THE THEORY OF SEPARATION OF POWERS AND ITS IMPLICATION FOR PAKISTAN

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For Pious Soul, Who Gave Birth To Me

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The theory of the separation of powers was not developed in the west only as many scholars think; it has roots in Asia and was also implemented in verity of forms in different Asian states in its political history

Bodin, the French writer. John Lock, the liberal writer of the late seventeenth century. Montesquieu. French oracle and the wit. who formed the theory in its modern shape. Reasueu and many other theorists have also attempted to play their role in the development of the theory of separation of powers.

The theory was important in moulding the constitutions of the Nineteenth century monarchies in Europe. shaping United States colonial constitutions and the most of constitutions were built upon the separation powers. on the one hand the theory contains generalization. theory or hypothesis, on the other hand it proposes a practical suggestion for government to carry on its business.

My Contribution

This thesis is the first ever work on the solitary issue of the Separation of Powers theory and its implication for Pakistan. Through this research International Islamic University is contributing to the most argued and most implemented yet untouched system as for as the Islamic approach and the regional work on the issue is concerned.

Here. in this dissertation the emphasis is attempted on the theory. its background and practice in prehistory's surviving religion as well as the last divine religion with concentrating on region's developing countries' constitutional journey.

Western scholars like; John Lock. Montesquieu. Hamilton and Madison have worked a lot to develop the theory in the west but they have not touched Eastern government and their efforts for ensuring the liberty and their version of the separation of powers: i.e.. separation of assemblies and judiciary from executive and again its concentration in one person. separate from the executive, a legislature and judiciary.
My main task is to find out the practical aspects of the theory in Hinduism and Islam and to make an adept research upon its genetic forms in Asian political history. i.e., Pakistan.

Previous work on the Doctrine

There have been lot of references made to the theory in many books especially on constitution and generally on political science. i.e., Fundamental Law of Pakistan. Constitutional Foundation of Pakistan etc.but there is not a single book dealing exclusively with the issue.
The discussions of use in the West on the power and its separation are given in the following remarkable work of prominent writers:

- S.Lukes *Power: A Radical View*
- R.A.Dahl. *The Concept of Power*
- J.G.March. *The Power of Power*
- H.L.A. Hart. *The Concept of Law*

Preface

What is the Theory?

The unlimited powers are threat to liberty and individual rights. The absolute power corrupts and there can be no liberty where the legislative and executive powers are united in same person or body of persons. The main concern of the theory is the protection of individual rights. The consideration of individual rights in conjunction with the separation of powers gave rise to the goal of avoiding tyranny.
It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislative, the executive, and the judiciary. To each of these branches, there is corresponding identifiable function of government, legislative, executive, and judicial. Each branch of government must be confined to the exercise of its own functions and allowed to encroach upon the functions of other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct; no individual being is allowed to be at the same time a member of more than one branch. In this way each of the branches will be check to others and no individual single or group of people will be able to dictate the entire machinery of the state and control it at their will.

Importance of the theory

These features of government are recognized in political theory today but after numerous changes and refinements.

The powers are separated to preserve the dignity, the rights and liberties of the individual as well as the society. The theory of the separation of powers is accepted universally yet we are surprised it is violated universally. The only way to ensure, it is argued, that the power is not abused is to limit it and the ultimate need for the purpose of limiting the powers is to divide it and to draw the boundaries for each organ's jurisdiction.

The theory of the separation of powers finds its roots in the ancient world, where the concepts of governmental functions and the theories of mixed and balanced government were evolved. The theory of the separation of powers has long history. It is not something discovered by Montesquieu only. Long before Hindu teachings in code of Manū and other Vedic scriptures have clear reference regarding how to avoid the abuse of powers The suggested way was to separate the duties, functions and even categories of people in the society.

These were essential elements in the development of the doctrine of the separation of powers and their transmission through medieval writings, to provide the basis of the ideas of constitutionalism in England, which enabled the doctrine of the separation of powers to emerge as an alternate but closely related formulation of the proper articulation of the parts of government.

- T.C.Hartley and J.A.G. Griffith, *Government and Law: An Introduction to the Working of the Constitution in Britain*
- Carl J. Friedrich, *Constitutional Government and Democracy*
- Peter Morriss, *The Frontiers of Political Theory*
- Roscoe Pound, *Jurisprudence: The Nature of Law*
- Geoffrey Marshall, *Constitutional Theory*
- A.V.Dicey, *Introduction to the Study of the Law of the Constitution*
- Peter Harris, *Foundations of Political Science*
- Georg Wilhelm Friedrich Hegel, *The Philosophy of Right: The Philosophy of History*
- Jean Bodin, *The Republic*
- John Lock, *Two Treatises of Government*
- Robert Maynard Hutchins, ed., *Great Books of Western Civilization*
- Charles De Montesquieu Spirit of the Laws
- J.M.C.Vile,*Costitutionalism and the Separation of Powers*
- W.B.Gwyn, *The Meaning of the Separation of Powers*
- Geoffrey Marshall, *Constitutional Theory*
- Hans Kelsen, General Theory of Law and State

There are two books written in Arabic dealig with thew issue exclusively:

Al-Fikr al Islami wa Sultat al-Salatha by Muhammad Tahavi
Al- Sultat al-Salatha wa al-Alam al-Arabi

INTRODUCTION

The theory of the separation of powers is ancient. It has existed in different forms through out history. The theory is found in Islamic Law in a unique form and this has implications for Pakistan.

The theory of the separation of powers is based on the premiss that it is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislative, the executive, and the judiciary. For each of these branches there is corresponding identifiable function of government, legislative, executive, and judicial. Each branch of government must be confined to the exercise of its own functions and must not be allowed to encroach upon the functions of other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct; no individual being is allowed to be at the same time a member of more than one branch.

In this way each of the branches will provide a check for the others and no individual single or group of people will be able to dictate to the entire machinery of the state and control it at his will. Unlimited powers are a threat to liberty for absolute power corrupts absolutely and there can be no liberty where the legislative and executive powers are united in same person or body of persons. The main concern of the theory is the protection of individual rights. The consideration of individual rights in conjunction with the separation of powers secures the goal of demolishing tyranny.

These features of government are recognized in political theory today but after numerous changes and refinements. The theory of distinct functions and related powers is referred to as the theory of separation of powers

The theory of the separation of powers finds its roots in the ancient world, where the concepts of governmental functions, and the theories of mixed and balanced government were evolved. These were essential elements in the development of the

doctrine of the separation of powers. Their transmission through medieval writings, to provide the basis of the ideas of constitutionalism in England, enabled the doctrine of the separation of powers to emerge as an alternate but closely related formulation of the proper articulation of the parts of government. Yet if the doctrine is defined in terms suggested above-it was in seventeenth century England that it emerged for the first time as a coherent theory of government, explicitly set out, and urged as the secret of liberty and good government.

The theory of the separation of powers was not developed in the west only as many scholars think. It has roots in Asia and was also implemented in a variety of forms in different Asian states in its political history

The theory of the separation of powers has a long history. It is not something discovered by Montesquieu only. Long before that Hindu teachings in code of Manū (2500 BC) and other Vedic scriptures have given us a clear concept regarding, how to avoid the abuse of powers? While these scriptures reply to this was to separate the duties, functions and even categories of people in the society.

The theory of separation of powers goes back as far as the origins of Hindu legal codes, i.e., *Manūsmṛti, Arthashastrā, and Bhagavadgītā (Purānās)*. The idea of splitting up power into three separate parts is as old as Greeks and the governments of some of the great city-states; like Rome evolved a fairly subtle separation of powers between its senate and councils each charged with more or less separate functions. Bodin, the French writer, John Locke, the liberal writer of the late seventeenth century, Montesquieu, French oracle and the wit, who formed the theory in its modern shape, Reasueu and many other theorists have also attempted to play their role in the development of the theory of separation of powers.

If looking back into Islamic political system we will come across more or less the same doctrine in its purist form than the prevailing ideas about it in the West.

The theory was important in molding the constitutions of the Nineteenth century monarchies in Europe, shaping United States colonial constitutions and the most of constitutions were built upon the separation powers, on the one hand the theory

contains generalization, theory or hypothesis, on the other hand it proposes a practical suggestion for government to carry on its business.

Here, in this first ever dissertation in English-in the Faculty of Shariah and Law, the emphasis is attempted on the theory, its background and practice in prehistory's surviving religion as well as the last divine religion with concentration on region's developing countries' constitutional journey and the theories implication for it.

Western scholars like; John Locke, Montesquieu, Hamilton and Madison and others have worked a lot to develop the theory in the west but they have not touched Eastern governments and their efforts for ensuring the liberty and their version of the separation of powers, i.e. separation of assemblies and judiciary from executive and again its concentration in one person, separate from the executive, legislature and judiciary.

My main task will be to find out the practical aspects of the theory in Hinduism and Islam and to make an adept research upon its genetic forms in Asian political history.

I will divide my thesis into four parts. In the first part, I will give the full concept of the theory, its origin and development in two religious histories (Islam and Hinduism). In the second part, I will discuss the Asian version of the theory. The third consist of the power position in Greeks, Rome and Modern West (i.e. UK. America and France). The last part will lay down the development and application of the theory in Indian and some Muslim states (i.e. Saudi Arabia, Iran & Pakistan).

The powers are separated to preserve the dignity, the rights and liberties of the individual as well as the society. The theory of the separation of powers is accepted universally yet we are surprised it is violated universally. The only way to ensure, it is argued, that the power is not abused is to limit it and the ultimate need for the purpose of limiting the powers is to divide it and to draw the boundaries for each organ's jurisdiction.

1. LEGAL POWERS AND THE THEORY OF SEPARATION OF POWERS

The theme is divide into two parts in order to have a clearer understanding of the idea of the powers, its legitimacy and then the separation.

1.1 Legal Powers

Power,[1] by which here is meant legal power, is both the cause of political and legal conflict on one hand. It brings discipline in the state organs and is the basis for smooth working of governmental departments. Man has power when he is able to vary the situation of things and living beings. Power, in a positive way, is the ability to confer something and, in a negative way, is to prevent someone from having something. So, the power is converse of disability. Power is the ability, conferred by a law upon a legitimate person or office, to bring about changes in the status of others or in their own status. Power is the ability conferred on a person by law to determine by his own will directed to that end, the legal relation of himself and others. A man has a legal power whenever he is abide by some voluntary act of his to vary the legal position of another person.

The expression 'legal power' is a term that refers to the powers and authority of a public servant, private citizens and legal persons. The idea of a legal power, cited here, connotes the powers of legislature to make rules, of the office of the president to enjoy combined powers, of the cabinet to determine policy for implementing the law, of the judiciary to give verdicts and make orders according to law. So, the possession ability to scrutinize and regulate the functions of others and themselves according to the law is a 'legal power'. In relation to the state affairs "powers mean groups of people (as when we speak of Great Powers, meaning certain nations)and even an individual(he is a power in the land).Powers are also used to mean function: the

[1] The discussions of use for the concept of power is given by S.Lukes, *Power: A Radical View* (London: MacMillan, 1974); R.A.Dahl, *The Concept of Power* (New York: The Bobbs Miller Company. INC. 1969);J.G.March, *The Power of Power*(Englewood Cliffs: Prentice Hall,1966);H.L.A. Hart. *The Concept of Law*(Oxford: Oxford University Press, 1961).

legislative power, the judicial power, the executive power.[2]

1.2 Theory of Separation of Powers

In politics the power means a prosperous nation, as the word is sometimes used for great powers; it is also used for the leader of a state (i.e., Fidel Castro is power in Cuba and Imām Khumaynī was a power in Iran). By powers some political thinkers mean, a person or group that possesses the ability to command and this ability to command involves the ability to decide[3]. In governments powers are used to mean functions, the basic and essential functions in the administration of any democratic state are legislative, executive and judicial carried on by the legislature, the executive and the judiciary.[4]

It is important to know, how the machinery of the government works? To what extent various powers are combined to the same person or body of persons? How far are they separate? To what extent there should be co-ordination between various organs and how far they are independent of one another? Thus, the legislature legislates, the executive executes, and the judiciary adjudicates. From this the need arose that the organs through which their functions are exercised should be kept separate and distinct.

The real intention behind this idea was to preserve the liberty and ensure the protection of rights of individuals. This deduction is also made by Roscoe Pond, who says: "In nineteenth century, the philosophical jurists often deduced the separation of powers from the idea of liberty and so it was taken to be a fundamental dogma both in jurisprudence and in politics"[5] It is said "the existence in a state of state bodies with different jurisdictions means that a certain division of functions in exercising state power is essential while maintaining the unity of state power."[6]

Although through experience it has been observed that the concentration of powers in one fallible person or a group will yield nothing but tyranny.

The theory not only provides that the three powers of government shall be entrusted to

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2 T.C.Hartley and J.A.G. Griffith, *Government and Law: An Introduction to the Working of the Constitution in Britain, 2nd*(London: Weidenfeld &Nicolson, 1981), 1.

3 Carl J. Friedrich, *Constitutional Government and Democracy* (Boston: Ginn and Company, 1946), 180.

4 Peter Morriss, *The Frontiers of Political Theory* (New Delhi: Heritage Publishers, 1982), 2.

5 Roscoe Pound, *Jurisprudence: The Nature of Law*, vol. II (USA: St.Paul, Minn West Publishing Co., 1959), 328.

6 Encyclopedia USSR, s.v. *"Separation of Powers Theory"*.

separate persons or a body of persons but it also reveals that in discharge of the functions and duties each department should confine itself to its own jurisdiction and should not encroach upon others' duties. The legislative, executive and judicial powers produce outputs of law or rules, so between rule making, application and adjudication there must be boundaries.[7] Professor Marshall strengthens this approach by providing that:

i. there are three intrinsically distinct functions of government; the legislative, the executive, and the judicial;
ii. these distinct functions ought to be exercised respectively by three separately manned departments of government; which
iii. should be constitutionally equal and mutually independent; and
iv. The legislator may not delegate its powers.
v. The function of one institution should not encroach on the functions of another.[8]

However, these features of the pure form of the theory has received a sound recognition in political world, again there are number of versions which have changed and developed over the course of political history.

The theory of separation of powers goes back as far as the origins of Hindu legal codes, i.e., *Manūsmṛti, Arthashastrā, and Bhagavadgītā (Purānās)*. The idea of splitting up power into three separate parts is as old as Greeks and the governments of some of the great city-states; like Rome evolved a fairly subtle separation of powers between its senate and councils each charged with more or less separate functions. As it may be noticed in Hegel's, *The Philosophy of Right,* where he says:

"The state as a political entity is thus cleft into three substantive divisions:

a. the power to determine and establish the Universal-the Legislature;
b. the power to subsume single cases and the spheres of particularity under the Universal-the Executive; and
c. the power of subjectivity, as the will with the power of ultimate decision-the Crown."[9]

Bodin,[10] the French writer, John Lock,[11] the liberal writer of the late seventeenth

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7 Geoffrey Marshall, *Constitutional Theory* (Oxford: The Clarendon Press, 1971), 100. See also A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan &Co. Ltd., 1965), 337.

