refer to the constitution of the system. This is particularly impressed in the dominant political system of our country because of the special nature of the system and enjoying the dual prohibit of divine – public legitimacy. We have seen

many times in the political debates and the intellectual context some affairs are attributed to the Constitution that have no compatibility with the text and spirit of the Constitution. On the other hand, a great ignorance is accomplished in many of the Articles of the Constitution- that are mainly due to the dominant of Islamic laws and the Supreme Leader¹.

How to interpret and interact with Article 57 of the Constitution of the Islamic Republic of Iran is one of the most important aspects of this speech. This Article states that "the dominant powers in the Islamic Republic of Iran include: legislative power, executive power and judiciary power that are applied under the rule absolute Jurisdiction and Leadership of the Ummah in accordance with the future principles of this law. These powers are independent of each other". It is clear that the powers being elite and detached from each other will have meaning within the framework of powers separation theory. Although powers separation theory is sufficiently complex and has diverse concepts, the explanation of the concept of powers independence or powers being elite and detached outside the scope of this theory is impossible. Because in this case the concept of independence will convert into a non-transparent and non-functional concept in practice. Accordingly, this research is arranged based on the investigation of boundaries of powers independence in the legal system of the Islamic Republic of Iran.

Definition of powers separation

The separation of powers means the assignment of the main government powers, namely the legislative, executive and judicial powers to numerous and varied institutions. The main purpose of the powers separation, as one of the pillars of democracy, is to prevent tyranny and dictatorship as well as power concentration and monopoly, in other words freedom¹.

Separation of powers in the constitutionalism Constitution

First time in the history of Iran the separation of powers was named legally and officially after the Constitutional Revolution triumph at Article 27 of Amendment of the constitution. In this Article it is established that "the country powers split into three poweres. The first is the legislative that is special for enactment and refinement of laws... the second is judiciary and judgment power that include discerning the rights and the third is executive power that is special for the King, that is to say the laws and ordinances are executed by the ministers and civil servants ...".

Constitution and its amendments adopted in 1906 and 1907 are the result of our ancestors' endeavors and efforts. They are specially the consequence of the dedication of liberals at the beginning of constitutional and the founders of freedom and equality seeking thought movement of Iranian people. Iranian and foreign historians in many Iran history books have described it in detail and have spoken about the incidents. Although it is undeniable that the law and history have a long association and indeed history is the creator of law. As it is quoted no science is based on the past traditions and customs as much as the law is and the study of history is one of the best means to establish the true meaning and spirit of the law ².

Although, we are not supposed to describe the constitutional history, in this context two issues, namely the reasons for revolution and the process of drawing up and adopting of the Constitution and its amendments (the constitutionalism Constitution) should be investigated. Taking these two issues into account completely indicates the importance, necessity and philosophy of Constitution legislation and in particular the principle of separation of powers.

Islamic Revolution and the new Constitution legislation

After several changes at 11 February 1979 the Islamic Revolution in Iran was scored. This revolution actually caused the fundamental transformation in the system of Iran government and society and the system of government was changed from monarchy to the Islamic Republic.

Fifty days after the Islamic Revolution in Iran, the first survey of the nation was carried out. At 1 April 1979 Iran's people for the first time since the fall of the monarchy, in fact, for the first time in their history, went to the polls to determine the next government form and the outcome of the referendum was 98.2 percent of the vote to accept the Islamic Republic³.

After the referendum on 1 April 1979 until the opening of the Assembly of Experts on 19 August the debate was on how the Constitution should be. Each category and group proposes a plan to deal. There were also several arguments on the Assembly that must perform the investigation (proceedings relating to the Constitution presentation). On 5 July 1979 Assembly election law of investigating the Constitution of the Islamic Republic of Iran passed by the Revolution Council³.

Ministry of the country could carry out the election of Constitution Experts Assembly and inaugurate the Assembly. Assembly of Constitution Experts after ongoing discussion and work have ratified a text on 15 November 1979.

Assembly of Experts concluded its work, but the ratification of the Constitution was not completed, because the nation direct opinion should have been expressed. After the end of the Assembly of Experts' job, to make everybody familiar with the Constitution, firstly it was published in wide circulation so that everyone can get a copy of it in the country. Secondly, before the referendum numerous wide circulation newspapers published its full text. Thirdly, some seminars were held¹.

Powers relations in Iran legal system

Relations between the legislative power and the judiciary power

Independence of the judiciary power is different. This power is legally protected from invasion and influence of the other powers. According to Article 156 of the Constitution, the judiciary power is an independent power on which the legislative power has little influence and no way is observed to ask question, impeach and remove the Judiciary authorities. Head of the Judiciary power is appointed by the Leader² and has no submissiveness and obligation (except for law enforcement and coordination of the budget) towards the other powers. Employment and official affairs of the judiciary power is independent and free from the other powers. Also the independence of the judiciary power necessitates that performing judicial duties in the investigation and issuance of command and adjudication of disputes and conflicts is monopolized to this power. However, some of legislative measures is not ineffective on the judiciary power. The main role of the judiciary power in exercising its jurisdiction is to enforce the regulations. Therefore, no officer of the judiciary power can refrain from carrying out their statutory duties. The issuance of sentences in the judiciary power must be documented and in accordance with Article 167 of the Constitution the judge is obliged to find the command of each claim at codified laws. One of the legislative power authorities towards the judiciary power

¹ Article 58 of the Constitution

² Article 157 of the Constitution of Islamic Republic of Iran

is to deal with the complaints of people related to judiciary power brought to the legislative power. Thus, if the Assembly receives complaint, according to Article 90 of the Constitution, it has the right to ask the judiciary power adequate respond and announces the outcome of the proceedings after the investigation. The final judgment of the Assembly does not enjoy the necessary performance guarantee and it has just ethical and political aspects ³.

Representatives of the Islamic Council Assembly have parliamentary immunity to provide freedom to perform parliamentary duties in accordance with Article 86 of the Constitution, but they do not enjoy immunity from punishment. Representative job is not an obstacle in the investigation and prosecution of them. Arrest and prosecution of some members of the legislative power by the judicial courts is not ineffective on the judiciary power task. Prosecution of members of the executive power in ordinary criminal proceedings under Article 140 of the Constitution and the prosecution of President according to Article 110 of the Constitution is another concession that strengthens the independence of the judiciary power.

Guaranteeing the independence of the judiciary power is so that the head of the judiciary power in accordance with Article 157 of the Constitution is appointed by the Supreme Leader and has no submissiveness and obligation (except for law enforcement and coordination of the budget) towards the other powers. In addition, no way is observed to ask question, impeach and remove the Judiciary responsive. According to Article 158 of the Constitution, employment and official affairs of the judiciary power is independent and free from the other powers. Judicial cases are opened and blocked in the judiciary power. Sentences are issued with complete independence. Also the independence of the judiciary power necessitates that performing judicial duties in the investigation and issuance of command and adjudication of disputes and conflicts is monopolized to this power. Submitting the judgment affair to parallel organizations specifically executive power in any form, totally or partially is legally unwarrantable and inadvisable. In accordance with Article 61 of the Constitution in Iran country, judiciary power performance is under the judicial system which shall be established in accordance with Islamic principles. It must be engaged in adjudication of disputes and conflicts and protection of public rights as well as development and enforcement of justice and divine bounds. Justice is also the official reference for formal grievances and complaints and trial formation as well as determination of their competence are subject to the rule of law. So creating parallel structures that undertake somehow the accomplice in the judicial process, totally or partially, is contrary to the principle of separation of powers and far from logic ².

Relations between the judiciary power and the executive power

The executive power is not immune against the judiciary power. Judiciary power in accordance with its statutory duty enjoys the essential authority towards the executive power. According to Article 172 of the Constitution the Courts judgments should refrain the implementation of decrees and state regulations that are contrary to Islamic laws and regulations or out of the jurisdiction of the executive power. Anyone can request the revocation of such rules from Supreme Administrative Court. Therefore, judiciary power is completely dominant on the decisions of the executive power. In addition, the purpose of the establishment of the Supreme Administrative Court is to investigate the complaints, grievances and protests against the authorities, administrative units and regulations and administer their rights. The Supreme Administrative Court, as a part of the judiciary power has a widespread organization, which can

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adjudicate the executive power to justice. This authority removes the immunity of the state and grants the right of petition and entreat to people. Another manifestation of the authority of the judiciary power to the executive power is the state inspection organization that is engaged in monitoring the affairs according to Article 174 of the Constitution to provide proper flow of affairs and accurate implementation of laws in the administrative systems. The state inspection organization continuously inspects departments and government agencies with its legal authority and announces the fraud and financial and administrative processes bad flow and demands prosecuting violators ⁴.