8 Peter Harris, *Foundations of Political Science* (London: Hutchinson, 1986),110.

9 George Wilhelm Friedrich Hegel, *The Philosophy of Right: The Philosophy of History*,24th ed. (London: William Benton, 1982),46.

century, Montesquieu, [12] French oracle and the wit, who formed the theory in modern shape, and attempted to pay their share in the development of the theory of separation of powers. However, the modern account of the separation of power is M.J.C Vile, [13] W.B.Gwyn, [14] Marshal, [15] Hans Kelsen [16] If looking back into Islamic political system we will come across more or less the same doctrine in its purist form than the prevailing ideas about it in the West.

The theory was important in molding the constitutions of the Nineteenth century monarchies in Europe, shaping United States colonial constitutions and the most of other constitutions were based upon the separation powers in strict or narrow sense, on the one hand the theory contains generalization; theory or hypothesis on the other hand it proposes a practical suggestion for government to carry on its business.

Here, in this dissertation the emphasis is attempted on the theory, its background and practice in different developed states vis-à-vis its implication for Pakistan.

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10 Jean Bodin, *The Republic* (Cambridge: University Press, 1962).
11 John Lock, *Two Treatises of Government*, 2nd ed. (Cambridge: University Press, 1967).
12 Robert Maynard Hutchins, ed., *Great Books of Western Civilization*, vol. 38, *The Spirit of Laws*, by Charles De Montesquieu (London: William Benton, 1984).
13 M.J.C. Vile, *Constitutionalism and the Separation of Powers*(Oxford: The Clarendon Press, 1967).
14 W.B. Gwyn, *The Meaning of the Separation of Powers* (Korea: Tulane University Press,1965).
15 Geoffrey Marshall, *Constitutional Theory* (Oxford: The Clarendon Press, 1971).
16 Hans Kelsen, *General Theory of Law and State* (New York: The Bobbs Miller Company. INC, 1961).

2	**THE STRUCTURE OF GOVERNMENT**
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2.3	The Judiciary

2. THE STRUCTURE OF GOVERNMENT

The government comprises of the three main departments working for the welfare of people, establishment of state, protection its belongings, whatsoever, that may be, and for good governance. These main organs are ;the executive, the legislature, and the judiciary.

2.1 The Legislature

Legislature is a body, which enacts new general laws and repeals or amends the existing one. However, there are always limitations, expressed or implied, on its generality. Legislature can make laws for foreigners on its territory and also can make rules for its subjects wherever they may be but it can not make laws for foreigners on foreign land because the practice is to legislate only for persons or acts done within territory of the country legislating. Legislatures enact laws in a certain procedure and in a certain form. It is a forum for debate, for criticism of government and the existing laws. This, usually, has two forms parliament and congress.

2.1.1 Forms of the Legislature

Mainly there are two forms of legislature the account of which is given as under:

2.1.1.1 Parliament:

The word parliament evolved into a sort of court in France, council of state and then a legislative body in England. Parliament is, usually, fused with the executive branch in the person of Prime Minister and a Cabinet. Parliament, although having a set term of years between elections, may be dissolved for an election before its constitutional term expires. Its lower branch is more functional than the upper house and is supreme in its power to change the constitution and could be restricted to some limitations.

2.1.1.2 Congress:

The term congress is related to the notion of a formal meeting of delegates. It is a supreme legislative body.

Congress is usually separate organ of government not mixed with the executive branch. The Cabinet or the head of government and president are not usually the members of the congress and it is not dissolved before expiry of its legal term. It consists of lower and upper houses, like parliaments. Generally speaking the upper house is more powerful than the lower house (there are many congressional bodies which comprise just a one house).

2.1.2 Functions of Legislature

This is a body of representatives, which enacts new law and repeals or amends the existing law. "Legislative as the word is used in speaking of the legislative department of the governments means the organ of government makes laws – legislative is defined as making or having the power to make laws.[1] Legislative body is the one having power to enact laws or to declare what the law should be and such power covers every subject of legitimate legislation except when limited by a constitutional provision.[2] Traditionally it has been said that the parliaments exist to make laws (in the western sense to provide the money to support the government and to enforce the responsibility of the government to account for its actions.[3]

In liberal democratic countries following are the functions of legislature:

2.1.2.1 Drafting of the law (law enactment):

The important function of legislature is to enact new laws and to scrape the obsolete one. Member of the legislative assembly enjoy the freedom in favoring are criticizing the bills presented before it for approval. Legislative makes laws for its subjects, foreigner its territory and the subjects wherever they may be but it cannot make laws for foreigners or foreign land, except it the interest of the sate legislating are

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1 [illegible], *Words & Phrases: legislative in general*, vol. 24A (USA: St.Paul, Minn West Publishing Co., 1964), 513.

2 Arnold O. Ginnow, ed., *Corpus Juris Secundum: Constitution law*, vol. 16 (USA: St.Paul, Minn West Publishing Co., 1985), 377.

3 Peter Harris, *Foundation of political science* (London: Hutchinson, 1986), 112.

jeopardized by foreigner and foreign land, because the practice is to legislate only for citizen or acts done within a country legislating. Legislature can also amend the constitution by its two third majority as in Pakistan.

2.1.2.2 Budgetary:

Legislature controls the budget, imposes a cut on it controls the taxation and the other money bills. Therefore executives cannot spend nations wealth without prior approval of the people's representatives (Legislature).

2.1.2.3 Debating:

Each enactment requires careful vision at legislators to elucidate all aspects of the laws and that need would discussions in the assembly of the legislators. Without proper concentration and scrutiny, the bills are not approved to be the laws. Thus it is a term for debate also.

2.1.2.4 Executive:

Legislature exercises full control over the executive branch of government in parliamentary system. It is not only questions the executive for its policies but also can influence it for reconsideration. It makes the executive body and removes it too through no confidence motion. Legislative can appoint committees to investigate the executive work.

2.1.2.5 Judicial:

In certain countries legislature enjoys some judicial powers also, i.e., in U.K. the house of lord is the final court of appeal. In America senate hears the impeachment cases against officials. In Canada senate hears divorce cases. In Switzerland, the federal assembly interprets the constitution. In Pakistan and India parliaments hear the impeachment against President.

2.1.2.6 Electoral:

Legislature elects the President, Vice President, the Prime Minister and Judges in many countries. In Russia the Judges are elected by the Duma. In America the consent of Senate is required for the Presidential nominations of Ministers, Judges and Ambassadors. In Pakistan, China and India Assemblies take part in the election of

President. In Switzerland all the members of executive branch and federal tribunal are elected by the assembly. The judges of federal court of Germany are elected by parliament, six coming from ranks of career judges and ten from different groups.

2.1.2.7 Representative:

The people mostly elect the members of legislative body; therefore they act as the true representatives of their constituencies in order to compel the executive branch to act according to the works of the people and the popular opinion. They share in varying respects, the function of providing some form of link between the government and governed.

2.1.2.8 Removal:

In U.K., U.S.A., Russia, and China the assemblies have powers to remove the judges of apex courts. While, the situation is quite different in despotic governments, where only one man or a small group of men from executive branch hold all the powers in a State and same is with the countries where there is monarchy (some), marshal law and military.

2.2 The executive

The term executive is used to include the head of State, the ministers and the officials responsible to implement the rules. In a broad and collective sense the executive organ embraces the aggregate or totality of all the functionaries, which are concerned with the 'executive will' of the state, as that 'will' is formulated and expressed in terms of law.[4] Webster defines executive as; "qualifying for, or pertaining to, the execution of the laws; as executive duties."[5] The executive department of the government is one, which carries the laws into effect.

The administrator is not necessarily an executive in strict sense however the term is broad enough to include one whom, also, has administrative duties. But as whole it is responsibility of the executive to ensure the implementation of the laws passed by the legislature of the state.

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[4] J.W. Garner, *Political Science and Government* (USA: American Book Company, 1932), 67.
[5] Webster, s.v. "*Executive.*"

2.2.1 Forms of Executive

Following are the prevailing forms of executive in developed and underdeveloped political world:

2.2.1.1 Normal executive:

The countries, where head of State (King, Queen, President, Chancellor, and Chairman) has just nominal powers to represent the country and ratify the laws, and governmental actions. These are called states headed by a nominal executive, i.e., Britain, Canada, Denmark, Norway, Holland, Japan, Malaysia, Pakistan, India, Sweden, and Switzerland.

2.2.1.2 Real Executive:

Here, Head of State has the core authority to execute the laws and implement policies. The real executive power is vested in him as in Algeria, Brazil, Egypt, France, Indonesia, Saudi Arabia, Syria, and United State of America.

2.2.1.3 Single executive:

The distinction is, also, made between single and plural executives. In a single executive the final authority is vested in one head of the state, i.e., Algeria, Chile, China, Egypt, Jordan, Saudi Arabia, Syria and United States of America.

2.2.1.4 Plural Executive:

Here, the executive power is not in the hands of one person rather; it is vested in two or more. Though, it is rare but the best example is of Switzerland, where seven persons in federal council share the executive power. Iran, also, falls in this category, where the President strictly follows the decisions of guardianship council, while the British system shows that the executive power is vested in an executive committee of the House of Commons.

2.2.1.5 Presidential Executive:

Here, the executive is not responsible to any one though he has the representative character. He may appoint minister for his assistance but the policy making power resides in him. This is in practice in the most of republics, i.e., Algeria, Chile, China,

Egypt, Syria, South Africa, and United States.

2.2.1.6 Parliamentary Executive:

In this form of executive the Prime Minister and the Cabinet are responsible to legislature so long as it has the confidence and support of the legislature and usually the members of the cabinet with Prime Minister are also the members of the Parliament, as in Australia, Britain, Pakistan (in case democracy is restored) India, and Turkey.

2.2.1.7 Hereditary Executive:

In this form, executive does not need to be elected. Because after the death of the head of a state his son, daughter or near relative occupies the throne, as in Arab Emirates, Bahrain, Jordan, Morocco, Syria, Thailand, and Belgium.

2.2.1.8 Elective Executive:

Where the head of state or government is elected by the people or by their representative, examples of this are found in Malaysia, India, and United States.

2.2.1.9 Dictator:

Where an individual, a group or a party exerts power with the help of army, foreign states or through a revolution and then remains all in all in the state. It is called the dictatorial executive, i.e., Cuba, North Korea, Congo (through revolution) Iraq, Libya, Uganda (through army) Peru, Panama, Haiti (through foreign hand).

2.2.2. Functions of Executive

The executive is that organ of government, which carries out or executes the 'will' of people as formulated by legislation. Broadly speaking, the executive function comprises the whole corpus of authority to govern, other than that, which involves the legislative functions of parliament and judicial functions of courts.[6] Executive 'is the second department of the government, it is free, and independent of the other departments and confined to its own functions'.[7] Executive functions are incapable

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6 Interpretation and application law, s.v. "*Executive*".

7 , *Words & Phrases: Executive in general*, vol. 15A (USA: St.Paul, Minn West Publishing Co., 1964), 284.

of comprehensive definition, for they are merely the residues of functions of government after legislative and judicial functions have been taken away. The functions of the executive differ in each case according to the form of government.

Ordinarily following are the functions of the executive:

2.2.2.1 Administrative:

It is for the executive branch to ensure the peaceful environment and to maintain law and order. 'Presidents, Prime Ministers and Chancellors are at the center of government activity and their power to appoint the rest of the members of the government is a very real power indeed.'[8]

2.2.2.2 Legislative:

Law making is the legislative body's prerogative but in most of the countries executive branch has partial role to play with regard to law making. In parliamentary governments Prime Minister and Cabinet are also the members of the legislature, thus, they do participate in law making. Presidents also have the power to make temporary laws by issuing ordinances.

2.2.2.3 Judicial:

The executive organizes the system of justice in the country, conducts government cases, and provides the legal advice to all departments. Also in many countries Presidents have got the power to grant pardon, hear the appeals and sometimes they, the Chief Executives, are the members of Supreme Judicial Councils.

2.2.2.4. Military:

In almost all countries the head of State has many military powers. The executive head is the Supreme Commander of the armed forces and has power to promote, demote and dismiss high military officials. In some States the power to declare war and peace is also vested in the President, especially where there is dictatorship or Presidential type of government, in few cases he has to do so with the consent of Assembly or Congress.

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[8] Allen R.Ball, *Modern Political Government*, 4th ed. (London: Macmillan, 1988), 177.

2.2.2.5. Diplomatic:

The executive establishes political relations with foreign countries make treaties and sign pacts. Appointment of diplomats and their receiving is also executive function. It has also become the function of executive to send special envoys and secret delegations to negotiate the publicly sensitive issues.

2.2.2.6 Financial:

Fixing of Salaries, preparation of budget, taxing the people and tapping the sources of income is executive function.

The functions also entail the formulation or application of general policy in relation to a particular situation or the making and execution of discretionary decisions. They also include provision and supervision of services as education, public health, transportation and national insurance. The executive controls the mass media and it has to ensure oversight of the whole administrative structure of government, because its being competent in the field of initiation, implementation and supervision of policies.

2.3 The Judiciary

There are many judicial systems prevailing in the world. The main purpose behind all of them is to dispense justice and to extend their assistance to the rest of government functionaries in maintaining law and order. The judiciary consists of the Ordinary Courts, Banking Courts ,Military Courts, Administrative Courts, Admiralty Courts, Magisterial Courts, Tribunals, etc.

2.3.1 Functions of Judiciary

The judiciary is to interpret, construe and apply the laws. Although, the basic function of the judiciary is to determine disputed question of fact and law by exercising it in civil and criminal courts by professional judges yet, it is invested with distinct independent powers, to operate as a check upon those of the legislative and executive departments and to ensure that the law and the other activities of these two are in conformity with constitution. Thus, the following heads could be included in its functions.

2.3.1.1 Interpreting the Law:

In the cases where law is ambiguous or silent, the courts are expected to interpret it lucidly in order to estrange the doubts. So, 'the ultimate interpretation of a statute is an exercise of the judicial power'.[9] But this does not mean that the courts are sharing the law making function in this very sense. In the modern world this very function of the courts is well recognized and no other functionary in the government is allowed to take away ,share ,or influence this very power of the court.

2.3.1.2 Safeguarding the Rights:

In a free government the citizens are granted many rights in order to make their life easier, these rights are always at stake due to the ruler's nature. Therefore the only sound entity, which can stop the violation, is the judicial department being a protector of rights. In Britain civil liberties have been established through judicial decision, because there is no constitutional declaration of rights. Civil rights have become one of the major areas of impact since 1937 in United State's of Supreme decisions.

2.3.1.3 Decision Making:

The judiciary decides controversies when its authority is invoked through a proper process. It decides the cases between citizens and between state and its subjects, whether relating to religious affairs, life, liberty, and property or family matters.

2.3.1.4 Judicial Review:

If a law passed legislative body violates the Supreme law of the land as interpreted by the courts or state's ideological norms as established in a society, that law will be declared void by the judiciary. In modern world the famous case of Marbury V. Madison in 1803 established this right to review the judicial or constitutional matters is established in majority of world nations, i.e, Argentina, Bangladesh, Brazil, Denmark, China, Japan, Nepal, Norway, Pakistan, Uganda, and United States.

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9 *Words & Phrases: Judiciary in general*, vol. 23A (USA: St.Paul, Minn West Publishing Co., 1964), 38.

2.3.1.5 Arbitration:

Almost all constitutional courts in the world play the role of arbitrator between various political institutions, whether between federal and provincial governments or between executives and assemblies. Its historical instance is seen in 1821's U.S. Courts ruling in Mc Culloch v. Maryland that the States had no authority to levy a tax, which would challenge the right of Congress to do the same.

2.3.1.6 Supportive Function:

In some states it is considered to be most important function to stabilize or support the existing political set up and it shows its political sensitivity on policy, which may change the system and brings many conflicts in a law-abiding States. For example, United States President's (Roosevelt) attempt to change court's composition was defeated in 1936.

2.3.1.7 Miscellaneous Functions:

There are various other functions besides the activities of the courts mentioned above. Some of the judges exercise legislative functions in the making of rules of procedure and they have enunciated all the rules of Common Law, equity, admiralty and ecclesiastical law. They also perform executive functions such as the appointment of guardians and trusties, the protection of interests of persons suffering from mental disorder and other disabilities.[10]

The functions also include; trial of civil actions and criminal prosecutions, hearing of appeals from lower courts and from administrative tribunals or authorities, making of decrease of nullity and divorce, the administration of estates of deceased persons, the dissolution of partnerships, redemption or foreclosure of mortgage Licensing of premises for the sale of alcoholic liquor, issue of warrants of arrests, granting of bail, issuing orders for sureties for good behavior and making of orders for the restitution of goods stolen or unlawfully detained. In may European Courts in matters regarding community laws are exercised, for region's courts judicial functions, by the European courts of justice.

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[10] Lord hail sham of St. Marylebone, *Halsbury's Laws of England*, 4th ed., vol. 8 (London: Butter Worths, 1974), 538.

3. SEPARATION OF POWERS IN ANCIENT INDIA

The first clear concept of the separation of powers can be noticed in the structure of the Hindu sates of ancient India, the well known Indus Civilization (2500 – 1500 BC). Traces of which are found in Moen-Jo-Daro and Harrapā's bright days. The interesting assertion is made on word; "India" that the term Hindu is a corruption of the word Sindhū, the Sanskrit name for the Indus rivers. The Persian, who found it difficult to pronounce the initial and the last letter thus they called is Hindu. This corruption produced some other words like Hinduism, Indus and India.[1]

3.1 Similarity of the Spheres of Religion and Politics

The states spanning across the Indus were at the climax of development in the sphere of politics in the bright days of Indus civilization. Sir Wheeler, its recent excavator has observed, "that the Indus civilization exemplifies the vastest political experiment before the advent of the Roman Empire."[2] Of course with its journey towards civilization, all political options were tested, i.e., aristocracy, democracy, Monarchy, and despotism. India was a religious state (in modern terminology) even before Āryan invasion of it in 1500 B.C.E., traditionally there was no distinction between the spheres of religion and politics. The words India and Hindu are etymologically linked.[3] If the factors that shaped Hindūism are taken into account that will clarify the political motives of Hindus. For example, The very concrete land of *Bhārata* (India) is the holy land; the great rivers, i.e., *Gangā*, *Yamuna*, *Irāvatī*, and *Malū* are holy rivers, since their waters purify those who bathe in them from all their sins; trees receive worship, either as manifestation of *Viṣṇū* or *Śiva* in the form

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1 S.A. Nigosian, *World Religions: A historical approach*, 3rd ed. (Boston: Bed Ford / St. Martius, 2000), 21.

2 Sir Mortimer Wheeler, *Early India and Pakistan* (New York: Frederick A. Praeger, 1959), 98. See also Joseph Campbell, *The Marks of God: Oriental Mythology*, (London: Penguin group, 1988), 155.

3 Stuart Mews, *Religion in Politics* (London: Longman Group, 1989), 98.

of *Tulsī* or *Udumbara;* some mountains and hills, i.e., *Kailāsa* and *aruṇācala,* have been considered sacred; cows, snakes, rateś and vultures are sacred; ancient India singled out *Madhyadeśa* (the heartland of India), beyond its boundaries salvation could not be gained; rulers, rich man and pious people were the gods and goddesses. In sacred texts, especially the Vedas, numerous deities are identified with powers and functions associated the natural phenomena.[4] Social order in the Hindū state was to *Dharmā* (legal obligations), in which all functions and duties were assigned to separate classes of people; law books, like all others written on different themes, were sacred books, i.e., *Manūsmṛti* occupies a special place and has been accepted by Hindūs of all times. Being most complete expression of Hindū law, *Manūsmṛti* consists of civil and criminal law, rules for various casts and the duties of individual classes of people, Family law, dietary regulations, daily rites, sacrifices as well as statements on various functions of the rulers.[5] Each role in society, including kingship, had its own *dharmā* (translated as responsibility or duty). Texts of the *Arthashastrā*, by fourth century B.C.E. Hindu political theorist Kautilya, mention the prime duty of the ruler was to maintain power and uphold the *dharmā* of the social whole.[6] In the ancient period (before 1500 B.C.) also good things of civilization existed in Hindu region, such as liberty, equality, economic well being and organized charity. As these were no classes in society before Āryans, all Hindus including the rulers (*Vispathīs*) and the legislators (*Rishīs*), were known as the "*VIS*" or *Visas*. Caste system did not exist over there. All people were of one community lived together, ate and drank together, and intermarried. Providing justice was the duty of different gods[7] represented by man of highest wisdom (*Brahmanās*) in socio-religious constitution of the Hindu society. Fighting was the duty of the man reaching at the stage of *Vanaprasthā*, (manhood).[8] These were the well- established institutions of ancient India. The main idea ,which comes to ones mind is probably that although the society was divided on the basis of profession ,some one adopts but this very division was also seen on the top level in governmental departments and moreover, there was no separation among religious rites ,governmental

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4 Ibid, 29.
5 Klaus K. Klostermaier, *A survey of Hinduism* (New Delhi: Munshiram Manoharlal Publishers, 1990), 67.
6 Stuart Mews, *Religion in Politics* (London: Longman Group, 1989), 98.
7 Swami Dharma Theertha, *A history of Hindu Imperialism* (Madras: Dalit Educational Literature Centre, 1992), 15-16.
8 Ibid, 17-18.

responsibilities and the market business. All were mixed together and the was simple.

3.2 Doctrine of Castes Classification

After invasion of Āryans (1500 B.C.E.) the then prevailing system was changed into the doctrine of caste classification. Āryans divided the people of India into four classes. In this the spirit of democracy directed them. They wanted smooth working relationship between government functionaries. There was no difference between social obligations, religious duties and governmental responsibilities as the same was indistinguishable in the past governments also. By benefiting from this situation Āryans introduced a cast system by assigning different duties to different casts. S.A. Nigosian has clearly mentioned the ranking in casts and their assignments.

He writes:

> In the first rank were the Brahmins who occupied the central place of power in Hindū society. The Brahmins were priests, the spiritual and intellectual leaders of the society. They devoted their time to studying, teaching, performing scarifies and officiating at religious services. They dispensed justice and were arbitrates also.
>
> Second come the Kshtryās, who as rulers, warriors, and nobles, protected, administered and promoted the material welfare of society. (They were the executives).
>
> Third in rank were the vaisyās, who as farmers, merchants, and traders contributed to the economic well-being of the society. (This was newly introduced by Āryans).
>
> Fourth were the Sūdrās, who as laborers and servants supplied the manual labor or service needed by the first three groups.[9]

Being the respectful members of the society, Brahmins assumed the legislative powers to themselves also, leaving the democratic kings with executive power alone. This was because of their direct influence in the life of the community. It is said,

> The rules were soon promulgated (by Brahmins) making the employment of the priests necessary and depriving the householders and the kings of their right they had from immemorial days of sacrificing without a priest. The sacrificial ground became the legislative chamber from where the priests issued their sacrificial dicta and social laws.[10]

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[9] S.A. Nigosian, *World Religions: A historical approach*, 3rd ed. (Boston: Bed Ford/ St. Martius, 2000), 23.

[10] Swami Dharma Theertha, *A History of Hindu Imperialism* (Madras: Dalit Educational Literature Centre, 1992), 34.

This was democracy's tendency towards aristocracy where a class of persons (Brahmins) waned to overcome all the government organs. No doubt the laws promulgated by this class very often served to check the autocracy of kings and to ensure to the people government according to law but this curtailment of executive power meant a tightening of the legislature's grip, and the law of the country generally meant the priest imposed caste laws. By virtue of this power Brahmins often expelled the king (with his cabinet) and sometimes ordered his murder, i.e., King Veṇā was killed for violating the rules of *Dhandanīthī*, Pirthū was put on throne to replace his father.[11]

3.3 Clear Division of Functions and Their Violation

Though, in ancient India the functions of each organ in government and society were clearly divided and separated but again there were many violations to the rule of *Bhagavadgītā*, which provided "It is better to fulfill one's own duties (*dharmā*), however, imperfectly, than to do that of another, however, perfect it may be."[12]

Thus, the frequent violations of the doctrine of separation of functions or powers caused the decline of the ancient version of prevailing democracy in India, which never returned to its golden days.

[11] Ibid, 44.
[12] Bhagavadgītā, 3: 35.

4. SEPARATION OF POWERS IN GREECE

The Greeks passed through many ups and downs as far as the political stability is concerned. In some instances it give us the complete picture of democracy, in others it takes it.

Greek government consisted mainly three organs, i.e.;

- the kingship (The executive plus nominal judicial powers);
- the priesthood (Religious commandment and some legislative functions but later the legislative functions where transferred to popular assembly);and
- the judgeship (what we call judiciary now).

Though Greeks were experiencing different systems, they tried the doctrine of separation of powers also, for crushing the despotism in this great city-state.[1]

4.1 Government Structure in the time of Solon

Solon, the first great reformer at Athens established democracy and gave a constitution to it in 594 BC. He broke the monopoly of the members of Eupatridae, whom in practice controlled the machinery of the state. He established four classes

[1] Robert Maynard Hutchins, ed., *Great Books of Western Civilization*,vol. 38,*The Spirit of Laws*,by Charles De Montesquieu (London: William Benton, 1984), 76.

graduated in terms of income, whom formed the qualification for different offices, i.e., the higher posts to the higher class and the lowest class had the right to attend the assembly and to sit in the appeal court, which Solon instituted to review the judicial decisions of the magistrates where they did not give the satisfaction.

4.1.1 Assembly

The Athenian assembly comprised all classes from richest to the poorest. It 'composed of Laundrymen, shoemakers, carpenters, smiths, peasants, merchants and shopkeepers.'[2] Every citizen had right to vote, to propose amendments and to make speeches. The assembly met four or five times a month and at least forty times a year on the hilly area of *Pnyx*. The preparation of agenda for the assembly was the responsibility of the council of five hundred. The councillors in this council were elected by lot from all constituencies of Athens in proportion to their population, but no one could serve more than twice in his life in the council. No amendment could have been moved or question discussed and noted in the assembly unless the council with due publicity had put it on the agenda and prepared drafts of the issue. The assembly discussed and decided policy matters as well as functions of the state administration. It controlled the police, the magistracy and the army generals, who received strict orders from it.

4.1.2 Courts

The courts in the time Solon not only decided private cases but also conducted examination of magistrates on the expiry of their term in the office. These courts tried politicians, bureaucrats and generals (like National Accountability Bureau in Pakistan). The courts were also known as the arbiters of the constitutional issues.[3]

4.1.3 Executive

Three hundred and fifty magistrates were chosen by lot in each year to carry out the day-to-day administration. The lot was drawn among the citizens who extended their names for serving in the government, the assembly elected ten generals and some other officials. Although the term in office was restricted to two in the constitution

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[2] Hugh Lloyd-Jones, *The Greek World* (London: Penguin Books ltd., 1962), 72.
[3] Ibid, 75.

but for the skilled officers there was no restriction regarding their re-election.

The councilors, the jurors, the magistrates and also the citizen who attended the assembly were all paid for their services.

Montesquieu is of the view that the three powers in Greece were distributed in such a manner 'that the people were the Legislature, and King had the executive together with (some) judiciary powers.' Moreover he says that 'Greeks had no notion of proper distribution of the three powers in the government of one person.'[4]

4.2 Pericles Reforms

In the days of Pericles (495-429) each citizen enjoyed the right of equality before Law (*Isegoria*) and equal participation in the legislative assembly (*Isonomia*). The citizen at this time meant one who votes, takes turn by lot in serving nation as a judge or magistrate, standing by to serve the state at any time and was a member of *Ekklesia* (the lower assembly).

4.2.1 Legislative Reforms

The assembly here also met four times a month in *Agora*, in the theater of *Dionysus*, or at the *Piraeus* but ordinarily in the *Pnyx* in the west of *Areopagus*. The presiding officer used to open the assembly by presenting a *probouleuma* or reported bill. The members in this assembly were heard in the order of their age.

It was possible to propose a bill at the first session of each month and whoever presented it was held responsible for its being illegal, if proved by any member in the later stage through *graphe paranomon* or writ of illegality. It was also a practice that before considering a bill assembly was required to submit it to the council of five hundred for preliminary examination, as mentioned earlier, and than to the Committee having special expertise in dealing with the issue. Finally, it was brought on the agenda in the assembly for debate.

Voting was by show of hands and these votes could confirm amend, or

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[4] Robert Maynard Hutchins, ed., *Great Books of Western* Civilization, vol. 38, *The Spirit of Laws*, by Charles De Montesquieu (London: William Benton, 1984), 5.

override the council's report on a bill and the decision of assembly was final. The assembly's main functions were to pass Laws, known as *nomoi*, elect magistrates and pronounce final word on question of war and peace.