The President has the right to notice the judiciary power in the case of breach or non-performance of Constitution. President trial in the case of violation of his statutory duties is performed by the judiciary power by the Supreme Administrative Court. Ministers and representatives of the Islamic Council Assembly are also tried in the court of public justice. However, the Assembly representatives are not responsible for the statements that they expressed concerning their obligations and will not be traceable and judicial proceedings. So according to the above mentioned issues, the main task of the Minister of Justice is to establish the relationship between the judiciary power and the executive power and the legislature power. He has the duty and responsibility for this and also common tasks of the Council of Ministers. Regard to all issues related to the relationships between the judiciary power and the legislature power, and the executive power, the main issue that can be considered between the judiciary power and other powers is legal bills and judiciary budget. One of the duties of the Head of the Judiciary power is to prepare legal bills in accordance with the Islamic Republic according to article 158 of the Constitution.

Leadership role in relation to the three powers

3-8-1- Leadership role in relation to the three powers and monitoring them

In each governmental regime an individual is placed on top of the power pyramid with a specific title. This person in the empires is the king and in the republic regimes is President.

In the Islamic Republic of Iran this person is the Leader. Although the Constitution of the Islamic Republic of Iran has accepted the principle of separation of powers, a fundamental difference is evident in it. That is to say, in the classical separation of powers system there is no power higher than the three powers. Basically, the purpose and meaning of the separation of powers is that there is no higher power than the three powers and the three powers moderate each other to prevent the abuse of power ⁵.

However, according to Article 57 of the Constitution, these powers are applied under the rule absolute Jurisdiction and Leadership of the Ummah. This supervision by the just Supreme Leader in the absence of Wali Asr (A. J.) is one of the fundamental principles of the Islamic Republic³. The rule Jurisdiction and Leadership of the Ummah means that the government is conducted by the Leadership and the Supreme Leader as governor monitors and observes the state affairs and authorities comprehensively (in terms of legislation, enforcement and judicial)⁶.

It should be noticed that the legal and political structure is generally incompatible with separation of powers, which is the pivot of power concentration, because the basic and fundamental philosophy of acceptance of the powers separation principle is to deal with the concentration of power, where there is a fear of tyranny. Apparently, the Supreme Leader broad

³ Article 5 of the Constitution

authority has led to such a power concentration that naturally in the extant powers separation in the Islamic Republic, the basic and fundamental goal of powers separation, which is dealing with the concentration of power, cannot be achieved⁷.

Nevertheless, with taking up the explicit position of the Constitution to eliminate tyranny and regulatory practices that have been appointed to the Supreme Leader, it is hoped to achieve the ultimate goal of the separation of powers principle (the elimination of tyranny and guarantee of people freedom). However, despite the supervision of the rule absolute Jurisdiction and Leadership of the Ummah on the three powers, the principle of separation of powers of the Islamic Republic of Iran does not seem fully compliable with the separation of powers extant in other modern democracies.

As mentioned earlier, Iran's Constitution has set the three powers separation system in accordance with Article 57, so that each of the powers do their own tasks, however, there may subjective relationship between them in terms of organization and establishments and conflicts arise in their jurisdiction. By regulating the relations the collaboration between the three powers can be provided in order to achieve the coordination and well execution of activities. In the Constitution of 1979 the president was responsible for the task of regulating the relations between the three powers, but in the revision in 1989, according to paragraph 7, Article 110 of the Act the Leader was charged with this task. As the Constitution has placed the Leader in top of the governance pyramid, according to Article 57, he should monitor the exercises of judiciary power, legislative power and the three powers performance is taken place under the supervision of the rule absolute Jurisdiction and Leadership of the Ummah. As the Supreme Leader is dominant on the three powers, in the case of dispute he can judge and resolve the conflicts among them. The supervision of the Leaders on the three powers is applied as the following⁸.

3-8-2- Leadership and legislative power

The Supreme Leader associates with the legislative power through the installation and removal and resignation of six individuals, Guardian Council jurists. Thus, these jurists prevent the approval of those regulations in Islamic Council Assembly that are contrary to the laws of Islam. According to Article 72 of the Constitution, the Islamic Council Assembly cannot enact the laws that are inconsistent with the principles and provisions of the country official religion. In accordance with Article 96 of the constitution, the Guardian Council is charged with recognizing that.