The *boul* or council, inferior to legislative assembly and originally the upper house, met in the *bouleuterion* or council hall in the south of *Agora* and its ordinary sessions were public. The council at Sparta was known as *gerousia* and was originated in a tribal council of elders, its members served for a term of one year.[5] The functions of *gerousia* were legislative, consultative and Executive. It scrutinized bills before their presentation in the legislative assembly and it could have issued executive decrees when the assembly was not in session (as president issues ordinances in Pakistan when assembly is not in session). It supervised the conduct and accounts of the religious and administrative officials, and controlled foreign affairs of the State.[6] Various other tasks were also assigned to them by the legislative assembly or *boul* (the upper house council).

The council (*gerousia*) comprised ten committees called *prytanies*, each committee presided over the *boul* (the upper house council) and on occasions the public assembly for one month.

If any law was condemned by vote of the public assembly, or any citizen had a new law to propose in lieu of the existing one, the *prytany* was employed. The effect of *prytany* was to place the making or repealing of laws under guarantees for the trying of causes and the accusation in judicature.

Through public assembly, council and *prytany*, Athens carried out its legislative functions at the time of Pericles.

4.2.2 Judicial reforms

The judicial competence was taken away from the *Areopagus* (the assembly) and *archons* (the magistrates). This was confined to the newly created panels of salaried dicasts called *heliaea* (the judiciary). This was the popular judiciary of Athens, which sat at fixed meeting places in the neighborhood of market.

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[5] Martin Van Creveld, *The Rise and Decline of the State* (UK: University Press Cambridge, 1999), 26.
[6] Ibid.

The *Heliaea* was composed of six thousand dicasts annually elected by lot. These six thousand dicasts were distributed into ten dicasteries or panels of five hundred.[7] This was for the first time that the panel of thirty judges were summoned to try the cases in each borough. They acted systematically. For the first time they were organized, thus commencement of their pay was also the commencement of their regular judicial actions. They were given modest pay for their services – barely enough to keep them financially solvent.[8] The pool of 6000 potential jurors called *nomothetae* was also elected by the assembly to prevent bribery and to help judges to sort out cases brought to them in these courts.[9]

4.2.3 Administrative Reforms

The general power of supervision over the city-state was confined to *Archons*, which acted under the direction of the assembly, the council, and the courts. These were about twenty five groups with the estimated number of seven hundred officials. They were elected through lot but no one could hold office more than twice. These magistrates were restricted to simple administration and after expiry of the capacity of *archonship* they could become members of *Areopagus* (the legislative assembly).

Fulfillment of necessary conditions for *archonship* were required from candidates, i.e., 'all those upon whom the lot falls were subjected, before taking up their duties, to a rigorous character examination (*dokimasia*) – and his whole life was exposed to challenge by any citizen.'[10] The *archon* was also required nine times a year to face the vote of no confidence.

The magistrates were responsible for running state's day to day business, and this was besides summoning the assembly.

The functions also included the following:

i) Commanding in war (*strategoi* and *polemarchs*).

ii) Looking after Finances.

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7 Will Durant, *The Story of Civilization*, part II (New York: Simon and Schuster, 1939), 259.
8 Martin Van Creveld, *The Rise and Decline of the State* (UK: University Press Cambridge, 1999), 27.
9 Ibid.
10 Will Durant, *The Story of Civilization*, part II (New York: Simon and Schuster,1939),263.

iii) Erecting public buildings.

iv) Supervising markets.

v) Exercising justice (to the limit of fines).

vi) Keeping internal order.

vii) Serving deities and keeping them happy.

Appeal against the actions of *archons* lie before the *boul* (the council) or *heliaea* (the judiciary) and at the expiry of their term in the office a board (logistai) reviewed their actions and the accounts. If any misappropriation or malfeasance proved was punished with severe penalties. The committee of seven magistrates called *nomophylaces* was empowered to confine the magistrates to act according to the law.'The system meant that instead of executive and juridical powers resting in the hands of the same person, they were separated'[11] and through these reforms Pericles made Athens a greatest democracy in city-states of ancient world.

[11] Martin Van Creveld, *The Rise and Decline of the State* (UK: University Press Cambridge, 1999), 27.

5. SEPARATION OF POWERS IN ROME

Rome experienced the theory by dividing the power into three main branches followed by many subordinate offices behind each branch. In the beginning hundred tribes' heads were chosen to assist the government for running its business. These heads are known as *Patres* (Fathers). They formed a body called Senate. These *Patres* or *Patricians* ruled the socio-political classes of Roman city-state for a long time.

Then comes the body of citizens (*Plebs* or *Populus*) comprised of peasants, traders and artisans. These were the main two classes in Rome, which resisted each other's authority. *Plebs* began gaining importance through their demands from senate for the participation in magistracies and priest hood. Senate for the first time established two tribunes and three *aediles* for apprehension of the issues related *plebian* class but in a little while they demanded the change of laws in Rome. Senate meeting their demands chose ten men, *decemviri*, to formulate a new code. They (*the decemviri*) were given supreme state powers under the chairmanship of Applus Claudius for two years to change the system. But they refused to handover the power even after the expiry of their term and of course *plebs* blamed senate for bringing dictators in power because the yoke their tyranny and cruelty wiped out the *plebs*, they suffered from this new authoritarianism.

After the constant protests *patricians* were strained and forced to depose *decemvires*, however they restored the old system and confirmed the right of appeal to assembly from the decisions of the magistrates.

This kind of demand and supply continued with all forms of government (democracy, aristocracy and monarchy) in Rome.

However, in early Roman days the powers of government were equally divided among three popular organs, i.e.:

- The consuls possessed supreme military powers and power in civil administration.

- The senate controlled the finance and had large powers of inquisition and adjudication.
- The assembly had the power of bestowing offices, passing and repealing laws, deciding upon war and peace, determining the penalty against serious offences. Each of these offices was a check upon each other's activities.

The composition and function of these offices is discussed below.

5.1 Legislative Powers

Senate was the supreme body and performed as the assembly of elders. The age for its membership was 30 years for lifetime tenure. It could discuss the issues presented to it by a magistrate and thus advised on crucial matters.

The power of the senate was absolute with regard to foreign affairs; it received ambassadors and sent them also.

It assigned administrative duties and issued instructions to councils and *praetors*. It fixed the number of the troops in army, appointed or designed and controlled the defense share in budget. It supervised religious matters and ministers in government. All financial decisions were at senate's discretion. It was also empowered to impose emergency, suspend all laws and could declare itself as the high court of justice.[1] Voting in assemblies was direct; citizens who could not come to Rome had no representation. The citizens who served in army more than ten years with the heads of clans in a gathering of *curiae* composed a body called *cumire*, which gave the power to the elected magistrates to govern. After the fall of monarchy this power of *curial* assembly was conferred upon the *centurial* assembly composed of one hundred general ranking soldiers. This *centurial* assembly gained power of choosing magistrates, passed or rejected the measures proposed by the officials or even senate. It heard the appeals from judgments of the magistrates, tried all cases of capital crime, and decided upon war and peace. It convened at the call of consul or a tribune.

Plebians established democracy in the true sense and held the republic responsible to their own assembly called *concilia-plebis* out of which emerged the *comitia populitributa*, which exercised a lot of legislative powers. Each tribe in Rome had

[1] Henry Smith Williams, *The Historians History of World*, vol. 5 (New York: J.J. Little and co., 1904), 333-334.

one vote in this assembly. This assembly became the main source of Roman Laws after senate's recognition to it in 287 B.C. This assembly was to conduct the activities of *plebs* but it gradually extended its powers. Now its ordinances (*plebiscita*) become law.[2] On occasions the plebs assembly (*comitia*) passed laws for patricians, who had no share in legislation. This exorbitant power destroyed senate's authority in Rome.[3]

Montesquieu says: ' the sensors and before them the consuls modeled and created as it were, every five years the body of the people. They exercised the legislation on the very part that was possessed of the legislative powers.' [4]

5.2 Executive Powers

The popular assembly of Rome left the executive power of the senate and the consuls. Although the magistrates were chosen by the *centurial* assembly and minor officials by the *Comitia* but one interested in political career had to serve in army for ten years and seek election as one of the *quaestors* (The body under the senate and consul for managing state funds and assisting *praetors* in investigating the crimes). After the successful destiny there the citizen might have been selected for *aediles* (the body to take care of buildings, markets, public places, saloons, brothels and sports). After this the man would have become eligible to join as *praetor* (the body led armies and acted as judges and interpreters of the rules). After gaining constant success he could become *Censor* in the *centurial* assembly. This was the body to hold elections and examine the charter of all candidates. Their duties also included removal of senators on criminal charges. Letting the governmental property and land for cultivations, collection of taxes, treatment of slaves, construction of public buildings, education of citizens, preparation of budget and convention of citizens for religious ceremonies.

The senate also had a share in executive power, it disposed of the public money, and framed out the revenues, they were arbiters of the affairs of their allies, they determined war and peace, and directed in this respect the consuls, they fixed the

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2. Ibid.
3. *Robert Maynard Hutchins, ed., Great Books of Western Civilization*, vol. 38, *The Spirit of Laws*, by Charles De Montesquieu (London: William Benton, 1984), 78.
4. Ibid, 79.

number of the Roman and of allied troops, disposed of the provinces and armies to the consuls or *praetors*, and upon the expiration of the year of command had the power of appointing successors, they decreed triumphs, received and sent ambassadors, they nominated, rewarded, punished and were the judges of the kings declared them the allies of the Roman people, or stripped them of that title.[5] These are the executive functions of the senate that Montesquieu has asserted.

Senate was also empowered to appoint a dictator whose authority over citizens and their property was absolute, the dictator as the head of army and supreme administrator in the state possessed unchallenged control of money and soldiers.[6]

Then come the consuls, which had sanctity for leading religious rites. It could summon the senate and assembly and presided over these two. Consul executed all types of laws. It levied army, raised funds and 'had the command of the forces by sea and by land; disposed of the forces of the allies; were invested with the whole power of the republic in provinces gave peace to defeated neighbors, imposed conditions on them and referred them to the senate.[7]

5.3 Judicial Powers

In early Roman days priests were the sole judges who could declare right and wrong and decided the meeting places and the time of courts. These irregular courts of priests dealt issues of marriage, divorce, incest, wills and rights. Appius Claudius Caecus (the blind), the great grand son of *Decemvir*, formulated a legal procedure, which remained in the hands of priests, and after a long struggle the code of twelve tables was introduced that replaced the priests with lawyers. Though the procedure was complicated in this code (because any magistrate could have served as a judge) but it declared *praetor* to be regular judges. By this the priests monopoly of the courts was broken first by twelve tables, then by the publication of the traditional formulatory and the opening of the college of the priests by Lex Ogulnia 300B.C. So, the main importance of the jurists for development was their interpretation of the XII tables, the other legislation and the edicts.[8]

Kings had absolute judicial power after them the consuls were assigned this task and

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5 Ibid, 80.
6 Luigi Pareti, *History of Mankind,* vol. II, (London: George Allen and Unwin Limited, 1904), 783.
7 Robert Maynard Hutchins, ed., *Great Books of Western Civilization*, vol.38,
The Spirit of Laws, by Charles De Montesquieu, (London: William Benton, 1984), 80.
8 Luigi Pareti, *History of Mankind,* vol. II, (London: George Allen and Unwin Limited, 1904), 789.

then the *praetors* followed them in performing as the judiciary.[9]

The *centuries* formed a high court of justice for the trial of citizens and the tribunes sometimes also tried the criminal offences and on some occasions it could throw the culprit into prison with out any trial.[10]

Praetors could also make drastic changes in practice in the law; each *praetor* held office for one year and each issued his own edict. Strictly the *praetor* could not legislate but could declare the laws valid or void and would give or refuse an action. The *praetors* developed the laws by giving ad-hoc actions, where no remedy existed at civil law.[11]

There were two types of *praetors*; *praetor urbanus* (dealing with the cases in which all the parties were Romans) and *praetor peregrinus* (dealing with the cases in which at least one of the parties was Roman). It is said that judges decided only the questions of fact, and the question of law was carried before the tribunal of *Centumvirs*.[12]

The crimes against the public were tried by the people and private crimes by a commission called *quaestor*. The *quaestor* had authority to nominate the judges for each case.[13]

Although at the Rome the *praetors* were regular but their nominated judges were not permanent.[14] At first the judges were taken from the senators but afterwards they were chosen from *equestrian* order.[15] However, in Carthage the senators were the honorary judges

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9 Robert Maynard Hutchins, ed., *Great Books of Western Civilization,* vol.38, *The Spirit of Laws,* by Charles De Montesquieu, (London: William Benton, 1984), 80.

10 Henry Smith Williams, *The Historians History of World,* vol.5, (New York: J.J. Little and co., 1904), 337.

11 Luigi Pareti, *History of Mankind,* vol. II, (London: George Allen and Unwin Limited, 1904), 788-789.

12 Robert Maynard Hutchins, ed., *Great Books of Western Civilization,* vol.38, *The Spirit of Laws*, by Charles De Montesquieu, (London: William Benton, 1984), 81.

13 Ibid, 82.

14 Ibid.

15 Ibid.

6. SEPARATION OF POWERS IN ISLAMIC STATE

In the beginning of Islamic era the City of Madīnah was established as an Islamic State with the promulgation of the constitution of the Madīnah.[1] The holy prophet formed a first state over there. Being a divine personality he was Lawgiver (Legislator), Head of the state (Executive), and the Fountain of Justice (Judiciary). He presided over the assembly not merely the speaker but as an active, primal and main legislative authority. He gave decisions that are evident from the Hadīth in which he says:

> Verily you come to me with your cases, and probably some of you may present his case more eloquently than the other. For the sake of Allah I am but human being, I will judge according to what I hear. Therefore any one I accordingly give him the legal right of the other I am giving him the appropriate place in hell, if he wants to take it or leave it.[2]

He as an executive head appointed government officials, military commanders, and judges, sent expeditions,[3] ambassadors and envoys and receive them also.

6.1 Legislature in Prophet's time

The Qur'ān, the Sunnah, the Ijmā ', the Istashāb, and Maslahah-Mursalah are the very acts of Legislation. The Sunnah (words, acts, and approval) of the Prophet (s.a.w.s) is the source of Islamic Law[4] and the Sunnah relating to ahkām is taken as the fundamental law in Islamic legal system. In his lifetime, the holy prophet (s.a.w.s.) was the legislator after Allah and his companions were allowed to do Ijtehād (analogy) this also, when confirmed by the holy prophet (s.a.w.s.), could have become

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1 Muhammad Hamid Ullah, *The First written Constitution in the World*, edition 2nd,(Lahore: Sh.Muhammad Ashraf & Company, 1968),16 and 41-54.

2 *Sahīh al-Bukhārī,* Ahkām, 281 ,vol.ix, translation: Muhammad Muhsin Khan (Lahore: Kazi Publications,1979)212.
See also *Sahīh al-Bukhārī,* 638 ,vol.iii, translation: Muhammad Muhsin Khan (Lahore: Kazi Publications,1979)38.

3 Muhammad Yasin Mazhar Siddiqui, *Organization of Government Under Prophet* (Delhi: Idārah-i-Adabiyāt-i-Delli, 1987), 44.

4 Imran Ahsan Nyazee, *Outlines of Islamic Jurisprudence*,(Islamabad: ALSI,1998)69.

act of legislation. Ijmā' was not recognized as a source of law in the lifetime of the holy prophet (s.a.w.s.).

There was a Shūrā committee in the holy prophet's time. This was consultative assembly, which represented Muslim's Community. Its members enjoyed the confidence of masses and were outstanding in military, civil administration, and missionary fields. They also were well versed in Islamic jurisprudence.

The task of this committee was to advise, to provide expert opinion and to legislate through their Ijtehād. The legislation became the Sunnah (act of legislation referred to the Holy Prophet) if the Prophet (s.a.w.s.) approved it. However, the only condition on this law making authority was that it should not be in contravention to the Qur'ān and the Sunnah. The reference to consultative assembly (shūrā) in crucial issues was almost necessary for the government though not binding.

The Qur'ān contains a whole sūrah on consultation and it provides that " they conduct their affairs by mutual consultation".[5]

Abū Hurairah narrating the pursuit of the Prophet (s.a.w.s) in consultation says, "I have never seen a person who could excel the prophet (s.a.w.s.) in consultation from his companions".[6]

Abū Bakr (r.a.t.a.) and 'Umar (r.a.t.a.) were members of the assembly and had a great wisdom and influence in or outside the assembly, even the Prophet (s.a.w.s.) honored their opinion and when they got together on an issue, he would not have gone against that. 'Ā'ishah (r.a.t.a.) says: " I have not seen a person consulting the people more than the prophet (s.a.w.s.). He said if Abū Bakr and 'Umar got together on an opinion; he would not go against that."[7]

There are plenty of instances where the Prophet (s.a.w.s.) followed the majority opinion. In battle of Uhad Prophet's opinion was to fight the offensive enemy from inside the Madīna but the opinion of majority was honored.[8] A guideline on administrative affairs to 'Alī (r.a.t.a.) is another example of the importance of the assembly even in the Prophet's era. This is proved from 'Alī's (r.a.t.a.) saying, "I

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5 Al- Qur'ān (42: 38).

6 Ibn Hajar al-'Asqalānī ,*Fath al-Bārī*,vol.13 (Beirut: Dār al-Fikr,1996) 289.

7 *al-Kutub al-Sittah*,vol.13, *Sunan al-Tarmizī*, 1714,vol.iv,(Istanbul: Çargriyayin Lari,1981), 213-214.

8 Tarīkh al-Tabarī, vol. 2, 4th ed.,(Cairo: Dār al-Ma'rif,1977),502.
See also W. Montgomery Watt, *Muhammad at Medina*, (Oxford: Clarendon Press,1956),17.

asked the Prophet (s.a.w.s.) How to settle the affairs left without guidance from the Qur'ān and the Sunnah. He replied that we should convene the meeting of Shūrā (the assembly) comprising of the pious people of the Ummah and decide thereby."[9]

6.2 Judiciary in Prophet's time

It was in the Prophet's era when judiciary started working first in Islamic State of Madīna. The Holy Prophet (s.a.w.s.) appointed 'Alī (r.a.t.a.) as a judge to Yemen and so was Mu'ādh (r.a.t.a.) appointed by him.

In a famous conversation of the Prophet (s.a.w.s.) with Mu'ādh (r.a.t.a.); he asked Mu'ādh (r.a.t.a.): "O Mu'ādh, which laws are you going to apply in your judgment?" Mu'ādh (r.a.t.a.) said, "I will apply the Qur'ānic laws." The Prophet then said, "What will you do if you do not find such a law in the Qur'ān? He said, "I will apply the Prophet's Sunnah." The Prophet repeated, "If you do not find such law in Sunnah!" He said, "I will try my utmost and judge accordingly."[10]

The Muslims were asked to refer their cases to Allah through His Prophet as the verse in Sūrat al-Nisā provides, "If a dispute appears among you on something, return it to Allah and His Prophet."[11]

The court of the Prophet (s.a.w.s.) was the final court of appeal, which is proved from the following verse, which says, "It is not suitable for a believer, man, or woman, when a matter has been decided by Allah and His Apostle to have any option about their decision."[12] The judgment of the Prophet (s.a.w.s.) was binding in nature as it is apparent from Sūrat al-Nisā's this verse, "But no, by your Lord, they can have no faith until they make you judge in all disputes between them. And find in their souls no resistance against your decisions but accept them with the fullest conviction."[13]

From assignation of judicial duties to Mu'ādh (r.a.t.a.) and 'Alī (r.a.t.a.) the only idea which is perceptible is that the Holy Prophet (s.a.w.s.) not only himself performed the duties of Chief Justice but appointed also the chief justices of higher courts in the provinces of Islamic State and in the constitution of Madīna it was clearly mentioned

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9 Alāmah Mahmūd al-Alūsī, *Rūh al-Ma'ānī fī Tafsīr al-Qur'ān al-'Azīm wa Saba' al-Mathānī*, vol. 14, (Beirut: Dār al-Fikr, 1994),72

10 Hadith Mu'ādh, *Ibn hanbal* , vol. 5 pp. 230,236,242.

11 Al-Qur'ān, 4: 59.

12 Ibid ,33: 36.

13 Ibid, 4: 65.

that the prophet himself will be the final court of appeal.[14] The illustrations were also noticed that the prophet (s.a.w.s.) referred the cases to his companions for training them to hold the judicial offices in future.

6.3 Executive in Prophet's time

This goes without question that the Holy Prophet (s.a.w.s.) carried out the whole functions of the executive head of Islamic State. He was sovereign power after Allah. He established Islamic State, as it is natural with all states in the history of political science that it is run by the founder and he takes the position like of the head of that very state which he established, he was the supreme leader and all references were made to him. Thus, the Holy Prophet (s.a.w.s.) also carried out all administrative functions in the Islamic State of Madīna. He (s.a.w.s.) appointed 'Alī (r.a.t.a.) and 'Uthmān (r.a.t.a.) deputy commanders of Islamic forces on the occasion of the expedition of Banū Nadīr and Khyber. He sent envoys and received them, i.e., Muhammad Bin Muslamah was sent as an envoy to the Jewish tribe to communicate to them the decision of the Prophet (s.a.w.s.) in their case. Two years later Sa'd bin Mu'ādh (r.a.t.a.), Sa'd bin 'Ubādah and 'Abd Allah bin Rawāhah were sent to Banī Quraydah to remind them of their agreement with Muslims.[15] He also appointed governors of states and Qudāt, sent expeditions and Āmils for tax collection.

In short, all necessary appointments were made by the holy prophet (s.a.w.s), whether military or civil, internal administration or external, local or at center, in the first Islamic State.

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[14] Muhammad Hamid Ullah, *The First written Constitution in the World*, edition 2nd, (Lahore: Sh.Muhammad Ashraf, 1968), 20.

[15] Muhammad Yasin Mazhar Siddiqui, *Organization of Government Under Prophet* (Delhi:Idarah-i-Adabiyat-i-Delli, 1987), 168.

7. POWERS AT THE TIME OF RIGHTLY GUIDED CALIPHS

The word Khalīfa means the person succeeding or representing the Holy Prophet (s.a.w.s.) as the head of state in performing administrative functions in Islamic State.[1] Abū Bakr (r.a.t.a.) was the first head of state who laid down the very principles for running the functions of Islamic State. He separated executive from judiciary and legislative bodies.

The clear distinction between organs of the state was set up for preserving the rights of Muslim community (Ummah).

7.1 Executive Functions

The word Amīr or Amīr al-Mu'minīn is used for executive head in Islamic State; this was applied after Prophet's (s.a.w.s.) death. As this organ in the states has remained the most powerful due to its vast jurisdiction in the history of governments, the same place it occupied in Islamic State. It was the nucleus of authority and the active force in the government. It remained empowered to implement governmental decisions. It is observed that in the Islamic State the basic function of executive is to enforce directives of the Qur'ān and the Sunnah and to bring about a society ready to accept and adopt these directives for practical application in its life.[2] The Amīr is also responsible for enforcing court decisions and the letters of the law; he has the

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[1] Ibid, 231.

[2] Qamaruddin Khan, *The Political Thought of Ibn Taymīyah*, (Islamabad: Islamic Research Institute, 1973), 66.

authority to appoint subordinates, direct them in their duties and to remove the one who neglects it. The head of state is liable for formulating and executing the administrative policy[3] He issues ordinances that have force of laws. He is commander in chief of armed forces. He has power to determine the movement and use of the forces in times of peace of war. He has the control of production and transportation and power to declare emergency.[4] The executive head of Islamic State is responsible for formulating and execution of foreign policy as Abū Bakr (r.a.t.a.) and 'Umar (r.a.t.a.) frequently did the same in their tenures in government, and is empowered to send and receive ambassadors. The ambassadors were usually received from Rome and Persian empires, i.e., the famous story of Roman Empire's ambassador who found 'Umar (r.a.t.a.) lying under the tree is frequently quoted in this regard. The executive department has power to issue pardons and to suspend the Hudūd. He can reduce sentence and can also issue proclamation of amnesty[5] The executive head can convene the meeting of the legislative body as Abū Bakr (r.a.t.a.) convened the meetings

of Majlis-e-'Ām to discuss sending the troops under the banner of Usāmā(r.a.t.a.) and taking of action against the renegades who refused to pay Zakāt to the state[6] and later convene the meeting of majlis-e-khās for appointing his successor. It was very often that the head of executive branch convened the meetings of the legislative body and presided over it. The well-known scholar Kattānī observes that the functions of diplomatic mission by categorizing them that the embassy duties including inviting people to Islam to make Sulh (treaty) to give protection (amān) to ask the Kings to send Muslims back safely to their country, to ask the King to solemnize the marriage of a Muslim woman with the Imām, to send gifts with them or to warn a unreasonable ruler of the dire consequences of his paganism.[7]

7.2. Legislature

The legislature in Islamic state was called Shūrā, which comprised two chambers, i.e., Majlis-e-'Ām, and Majlis-e-Khās. The former comprised of the members of the

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3 Abū al-A'alā , Mawdūdī,*First Principles of the Islamic State,* edition 7th (Lahore: Islamic Publications,1997),32.

4 'Abdullrahman 'AbdulKadir Kurdi, *The Islamic State: A Study based on the Islamic Holy Constitution.*(London : Man sell Publishing Limited,1984),90.

5 Ibid, 91.

6 Ibid, 92.

7 'Abd al-Hayyee Ka ttānī, *al-Tarātīb al-Idārīyah,*(Beirut :Hassan Ja'nā, n.d.), 200.

general representatives and the later comprised of the members specialized in different fields. The legislature makes and unmakes laws (those, which are not mentioned in the Qur'ān and the Sunnah. Muhammad Asad says: " No legislature measure could become law unless and until it has been thoroughly discussed in the Majlis al- Shūrā and finally approved by it with or without amendments.[8]

The well-known meeting at Saqīfah-Banī Sāida was the meeting of Majlis-e-'Ām and same was the meeting called upon by

Abū-Bakr (r.a.t.a.) regarding the sending of troops under the banner of 'Usāmā'. The traces were also found for the convention of the meeting of Majlis-e-Khās in which he announced 'Umar's (r.a.t.a.) name as his successor and then the issue was brought before the Majlis-e-'Ām.[9] 'Umar (r.a.t.a.) also consulted Shūrā on many issues till the moment of his last breath. He convened the meeting of Majlis-e-Khās in his last moments asking them to discuss the matter of succession, as the number of members in the assembly was not fixed, so this time they were six in number. He requested them to appoint any one after his death. This assembly proposed 'Usmān's (r.a.t.a.) name which later was brought to Majlis-e-'Ām that also voted for him. The executive head or Khalīfah was not vested with any legislative powers his policy was directed by Majlis-e- Shūrā and the well known members of it at the time of 'Umar's Caliphate were 'Usmān, 'Alī, 'Abd al-Rehmān bin 'Awf, Mu'ādh bin Jabal, Ubayy bin Ka'b and Zayd bin Thābit.

7.2.1 Legislative Functions

The legislating power of a Muslim legislature is controlled by the well-defined principles. However, it is authorized to legislate in specific spheres.

Muslim legislators can legislate through Ijmā' as in Islamic history it frequently decided matters through it. At the time of four right-guided Caliphs, the procedural issues were left for legislature to decide upon its machinery provisions. The Islamic legislature can draft the laws to indicate manners in which the particular society will constitute and run its state affairs.

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[8] Muhammad Asad, *The Principles of State and Government in Islam,(* Gibraltar: Dār al-Andalus,1980),64.

[9] Abū al-A'alā Mawdūdī, *First Principles of Islamic state*, edition 7th, (Lahore: Islamic Publications, 1997), 30.

7.2.2 Limitations on the activities of Legislature

Where the explicit directives from God and His prophet (s.a.w.s) are available, legislature is authorized to enact them in the shape of sections, devise relevant definitions and details by making the rules for the purpose of enforcing them without alteration or amendment.[10] In case the text or directive of the Qur'ān and the Sunnah are capable of more than one meaning then it becomes the function of legislature to place one of these interpretations on the statute book, provided this should not be diverted for another meaning where there is no explicit provision in the Qur'ān and the Sunnah, the legislature is free to enact laws in order to sort out the issue which it is facing at that very moment but keeping in consideration the very spirit of Islam and fiqh requirements for the enactment.[11] The legislature is free to legislate and formulate the laws without any restriction and can provide the basic guidance if necessary when the same is not provided in the Qur'ān or the Sunnah.[12]

The sections in which the legislature usually attempts making laws are covered under four headings, i.e.;

7.2.2.1 Constitutional:

This is the task not covered by the Qur'ān and the Sunnah. The legislature's business will be to constitutionlise these areas.[13]

7.2.2.2 Electoral:

The nomination and approval of the candidates in executive, a legislative or judicial branch is the function of legislature with the exceptions in nominating the judges of the courts.