The Guardian Council is responsible for upholding the laws and Constitution of the Islam. Therefore, legislative power is not recognized without Guardian Council. Also, according to Article 94 of the Constitution, all acts of Islamic Council Assembly should be sent to the Guardian Council and the Guardian Council is obliged to investigate them in terms of their accordance with Islamic principles at most in ten days after their receipt. According to Article 96 of the Constitution all the members of the Guardian Council are responsible for this investigation and if they find them against Islamic principles, they send them back to Islamic Council Assembly for revision. Otherwise, the Act is applicable. However, if the Guardian Council considers ten days insufficient for consideration and comment, according to Article 95, mentioning the reason, it can request extension of time at most ten days from Islamic Council Assembly. Therefore, the integrity of the legislative power depends on Guardian Council presence and the integrity of the Guardian Council depends on the presence of jurists that are

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appointed by the Leader. The Leader is only associated with the legislative power by the Guardian Council, and he monitors this power ⁸.

3-8-3- Leadership and executive power

Leadership activity domain in the executive power is much more than the legislative power.

Sentence Signature

A) The President

After the president was elected by people polls, his sentence should be confirmed and signed by the Supreme Leader for the term of office of the presidency that is four years. The question that arises is that the signing shows the ratification or formality? In this regard, there are two assumptions:

1. The first assumption is based up on the formality of signing. It can be argued and accounted that firstly, the public governance in determining their destiny is applied typically through a public vote, through elections and referendums.⁴ The election of the president is conducted by direct public vote; that is to say, popular vote. In conclusion we can say that is the prerequisite for the presidential vote. Therefore, it can be stated that the essential condition of holding the President position is the achievement of public vote as the determination of Leader is under taken by the Experts elected by the people. As a result, opposition and refraining from presidential decree signature is disregarding the vote of the people and the nation's sovereignty. Secondly eligibility of presidential candidates in terms of having the conditions (according to Article 150 of the Constitution) must be approved by the Guardian Council prior to the election in the first round by the Leadership.⁵

In this regard, the Guardian Council that half of its members are direct or elected theologians representatives of the Supreme Leader monitor and control the presidential candidates' conditions with the necessary precision and approve their qualifications. The mentioned Council will also monitor the presidential elections.⁶ One of the competent candidates is elected as the president by the monitoring of the Guardian Council. Regard to the fact that the opinion of the Supreme Leader is provided in supervisions and the authority of the President appears undoubtedly and valid, Leader has no other way but to sign, because otherwise the primacy and authority of the Supreme Leader's representatives and the Guardian Council will be doubted and in question.

2. Second assumption, is based up on the enforcement of Presidential Decree signing. In this case, the Assembly talks on the institutional review of the Constitution indicates being enforcement ⁽⁹⁾. In addition, Article 1 of the presidency election adopted in 1985 states that the presidential term is four years and begins at the date of his credentials ratification by the Leader. It seems that in this assumption the first argument and hypothesis is more accurate and reasonable. The Supreme Leader is charged with dismissal of the President with regard to the interests of the country after the Supreme Court has ruled in his violation of the legal obligations or the vote of Islamic Council Assembly on his inadequacy, according to Article 89 (given the

⁴ Article 6 of the Constitution

⁵ Articles 109 and 118 of the Constitution

⁶ Article 110 of the Constitution

fact that the President has the political and legal responsibility). Politically, Islamic Council Assembly has the right to impeach the president and vote on his politically incompetent with a two-thirds majority vote of total representatives.⁷ In terms of violation the Supreme Court tries him. However, in both cases, the dismissal proposal will be submitted to the Leader and the Leader taking the interests of the country into account attempts to dismiss him.⁸

B) General Command of the Armed Forces

The Supreme Leader being in charged with the general command of the armed forces is the supreme authority of the country's military. He is responsible for declaration of war and peace and staffing. Foreign policy of Islamic Republic of Iran is based on peaceful relations with the noncombatant governments (Article 152 of the Constitution), but the need to preserve the independence and territorial integrity of the country against external threats makes the border clashes likely happen. In such cases, the Leader has the authority to declare war. In this regard, although the Leader issues the decree alone, the Supreme National Security Council as a policy maker institution in military affairs assist him in making decision. Peace declaration is also the authority of the Leader. However, as this decision always leads to agreements and treaties, in practice, the government is charged with concluding peace. This will be recognized after the approval of the Islamic Council Assembly signed by the President or his representative. Among the treaties that may have a direct connection with peace is the boundary lines change, which must be approved by the Islamic Council Assembly complying with the rules and certain mandatory regulations.⁹