7.2.2.3 Law making:

The legislature has the authority to legislate and make statutes in the areas not covered by the Qur'ān and the Sunnah of the Holy Prophet (s.a.w.s).

Supervisory Function: One of the functions of legislature is the supervision of the executive branch particularly and administration generally.

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10 Ibid.
11 Ibid,31.
12 Ibid.
13 'Abd al-Rehmān 'Abd al-Kādir kurdi, *The Islamic State: A Study based on the Islamic Holy Constitution,*(London : Man sell Publishing Limited,1984),94.

These are the various functions attached to it by noticing its practices in past and the recommendation of well-known jurists.

7.3. Judiciary

The Qur'ān guided the righteous Caliphs and their judicial officers in deciding disputes by providing in Sūrat al Mā'idah:

> " Those who do not judge according to Allah's revelation are indeed disbelievers".[14]
>
> "Those who do not judge according to Allah's revelation are indeed unrighteous";[15]
>
> and
>
> " Those who do not judge according to Allah's revelation are tyrants."[16]

Abū Bakr (r.a.t.a.) was the first to separate judiciary completely from the executive and make it independent. He appointed 'Umar (r.a.t.a.) as Chief Justice, who held the office without any interruption from executive side.[17]

The independence of Judiciary can be judged through this occasion when two persons Aqrah bin Habas and 'Ayanayah bin Hassaṇ came to Abū Bakr (the then Caliph) and asked for the barren land laying in their vicinities. They were inclined towards Islam. The caliph sympathetically considered their application and awarded them a little deed for that for cultivation. Their issue was brought in 'Umar's Court, who summoned them and tore of the deeds by saying to them that, " Prophet patronized you because Islam was week in those days." Not only this but he went to the then Caliph (executive head) and asked him why he has done so, on which Abū Bakr (r.a.t.a.) replied, " It is a mistake" and once on another occasion said, "I can not reopen issue rejected by 'Umar."[18]

The government departments functioned separately and independently of each other under the reign of righteous Caliphs. The body called "Ahl al-Hal wa al-'aqd" whose function was to advise the executive branch in matters of law and make necessary

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[14] Al-Qur'ān 5: 44.
[15] Ibid: 45.
[16] Ibid: 47.
[17] 'Imād al-Dīn ibn Kathīr, *Tafsīr ibn Kathīr*, (Al-Riyād: Dār al-Salām,1998),1189.
[18] Professor Masud al-Hassan, *Hadrat 'Umar Farooq* (Lahore: Islamic Publications Limited,1982),103-104.

legislation, while administration and state policies was a separate entity. Then there were the executive officers that had no say in judicial matters, which were dealt separately and independently by the judges (Qādīs).[19]

The executive head appointed the Qādīs but it was not ordinary for him to terminate their services or to put pressure on them for having certain decision.[20]

Qādī could summon executive head if the case is brought against them, as 'Umar (r.a.t.a) and then 'Alī (r.a.t.a) appeared before Shurayh, the then Chief Justice.

Giving the details of Qādī at different places in the era of 'Umar (r.a.t.a) the author of the book " the administration of justice in Islam" writes:

> This system of government worked smoothly until the time of Hadhrat 'Alī (r.a.t.a) and after a break 'Umar II survived it, but due to the political changes the judiciary lost its independence.[21]

7.4 Conclusion

Islam's teachings in each sphere follow divine logic and it was quite natural to have central government with different departments, as was in the ancient city-states. On the basis of historical traces it cannot be claimed that Islam introduced the theory of separation of powers but certainly it would be affirmed that Islam practiced it in its true sense. The logic of concentration of powers in the Holy Prophet (s.a.w.s) was the training of companions in different fields and transfer of first hand knowledge to them and that in the inception of Islamic state there were not enough people to look after the different governmental departments independently, lastly it was the divine personality of the Prophet (s.a.w.s.) to be trusted in each matter because he himself was the source of Islamic laws.

The rightly guided caliphs totally separated the judiciary and let it work independently. Legislative body was strengthened and that independently worked in its specific jurisdiction and same was with the executive branch. Some times the persons responsible for the specific branch were given some other responsibility in another branch but this never meant that there was no separation in governmental institutions and all powers laid in one hand, However, it was because the number of

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[19] Abū al-A'lā Mawdūdī, *First Principles of Islamic state*, edition 7th, (Lahore: Islamic Publications, 1997), 35.

[20] Ibid,36.

[21] Al-Hāj Muhammad Ullah, *Administration of Justice in Islam*,(New Delhi:Kitāb Bhāvan,1986),23.

experts was less than the working sections of different departments in government.So one had perform many responsibilities at ones.

Discussing Shah Walī Allah's thoughts on the issue , Muhammad Al-Ghazālī says:

> One of the primary responsibilities of the state is to depute judges through its realm. Since the function of judiciary is a delicate exercise, which is liable to be influenced by bias and prejudice, it has drawn certain rules for the judges in the discharge of their judicial functions. [22]

[22] Muhammad al-Ghazālī, *The Socio-Political Thought of Shah Walī Allāh,*,(Islamabad: International Institute of Islamic Thought, 2001), 101.

8. SEPARATION OF POWERS IN MODERN EUROPE

In Europe, the theory took a little introduction, first in France in the writings of Jean Bodin in late 16th century. In France and generally throughout Europe there was a discontent- injustice and tyranny were prevalent more than before, the king enjoyed the judicial powers with that of administrative and legislative one. These deliberate tyrannies and failure to govern extended sort of unpopularity towards Crown. People started discussing King's despotic powers. Bodin, representing the public view, argued that if the King were both the lawmaker and judge, then a cruel King might give cruel sentences. Therefore, the justice and prerogative of mercy should not be mixed up together. He urged giving the judicial powers to independent judges.[1]

This was a rough idea of theory of the separation of powers, which Bodin gave in 1583 in France. In England the political situation was not different than that of the rest of the Europe. The Crown over there was also handling all governmental powers, like his counter parts in other European regions. He was a supreme judicial authority as well as keeping the executive powers in his hand. People revolted against Crown and brought Cromwell in power but he also in good faith for giving rights and ensuring liberty turned to be despotic. This was the situation, which forced people again to restore Charles II 's throne. Continuous tension on top and the distress obliged the then philosophers to look for a system that can console them.

8.1 John Lock's View

Some philosophers favored the Crown, like Hobbes and others talked on division of powers, as did John Lock. For him, every government should have three sorts of powers; the legislative, the executive in respect of things dependent on the law of nations, and the executive in regard of matters that depend on the civil law. By the first, the government (on its behalf the legislature) enacts laws, whether temporary or permanent, and has the power to amend or abrogate the old ones, by the second it

[1] Jean Bodin, *The Republic* (Cambridge: University Press, 1962).102

makes peace or war, sends or receives embassies, and by the third, it determines the disputes arising between individuals and maintain internal order. Lock explaining the theory says:

> It may be too great temptation to human frailty, apt to grasp at power, for the same person who have the power of making laws to have also in their hands the powers to execute them, whereby they may exempt themselves from obedience to the law they make, and suit the law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government. Therefore in well ordered commonwealths, where the good of the whole is so considered as it ought, the legislative power is put into the hands of divers persons who, duly assembled, have by themselves, or jointly with others, a power to make laws, which when they have done, being separated again, they are themselves subject to the laws they have made.... But because laws that are at once, and in a short time made, have a constant and lasting force, and need a perpetual execution, or an attendance thereunto, therefore it is necessary that there should be a power always in being which should see to the execution of the laws that are made, and remain in force. And thus the legislative and executive power come often to be separated.[2]

This sense of separation has nothing to do with the separating of balancing senses of the term although it served as landmark in Europe's political history and attracted Montesquieu's heed towards it while looking for his liberty to be secure.

Lock did not believe in the separation of powers in the sense of independence and equality of executive and legislature, for he held that "there can be but one supreme power, which is legislative, to which all the rest are and must be subordinate."[3] Nor did he deal in any separation of individual power, which was considered by him as a part of the executive.

8.2 Montesquieu's View

Then comes the famous man to whom the theory is referred. It is said that he was the first to fully formulate the theory in an organized manner.[4] Dr. Finer says, "France was monarchy in which authority was shared between a hereditary King and the Parliament. The Parliaments were superior courts of justice with many administrative

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2. John Lock, Two Treatises of Government, edition 2nd (Cambridge: University Press, 1967), 382-383.
3. Ibid.
4. Herner Finer, *The Theory and Practice of Modern* Government, edition 4th (London: Methuen & Co., 1961), 94.

functions. They were composed of judges, notaries and other officers who had purchased their offices"[5] for protection of personal and political rights and liberty. The search for the system to preserve personal as well as political liberty led Montesquieu to a long tour of Europe in1728. In his trip to England he closely observed the English constitutional system of that time, which he found perfect to quench his thirst. Of course in England the system was quite liberal than that in the rest of Europe.

The distribution of governmental authority between the King, the Parliament and the Courts; the allocation of the legislative powers of the state to the King, the House of Lords, and the House of Commons and the division of the judicial powers between House of Lords and the Courts, were the most obvious features of the British constitutional law at that time. Montesquieu studied it and liked it. Of the Constitution of England he says,

> In every government, there are three sorts of power: the legislative; the executive in respect of things dependant on the law of nations; and the executive in regard to matters that depend on the civil law. By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judicial power and the other simply the executive power of the state.[6]

Montesquieu renamed Lock's executive power and called it judicial power. The executive function described by Lock had been to execute the laws, anyway. Whereby Lock's federative power became the executive power in Montesquieu's version of the theory. By emphasizing the importance of maintaining internal as compared to external peace, and by thus assimilating the police function to the functions of defense and foreign policy, Montesquieu constructed the modern executive power. This executive power included the Crowns prerogative.

Montesquieu's assertion about the separation of powers in England was inappropriate even when he made it, since in terms of the personnel, the powers and influence, the

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[5] Ibid, 97.
[6] Robert Maynard Hutchins, ed., *Great Books of Western Civilization*, vol.38, *The Spirit of Laws*, by Charles De Montesquieu, (London: William Benton, 1984), 69.

functions of government in England were intermixed.

Montesquieu emphasized the need to place judicial and executive power in different hands, and also spoke of the mutual balancing and restraining of the legislative and the executive powers through running together the checking and balancing theories of mixed government with the separation of powers doctrine. Neither he nor many others down to the present day have seen clear as to whether the checking of one branch by another is a participation in the others function and a partial violation of the separation of the powers doctrine. He was searching for a constitutional system to preserve the liberty of which he says:

> When the legislative and the executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and the liberty of the subject would be exposed to arbitrary control: for the judge would be then the legislature. Were it joined to the executive power, the judge might behave with violence and oppression.
>
> There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of the trying the causes of individuals.[7]

It seems from his assertions that he was not much satisfied even by the English constitution in its practice. As he concludes that, "the most kingdoms in Europe enjoy a moderate government because the prince who is invested with the two first powers leaves the third power to his subjects."[8] For the liberty in England he says, "it is not my business to examine whether the English actually enjoy this liberty or not. Sufficient it is for my purpose to observe that it is established by their laws; and I inquire no further."[9]

Although Montesquieu did not intend an absolute separation of powers he taught the legislature's meeting on the call of executive body, executive's veto on crucial issues relating to legislation, and legislature's extra ordinary judicial powers, yet he successfully modified the ancient doctrine and that was by making the separation of powers into a system of check and balances between the departments of the government.

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7 Ibid, 70.
8 Ibid.
9 Ibid, 75.

8.3 Black stone's View

After Montesquieu another English philosopher voiced for the liberty and consequently for the theory of the separation of powers. This learned man was Blackstone, who almost reproduced Montesquieu's work in his *Commentaries on the Laws of England*, written in 1765 on the theory. What he did was sort of reply to above-mentioned French philosopher and of his understanding of the English constitution. He sees the independence of judiciary as a crucial factor for preserving liberty, he says, " in this distinct and the separate existence of the judiciary power in a peculiar body of man, nominated indeed, but not removable at pleasure, by the Crown, consists our main preservation of the public liberty; which can not subsist long in any state, unless the administration of common justice be in some degree separated from both the legislative and also from the executive power."[10] Defending English constitutional system and so called separation of powers in it he writes:

> And herein indeed consists the true excellence of the English government, that all the parts of it form a mutual check upon each other in the legislature, the people are a check upon the nobility, and the nobility a check upon the people; by the mutual privilege of rejecting what the other has resolved; while the King is a check upon both, which preserves the executive power from encroachments. And this very executive power is again checked and kept within due bounds by the two houses, through the privilege they have of enquiring into, impeaching, and punishing the conduct (not indeed of the King, which would destroy his constitutional independence; but, which more beneficial to the public) of his evil and pernicious counselors. Thus every branch of our civil polity supports and is supported, regulates and is regulated, by the rest: for the two houses naturally drawing in two directions of opposite interest, and the prerogative in another still different from them both, they mutually keep each other from exceeding their proper limits while the whole is prevented from separation, and artificially connected together by the mixed nature of the Crown, which is the part of the legislative, and the sole executive magistrate. Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by itself, would have done, but at the same time in a direction partaking of each, and formed out of all; a direction which constitutes the true line of the liberty and happiness of the community." [11]

He does not hold up here rather goes on defending his ideas and carrying out the

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[10] William Blackstone, *Commentaries on the Laws of England*, edition 15, (Oxon: Professional Books limited, 1982), 151.
[11] Ibid, 154-155.

operation of this very old doctrine he says "the right both of making and enforcing the laws, is vested in one and the same man, or one and the same body of man; and where ever these two powers are united together, there can be no liberty. But, where the legislative and executive authority are in distinct hands, the former will take care not to entrust the later with so large power."[12] This was theory's trip to Europe and its meeting with known philosophers, i.e., Bodin, Lock, Montesquieu, and Blackstone. Then there come hundreds of writers reproducing criticizing, and expanding the theory to other departments of the institute of government.

[12] Ibid, 146.

9. SEPARATION OF POWERS IN UNITED STATES

The framers of United States constitution wanted to create a system in 1787 that would operate more effectively and efficiently, without producing intolerable deadlocks, then the discredited articles of confederation- written in 1777 and ratified in 1781. Americans believed that the hostilities between states were a result of the defect in the system; it was that the doctrine of separation of powers had not been followed because of the worst of the cabinet government and influence of the king in parliament.