3-8-4 Leadership and the judiciary power

According to Articles 156, 157, 158, 160, 161, 162, 164, 173 and 174 of the Constitution, the head of the judiciary power is responsible for all the responsibilities of this power. According to the authority that the Leader has in the removal and installation of the Head of the Judiciary power, his influence in this power is clear. Pardon or commutation of convicts' sentences in Islamic principles after the proposal of the head of the judiciary power is the authority of the Supreme Leader¹⁰. Consequently, according to the mentioned issues, in the Islamic Republic of Iran, in addition to the three dominant powers there is a power, which is headed the three powers of government and the Constitution principal is adopted and approved so that the presence of this power beyond the the other powers is evident in all sectors and areas. This power can and has authority to stop each of the power's movement or make their movement fast or slow ⁸.

CONCLUSION

⁷ Article 89 of the Constitution

⁸ Article 57 of the Constitution

⁹ Article 77 of the Constitution

¹⁰ Article 162 of the Constitution

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Although the Constitution of the Islamic Republic of Iran has accepted the principle of separation of powers, a fundamental difference is evident in it. That is to say, in the classical separation of powers system there is no power higher than the three powers. Basically, the purpose and meaning of the separation of powers is that there is no higher power than the three powers and the three powers moderate each other to prevent the abuse of power. According to Montesquieu power stops the power.

In fact the main purpose of the separation of powers is to break the force barrier between the government powers. In this regard, by the division of tasks between the powers, firstly, tyranny is prevented, secondly, the power is not assigned to an institution that is dominant and superior to the three powers, and each of powers with having a part of the authority tries to improve the society elevation.

The Supreme Leader as the President and the Governor of the country has placed in the top of the pyramid and as the Constitution has stated his rules and instructions are valid and binding. However, apart from these issues the Leader has political and financial responsibility. These responsibilities are stated at Article 111, 142 and 107 of the Constitution. Pursuant to Article 111 of the Constitution, whenever the Leader becomes incapable of performing the duties or lacks any one of the conditions mentioned in Articles 5 and 109 or it becomes clear that he lacked some conditions from the beginning, he will be removed from his position. The recognition of this is assigned to the Experts referred to in Article 107.

With this emphasis, the Supreme Leader seems responsible for the Assembly of Experts. Also, in accordance with Article 142 of the Constitution, the Supreme Leader's properties, wife and children, before and after the service will be investigated by the head of the judiciary power, which is not increased contrary to the right.

"The leader is equal to the rest of the country in the eyes of the law"¹¹.

Constitution has expressed the powers separation system in Article 57. Therefore, each of these powers do their tasks. However, there may be conflict between them that by setting up the relations the necessary collaboration can be established between the powers. Setting the relations between three powers is a political act that cannot be brought into specific topics framework. Nevertheless, in the event of a dispute between the three powers the Leader, due to his dominance on the three powers, can resolve the dispute.

Of course the politically correct vision for a Leader, which is one of the conditions for his selection, can solve this problem partially. It should be noted that, at the Constitution of 1979 this task was undertaken by president, but in the revision in 1989 the Leader was charged with this task.

As can be perceived from the principles of the Constitution, accepting the separation of powers relatively, the Constitution only proposes the independence of powers from each other. On the other hand, it states that the three powers are "under the rule absolute Jurisdiction and Leadership of the Ummah". This is an emphasis on power concentration. It seems that despite the recent referendum insists expressly on the separation of powers, according to the extant principals of the Constitution of the Islamic Republic of Iran, this expressiveness stabilizes the concentrative scope of the state authority.

Furthermore, from the speech of advocates and interpreters of the theory of appointive Jurisdiction it is perceived that they emphasize the expanded role of the Supreme Leader and

¹¹ Article 107 of the Constitution

even legitimizing role of the Supreme Leader to the other powers and institutions and do not accept the separation of powers in the conventional sense. Imam Khomeini's theory, according to the evidence mentioned in previous discussions, directs towards where you can find all interpretations of the concept of powers separation. Some parts of Imam Khomeini's speech was mentioned in the text.

However, despite the supervision of the rule absolute Jurisdiction and Leadership of the Ummah on the three powers, the principle of separation of powers of the Islamic Republic of Iran does not seem fully compliant with the separation of powers extant in other modern democracies.

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