There existed no judiciary or executive in the strict since, before 1787. The continental congress had to legislate and adjudicate what they have passed. This was an embracing system. Congress, of that time, wanted a change. Thus, it delegated administrative and judicial duties to personnel not members in congress and it established national judiciary by setting up codes of admiralty, just to decide naval controversies. In 1780, it established the court of appeals. This search for efficient system led the framers to adopt the theory of separation of powers, which was almost the necessity at that time. Hence, they placed a great faith in the doctrine of separation

of powers. The United States constitution, which was brought into effect on March 1789 probably, provides the most extreme example of a practical separation of powers but of course not the ideal one. It is said, "the constitution of United States of America is an essay (of 4300 words) in the theory of separation of powers".[1] Although the theory is not expressly stated in the constitution, it is implied in the allocation of legislative powers to the congress.[2] Executive powers to the president,[3] and judicial powers to the Supreme Court.[4] The absolute separation of powers of government has been held to prevail without qualification but in practice the three organs are not kept entirely distinct without any connection with each other; so each of them can exercise powers, which may not fall in its realm. As it is blatant in the system of check balances where president is empowered to veto legislation of congress and such a veto may be overridden by a two thirds of majority in the senate before it comes into effect. The rule is that no member of government can become a member of the Congress. But voice president, ex officio presides over the senate. The president appoints judges to the office in the Supreme Court and the Supreme Court can declare acts of the Congress, any state legislature and president void and illegal if they are inconsistent with the constitution. Moreover, the total separation of powers is not the purpose of the constitution; it is abstract in general intended for practical purposes.[5] It could be described as separation of powers modified by check and balance system or separate institutions sharing powers.[6] Checks and balances are not contrary to the principles,[7] with the development of constitution the system of check and balance developed by assuming supreme court's power in 1803, in Marbury v Madison to itself declared the laws contrary to the constitution, invalid. Hence the American constitution goes further than any other in the application of this theory, which divides the government responsibilities among the legislative, executive and judicial branches; checks and balance prevents the exclusive exercise of those powers by any one of three branches.

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1 Wade, Ecs and Godfrey Philips, *English constitutional law*, (Lahore: Mansoor Book House, nd) p.129.
2 *Constitution of United States of America*, Article 1, section 1.
3 Ibid, Article 2, section 1.
4 Ibid., Article 3, section 1.
5 Arnold O. Ginnow, ed., *Corpus Juris Secundum: Constitution law*, vol.16 (USA: St.Paul, Minn West Publishing Co., 1985), 377.
6 Richard E. Neustadet, *The Politics of Leadership*, (New York: Cornell University Press 1960), p.33.
7 Robert Maynard Hutchins, ed., *Great Books of Western Civilization*, vol.38, *The federalist Papers* 47, by Madison, (London: William Benton, 1984), 153-154.

9.1 Federalist's Vision

Beginning in October 1787 series of 85 newspaper articles appeared under the title, the federalist: a commentary on the constitution of the United States. They bore the pen name Publius. James Madison and Alexander Hamilton wrote the essays, with some assistance from John Jay. The federalist (also called the federalist papers) remains the best commentary on the meaning of the constitution of the United States.

In examining the particular structure of the government Madison tries to investigate the sense in which the preservation of political liberty requires that the powers should be separate and distinct. His strivings were to defend his own version of the theory instead of pleading the historical position. He goes on asserting "that is not a single instance in which the several departments of powers have kept absolutely separate and distinct".[8] He steps further by ascertaining even Montesquieu's intention of the doctrine and his meaning on the point. Says: "he did not mean that these departments ought to have no partial agency, or no control over, the acts of each other.'[9] Montesquieu's words, " there can be no liberty where the legislative and executive powers are united in the same person or body of magistrate", signify- as Madison thought- the whole and the complete blend. And Montesquieu's fear is the situation where the same hands, which possess the whole power of another department, exercise the whole power of one department.[10] He rejects the complete mixture of powers and the complete separation. He argues for practicability of the maxim through discussing the that time constitution of the Georgia, South and North Carolina, Virginia, Delaware, Pennsylvania, New Jersey, New York, Rhode Island, Connecticut, Massachusetts and new Hampshire. After citing the sad examples, in which the legislative, executive and judiciary have not been kept wholly separate and distinct, Madison, in full confidence says; "that in no instance has a competent provision been made for maintaining in practice the separation delineated on paper." [11]

This means the sense annexed to the theory by its displayed and as it has been understood in America is not the total separation or its accumulation but is separation

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[8] Robert Maynard Hutchins, ed., *Great Books of Western Civilization*, vol.38, *The federalist Papers* 47, by Madison, (London: William Benton, 1984),153-155.
[9] Ibid.
[10] Ibid.
[11] Ibid.

of powers modified by check and balance or separate institutions sharing powers. American brand definition of the maxim is contended to be compatible with a partial intermixture of the departments-legislature, executive and judiciary-for a special purposes. Preserving them distinct and unconnected, it has also been argued that the partial intermixture is even (in some cases) not only proper but necessary to the mutual defends of the several members of the government against each other. [12]

9.2 Executive

There is an opinion in congress that the executive powers are vague and are held by a single person or the president. He has plenty of powers to take over in an unusual situation without any established rule,[13] but this does not mean he has less constitutional powers, as an executive, than the other branches of the government. It is also presumed that he is in a strong position politically, constitutionally and situationally to claim greater need for the authority. The president derives his powers from the constitution, congressional statutes, usage, customs and the court decisions. Constitutional powers of the president are mentioned below:[14]

9.2.1 Administrative Head:

President as an executive chief has power to check the departments and government agencies, whether they are applying the laws and if not he used to supervise their application. Being an administrative head, he used to ensure the enforcement of the laws, constitution, treaties and the decisions of the federal judiciary as per requirement of the constitution, which provides "the executive power shall be wasted in a president of the united states of America"[15], and "he shall take care that the laws are faithfully executed." [16].

It is said that as a whole he has the authority to control the entire administration. This is designated as the doctrine of prudential dominance, and this indicates to the notion that the entire administration is subject to the direction, supervision and control of the

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[12] Robert Maynard Hutchins, ed., *Great Books of Western Civilization*, vol.38, *The federalist Papers 66*, by Hamilton, (London: William Benton, 1984), 201-202.
[13] Janda, Bary, and Goldman, *The challenge of democracy*, (Boston: Houghton Mifflin Company1992), 424.
[14] *Constitution of United States of America*, Article 2.
[15] Ibid, Section 1 (1).
[16] Ibid, section 3.

president.[17] Thus, he is expected to the best of his ability to preserve, protect and to defend the constitution of the United States.

9.2.2 Power to Appointment Officials:

The president has power to appoint a wide variety of civil and military officer to say ambassadors, other public ministers and consuls, judges of the Supreme Court and all other officers of the United States.[18] Some of key appointments require senate's confirmation but the time when senate is not in session, the president shall have power to fill up all vacancies.

9.2.3 Power to Convene and Adjourn Congress:

On extra ordinary occasions president has power to call special congress or one of its two houses into a session and he may adjourn them to such time, as he shall think proper.

9.2.4 Power to Send Message to Congress:

The president, each year, gives the state of a union message (not restricted to this only) to congress, provides information, recommends necessary and expedient measures and proposes the remedies for existing situations. Although the congress is free to present, edit, amend, discuss and reject the bill but even then the large number of bills passed by congress originate in the executive branch and these are designed to achieve president's desires.

9.2.5 .Power to Legislate:

The president has power to issue from time to time orders, decree and proclamation. This is usually done to give the congress' journal rules a specific shape in order to make the application of the laws easier. This is termed as delegated legislation.

9.2.6 Power to Veto the Votes of Congress:

President's veto of bill is worth $1/6^{th}$ of the voting strength of the congress. When he says "yes" bill or a resolution will take just a simple majority to become law, it needs $2/3^{rd}$ of the votes to pass if he disapproves the bill except to joint resolution, which

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[17] Mazhar ul Haq, *Modern Constitutions*, (Lahore: Book Land Publishers, 1970), 161.
[18] *Constitution of United States of America*, Article 2, section 2 (2).

proposes constitutional amendments.

9.2.7 Power to Pardon:

The president is in power to grant pardons and reprieves people who have committed crimes against the United States, except in the cases of impeachment or removal from public office. He is authorized to pardon an offender before or during the trial and after the conviction and stop the proceedings no matter at what stage it may be. He can change the death sentence into imprisonment of any nature and also can release the offender.

9.2.8 Commander in Chief of Military:

The highest military powers are vested in the president. Therefore, he is the commander in chief of army, navy, air force and militia of the several states of the United States of America but cannot initiate the military action without the approval from congress.

9.2.9 Power to Negotiate Treaties:

The president has the control of the channels of diplomatic intercourse with foreign countries and can make treaties with foreign powers with the consent of the senate, receive ambassadors and has right to recognize other states and governments, and may also refuse the recognition at his discretion.

10. SEPARATION OF POWERS IN PAKISTAN

In Pakistan the theory of separation of powers was adopted in a manner that it neither gave the impression of being absolute and unqualified separation nor deviated from the theory in the sense that the despotism prevailed. It took the middle way that of

giving judiciary the complete independence[1] and retaining some legislative powers with executive branch.

The first ever Constitution was granted to Pakistan after nine years of its emergence as an independent domain. In 1956, the Constitution provided parliamentary democratic form of government in Pakistan. The executive was responsible before legislature and had share in passing laws, summoning and dissolving the assembly. Judiciary's job was to decide cases, to interpret and apply the law though the executive appointed the Judges but it could not interfere in Judiciary's business. A.K. Brohi, the Eminent Jurist, mitigating the implication of the theory of separation of powers says:

> "In our Constitution therefore, there is no such thing as an absolute or unqualified separation of powers in the sense conceived by Montesquieu. There is, however, a well marked and clear cut functional division in the business of the government in that, three distinct bodies or organs have been set up to perform the functions of the legislature, the executive and the judiciary. And although the responsibility to discharge these functions is primarily lodged in these organs of sovereign power, case has been taken to see that the due discharge of these functions by them combines a sense of responsibility with due maintenance of an efficient system of administration." [2]

The due discharge of duties and functions with the sense of responsibility remained the fate of judiciary and legislature only; it could not bind or hamper the executive organ.

The efficient Executive practically kept on violating this principle of division of the powers and other basic principles of democracy. Resultantly the Constitution, which could not guarantee the rights, stop transcendence of boundaries and intrusion into others' jurisdiction, had to die down and the Executive had to ascend and proclaim the supremacy because it abrogated principles. Now, no one could talk about separation of powers. Army was the power. Allocation of rights and duties depended upon despotic dictators. They brought new Constitution, which changed the form of government from Parliamentary to Presidential system. The Executive head was the fountain of all powers. The President was executive authority of the

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1 Government Vs Sharaf faridi (Lahore:P.L.D.,1994)105.
2 A.K. Brohi, *Fundamental law of Pakistan*, (Karachi: Din Muhammad Press,1958),75.

republic; he allocated and transacted different functions to central government for running its day to day business. He appointed members of the President's Council of Ministers, the Parliamentary Secretaries, the Judges of Supreme Court, the Judges of High Courts, the Governors of Provinces, Attorney General, Auditor General, the Members of Advisory Council of Islamic Ideology, Chief Election Commissioner, Members of National Economic and Finance Council, and Commission respectively. The Legislative branch worked at executive head's pleasure; he could summon, address and dissolve the National Assembly, his consent was necessary before initiating or moving a bill or amendment and no bill could become a law without his consent. Lastly, he had authority to make and promulgate Ordinances (It is sort of law making). The risk of powers is not finished here Moreover, he possessed financial and judicial powers and was sole authority in military matters. He constituted constitutional bodies and also held immense and terrible emergency powers.

1962 Constitution was the innovation of a dictator who, articulates Maluka, "having achieved his long cherished ambition of becoming the sole arbitrator of national affairs, made the government servants and the politicians his prime target of attack". 3

Writing on Ayub's regime Maluka says "with the extreme centralization and the executive supremacy of the military regime, Ayub Khan had visualized his future role as an authoritarian President heading a strong Centre, in 1954-55." 4
He wanted to

> "be made the final custodian of power on the country's behalf and should be able to put things right both in the provinces and the Centre should they go wrong laws should be operative only if certified by the President.....No change in the Constitution should be made unless agreed by the President." 5

This was the situation until new Constitution was promulgated in 1973. The country again returned to the Parliamentary Form of government. Powers were re-distributed. The Executive, legislature and Judiciary were again made functional.

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3 Zulfiqar Khalid Maluka, *The Myth of Constitutionalism in Pakistan*, (Karachi: Oxford University Press, 1995), 177.
4 Ibid.181.
5 Ibid.

Every Organ was given its due share in power. This time the system looked like that of United Kingdom. Executive Personnel being the Members of Legislature could legislate; President appointed judicature, practically on Prime Minister's advice. Although executive had gigantic share yet it could have been corded if crossed its limits. Legislators talked in Parliament, they diverged executives on many issues.

Again another dictator through the so called eighth amendment changed the Constitution's basic nature. Consequently, already unequal equilibrium of powers was unbalanced further. After Zia's regime politicians tried their fate to bring it to its best but failed. Since then every government (the executive branch) wanted to have all powers in its pocket. The struggle for concentrating the power's in one hand invited the present military personnel and their efforts to restore real democracy and implement the theory of separation of powers in its true sense.

After giving this brief, the power position in the Constitution, 1973 with its amendments can precisely be demonstrated in the following:

The Governmental power in Pakistan is divided among Executive, Legislative and Judiciary. It is also said that the power actually is divided, "among the President, as head of state; the Prime Minister, as head of government; the Legislature and the courts which have some powers of judicial review." [6]

10.1 The executive

The executive consists of President ,Prime Minister and Cabinet ,as afore said.

10.1.1 The President

Constitution provides that the president is head of state and " shall represent the unity of the republic"[7] he is also the chief executive officer of the government and has extensive powers. For the qualification of a presidential candidate it is put that " unless he is a Muslim of not less than forty-five years of age and is qualified to be

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[6] Robert L. Maddex, *Constitutions of the World*,(London:Routledge,1995),208.
[7] Constitution of Pakistan,1973, Article 41 (1).

elected as member of the National Assembly".[8] and regarding the process of election of the president ,constitution provides that:

> The President to be elected after the expiration of the term specified in clause (7) shall be elected in accordance with the provisions of the Second Schedule by the members of an electoral college consisting of-
>
> (a) the members of both Houses; and
>
> (b) the members of the Provincial Assemblies.[9]
>
> Election to the office of President shall be held not earlier than sixty days and not later than thirty days before the expiration of the term of the President in office:[10] Provided that, if the election cannot be held within the period aforesaid because the National Assembly is dissolved, it shall be held within thirty days of the general election to the Assembly.
>
> An election to fill a vacancy in the office of President shall be held not later than thirty days from the occurrence of the vacancy.[11] Provided that, if the election cannot be held within the period aforesaid because the National Assembly is dissolved, it shall be held within thirty days of the general election to the Assembly.
>
> The validity of the election of the President shall not be called in question by or before any court or other authority.[12]

The President holds office for a term of five years from the day he enters upon his office and continue to hold office until his successor enters upon his office. He may be eligible for re-election to the office, but can not hold that office for more than two consecutive terms. He may resign his office by writing under his hand addressed to the Speaker of the National Assembly.[13]

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8 Ibid.41(2).
9 Ibid 41 (3).
10 Ibid 41 (4).
11 Ibid 41(5).
12 Ibid 41(6).
13 Ibid 44.

The duties and powers of president include granting pardons , reprieve and respite, and remit, suspend or commute any sentence passed by any court, tribunal or other authority.[14]

appointing ministers, the provincial governors, the chiefs of the branches of armed forces and the chairman of the joint chief of staff; dissolving the lower house and calling for elections;[15] and vetoing legislation, although a veto may be overridden if repassed by a majority vote of both houses. Constitution gives the president power to proclaim an emergency, which may lead to the suspension of certain rights under the constitution. [16]

The President may from time to time summon either house or both houses to meet and may terminate such sessions.[17] He may address either House or both Houses assembled together and may for that purpose require the attendance of the members. He may send messages to either House, whether with respect to a Bill then pending in the Majlis-e-Shoora (Parliament) or otherwise, and can address both Houses assembled together and inform the Majlis-e-Shoora (Parliament) of the causes of its summons.[18]

10.1.2 The Prime Minister and Cabinet

In making decisions the president is required to act in accordance with the advice of the prime Minister and cabinet members, whom the president appoints from among the members of the lower house.[19] The president may ask that they reconsider their advice, although the recommendation must be followed if the advice does not change. But subsection 48 (2) states that notwithstanding the foregoing, "the president shall act in his discretion in respect of any matter in respect of which he is empowered by the constitution to do so and the validity of any thing done by the president in his discretion shall not be called in question on any ground whatsoever."[20]

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14 Ibid 45.
15 Ibid 48.
16 Ibid 232.
17 Ibid 54.
18 Ibid 56.
19 Ibid 47.
20 Ibid 48 (2).

10.2 The Legislature

Constitution provides that " there shall be a Majlis-e-Shoora (Parliament) consisting of the president and two house to known respectively as the national assembly and the senate".[21]

10.2.1 Upper House

The senate of the eighty seven member, fourteen each elected to six years term by the provincial assemblies, eight elected by members from the tribal areas in the national assembly ,three from the federal capital, and five more elected by each of the provincial assemblies from religious scholars and professionals. A senator must be citizen of Pakistan and thirty years of age. The senate elects a chairman and deputy chairman for two year terms and unlike the assembly, is not subject to dissolution.

10.2.2 Lower House

The national assembly has more than two hundred " Muslim members elected for a maximum of five years by direct and free vote". Seats are allocated to each province, tribal area, and the federal capital on the basis of population. The additional seats are set aside proportionally for religious minorities; and for a ten years period twenty seats were to be set aside for women and allocated to the provinces. To be a member of assembly a person must be a citizen and twenty five years old. Regarding all above the constitution provides the following:

> (1) The National Assembly shall consist of (two hundred and seven Muslim) members to be elected by direct and free vote in accordance with law.
>
> (2) A person shall be entitled to vote if :
>
> (a) he is a citizen of Pakistan;
>
> (b) he is not less than (twenty one) years of age;
>
> (c) his name appears on the electoral roll; and

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[21] Ibid 50.

(d) he is not declared by a competent court to be of unsound mind.

(2A) In addition to the number of seats referred to in clause (1), there shall be in the National Assembly ten additional seats reserved as follows for the persons referred to in clause (3) of Article 106:

- Christians 4
- Hindus and persons belonging to the Scheduled castes 4
- Sikh, Budhist and Parsi communities, and other non-Muslims 1
- Persons belonging to the Qadiani group or the Lahori group (who call themselves Ahmadis) 1

(3) The seats in the National Assembly shall be allocated to each Province, the Federally Administered Tribal Areas and the Federal Capital on the basis of population in accordance with the last preceding census officially published.

(4) Until the expiration of a period of ten years from the commencing day or the holding of the (third) general election to the National Assembly, whichever occurs later, (twenty seats) in addition to the number of seats referred to in clause (1) shall be reserved for women and allocated to the Provinces in accordance with the Constitution and law.

(4A) The members to fill the seats referred to in clause (2A) shall be elected, simultaneously with the members to fill the seats referred to in clause(1), on the basis of separate electorates by direct and free vote in accordance with law.[22]

After elections the assembly elects both a speaker, who stays on until replaced even after dissolution of the assembly, and a deputy speaker. the assembly must meet for at least three sessions a year for a total of at least 130 days, with no more then 120 days between sessions.

[22] Ibid 51.

10.2.3 New arrangements for Establishing Genuine Democracy and Elections to the National Assembly:

In February 2002 the present government has taken new initiatives and has announced the following arrangement of seats for the National Assembly:

	General Seats	Women	Technocrats	Total
Balouchistan	14	3	1	18
FATA	12	-	-	12
Federal Capital	1	-	-	1
North-West Frontier Province	32	9	3	44
Punjab	147	33	15	195
Sindh	59	15	6	80
TOTAL	**265**	**60**	**25**	**350**

- the constituencies for the election on general seats shall be single member territorial constituencies;
- every person contesting election for a seat in the National Assembly, including for a seat reserved for a woman or technocrat, shall be at least a graduate possessing a bachelor degree in any discipline or any degree recognized as equivalent by the University Grants Commission under the University Grants Commission Act, 1974 (XXIII of 1974);
- members to fill the general seats in the National Assembly shall be elected by direct and free vote;
- the constituencies for the seats reserved for women and technocrats shall be such that each Province forms one constituency with as many such seats as are allocated to the Provinces; and
- the members to fill seats reserved for women and technocrats which are allocated to a Province shall be elected simultaneously through proportional representation system of open political parties' lists of the candidates on the basis of total votes cast for the candidates of each party contesting election to

the general seats in the National Assembly, except the parties securing less than five per centum of the total votes cast in the election on general seats.

10.2.4 Functions of Legislature

Except for money bills, which must originate and passed in the assembly, bills concerning matters within the competence of the national legislature as set forth in the constitution may originate in either house. If passed by both houses, a bill is sent to the president for his assent. A bill that is passed but amended in the second house may be passed in a joint session by a majority of total membership of both houses; it then goes to the president. Presidential vetoes may also be considered in a joint session.
The decisions are made by majority of those present and voting; the presiding officer votes only in the case of a tie vote. One-fourth of the members constitute a quorum. A number of qualifications and disqualifications are set forth in the constitution.

10.3 The Judiciary

The Judiciary consists of the Supreme Court ,High Courts in Provinces, Federal Sharī'at Court, and Subordinate Judiciary, i.e., Civil & Criminal Courts, Revenue Courts, Special Courts, and Service Tribunals.

10.3.1 Organization of Supreme Court

The supreme court is made up of a chief justice and other judges determined by the law "or until so determined, as may be fixed by the president".[23] An Act of Parliament has determined the number of judges. The number fixed at the moment is seventeen. The chief justice and other judges are appointed by the president after consulting with the chief justice, from among citizens with at least five years of experience as a judge on a high court or fifteen years of experience as an advocate of a high court.[24]
The Supreme Court, except in very important cases, generally operates through benches. Besides its permanent seat at Islamabad, benches have been constituted, and are functional, almost round the year, at Karachi and Lahore. Special benches are also constituted periodically for the provincial headquarters of Peshawar and Quetta.

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23 Ibid 176.
24 Ibid 177.

Whereas the division of Court into benches and their operation in various cities, facilitates the public and ensures prompt disposal of cases

10.3.2 Functions of Supreme Court

It is the Court of ultimate appeal and therefore final arbiter of law and the Constitution. Its decisions are binding on all other courts.[25] It has exclusive jurisdiction in disputes between the federal and provincial governments but may make only declaratory judgments in such cases. The Supreme Court is the apex Court of the land, exercising original, appellate and advisory jurisdiction.[26] It is also authorized to enforce fundamental rights and hear appeals from the high courts. The president may refer question of law to the supreme court.

The Court appoints its own staff and determines their terms and conditions of service.[27] The Supreme Court (Appointment of Officers and Servants and Terms of Service) Rules 1982 prescribe the qualification for and mode of appointment and promotion of staff together with penalties and procedure for disciplinary proceedings against them. The Court may also frame its own rules of procedure.[28] The Supreme Court Rules 1980 laid down detailed procedure for the filing of petition and appeals and their processing through the Court.

The constitution of Pakistan gives the court the power of judicial review :

- for doing complete justice between the parties;
- where the party has suffered substantial injury;
- for clear violation of written law;
- in accordance with the principles of 0.47, rule1,Civil Procedural code;
- within the limits laid down in Akbar Ali verses Iftikhar Ali (P.L.D. 1956 F.C.50; and
- not where there is difference in the mode of interpretation, and where there is a mere incorrectness of conclusion reached by the court." [29]

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25 Ibid 189.
26 Ibid 184, 185 & 186.
27 Ibid 208.
28 Ibid 191.
29 Muhammad Khan V. Controller of Estate of Duty, (Lahore: P.L.D. 1962) S.C.335.

In the words of Cornelius,C.J.the supreme court held that :

> Article 161 of the constitution of 1956 gave power to the Supreme Court to review its own judgments or orders of subject to the provisions of any act of parliament or rules made by the Supreme Court. No Act of parliament has yet been passed nor has the Supreme Court made any rules to define or limit its powers of review. [30]

The brief account of the remaining courts is given as under:

10.3.3 Organization and Strength of Judicial Hierarchy

- Sharī'at Appellate Bench Of the Supreme Court :5 (3 SC + 2 FSC)
- Federal Sharī'at Court:CJ+7(3 to be 'Ulamā)
- Lahore High Court: CJ+49
- High Court of Sindh: CJ+27
- High Court of Balouchistan: CJ+5
- Peshawar High Court:CJ+14
- District and Sessions Judge in each District Head Quarter
- Additional District & Sessions Judge in each District Head Quarter
- Senior Civil Judges at Tehsil level
- Civil Judge 1st Class
- Civil Judge 2nd Class
- Civil Judge 3rd Class
- Judicial Magistrate 1st Class (in most cases Civil judges are performing the duties of judicial magistrates)
- Judicial Magistrate 2nd Class
- Judicial Magistrate 3rd Class

[30] A.G. Chaudary, *The Leading Cases in Constitutional Law* (Lahore: Sahar Publishers,1995),720.

10.3.4 Jurisdiction of different other courts as laid down in the constitution of Pakistan

10.3.4.1 Federal Sharī'at Court

- ✓ To determine whether a provision of law is repugnant to the injunctions of Islam;[31]
- ✓ jurisdiction for revision in cases under Hudūd laws;[32]
- ✓ to review its judgment/order;[33]
- ✓ to punish for its contempt; and[34]
- ✓ Under Hudūd laws, hears appeals from judgment/order of criminal courts.

10.3.4.2 Jurisdiction of High Courts

- ✓ To issue 5 writs namely mandamus, prohibition, certiorari, habeas corpus, certiorari and quo warranto;[35]
- ✓ Enforcement of Fundamental Rights;[36]
- ✓ to supervise/control subordinate courts;[37]
- ✓ to punish for its contempt;[38]
- ✓ to hear appeal; and to decide reference;[39]
- ✓ power of review;[40]
- ✓ power of revision;[41]
- ✓ appeals under Cr.P.C;[42]
- ✓ appeals against acquittal;[43]
- ✓ appeals against judgment/decree/order of tribunals under special laws;
- ✓ to issue directions of the nature of Habeas Corpus;[44]

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31 Ibid.203-D.
32 Ibid.203 DD.
33 ibid.203 E.
34 .bid. 203 E.
35 Ibid. 199(1).
36 Ibid. 199(2).
37 Ibid. 203.
38 tbid. 204 .
39 Civil Procedural Code of Pakistan, S.100 .
40 ibid. 114.
41 ibid. 115.
42 Criminal Procedural Code of Pakistan, S.410.
43 Civil Procedural Code of Pakistan, S.417 .

- ✓ inter-Court appeal at Lahore High Court and High Court of Sindh, {High Court of Sindh has original jurisdiction in civil cases of the value of five Lac rupees.}

10.3.4.3 Jurisdiction of District & Sessions Judge/Additional District& Sessions Judge

- ✓ Appeal against judgment/decree of a Civil Judge under S.96 of CPC;
- ✓ appeal against order under S.104 of CPC;
- ✓ power of revision under S.115 of CPC;
- ✓ original jurisdiction in suits upon bills of exchange, hundies or promissory notes under Order XXXVII of CPC;
- ✓ murder trial under S.265 A of the Cr.P.C;
- ✓ criminal trial under Hudūd laws;
- ✓ appeals under S.423 of Cr.P.C;
- ✓ power of revision under S.435 of Cr.P.C; and
- ✓ decides pre-arrest bail applications under S 498 of the Cr. PC.

(In Karachi District, the original jurisdiction of District Judge is limited to five Lac rupees)

10.3.4.4 Jurisdiction of Civil Judge 1st Class

- ✓ To try all civil suits, there is no pecuniary limit on its jurisdiction;
- ✓ In certain jurisdictions also designated as Rent Controller;
- ✓ In certain jurisdictions also designated as Judge, Family Court;
- ✓ At Karachi, pecuniary jurisdiction limited to rupees twenty five thousand (Karachi Courts Order 1956); and
- ✓ In certain jurisdictions designated as Magistrate empowered under S.30 of Cr.P.C.

10.3.4.5 Jurisdiction of Civil Judge 2nd Class

- ✓ To try civil suit up to the value of fifty thousand rupees; and
- ✓ In certain jurisdictions designated as Rent Controller/Judge, Family Court.

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[74] Criminal Procedural Code of Pakistan , S.491

10.3.4.6 Jurisdiction of Civil Judge 3rd Class

- ✓ To try civil suit up to the value of twenty thousand rupees.

10.3.4.7 Jurisdiction of Magistrate 1st Class

- ✓ To try offences punishable up to three years imprisonment and fifty thousand rupees fine.

10.3.4.8 Jurisdiction of Magistrate 2nd Class

- ✓ To try offences punishable up to 1 year and five thousand rupees fine.

10.3.4.9 Jurisdiction of Magistrate 3rd Class

- ✓ To try offences punishable up to 1 month and one thousand rupees fine.

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